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The Law Review

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ABOUT THE AUTHORS

Justice Dr. S. Radhakrishnan

Justice Dr. S. Radhakrishnan is a scholar and an academician at heart. He topped the University of Bombay at the LL.M. Degree Examination in 1974. He is an alumnus of Government Law College and has also taught extensively. He taught the LL.B. course for 11 years, the LL.M. for 13 years and Press Laws for 5 years. As an advocate, he has handled mainly constitutional matters. He is renowned as a judge with a strong environmental conscience, having handled various Public Interest Litigations to protect green spaces and to prevent noise pollution. He has also given several important directions for the conservation of ecology, including the planting of 1 lakh trees in Nagpur, the protection of the environment at Mahableshwar and Panchgani and the preservation of the Sanjay Gandhi National Park. In addition, he has sought pension for retired teachers, rights for visually challenged persons and the protection of the privacy of women.

Justice Mrs. R.S. Dalvi

Justice R.S. Dalvi has always been recognised as a judge for victims and against wrongdoers, defaulters and fraudsters of all types. Through her rich experience as a practicing lawyer and a judge she has focused upon issues related to domestic violence and laws governing trafficked and sexually abused children. She believes children and women to be two of the worst sufferers in our legal system. In her own words, "The desire to upgrade [their] status and elevate their position arose during my study of the procedural legal requirements at the Warwick University. This was the study of Court and Case Management in cases relating to Gender." A corollary to this discourse led to an article on management of all kinds of cases, which include those of women and children and extend to the benefit of society as a whole.

Justice Mr. V. G. Palshikar (Retd.)

Justice V.G. Palshikar graduated from Hisloc College, Nagpur and obtained a degree in Law from Pune University, securing the third position of merit. His areas of practice as a lawyer included constitutional, service and civil matters. He occupied the position of Chairman of the Bar Council of Maharashtra in 1983 and was elevated as Judge to the High Court of Bombay in 1994. He was transferred to the Rajasthan High Court in the same year and re-transferred to Bombay in 2001. He retired in 2007. He takes a keen interest in legal research and has authored several articles on judicial activism, environmental protection and human rights.

Justice Mr. D.R. Dhanuka (Retd.)

Justice D.R. Dhanuka was a student and later a professor of Law at Government Law College, Mumbai. His involvement with the college continues and he is a member of the Advisory Board of the Securities Law Course of the College. He began his practice in 1956 and was appointed Judge of the Bombay High Court in 1990, and retired in 1996. He was the non-Executive Chairman and Public Representative Director of the Governing Board of The Stock Exchange, Mumbai (BSE). He was also a member of various important committees at the Stock Exchange such as the Disciplinary Action Committee, Defaulters Committee and Listing Committee. The Security Laws (Amendments) Committee under his chairmanship examined areas of deficiency in the realm of securities law. He was also appointed Chairman of the Legal Advisory Committee of the University of Mumbai. He currently appears as senior advocate in select matters before the Supreme Court of India.

PREFACE

This year the Government Law College is proud to present: The Law Review– Bench Edition. This special edition provides a unique insight from the other side of the bar: all the articles in this journal are authored by members of the higher judiciary and consequently, they display an analysis and depth that comes only with years of scholarship. The purpose of this special edition of the Law Review is to provide readers with a strong perspective on some important issues. We wish simply to bring to you the wisdom of their experience and the clarity of their understanding of law. We are thankful to the authors for their time and effort; it is a privilege to publish their work.

The first article entitled 'Development Of Environmental Law', authored by Justice Dr. S. Radhakrishnan deals with the numerous ecological disasters threatening our planet. It states that a growing environmental consciousness is the order of the day. This newfound green spirit finds reflection in the Indian judiciary as well, as this article demonstrates. The author traces the recognition of constitutional guarantees to a healthy environment, discussing epochal cases like the *Span Motels case, the CRZ Notification case,* and the *Ratlam Municipality case.* Vital international environmental law principles like the 'polluter pays' principle and the precautionary principle are also lucidly explained, as are cases from foreign jurisdictions. Above all, the article pleads for greater environmental sensibility.

The second article in this publication is 'The 'Business' Of Court Management', authored by Justice Mrs. R.S. Dalvi. As a British Council Scholar at the School of Law, University of Warwick, Justice Dalvi made a comparative study of Court and Case Management as it was introduced in the UK, and thereafter read the subject as it evolved in the USA. She had a first hand account of a critique on the subject in 1996, whilst at the University of Warwick when the Interim Report of Lord Justice Woolf on the Civil Justice System in England and Wales was first published. She has since enhanced her interest in it by studying the work of various court administrators who have written extensively on the subject. They brought

together a rich and varied experience of actual court functioning and ways and means of polishing and bettering the justice system by creative solutions incorporated in court work. Her interaction with judges and court administrators in the UK revealed that the Indian judiciary has been hailed as superlative for the interpretation of its substantive laws, but has been disparaged in the sphere of procedural laws. Whereas the British legal system, which introduced procedural codes in India, has itself come a long way by simplifying and streamlining the rules of procedure, its Indian counterpart has lagged behind by steadfastly holding on to an imperial past, for no good reason and with no good result. As a judge, she has tried to the extent possible, to steer clear of procedural technicalities and to emphasise upon the substance and merits of the case before her. She found a distinct advantage in putting merits before technicalities and substance before style 'to meet the ends of justice'. However, the prevailing need is for overhauling the system with creativity and change. Her article is a product of the two best Justice Systems of Common Law with large servings of her study of business management. She believes that the time is ripe for just such a partnership.

'Judicial Activism' by Justice V. G. Palshikar (Retd.) is a thought provoking article of great contemporary relevance, especially in the light of recent comments from the Apex Court and the controversy clouding judicial overreach. The article analyses and offers insight into landmark constitutional cases like *Golak Nath*, *Kesavananda Bharati*, *Minerva Mills* and the *Habeas Corpus case*. The article urges against the encroachment of the judiciary into the domain of the executive and legislature and outlines the framework within which judicial activism should be exercised. It emphasizes that '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.'

The fourth article is entitled 'Is Arbitration Law Required To Be Reviewed Urgently? Suggestions For Law Reforms' and is authored by Justice Mr. D. R. Dhanuka (Retd.). It recognises the fact that with the back-breaking burden of back-log on the judiciary, new avenues of alternative dispute resolution are always welcome. This article examines the efficacy of

existing arbitration law and makes insightful suggestions for giving it more teeth. The first half provides a brief overview of arbitral legislative history. In the latter half of the article, the author has made various recommendations for the incorporation of 'law reforms' in arbitration law. The learned author has suggested that no award should be set aside merely on technical grounds unless it is proved that the party challenging the award shall suffer substantial injustice unless the award is set aside. Suggestions are also made for amendment of Sections 7 and 36 of the *Arbitration and Conciliation Act, 1996*.

DEVELOPMENT OF ENVIRONMENTAL LAW

Justice Dr. S. Radhakrishnan

'Environment' is a difficult word to define. Its normal meaning relates to the surroundings, but obviously that is a concept which is relatable to whatever object it is which is surrounded. Einstein had once observed, 'The environment is everything that isn't me.' About one and a half century ago, in 1854, as the famous story goes, the wise Indian Chief of Seattle replied to the offer of the Great White Chief in Washington to buy their land. The reply is profound. It is beautiful. It is timeless. It contains the wisdom of the ages. It is the first ever and the most understanding statement on environment. The whole of it is worth quoting as any extract from it is to destroy its beauty:

'How can you buy or sell the sky, the warmth of the land? The idea is strange to us.

If we do not own the freshness of the air and the sparkle of the water, how can you buy them? Every part of the earth is sacred to my people. Every shining pine needle, every sandy shore, every mist in the dark woods, every clearing and humming insect is holy in the memory and experience of my people. The sap which courses through the trees carries the memories of the red man.

The white man's dead forget the country of their birth when they go to walk among the stars. Our dead never forget this beautiful earth, for it is the mother of the red man. We are part of the earth and it is part of us. The perfumed flowers are our sisters; the horse, the great eagle, these are our brothers. The rock crests, the juices in the meadows, the body heat of the pony and man—all belong to the same family.

So, when the Great Chief in Washington sends word that he wishes to buy our land, he asks much of us. The Great Chief sends word he will reserve us a place so that we can live comfortably to ourselves. He will be our father and we will be his children. So we will consider your offer to buy our land. But it will not be easy. For this land is sacred to us.

This shining water that moves in the streams and rivers is not just water but the blood of our ancestors. If we sell you land, you must remember that it is sacred, and you must teach your children that it is sacred and that each ghostly reflection in the clear water of the lakes tells of events and memories in the life of my people. The water's murmur is the voice of my father's father.

The rivers are our brothers, they quench our thirst. The rivers carry our canoes, and feed our children. If we sell you our land you must remember, and teach your children, that the rivers are our brothers, and yours and you must henceforth give the kindness you would give any brother.

We know that the white man does not understand our ways. One portion of land is the same to him as the next, for he is a stranger who comes in the night and takes from the land whatever he needs. The earth is not his brother but his enemy and when he has conquered it, he moves on. He leaves his father's graves behind, and he does not care.

He kidnaps the earth from his children. His father's grave and his children's birthright are forgotten. He treats his mother, the earth, and his brother; the sky; as things to be bought, plundered; sold like sheep or bright beads. His appetite will devour the earth and leave behind only a desert.

I do not know. Our ways are different from your ways. The sight of your cities pains the eyes of the red man. But perhaps it is because the red man is a savage and does not understand.

There is no quiet place in the white man's cities. No place to hear the unfurling of leaves in spring or the rustle of an insect's wings. But perhaps it is because I am a savage and do not understand. The clatter only seems to insult the ears. And what is there in life if a man cannot hear the lonely cry of the whippoorwill or the arguments of the frogs around a pond at night? I am a red man and do not understand. The Indian prefers the soft sound of the wind darting over the face of a pond, and the smell of the wind itself, cleansed by a mid-day rain, or scented with the pinon pine.

The air is precious to the red man, for all things share the same breath-the beast, the tree, the man, they all share the same breath. The white man does not seem to notice the air he breathes. Like a man lying for many days, he is numb to the stench. But if we sell you our land, you must remember that the air is precious to us, that the air shares its spirit with all the life it supports. The wind that gave our grandfather his first breath also receives the last sign. And if we sell you our land, you must keep it apart and sacred as a place where even the white man can go to taste the wind that is sweetened by the meadow's flowers.

So we will consider your offer to buy our land. If we decide to accept, I will make one condition. The white man must treat the beasts of this land as his brothers.

I am a savage and I do not understand any other way. I have seen a thousand rotting buffaloes on the prairie, left by the white man who shot them from a passing train. I am a savage and I do not understand how the smoking iron horse can be more important than the buffalo that we kill only to stay alive.

What is man without the beasts? If all the beasts were gone, man would die from a great loneliness of spirit. For whatever happens to the beasts soon happens to man. All things are connected.

You must teach your children that the ground beneath their feet are the ashes of our grandfathers, so that they will respect the land. Tell your children what we have taught our children, that the earth is our mother. Whatever befalls the earth befalls the sons of the earth. If man spits upon the ground they spit upon themselves.

This we know; the earth does not belong to man, man belongs to the earth. This we know; all things are connected like the blood which unites one family. All things are connected.

Whatever befalls the earth befalls the sons of the earth. Man does not weave the web of life; he is merely a strand in it. Whatever he does to the web he does to himself.

Even the white man, whose God walks and talks with him as friend to friend, cannot be exempt from the common destiny. We may be brothers after all. We shall see. One thing we know, which the white man may one day discover – our God is the same God. You may think now that you own him as you wish to own our land; but you cannot. He is the God of man, and his compassion is equal for the red man and the white. This earth is precious to him, and to harm the earth is to heap contempt on the creator. The white too shall pass perhaps sooner than all other tribes. Contaminate your bed and you will one night suffocate in your own waste.

But in your perishing you will shine brightly, fired by the strength of the God who brought you this land and for some special purpose gave you dominion over this land and over the red man. That destiny is a mystery to us, for we do not understand when the wild buffaloes are slaughtered, the wild horses are tamed, the secret corners of the forest heavy with scent of many men and the view of the ripe hills bottled by talking wires. Where is the thicket? Gone. Where is the eagle? Gone. The end of living and the beginning of survival.'

The ageless philosophy of the above extract finds reflection in some of the broad, basic aspects evolved by the Hon'ble Supreme Court of India to preserve, protect and promote our environment. Some of these principles are discussed below, as also corresponding norms in foreign, municipal jurisdictions and in international environmental law.

A. The Public Trust Doctrine

The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. The public at large is the beneficiary of the seashore, running waters, air, forests and ecologically fragile lands. These resources cannot be converted into private ownership.[1] In the *Span Motels Case*, the Hon'ble Supreme Court has observed as under:

> 'The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a

[1] *See M.C. Mehta* v. *Kamal Nath (Span Motels Case)* (1997) 1 SCC 388; *M.I. Builders* v. *Radhey Shyam Sahu* AIR 1999 SC 2468.

> great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of their status in life. The doctrine enjoins upon the government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. According to Professor Sax, the Public Trust Doctrine imposes the following restrictions on governmental authority:
>
> "Three types of restrictions on governmental authority are often thought to be imposed by the public trust; first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third the property must be maintained for particular types of uses."

B. Constitutional Guarantees For The Environment

Under our Constitution, provisions in Articles 14, 21, 48A and 51A(g) have been applied to protect our precious environment in various judicial decisions.

1. Right To A Wholesome Environment

Every person enjoys the right to a wholesome environment, which is a facet of the right to life guaranteed under Article 21 of the Constitution of India. In the case of *Subhash Kumar* v. *State of Bihar and Others*[2] the Hon'ble Supreme Court has observed in Paragraph No. 7 of its judgment as under:

> 'Article 32 is designated for the enforcement of Fundamental Rights of a citizen by the Apex Court. It provides for an extraordinary procedure to safeguard the fundamental rights of a citizen. Right to live is a fundamental right under Article 21 of the

[2] AIR 1991 SC 420.

> Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life...'

Further, in *Virender Gaur* v. *State of Haryana*[3] the Hon'ble Supreme Court has observed as under:

> 'Article 21 protects the right to life as a fundamental right. Enjoyment of life... including (the right to live) 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 contrary 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 the right to healthy life and it would be impossible to live with human dignity without a healthy environment... 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...'

2. Right to Livelihood

This right was recognized in the case of *Olga Tellis and Others* v. *BMC and Others.*[4] The Hon'ble Supreme Court held as under:

> 'As we have stated while summing up the petitioners' case, the main plank of their argument is that the right to life which is guaranteed by Article 21 includes the right to livelihood and since,

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3 (1995) 2 SCC 577.
4 AIR 1986 SC 180.

they will be deprived of their livelihood if they are evicted from their slum and pavement dwellings, their eviction is tantamount to deprivation of their life and is hence unconstitutional. For purpose of argument, we will assume the factual correctness of the premise that if the petitioners are evicted from their dwellings, they will be deprived of their livelihood. Upon that assumption, the question which we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, that it does. The sweep of the right to life conferred by Article 21 is wide and far-reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life, an equally important facet of that right is the right to livelihood because, no person can live without the means of livelihood. If the right to livelihood is not treated as a part of the Constitutional right to life, the easiest way of depriving a person to his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life liveable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life. Indeed, that explains the massive migration of the rural population to the big cities. They migrate because they have no means of livelihood in the villages. The motive force which propels their desertion of their hearths and homes in the villages is the struggle for survival, that is, the struggle for life. So unimpeachable is the evidence of the nexus between life and the means of livelihood. They have to eat to live. Only a handful can afford the luxury of living to eat, that they can do, namely, eat, only if they have the means of

livelihood. That is the context in which it was said by Douglas *J* in Baksey (1954) 347 M.D. 442 that the right to work is the most precious liberty that man possesses. It is the most precious liberty because, it sustains and enables a man to live and the right to life is a precious freedom. 'Life' as observed by Field *J* in *Munn* v. *Illinois* (1877) 94 US 113, means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed. This observation was quoted with approval by this Court in *Kharak Singh* v. *State of Uttar Pradesh* [AIR 1963 SC 1295].'

3. International Rights

It must be noted that there is an emerging norm to guarantee, in the domestic constitutions, law or executive pronouncements of several States including Malaysia, Thailand, Singapore and the Philippines, that all citizens have a right to a decent and healthful environment. In the United States, this fundamental right has been guaranteed by a handful of states but not by a Federal Government.

In this context, reference may also be made to the Draft Declaration of Principles on Human Rights and the Environment, 1994 (the 1994 Declaration), a few of the salient features of which are reproduced below:

- Human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible;
- All persons have the right to a secure, healthy and ecologically sound environment;
- All persons shall be free from any form of discrimination in regard to actions and decisions that affect the environment;
- All persons have the right to freedom from pollution, environmental degradation and activities that adversely affect the environment, threaten life, health, livelihood, well-being or sustainable development within, across and outside national boundaries;

- All persons have the right to the highest attainable standard of health free from environmental hazards;
- All persons have the right to safe and healthy food and water adequate to their well-being;
- All persons have the right to a safe and healthy working environment;
- All persons have the right to effective remedies and redress in administrative or judicial proceedings for environmental harm or the threat of such harm;
- All persons, individually and in association with others, have a duty to protect and preserve the environment;
- All States shall respect and ensure the right to a secure, healthy and ecologically sound environment. Accordingly, they shall adopt the administrative, legislative and other measures necessary to effectively implement the rights in this Declaration.

C. The Polluter Pays Principle

This principle, which is a part of the basic environmental law of the land requires that a polluter bears the remedial or clean up costs as well as the amounts payable to compensate the victims of pollution. In the case of *Indian Council for Enivro-Legal Action etc.* v. *Union of India and Others (the Bichhri Case)*[5] the Hon'ble Supreme Court has emphasized the above principle. In Paragraph No. 65, the Supreme Court has observed:

'[W]e are convinced that the law stated by this court in the Oleum Gas Leak Case (AIR 1987 SC 1086), is by far the more appropriate one—apart from the fact that it is binding upon us. (We have disagreed with the view that the law stated in the said decision is obiter). 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...'

[5] AIR 1996 SC 1446.

Most industrialized countries also subscribe to this principle. To summarize, it implies that polluters should internalize the costs of their pollution, control it at its source and pay for its effects. Apart from having been recognized by our Supreme Court as a 'Universal' rule to be applied to domestic polluters as well,[6] it has also been accepted as a fundamental objective of Government Policy to abate pollution.

D. The Precautionary Principle

The 'precautionary principle' requires government authorities to anticipate, prevent and attack the causes of environmental pollution. This principle also imposes the onus of proof on the developer or industrialist to show that the action is environmentally benign. In the case of *A.P. Pollution Control Board* v. *Prof M.V. Nayadu and Others*[7] the Hon'ble Supreme Court in Paragraph No. 35 of its judgment has observed as under:

'It is to be noticed that while the inadequacies of science have led to the precautionary principle, the said precautionary principle in its turn, has led to the special principle of burden of proof in environmental cases where burden as to the absence of injuries effect of the actions proposed is placed on those who want to change the status quo. (Wynne. Uncertainty and Environmental Learning, 2 Global Environmental Change III (1992) at P. 123). This is often termed as a burden of proof, because otherwise in environmental cases, those opposing the change would be compelled to shoulder the evidentiary burden, a procedure which is not fair. Therefore, it is necessary that the party attempting to preserve the status quo by maintaining a less–polluted State should not carry the burden of proof and the party who wants to alter it, must bear this burden...'

Another domestic case highlighting this principle is *Vellore Citizens' Welfare Forum* v. *Union of India*,[8] where Justice Kuldip Singh of the Supreme Court has expounded its scope. Widely recognized in the sphere of international environmental law as well, this principle basically entails

6 *See the Bichhri Case. See also S. Jagannath* v. *Union of India (Shrimp Culture Case)* AIR 1997 SC 811.

7 AIR 1999 SC 812.

8 AIR 1996 SC 27.

a duty to foresee and assess environmental risks, to warn potential victims of such risks and to behave in ways that prevent or mitigate such risks.

E. Government Agencies and the Environment

1. Duty to Perform

Government Agencies may not plead non-availability of funds, inadequacy of staff or other insufficiencies to justify the non-performance of their obligations under environmental laws. The Hon'ble Supreme Court in the case of *Municipal Council, Ratlam* v. *Vardhichand and Others*[9] has observed (in Paragraph No. 24 of it judgment) as under:

> 'We are sure that the State government will make available by way of loans or grants sufficient financial aid to the Ratlam Municipality to enable it to fulfil its obligations under this order. The State will realise that Article 47 makes it a paramount principle of governance that steps are taken for the improvement of public health as amongst its primary duties. The municipality also will slim its budget on low priority items and elitist projects to use the savings on sanitation and public health...'

2. Exercise of Discretionary Power

The power conferred under an environmental statute may be exercised only to advance environmental protection and not for a purpose that would defeat the object of the law.[10] in the case of *Indian Council for Enviro-Legal Action etc.* v. *Union of India and Others (CRZ Notification Case)*[11] the Hon'ble Supreme Court in Paragraph No. 26 of its judgment has observed as under:

> 'Enactment of a law, but tolerating its infringement, is worse than not enacting a law at all. The continued infringement of law, over a period of time, is made possible by adoption of such

[9] AIR 1980 SC 1622.
[10] *Bangalore Medical Trust* v. *B.S. Mudappa* AIR 1991 SC 1902.
[11] 1996 (5) SC 281.

> means which are best known to the violators of law. Continued tolerance of such violations of law not only renders legal provisions nugatory but such tolerance by the enforcement authorities encourages lawlessness and adoption of means which cannot, or ought not to, be tolerated in any civilized society. Law should not only be meant for the law-abiding but it is meant to be obeyed by all for whom it has been enacted...
>
> It is with a view to protect and preserve the environment and save it for the future generations and to ensure good quality of life that Parliament enacted the anti-pollution laws, namely the Water Act, Air Act and the Environment (Protection) Act, 1986. These Acts and Rules framed and notifications issued thereunder contain provisions which prohibit and/or regulate certain activities with a view to protect and preserve the environment. When a law is enacted containing some provisions which prohibit certain types of activities, then, it is of utmost importance that such legal provisions are effectively enforced...'

In addition, Government development agencies charged with decision making ought to give due regard to ecological factors including (i) the environmental policy of the Central and State Governments, (ii) the sustainable development and utilisation of natural resources and (iii) the obligation of the present generation to preserve natural resources and pass on to future generations an environment as intact as the one we inherited from the previous generations. In the case of *State of Himachal Pradesh and Others* v. *Ganesh Wood Products and Others*[12] in Paragraph No. 33 of its judgment, the Hon'ble Supreme Court has observed as under:

> 'These provisions establish and emphasise the power of the Central Government to regulate the location of industries which also includes the power to prohibit their establishment as well. Having regard to the objective underlying the Act and the alarming diminution of forest cover in the country, the said

[12] AIR 1996 SC 149.

> provisions should be understood not so much as conferring powers on the Central Government but as creating an obligation upon it to exercise those powers for achieving the objectives underlying the Act...'

Similarly, in the case of *Tarun Bharat Sangh, Alwar* v. *Union of India and Others*[13] the Hon'ble Supreme Court highlighted how protective powers conferred under wildlife protection laws could not be given full effect to if the State Government simultaneously permitted reckless mining activity in the Sariska Forest area. Paragraph No. 7 of the judgment reads as under:

> 'The purpose of the notification declaring the area as a Game Reserve under the Rajasthan Wild Animals and Birds Protection Act, 1951; or the declaration of the area as a sanctuary under the Wild Life (Protection) Act, 1972 and the notification dated 1-1-1975 declaring the area as a protected forest under the Rajasthan Forest Act, 1953 is to protect the Forest Wealth and Wild Life of the area. It is, indeed, odd that the State Government while professing to protect the environment by means of these notifications and declarations should, at the same time, permit degradation of the environment by authorizing mining operations in the protected area.'

Also, consider the case of *Virender Gaur* v. *State of Haryana,* wherein the Supreme Court, while emphasizing the importance of preserving open and green spaces, observed as under:

> 'The question is whether the Government can lease the land to the private trust like PSS- fourth respondent in the appeal. It is seen that the land is vested in the Municipality and the Government has no right and title of interest therein. They have no power to give either by lease to PSS or deal with the property as if the land vested in it. Therefore, the grant of lease by the

[13] AIR 1992 SC 514.

Government in favour of PSS is clearly without authority of law and jurisdiction. This Court has considered the power of the Government to grant lease or issue directions to the Corporation to lease out open land reserved for public use to a private trust to establish an hospital and explained the context in which the power could be exercised when the land was reserved for town scheme or city scheme in *Bangalore Medical Trust v. B.S. Mudappa*....By its resolution dated 14-7-1976, the Bangalore Development Authority allotted the open space in favour of the appellant, a Medical Trust, for the purpose of constructing a hospital, the allotment was challenged by the respondents in the locality. This Court considered the power of the Government for granting assignment or directions to lease out in favour of the private trust and consequential effect emanating from the user of the land reserved for public purpose or to any other purpose. In Para 23 of the judgment, this Court held that the Scheme is meant for the reasonable accomplishment of the statutory object which is to promote the orderly development of the city of Bangalore and adjoining areas and to preserve open spaces by reserving public parks and playgrounds with a view to protecting the residents from ill-effects of urbanization. It meant for the development of the city in a way that maximum space is provided for the benefit of the public at large for recreation, enjoyment, ventilation and fresh air. The statutory object is to promote the healthy growth and development of the city of Bangalore and the areas adjacent thereto. The legislative intent has always been the promotion and enhancement of the quality of life by preservation of the character and desirable aesthetic features of the city. The subsequent amendments are not a deviation from or alteration of the original legislative intent but only an alteration or affirmation of the same. In Paragraph 25 of the judgment, this Court further held that the reservation of open spaces for parks and playgrounds are universally recognized as legitimate exercise of statutory power rationally related to the protection of the residents of the locality from the ill-effects of

urbanization. The residents of the locality are the persons intimately, vitally and adversely affected by any action of the BDA and the Government which is destructive of the environment and which deprives them of facilities reserved for the enjoyment and protection of the health of the public at large. The residents of the locality, such as the writ petitioners, are naturally aggrieved by the impugned orders and they have, therefore, the necessary locus standi. The action of the Government and the BDA was held to be inconsistent with and contrary to the legislative intent to safeguard the health, safety and general welfare of the people of the locality. These orders are evidence of a colourable exercise of power and are opposed to the statutory scheme. The ratio therein squarely applies to the facts in this case.

It is seen that the open lands, vested in the Municipality, were meant for the public amenity to the residents of the locality to maintain ecology, sanitation, recreation, playground and ventilation purposes. The buildings directed to be constructed necessarily affect the health and the environment adversely, sanitation and other effects on the residents in the locality. Therefore, the order passed by the Government and the action taken pursuant thereto by the Municipality would clearly defeat the purpose of the scheme. Shri D.V.S. Sehgal, learned Senior Counsel, again contended that two decades have passed by and that, therefore the Municipality is entitled to use the land for any purpose. We are unable to accept the self-destructive argument to put a premium on inaction. The land having been taken from the citizens for a public purpose, the Municipality is required to use the land for the protection or preservation of hygienic conditions of the local residents in particular and the people in general and not for any other purpose. Equally acceptance of the argument of Shri V.S.C. Mahajan encourages pre-emptive action and conduct, deliberately chartered out to frustrate the proceedings and to make the result *fait accompli*. We are unable to accept the argument of *fait accompli* on the touchstone of prospective operation of our order.'

2. Enforcement

The Environment Agencies are under an obligation to strictly enforce environmental laws. In the aforesaid case of *Indian Council for Enviro-Legal Action etc.* v. *Union of India and Others*, the Hon'ble Supreme Court in Paragraph No. 45 of its judgment has observed as under:

> 'There has been a complete laxity in the implementation of the Act and other related statutes. Under the said Act, the Central Government has essentially been entrusted with the responsibility to enforce and implement the Act. Section 23, of the Act, however, enables the Central Government, by notification in the Official Gazette, to delegate such of its powers and functions to the State Governments or authorities. Thus, the implementation of the provisions of the Act has now essentially become the function of the State Governments. In an effort to control pollution, State Pollution Boards have also been established but the extent of its effectiveness is yet to be demonstrated. The Environment (Protection) Act, as framed, and Section 5 of the Act in particular, gives the Government powers to issue directions to any person, officer or authority with which they are bound to comply. The directions as issued have necessarily to be in accordance with the provisions of law and to give protection to the environment.'

Similarly, in the case of *T.N. Godavarman Thirumulkpad etc* v. *Union of India and Others*[14] the Supreme Court found it necessary to step in and issue the following comprehensive directions to protect and conserve the forests throughout the country:

'1. General: In view of the meaning of the word "forest" in the Act, it is obvious that prior approval of the Central Government is required for any non-forest activity within the area of any "forest" in accordance with Section 2 of the Act, all ongoing activity within any forest in any State throughout the country, without the prior approval of the Central Government, must cease forthwith. It is

[14] AIR 1997 SC 1228.

therefore clear, that the running of saw-mills of any kind including veneer or ply-wood mills, and mining of any mineral are non-forest purpose and are, therefore, not permissible without prior approval of the Central Government. Accordingly, any such activity is *prima facie* violation of the provisions of the Forest Conservation Act, 1980. Every State Government must promptly ensure total cessation of all such activities forth-with.

2. In addition to the above, in the tropical wet evergreen forest of Tirap and Changlang in the State of Arunachal Pradesh, there would be a complete ban on felling of any kind of trees therein because of their particular significance to maintain the ecological balance needed to preserve bio-diversity. All saw mills, veneer and ply-wood mills in Tirap and Changlang in Arunachal Pradesh and within a distance of 100 kms from its border, in Assam, should also be closed immediately. The State Governments of Arunachal Pradesh and Assam must ensure compliance of this direction.

3. The felling of trees in all forests is to remain suspended except in accordance with the Working Plans of the State Government. In the absence of any Working Plan in any particular State, such as Arunachal Pradesh, where the permit system exists, the felling under permit can be done only by the Forest Department of the State Government or the State Finance Corporation.

4. There shall be a complete ban on the movement of cut trees and timber from any of the even North-Eastern States to any other State of the country either by rail, road or waterways. The Indian Railways and the State Governments are directed to take all measures necessary to ensure strict compliance of this direction. This ban will not apply to the movement of certified timber required for defence or other Government purposes. This ban will also not affect felling in any private plantation comprising of trees planted in any area which is not a forest.

5. Each State Government should constitute within one month an Expert Committee to:

   (i) Identify areas which are 'forest'. Irrespective of whether they are so notified, recognized or classified under any law, and irrespective of the ownership of the land of such forest;

   (ii) Identify areas which were earlier forests but stand degraded, denuded or cleared; and

   (iii) Identify areas covered by plantation trees belonging to the Government and those belonging to private persons.

6. Each State Government should within two months, file a report regarding:

   (i) The number of saw mills, veneer and plywood mills actually operating within the State with particulars of their real ownership;

   (ii) The licensed and actual capacity of these mills for stock and sawing;

   (iii) Their proximity to the nearest forest;

   (iv) Their source of timber.

7. Each State Government should constitute within one month, an Expert Committee to assess:

   (i) The sustainable capacity of the forests of the State qua saw mills and timber based industry

   (ii) The number of existing saw mills which can safely be sustained in the State;

   (iii) The optimum distance from the forest, qua that State, at which the saw mill should be located.

8. The Expert Committee so constituted should be requested to give its report within one month of being constituted.

9. Each State Government would constitute a committee consisting of the Principal Chief Conservator of Forests and another senior Officer to oversee the compliance of this order and file status reports.

We also direct that notwithstanding the closure of any saw mills or other wood-based industry pursuant to this order, the workers employed in such units will continue to be paid their full emoluments due and shall not be retrenched or removed from service for this reason...'

4. Punishment for Persistent Polluters

Stringent action ought to be taken against contumacious defaulters and persons who carry on industrial or development activity for profit without regard to the environmental laws.[15] The Supreme Court has dealt with this aspect very strongly in the case of *M.I. Builders* v. *Radhey Shyam Sahu*. In Paragraph No. 82 of its judgment, the Hon'ble Supreme Court has observed as under:

> 'High Court has directed dismantling of the whole project and for restoration of the park to its original condition. This Court in numerous decisions has held that no consideration should be shown to the builder or any other person where construction is unauthorised. This dicta is now almost bordering rule of law. Stress was laid by the appellant and the prospective allottees of the shops to exercise judicial discretion in moulding the relief. Such discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorised construction, if it is illegal and cannot be compounded, has to be demolished. There is no way out...'

[15] *See Bichhri Case*; *Pleasant Stay Hotel* v. *Palani Hills Conservation Council* 1995 (6) SCC 127.

F. Emerging International Norms

Certain other leading norms in the field of international environmental law are as under:

1. Environmental Impact Assessment

Typically, such an assessment balances economic benefits with environmental costs. The logic of such an assessment dictates that before a project is undertaken, its economic benefits must substantially exceed its environmental costs. India has adopted this norm of select projects which are covered under the *Environmental Impact Assessment (EIA) Regulations* introduced in January, 1994.

2. Disclosure and Monitoring

Over and above the duty to notify and consult, a relatively new norm has emerged whereby States are expected to monitor and assess specific environmental conditions domestically, and disclose these conditions in a report to an international executive body created by an international agreement, and authorized by parties to the agreement to collect and publicize such information.

3. Role of Non-Governmental Organisations (NGOs)

Recently, the input of NGOs, especially those representing community based grassroots environmental activists is being welcomed. Their participation ensures that the people who are likely to be most directly affected by environmental accords will have a major role in monitoring and otherwise implementing the accord. This principle is mirrored in the Indian Government's domestic pollution control policy and the national conservation policy, and is given statutory recognition in the *EIA Regulations* of 1994. The Supreme Court has urged the Government to draw upon the resources of the NGOs to prevent environmental degradation.

The above three norms articulated above are reflected in some of the human, environmental rights guaranteed by the 1994 Declaration:

- All persons have the right to information concerning the environment. This includes information, however compiled, on actions and courses of conduct that affect the environment and information necessary to enable effective public participation in environmental decision-making. The information shall be timely, clear, understandable and available without undue financial burden to the applicant.
- All persons have the right to hold and express opinions and to disseminate ideas and information regarding the environment.
- All persons have the right to environmental human rights and education.
- All persons have the right to active, free and meaningful participation in planning and decision-making activities and processes that may have an impact on the environment and development. This includes the right to a prior assessment of the environmental, developmental and human rights consequences of proposed actions.

4. Shouldering the Environmental Yoke Equitably

The 1992 Rio de Janeiro Earth summit articulated the norm of *common but different responsibilities*. With regard to global environmental concerns such as global climate change or stratospheric ozone layer depletion, all nations have a shared responsibility, but richer nations are better able than poorer nations to take the financial and technological measures to shoulder the responsibility.

5. Intergenerational Equity

This is among the newest norms of international environmental law. It can best be understood not so much as a principle, but rather as an argument in favour of sustainable economic development and natural resource use. If present generations continue to consume and deplete resources at unsustainable rates, future generations will suffer the environmental and economic consequences. It is our children and grandchildren who will be left without forests (and their carbon retention

capacities), without vital and productive agricultural land and without water suitable for drinking or for sustaining cultivation or aquatic life. Therefore, we must all undertake to pass on to future generations an environment as intact as the one we inherited from the previous generations.

Proponents of intergenerational equity maintain that the present generation has a moral obligation to manage the earth in a manner that will not jeopardize the aesthetic and economic welfare of the generations that follow. From this moral premise flow certain ecological commandments:

- Do not cut down trees faster than they grow back.
- Do not farm land at levels, or in a manner that reduces the land's regenerative capacity.
- Do not pollute water at levels that exceed its natural purification capacity.

In the case of *State of Himachal Pradesh* v. *Ganesh Wood Products* the Supreme Court recognized the significance of intergenerational equity and held a Government Department's approval to establish forest-based industry to be invalid because it is contrary to public interest involved in preserving forest wealth, maintenance of environment and ecology and considerations of sustainable growth and international equity. After all, the present generation has no right to deplete all the existing forests and leave nothing for the next and future generations.

The theory of intergenerational equity *vis-à-vis* the environment and the intergenerational responsibility of the present generation to be a 'trustee' for the environment of future generations and its obligation to pass on the earth in sound condition to its unborn generations is well-articulated in the Goa Guidelines on Intergenerational Equity, which read:

> 'All members of each generation of human beings, as a species, inherit a natural and cultural patrimony from the past generations, both as beneficiaries and as custodians under the duty to pass on

> this heritage to future generations. As a central point of this theory the right of each generation to benefit from and develop this natural and cultural heritage is inseparably coupled with the obligation to use this heritage in such a manner that it can be passed on to future generations in no worse condition than it was received from past generations... the principle of intergenerational equity requires conserving the diversity and the quality of biological resources, of renewable resources such as forests, water and soils which form an integrated system. The principle requires that we avoid actions with harmful and irreversible consequences for our natural and cultural heritage.'

Regional instruments on human environment also stress the need to protect interests of future generations in the environment and remind the present generation of its duty to preserve the diversity of the planet's fragile life-sustaining resources for generations yet to be born.

Similarly, this principle finds reflection in certain features of the 1994 Declaration:

- All persons have the right to an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet their needs;
- Everyone has the right to benefit equitably from the conservation and sustainable use of nature and natural resources for cultural, ecological, educational, health, livelihood, recreational, spiritual or other purposes. This includes ecologically sound access to nature. Everyone has the right to preservation of unique sites, consistent with the fundamental rights of persons or groups living in the area.

Giving further expression to the principle is a landmark decision of the Supreme Court of the Phillipines in *Minors Oppose* v. *Secretary of the Department of Environment and Natural Resources(DENR)* upholding the constitutional right, essentially premised on the theory of intergenerational equity, justice and responsibility, of minors (and the generations yet unborn) to a 'balanced and healthful ecology in accord with rhythm and

harmony of nature' and their inalienable 'right to self-preservation and perpetuation' embodied in natural law, has translated the twin concepts of intergenerational responsibility and intergenerational justice into legally binding and judicially enforceable obligations. Appreciating the legitimate interest of minors, born as well as yet to be born, in the prevention of 'misappropriation or impairment' of (Philippines') 'virgin tropical forest' and of the unabated haemorrhage of (the country's) vital life support systems as well as apprehending the great and irreparable injury to minors and their successors- who may never see, use, benefit from and enjoy rare and unique natural resource treasures (virgin tropical rain forests), the court observed:

> 'This case, however, has a special and novel element. Petitioner minors assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for themselves, for others of their generation and for succeeding generations, file a class suit. Their personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.'

Although mankind has a long way to go before it imbibes completely the timeless wisdom of the Indian Chief's answer, the judicial principles and international norms discussed above are a positive step towards the creation of a cleaner, brighter future.

THE "BUSINESS" OF COURT MANAGEMENT†

Justice Mrs. Roshan Dalvi

A large company of consumer products, *inter alia*, manufactured soaps. Through oversight, a few empty soap cartons were shipped to a large departmental store. The company was charged with cheating and fraud. Its reputation was at stake. It needed to make amends. But the company had never intended to cheat or deceive – it had made a clear mistake. The management got installed a highly sophisticated detection system to oversee the products leaving its conveyor belt under a huge investment outlay. The system detected the empty cartons which triggered an alarm.

Another, much smaller, company manufacturing only soaps, installed a table fan running full blast over the final products leaving its conveyor belt. The empty cartons simply blew away!

I. Introduction

Indian Judicial Reform programme has been much the same. We have shouted from the roof-tops that the Population : Judge ratio is abysmal. That was improved, to an extent. The increase in manpower brought no commensurate change in the Case : Disposal ratio. We decried that the judicial officers get too little remuneration for too much work. Their conditions of service have improved, to a limited point. Their workload has far outweighed the ripple effect without any perceptible dent. We earnestly desired that the judiciary keep pace with the latest technology which was claimed to be the answer to its ills in speeding up its work as it did in other areas of business. The Court computerisation programme is well under way. The initiative has unfortunately not brought out a sea-change in the judicial functioning.

Which method does the Justice system now need?

How far away is its manufacture or use?

A part of the answer is in the present-day suffix "Management".

II. Evolution

Since the time of the Industrial Revolution, all industries, trades, businesses, commerce, and later, even trusts, charities, educational institutions and even events came under the spell of "Management". The art of managing affairs, people, countries and space grew into a science. The waves of management somehow failed to touch the shores of the Courts.

This was much the same in all countries, due to the intoxicating progress of science and technology. Much later in history, did the drivers of justice systems in many countries realise they had failed to keep pace with the world around them, even though laws, as evolving instruments of social change, had changed. Significant changes came about since the last half a century in the United States of America (USA)[1] and since the last decade in the United Kingdom (UK) [2]; two of the justice systems we have emulated and embraced since our Constitution.

III. The Western Scenario

The thrust of the change in the justice systems in the West is largely a product of Court and Case Management.

Case Management is in essence the Court taking over management of

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1 *Federal Rules of Civil Procedure,1938*:– Rule 1 sets out the goal of the Judicial System "To secure the just, speedy and inexpensive determination of every action."

2 Access to Justice: Final Report on Civil Justice Reform in England and Wales to the Lord Chancellor by Lord Justice Harry Woolf, Master of the Rolls, July 1996.
Its main features are pre-litigation mediation, shorter time scale of litigation (fixed dates, limited hearing time), capping of costs of Solicitors, Judges of the High Court and County Courts forming a judicial team, judicial training and Legal Aid funding.
It came about to beat the malaise of 2 or 3 years time earlier taken for resolution of a civil dispute. It propounds a time limit of up to 13 weeks for disposal of a civil suit. It shows the need to integrate and harmonize the Rules and Procedure for narrowing down the issues, witness statements and lays down a simplified procedure for appeals.

the case.[3] It conceptualises the Judges being managerial[4] - managing their affairs with improved efficiency so as to speed up the final adjudication in managing the litigation process by innovation and adaptation, two hallmarks of good business practices. These Judges are, therefore, interventionists, being in the "driving seat" as 'case managers' first and "case deciders" afterwards. They essentially limit the time taken for each step of the litigation - "definite issues, limited discovery, evidence and arguments, setting deadlines for each of these steps". [5]

Case Management shows how best to go through each of the stages of litigation without delay. [6] Business management principles can help explain which of these steps can be combined with others or altogether eliminated.

The sweeping reforms that were advocated in the Report of Lord Justice Woolf on Civil Justice Reforms dealt with the aspect of reducing delays and costs. It divided the Civil suits into Small Claims Track for cases involving less than GBP 5,000/-, Fast Track for cases involving up to GBP 15,000/- and Multi-Track for the more complex cases, specially involving medical negligence. The first two types formed a chunk of the civil actions; each of the reforms suggested in the report was to be applied. The few cases left in the Multi track necessitated pre-trial reviews – 8 to 10 weeks in advance of trial. This was followed by fixed time-tables set out in a Case Management Conference and a Pre-Trial Conference (akin to giving directions in our system but followed more keenly and respected more sincerely).

> *"There are no inherently protracted cases, only cases that unnecessarily are protracted by inefficient procedures and management."*
>
> *- Chief Judge Alfred Murrah, Federal Court, USA*[7]

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3 Steven Flanders, *Case Management and Court Management in the U.S. District Courts.* An analysis of procedures resulting in fast v/s. slow processing and high v/s. low rates of disposition – a study of District (Federal) Courts and procedures associated with the highest possible speed and productivity consistent with highest standards of justice.

4 Judith Resnik, 'Managerial Judges', (December 1982) Vol.96 No.2 *Harvard Law Review* 374-448.

5 Lord Woolf Report – *See* Chapters 12 (Disclosure) and 13(Evidence - witness statements)

6 Thomas W Church, *Justice Delayed : The Pace Of Litigation In Urban Trial Courts.* The philosophy of court control for the pace of litigation.

7 Steven Flanders, 'Courts And The Litigation Crisis: Where's The Problem? Where's The Solution?' *Business Economics,* October 1992.

A little research into our dockets would show that all but the most exceptional civil actions would qualify to be in the Fast Track bracket. These would involve a key issue to be determined, usually by documentary evidence. Monetary claims, suits against government or local bodies for injunctions, suits between landlords and tenants, suits to follow due legal process are some illustrations on the point.

In the USA, the backbone of Case Management is contained in the Federal Rules of Civil Procedure (FRCP). It entails, what is now popularly called, Early Neutral Evaluation (ENE).

The hearing of a case commences with the Rule 16 Conference, also known as a scheduling conference or status conference.[8] The Rule 16 Conference, a "dress rehearsal for trial", is essentially for scheduling dates after the jurisdiction of the Court is established. On the scheduled date, the pivotal issues are identified, a shot at settlement is taken and a decision on whether the case can be disposed of on motion or by trial is determined. Only if a trial is necessitated, are orders for discovery made and the Final Pre-trial Conference scheduled for previewing the evidence and for considering the limits on the length of trial.[9]

Despite various critiques,[10] the Rule heralded the era of Case Management since 1938. Its amendment, by which Rule 16(f) was incorporated, lays down sanctions for failure to obey the scheduling or pre-trial order and grants expenses for non-compliance.

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8 Under Rule 16 the Court is required to issue a scheduling order within 120 days of the filing of the Complaint. *See also Civil Justice Reform Act, 1990.*

9 The Elements of Case Management – Publication of Federal Judicial Center, Washington D.C., 2006. F.J.C. was established by the Congress in 1967 as a continuing education and research arm of the Federal Judicial System. See also Rubin, *The Managed Calendar : Some Pragmatic Suggestions.*

10 Robert F. Peckham, 'The Federal Judge As A Case Manager' (May 1991) Vol. 69 No.3 *California Law Review* 770-805. The author was Chief Judge, U.S. District Court, Northern District of California. *See also* Wayne D. Brazil, 'Improving Judicial Controls Over The Pre-trial Development Of Civil Actions : Model Rules Of Case Management And Sanctions Suggested Major Overhaul Of Rule 16' (Autumn 1981) Vol. 6 No. 4 *American Bar Foundation Research Journal* 873.

"Judges who think they are too busy to manage cases are really too busy not to. Indeed, the busiest Judges with the heaviest dockets are the ones most in need of sound case management practices."

– *William Schwarzer*[11]

IV. The Indian Scenario

The previously documented principles and procedures followed in Courts cannot be picked verbatim and applied in the Indian scenario; these must be adapted and calibrated to suit the ground realities of our country : "*Think Globally; Act locally*".

The position of civil justice reform in the 50th year of the Independence of India was voiced in different quarters. In an international study, the overall impression of the justice system in India as it then existed, was :

Streamlining procedures which enable the Judge to frame the issues are rarely effectuated. Likewise, sanction power to impose costs for frivolous conduct is seldom exercised. Interim injunctive relief is routinely granted, but long delays in hearing the contentions of those enjoined persist. Commonly made interlocutory appeals fracture the case into many parts and effectively stay the trial. The absence of alternatives to litigation makes a full, discontinuous trial necessary, regardless of how long a full trial may take. Once a judgment is reached, the truly hard work of enforcement and execution begins. These compounding problems engender despair among pessimists and overwhelm even dedicated optimists, while public tolerance appears to be waning.[12]

The same malady continues to afflict, into the 60th year of Independence, except perhaps in areas of computerisation and classification of cases. All that is required today in the business of judging, is a change from within.

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[11] Judge William W. Schwarzer, *The Elements of Case Management*, 1991.

[12] Hiram E. Chodosh, Stephen A. Mayo, A.M. Ahmadi and Abhishek M. Singhvi, 'Indian Civil Justice System Reform : Limitation And Preservation Of The Adversarial Process' (Fall 1997 - Winter 1998). Vol. 30 Nos. 1 and 2 *Journal of International Law and Politics of New York University.*

A Sitarist went to a guru to polish his skills. He played the Sitar as best he could. The guru showed him his faults. He practised and improvised. Still the Guru showed other faults. He practised more. The perfectionist Guru was not satisfied. He told the Sitarist to hold the Sitar in the other hand and practice from the beginning. The unlearning process resulted in perfection....This is perceiving the perspective....a complete change in the mindset to yield the desired result.

This end can be achieved in our justice system only by strategically overhauling the Rules and cannot be achieved within, under, or in compliance with the current procedural framework.

"The more the rules, the more the rift"

Case Management begins *before* a case enters the system and applies *not only* to cases that have entered the system. This principle brings to fruition a healthy "Court Climate".[13] A great deal of frivolous litigation - in suits, appeals or writ petitions — is avoided and eliminated by a sound Court Climate. To instill confidence of the litigants in the justice delivery system, Courts are required to be scientifically managed. This involves two targets:

(1) Reducing the number of cases entering the system; and

(2) Improving efficiency in disposal of cases that have entered the system.[14]

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[13] An atmosphere conducive to maintain respect and decorum expected of all the functionaries of the Court so that none can take the Court for granted. The litigants and lawyers must not be driven to say or think that a particular Judge would allow the unallowable.

[14] For results of improved efficiency, *see* Saikat Neogi, 'Judicial Reforms' *H.T. Research, Hindustan Times* (Mumbai, 27 September 2007).
The Author emphasizes that an efficient legal system is crucial for economic growth. It stimulates economic growth by aiding market development, facilitates foreign investment, enforces property rights and helps in poverty alleviation. The article refers to a study by the University of Bonn showing that an efficient Judiciary can increase per-capita income by 1.9% ("efficiency" relates to efficacy in procedures and not substantive laws). Delays in Justice system have a direct bearing on business and investment. The article refers to a World Bank Survey conducted in 60 countries, including India, in the year 2000 which showed that an unpredictable Judiciary was a major problem in the business operations of those countries. (Perhaps that explains why jurisdiction of foreign courts is the norm in present arbitration agreements involving international contracts). Hence, the Author advocates investing in judicial reforms for future economic development and economic prosperity.

"The best way to predict the future is to create it"

- Management Guru, Peter Drucker.

The justice system with about 16,000 Judges[15] in a country is a large enterprise. Several principles of Management must necessarily apply to such an undertaking. Its varied activities, in different divisions, require a specialised expertise to maximise its output through efficient use of its available resources.

V. The Principles Of Business Management

Such a project requires implementation of the five basic elements of Management - Planning, Organising, Directing, Co-ordinating and Controlling.[16]

"Failing to Plan is Planning to Fail"

(a) The first and the most essential management principle is that of *procedural simplification*. Cumbersome and complex legal procedures thwart the most seasoned litigants.

The verbose plaint/complaint is the first inefficient step in the long march to a legal outcome. A parallel can be drawn to the wordy speeches of ministers derided in the famous book, 'Yes Minister'.[17] The service of the plaint/petition/(and similarly appeal/revision and the like) is a daunting prospect. It takes days, weeks, months, even years to see through. The response of the recipient is required to be made again and again in different forms and formats (affidavit-in reply, written statement, counter, defence). Even after the appearance and the representation of the defendant in a legal proceeding, service is required to be "effected" !

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15 The latest statistics show sanctioned strength of subordinate Courts to be 15,399 Judges and a sanctioned strength in the 21 High Courts to be 792 Judges; the working strength is shown to be 12,368 and 586 respectively.

16 Harold Koontz and Cyril D'Onnell, *Principles of Management*.

17 Jonathan Lynn and Antony Jay in *Yes Minister – The Diaries Of A Cabinet Minister By The Rt Hon. James Hacker Mp* , "….. years of political training and experience had taught him to use 20 words where one would do, to write millions of words where mere thousands would suffice, to use language to blur and fudge the issues and events so that they become incomprehensible to others. When incomprehensibility has been achieved by a politician, so has temporary safety – Editor's note, 7.

Interim proceedings and even ad-interim applications require time, effort and cost of the litigants, their Advocates and the Judge invested in them. Their disposal requires production of many documents by the litigants, arguments upon them by Advocates and consideration and appreciation of them by the Judge. They reveal all the issues, unveil the admissions of the parties and manifest all the facets of oral evidence. They require material documents to be produced and inspection to be taken. They throw-up various propositions of law to be propounded and decided. Some demonstrate the need for a resolution of the dispute by alternative means. Several of them are based on admitted facts and involve only questions of law or interpretation of documents for ultimate adjudication. Some merit but a compilation of the documents of the parties and written arguments by Advocates. Each individual involved in such exercise - the litigant, the lawyer and the Judge - is abreast of all the aspects threadbare. An adjudication of the dispute (decision) after such exercise is necessarily expected to be final, subject, of course, to the rightful appeals.

In no other profession, industry or business will so much effort be derided as so little and merit yet another full-scale endeavour after the clock has turned full circle. That endeavour is required to be repeated for the "final hearing" of the suit/petition/appeal/revision several months/years later!

An effort in the right direction has been attempted in petitions/appeals/revisions for avoiding such blasphemous duplication of effort in what is popularly called "hearing at the stage of admission". This has resulted in reducing an entire stage of hearing. This has not been applied to suits – and suits form the bed-rock of litigation in the country! More than 15,000 out of 16,000 Judges are outside the purview of this band-aid to the malady.

The question that has confounded jurists and the man-in-the-street alike is how no one who is in charge could think and evolve a procedurally simpler system which will beget the same result on merits and without duplication of effort.

Despite all these, a strike at procedural simplification of cases in the Justice System demands no great brilliance, intellect or industry. It need

not be a ground-breaking, earth-shaking decision. It needs but an open mind and a desire for change. It requires only an honest acceptance of the present mess and a genuine desire for a tidier tomorrow. It therefore calls for the application of the elements of management principles - planning how the procedural wrangles can be weeded out, organising the case-files by simplifying the procedural requirements for each case, directing from the top, co-ordinating with all the Courts in the federal hierachial set-up, and controlling also from the top.

> *"Successful people do not do different things;*
> *they do things differently."*

The exemplary work of the great economist, Muhammad Yunus, shows how momentous ideas take shape in simplicity. The micro credit concept of Grameen Bank has evolved into an economic powerhouse.[18]

A simple blueprint for this much-needed, earnestly-desired change can be brought about by a single or a combination of the following modes:

(a) Amendment of the CPC and the Rules of the Courts (CPC)

(b) High Court Practise Directions for itself and the subordinate judiciary (HCPD)

(c) Precedents (Pr)

(d) Judicial Training and Education (JT)

[18] Muhammad Yunus & Alan Jolis, *Banker To The Poor (Autobiography)*

These would apply to the various stages of proceedings[19] thus :

No.	**Topic**	**Particulars**	
1.	Plaint	Plaint to be accompanied by a synopsis and short affidavit verifying its contents	CPC HCPD
2.	Service	Private service to be allowed by any mode mentioned in the CPC Service by RPAD and UPC to be encouraged. This applies to Writ Petitions, Appeals, Applications and Revisions	HCPD
3.	Deemed Service	Once the Defendant appears in person or through Advocate, summons must be deemed to be served under the Rules. This applies to all Suits, Applications, Writ Petitions, Appeals, Revisions etc.[20]	CPC Pr
4.	Defence	There need be only one form of defence eg, A/R, W/S, counter (by whatever name called)	HCPD Pr

[19] *Salem Advocates Bar Association, T.N.* v. *Union of India* (2005) 6 SCC 344.

[20] *Sunil Poddar* v. *Union Bank of India* (2008) 2 SCC 326*; D. Vinod Shirappa* v. *Nanda Baltiappa* (2006) 6 SCC 456.

No.	Topic	Particulars	
5.	Written Statement	W/S should also be accompanied by a synopsis, an affidavit verifying its contents and draft issues	CPC HCPD
6.	Interim Applications	I/A to be decided upon the defence filed (which defence alone can be considered even at the final stage)	HCPD
7.	Vakalatnama	All Vakalatnamas should be filed in the suit itself	HCPD
8.	Original Documents	Original documents must be produced in Court by all parties (they can be seen by the Court as well as offered for inspection to the other party)	HCPD JT
9.	Issues	Issues must be framed along with the order on the I/A. If any issue can dispose of the suit, it must be tried first (as pivotal issue)	CPC JT
10.	Admissions	Admissions, if any, to be recorded along with the Order on the Interim Application	CPC JT
11.	Costs	Heavy and realistic costs as per present standard of living be granted to the wronged party and made condition precedent	HCPD JT

No.	Topic	Particulars	
12.	ADR	All suits which are appropriate to be referred to Mediation etc. must be so referred	JT
13.	Judgments on arguments	Suits involving only questions of law or interpretation of documents and not requiring any separate oral evidence may be disposed of at the stage of hearing of interim applications	CPC JT HCPD
14.	Compilation	Copies of documents certified as true copy by the Advocate may be taken as compilation	HCPD
15.	Examination -in-Chief	Pleadings (which are accompanied by a supporting affidavit) must be used as Examination-in-Chief and parties be directly cross-examined thereon[21]	HCPD

[21] *Bar Council of Maharashtra & Goa* v. *Shamrao Vishnu Kanjir* AIR (2006) BOM 167.

No.	Topic	Particulars	
16.	Documents	Court to consider initially all admitted documents to be marked as Exhibits, followed by certified copies of public records or judicial proceedings also to be marked as exhibits. Court to consider admissibility of only private documents shown in the affidavit of evidence/pleadings	JT HCPD
17.	Cross Examination	Court to record cross examination by Commissioner in all routine, usual cases. Junior Advocates to be appointed on a panel of Commissioners with reasonable fees Cross-examination to proceed day-to-day	HCPD
18.	Arguments	Written arguments to be insisted upon. Oral arguments only to highlight points in the written arguments within specified time limit	HCPD

No.	Topic	Particulars	
19.	Judgment	Judgment be delivered immediately or within 30/60 days as allowed in the CPC. Judgment copy to be ready on the date of pronouncement. Judgment to be uploaded on the server forthwith	HCPD
20.	Decree	Certified copy of the Decree to be issued within 15 days aided by Court computerization	HCPD

"The best way to escape from a problem is to solve it."

Whereas each step of the litigation requires fine tuning and honing, as above, each step taken individually may result in only cosmetic changes. Such tidying up exercise would apply to at least 60% of the cases filed that could be ended more speedily.

The mass of rules that govern us have been the road-blocks to a speedier system. A smoother system with lesser rules may require their alteration or even obliteration.

A young scientist, newly hired in the laboratory of Thomas Alva Edison, went up to him on the first day of work and asked him what were the rules in the work-place.

"We got no rules here my son. Here, we want to ACHIEVE something," said the Master.

Each Judge owes a responsibility and has the privilege to put his astute discretion before the technicalities of the rules. The system requires to be geared for change of the procedure advocating its simplicity rather than being a slave of it.

The best 10 2-letter words may be apt,

If it is to be,

It is up to me.

(b) An equally efficacious, though more artful business canon, is the strategy of *Paradigm shift*[22] first propounded by Thomas Kuhn outlining scientific revolutions of significant changes in the basic thought.

It might be interesting to know that the technology of Quartz watches, which eliminated the tedious, monotonous act of winding watches, was introduced by a Swiss. This scandalised and outraged his countrymen who believed that no technology can replace the mechanics of winding watches as evinced from their best national products Omega or Rolex. The invention, discarded by the Swiss, was accepted by the Japanese. The result is history writ large on millions of wrists! That is a classic illustration of paradigm shift. It is largely analogous to CBI – Creative Business Ideas – in the commercial jargon. The example of "Intel Inside" in the sale of computers involved a similar strategy. The added features of technology in software design revolutionalised computerisation.

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[22] *See Kuhnian Paradigm Shift : The Structure Of Scientific Revolutions,* 1962.
See also Marcus Buckingham and Curt Coffman, *First, Break All The Rules : What The World's Greatest Managers Do Differently.* The Authors have considered Personnel Management required in all enterprises which work to provide services for a more positive and productive work environment yielding better business outcomes. They have challenged the conventional business practices and axioms. They have advocated to focus people toward performance.

The Justice system needs such an overall shake-up. The import of the procedure of "Summary Judgments" from the UK[23] and US[24] Civil Justice systems, with the required modifications to suit the Indian legal framework, may be apt.

In the U.S., a party in a civil suit may apply for disposal of a suit by a "Summary Judgment" and "motions of Demurrer" if no evidence, or further evidence, is required to be led. Such a suit is, therefore, decided on a motion by either party. Even a part of the dispute can be adjudicated by a 'partial summary judgment' in cases where the reliefs are severable.

Experience has shown that at least 65% of the civil suits in India on merits involve only an interpretation of documents upon certain admitted facts or a question of law emanating from the pleadings. Such suits do not need oral evidence to be recorded. The Court may, *suo motu,* or on an application by either party, set such a suit for *disposal on merits by arguments*. The hearing of an interim (and even ad-interim) application in a civil suit may also manifest such an exercise as opportune. Documentary evidence alone, relied upon by a party (which necessarily excludes oral evidence as an elementary principle of the law of evidence), can decide the fate of the several law suits on merits. In several such cases, the need or even desirability of oral evidence is questioned. The system which does not heed research into newer and better ways of dealing with and disposing of such cases is flawed. The removal of the flaw entails eradication of the mindset which fails to envision the stark reality.

"The mind is like a parachute;

It works only when it is open."

[23] Lord Woolf Report, Section III. *See also Civil Procedure Rules, 1998* (CPR) (UK) in force from 26th April, 1999.

[24] Rule 56 of the *Federal Rules of Civil Procedure* (FRCP) in the US District Courts.

What strategy is called for under such circumstances? An application for disposal of such suit on merits, the decision of the Judge to dispose of such suit on arguments, or better still, the disposal of such suit itself on the interim application (with express reasons for such disposal).

Any party may, at any stage, apply for disposal of the suit by arguments, if it can be disposed of on a question of law, admitted facts or interpretation of documents or law. The Court may *suo motu* set the suit on board for disposal by arguments if it satisfies the above requirements.

If, upon documentary evidence or on a question of law, a party applying is clearly seen not to have made out even a *prima facie* case, the suit itself can be dismissed on merits at the first hearing itself. It would not be surprising that a large percentage of litigation, specially in subordinate Courts, would come under the purview of disposal "on merits" without the need for oral evidence.

Yet another radical strategy in this direction is called for. It is common knowledge that a large chunk of the present day civil litigation in today's intensely litigious society entails filing frivolous suits or raising false defences.[25] Few civil actions involve an equally arguable case on both sides. The grant of injunctions in frivolous suits, which last for years before the trial ends and the appeals are exhausted, confounds the situation. Similarly, the wait for trials which spans decades allows germination of false defences. The endemic malaise cannot even be lessened, much less obliterated, by reducing the delay for trial. It matters not to a recussant sleaze that the injunction obtained in an undeserving cause lasts for 5 years and not 10 years. Similarly, it matters little

[25] In the US they are referred to as "boilerplate defenses". In a Rule 16 Conference, the Judge shall narrow down the issues to those only genuinely in dispute and, consequently, limit discovery.

to a party who only desires to delay the passing of a just decree against him that it can be forestalled by 5 years and not 10 years. Hence, lessening the delay period by a few years has not resulted in commensurate cleaning of the system. An equal number of frivolous suits keep on being filed; an equal number of false defenses keep on being raised. The system which breeds such litigation expands the vicious circle. The business strategy in this scenario is to *take up the latest cases first*. In other words, to constitute a new Court for taking up new cases filed in the current year, not just for hearing interim applications, but for their final disposal. Only when the litigants realise that it does not pay to file frivolous suits or raise false defences and the Cost:Benefit ratio becomes adverse - as the suits are disposed of within months of filing - that the lassitude would terminate.[26] This would decrease the filing rate itself, facilitate settlements and improve Court Climate.[27] By this, the management of the Courts will have extended to cases that have yet not entered the system. The ultimate result would be what is called "Rocket Docket" in the U.S., when a case is taken up involving the principles of management and set down for hearing on a date "written in stone".[28] The sagacity and wisdom of such classification would be seen in the ultimate performance of the system.

Another area for such a quantum leap is the jurisdiction of Courts in appeal. The Judges' Act, 1925 gave power to the US Supreme Court to not only decide appeals but also to decide which appeals it would decide. Certiorari is issued only in 70-80 out of about 7000 appeals filed each year. It is stated to have been "necessitated by the unmanageability of the Court's Appellate docket in the

[26] *Sakiri Vasu* v. *State of U.P.* (2008) 2 SCC 409. *See also* (2008) 2 SCC 403.

[27] Rule 11 of FRCP allow motions for dismissal of frivolous law suits resulting in a weeding process.

[28] Larry L. Sipes, 'Reducing Delay In State Courts : A March Against Folly' (1985) 37 *Rutgers Law Review* 299-317. The work sets out delay reduction programs by controlling case flow with firm trial dates.

old jurisdictional dispensation and to re-define the role of the Supreme Court in American life."[29] Division Benches of High Courts are indispensable, only for determination of the final merits of the case in appeal. Use of Division Benches for paltry work, or "admissions" results in mal-utilization of the most valuable resource of the judicial undertaking. Two Judges of the Division Bench would yield double the output if acting singly or separately. Similarly, as a converse rule, Justice Sabharwal, ex-CJI, in a lecture on "Delayed Justice"[30], suggested that cases which would definitely result in appeal could be set before the Division Bench at the outset.

"To be a success in any business,

Be Daring, Be First, Be Different".

(c) Another management principle which cries for application in the justice system is the Doctrine of "*Non-Value added items*"[31]. Even a grocer knows which goods do not sell and will refrain from stocking those. He also senses which wares need to be displayed in the front row. He understands, "what is in it for me?" The Courts have neglected to envision this salutary rule. Technicalities are given overmuch importance. They consume a disproportionate amount of time. They do not beget commensurable results. The scenario is like repairing a car with the engine running. Typical illustrations on the point are applications for bringing heirs on record after the death of a litigant, applications for amendments of pleadings, passing of directions for getting suits ready for trial including needless directions for service, filing of defences, placing suits for ex-

[29] Michael W Schwartz, 'Our Fractured Supreme Court' (Feb-Mar. 2008) *Policy Review* 147.
[30] Justice Sobhag Mel Jain Memorial Lecture on "Delayed Justice" delivered on July 25, 2006.
[31] "Business Method and Data Structure for eliminating non-value added data activity across a business continuum" has also been patented under U.S. Patent No.20020138484 showing the method of reducing redundant activities in various departments of a business.

parte hearing/decree/dismissal, issue of witness summons, applications for restoration of dismissed suits/writ petitions/ appeals/revisions, condonation of delay in filing appeals or review petitions, admission of first appeals/writ petitions (both civil and criminal), directions for deposit of decretal amounts in first appeals, investments of amount deposited in summary suits, first appeals and even passing "due orders", which are more administrative than judicial in nature. No qualified executive in any corporate undertaking would relish performing functions which call for so little intellectual satisfaction. But it lies in the lot of the Courts to suffer such labour which consumes at least an hour of each work day and benefits no one. This constitutes 18-20% of judicial time. For a strength of the Court at 60 Judges, it consumes the work-load of 10-12 Judges. Hence, if such wanton tasks are removed, the Court would effectively function on the strength of 72 Judges! Such cost accounting would exhibit the economics of mal-utilisation of meagre human resources. This calls for problem identification and problem solving skills, making a cause and effect analysis of model cases with statistical time control techniques.

A single answer to such an all-pervading conundrum in the law Courts is to relegate such functions to the Registry with pre-determined parameters for passing directional orders.[32]

Dismissal orders for want of service within the statutory time frame may be passed by the Registry. Once served, the defendant/respondent need appear only before the Registrar to file his defence within the statutory period. Failure would entail ex-parte order/decree to be passed by the Registrar. Setting aside such orders can also be automated, up to a point. All applications for restoration of dismissed suits/petitions/appeals, or applications

[32] In some Courts in the U.S., "Magistrate Judges" supervise pre-trial process and work as a team with the presiding judges who co-ordinate their respective work periodically to set out the general ambit for directional matters.

for condonation of delay in filing appeals/revisions may be allowed as a matter course, subject to payment of fixed costs (say Rs.10/- per day of delay) to the Legal Services Authority by the Registry itself. The parties would be more concerned with the interim reliefs being vacated upon dismissal. Similarly all amendments be allowed by the Registry as a matter of course (after all, this same material could have been a part of the pleading in the first place and that could not have been vetted in the system prevailing at present). Legal heirs may be brought on record of suits as a matter of course (except in few cases when it is shown that the cause of action does not survive or their heirship is disputed). Whenever any amount is deposited in a suit/appeal/petition immediate investment is called for without any judicial direction. The aid of computerisation with auto-text directions can be put to use.

Only after the pleadings, with synopsis and draft issues (in a suit) are filed, the suit need come up before the Court. The hearing on merits is the hallmark of our system, which is never jettisoned anyway. Such organisational design would leave time for "the mills of Courts to grind slowly" and yet "grind exceedingly well" for the core that remains and in which impetuousness has no place. The result is quantity of disposal without sacrificing quality and expeditious justice without sub-standard justice.

As regards precedents, the practice prevailing in the USA of enunciating a well settled principle of law so as not to refer to further case law on the subject, may be worth following. Further, once a principle of law, which would cover a number of cases is settled, all such cases must be sought out, classified, and concluded in terms thereof rather than waiting for them to reach to be disposed of in good time.[33]

[33] This practice followed in the Supreme Court of India in the 1990s is hailed as having disposed of thousands of pending cases in groups as per precedents. An illustration in point to appreciate the ambit of such effort is the case of *Secretary, State of Karnataka* v. *Uma Devi* (2006) 4 SCC 1.

(d) Following as a corollary, is the management principle of *Core Competence*.[34] Once the trivial auxiliary work is discarded, the Courts would be utilised only for the aspects they are best equipped to handle. This is in terms of the basic economic theory of comparative advantage.

The Golden Rule of business is :-

JAM yesterday - JAM Tomorrow - but NEVER JAM Today.

The seminal managerial action of an interventionist Court is to sift the suit that comes up before it. This may demand the usage of such salutary, but little-used provisions of the *Civil Procedure Code, 1908* (CPC) as contained in Order 7 Rule 11, Order 10 Rule 1, Order 11 Rule 5, Order 12 Rule 6, Order 14 Rule 2, Order 15 Rule 1.

Non-payment of *ad-valorum* court fee in each merited case is a consistent breach. Filing suits ostensibly for reliefs other than what in substance the action prays for is also endemic. Rejection of such plaints is necessitated.[35] Framing and answering preliminary issues resulting in disposing of the suit which would otherwise consume needless judicial time and to bring out the same result after years is a matter of managing the case as much as a binding precedent. Statements made by defendants about certain facts in issue would result in disposal of several suits at the first hearing itself. A slight lapse on this score would entail avoidable judicial time in future. Thus when the cause of action does not survive, the suit/petition/appeal has been infructuous, the procedural mandate is to immediately dispose of it.[36] Recording of admissions culled out from the pleadings, or

[34] *See* Gary Hamel and C.K. Prahalad, The C.c. Of The Corporation, 1990 for substainable competitive advantage. What is not a company's Core Competency, should be outsourced; what is difficult for the competitors to imitate, should be cultivated for maximum output as a corporate strategy.

[35] *Hardesh Ores Pvt. Ltd.* v. *Hede and Co.* (2007) 5 SCC 614.

[36] *Shipping Corporation of India* v. *Machado Brothers* 2004 AIR SCW 1842 .

examining parties at the first hearing on important aspects may narrow down the issues in dispute. "An activist Judge is the answer to irresponsible law suits".[37] Passing judgments on admission may bring about a judgment on a part or full of the claim in suit. Requiring parties to produce original documents in Court may occasion giving inspection in Court and obviate the need for future correspondence. Each of these procedural niceties are not ornamental; they must and do result in weeding out the wanton, unmerited cases.

The analogous system prevalent in the UK is the passing of "consent orders" and "unless orders".[38] The dismissal of trial is imminent unless directional orders are scrupulously followed or its breach is without intentional or contumacious conduct.

Once done, the remainder of the suits/appeals/petitions are the ones deserving deliberative, "patient" hearing, which is the specialized expertise - Core-Competence - of the Courts.

(e) Close on the heels is the tenet of *Time Management*[39] as the business maxim applicable to today's justice system. This involves a study of how to manage a given activity to its completion within a prescribed time and defining outcomes and physical actions within such time frame. With so much work and so little time, even for the most pivotal function of hearing the cases on merits, the need for choosing the most opportune case arises. Time consumed by an unmerited, ill-conceived case adversely affects all the cases waiting in queue which only "stand and stare".

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[37] *T. Arivandandam* v. *T.V. Satyapal* 1997 (4) SCC 467.

[38] Litigation Lawyer : A new approach to "Unless orders" – the criteria revised by the English Court of Appeal in 1997.

[39] Gerard M. Blair, *Personal Time Management For Busy Managers*. The author narrates how the "Eff " words - effective, efficient, effortless – can be utilized for work practices. *See also* Robert W. Bly, Time Management : Make Every Second Count.

A management professor brought a tumbler and some paraphenalia to class. He put some big rocks in the tumbler till they came to the top. He asked his students if the tumbler was full. The management students replied in the affirmative. He asked them if they could put in any more rocks. They answered in the negative. He put in some smaller rocks and pebbles. He shook the tumbler so that the pebbles occupied all the vacant intermolecular spaces. Then he asked his students if the tumbler was full. They said that then it was full. He then sprinkled some gravel and sand till it filled to the top. He again asked his students if the tumbler could take in anymore. They replied in the negative. He then poured in a jug of water till it came to the brim. Then he asked his students the moral of the story. Being management students, they answered that the moral was that no matter how much was put into the tumbler, there was space and time to put in still more. The professor sighed – "that is right, but that is not the moral of this story." He said, "the moral of this story is that if you do not put in the big rocks in the tumbler first, you will never be able to put them in at all." "So", he continued, "tomorrow morning when you get up, ask yourselves, 'what are my big rocks for today'? And put them in your day first. The smaller rocks and the other things will fit into your day anyway."

(f) Yet another facet of efficient business governance is its accounting arm. *Cost Accountancy* is an indispensable part of every business activity. The most significant capital asset of Courts is its time. *Time Accountancy* would, therefore, be the most notable aspect of a Court's balance sheet. The double entry book-keeping would command the dual aspect of setting down the *time* frame for each step of the litigation,[40] the most distinctive being the stage

[40] *supra* n. 28. An analysis of the delay reduction program in the Federal Courts in the U.S. from 1970.

of arguments, and awarding *costs*, "heavy", if not "actual",[41] for any abuse of legal process.

(g) Though to a lesser extent, a further Business dictum is that of *Decentralization*. The service of notices, summons, proceedings can be best effected, by each of the litigants/ lawyers desiring to serve in place of the Courts. Service would be by each one for oneself and the Court for none, but the most exceptional. The making of the "paper book" in appeal must go the same way.

(h) The other side of the managerial coin is *Specialisation*. From the era of Industrial Revolution the sole proprietor progressed to be a partner. One partner took care of the capital; the other concerned himself with labour. The principle of Specialisation of aptitudes with Decentralisation of work was born. It further evolved into Joint Stock Companies. The shareholders/members who owned the Company and brought in the capital are a class apart from the Directors who man the company as agents, trustees and managing partners. The specialisation of work brings out the best of their talents, aptitude and experience. Today the same applies even in the field of law. A 3-year infant lawyer "specialises" in one branch of law that his Senior excels in and to which he has been exposed since his entry in the profession. Why then should a Judge not specialise in an area of law in which he can give his best? Why should he be thrown in the arena like an Androcles to fight the lion? An argument on the other side is that he would be trained to be an all-rounder. Is that necessitated in the present judicial scenario where he is neck-deep in work which would not abate at least till his retirement? He learns, but at whose cost? And for whose benefit? Should the litigant be the guinea pig? Should his well-acquired

[41] In the UK, the system of awarding actual costs is so ingrained in the judicial process that it has encouraged the "rightful" party to prefer a large number of applications, the costs of which would be borne by the "wrongful" party. This has led to the new rule of "capping of costs" in all fast track litigations. Costs cannot exceed a defined upper limit in such suit as per Lord Woolf Report.

talent in one field be wasted to spend his time acquiring talent in another field as on-the-job-training? The desire to "get value for money" has caused the British judiciary to have Judges preside over the Bench in the realm of law to which they have been accustomed and in which they have had experience. In fact, Judge preference is an aspect specially considered for assignment of judicial work.[42]

(i) The feature of Corporations delving into the public sphere has evolved from the then novel business policy of General Motors, the giant auto industry of America. *Corporate Social Responsibility* has been at the core of the management of General Motors since it declared: "What is good for General Motors, is good for America."

The Judiciary has left an indelible mark on public life. In substantive laws and their interpretation through precedents, India is a fore-runner and looked upon with awe for inspiration.[43] It, therefore, falls upon it to take the public, the litigants, in its stride, much like worker participation in management. Efforts have been made in the area of legal-aid and allied legal services for a more fruitful access to justice.

This concept can well be enhanced as a partnership of "Judicial Social Responsibility" and "Legal Social Responsibility" with both the lawyers and the Judges putting in their best for the litigants they serve.

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[42] Lord Woolf Report 1996 para 41. Also, the Advocates' Society conducted "Long Trial Survey" of 2,000 lawyers in Ontario. It designed a questionnaire showing reasons for delay in trials. The respondents suggested reforms to beat the delays in Courts. The survey showed, inter-alia, the need for "specialist" Judges.

[43] Prof. Laurence Henry Tribe, *American Constitutional Law (Treatise)* 2000. The author considers "judicial legislation" during the turn of the century – "a period of tremendous constitutional change".

(j) No business or profession can survive the vicissitudes of the present times without *Continuous Education*.[44] Judicial Education, which was initially perceived as a threat in all countries, has now come to stay, especially in areas of racial and gender discrimination, human rights, procedural reforms, judicial ethics, victimology, ADR, environmental issues, judicial accountability and transparency, technology in Courts, court craft, court-room conduct, contempt of Court, recording and appreciation of evidence, role of media, judgment writing, amongst others. The exchange of ideas, thoughts, actions and "best" practices have the same result as trade and commerce. It enriches the giver and the receiver. The client-centred approach to learning, showing and disseminating knowledge and information is best suited for training and educating both the wings of the justice system – the bench and the bar along with the various related services like police, prosecutors, journalists, jurists, NGOs academicians and students that form its complex organization chart. A profound program in that direction would sharpen and polish the blunt edges in a profession whose most vital capital asset is learning. It would enure for the benefit of the ultimate beneficiaries of the system – the litigants for whom the Courts were established in the first place. A thought goes out to one of the earliest expressions in literature about an appraisal by a commoner on the then prevalent English Justice System : "He was at a loss how it should come to pass, that the Law which was intended for every Man's Preservation, should be any Man's Ruin" – Jonathan Swift.[45]

[44] The Practice of Judicial Education started in the USA in the 1930s, in the UK in the 1960s and in Australia in the 1980s. The Lord Chancellor himself attended the first judicial education workshop on sentencing policy with all the British Judges.

[45] Jonathan Swift, *Gulliver's Travels*.

(k) An area of management which has yielded tremendous profits in the business sector by improving morale, healthy competition and positive peer pressure is the principle of *Performance related Payments and Performance related Promotions (PRP)*. This underlines the need for a "quota for merit" system of "picking up the best man first" and concerns promotions in the judicial hierarchy at every stage. In a profession in which entry of the best talent is as much craved, as it is eluded, this principle assumes immense significance. An arterial rule is a blend of payment in cash and in kind – the package.

(l) And the final product to roll out on the judicial conveyor belt is the epitome of management culture - TEAM effort.

"Together Everyone Achieves More"

This is the ultimate leadership concept. Leadership initiative has been at the forefront in all management schools. Lessons in leadership and team spirit are demonstrated from a study of the animal world: Eagles hunt in pairs, hence they seldom lose their prey; Chital (with a great sense of smell and hearing) and Langur (with great vision) move together for survival; Geese fly long distances in "V" formation, taking turns to lead. The message is: "Complimenting is Team Work".

In the Justice System, much depends upon the "local, legal culture".[46] It calls for "the Bench-Bar vision, mission and passion", as Justice Krishna Iyer proclaimed. Is one a winner without the other? Can one survive without the other?

The fabled anecdote of the hare and the tortoise, declaring the slow and steady tortoise the winner has been replaced on the internet highway by a further narrative. The hare, being ashamed of losing decided to give it another try when he would not succumb to sleep. The tortoise agreed. The race ended with the hare the winner. The tortoise mulled over the situation. He knew he could never run faster. But he could strategise. He went up to the hare and challenged him to another race. Without a thought, the hare concurred. The tortoise suggested another route. The hare darted. He came upto a river and could not cross. The

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[46] Thomas W. Church, *Justice Delayed: The Pace Of Litigation In Urban Courts*
He defined a cluster of related factors as "local, legal culture" being "complex systems of practitioner attitudes comprising informal norms, expectations, behaviors and relationships of judges, attorneys and staff in a trial court". Judicial characteristics such as decisiveness, judge's control over trial, judge's work habits such as punctuality, judge's knowledge of the law etc. were attributes of legal culture.
In a survey, of 21 Courts – Civil & Criminal - he showed the usual traits of lawyers and Judges found everywhere around the globe as the most important factors that unduly lengthen trials:
(1) aspects of lawyers – unprepared counsel, style of advocacy, work habits, calling unnecessary evidence, lengthy and unfocussed cross-examinations, bar opposition to change, dilatoriness and tardiness with discovery and other procedures, rules ignored with impunity.
(2) Aspects of judges – tolerating judges, lack of judicial control, judicial failure to limit evidence and arguments, non-user of case management and case-flow management principles for defining and narrowing down issues and lack of pre-trial management of cases.
Changes suggested by the respondents of the survey-
(1) Clients to sign consent form when Counsel asks for adjournments
(2) Institution of fixed date system
(3) Use of specialist judges (increase in specialization)
(4) Imposition of more rigid limits on adjournments, subject to very reasonable requests.
(5) Fixing time for trial, arguments
(6) Administration by case managers (administrators)
See also, *supra* n. 28, the Long Trial Survey conducted by Advocates' Society in Ontario which showed various reasons for delay in trials as above, given by the respondents of the survey.

hare was constrained to wait it out. The tortoise caught up. Without another glance, he plunged in the water and was safely on the other side. He continued the race, much to the hare's chagrin. The hare was not to give up. He knew he had to cope with the exigencies of the relationship. He had to live, not survive. He would not live in vain or shame. He went up to the tortoise and explained that they were made for different things. They had to accept their shortcomings and make the best use of their innate talents. Why then could they not race together? The tortoise had desired just that. They raced again, and won – together.

In a more concrete case, a commander, whilst being introduced to his battalion barked, "You are nothing without me". This followed an eerie silence. The soldiers wondered about what had befallen them. After a pause, he droned, "And I am nothing without you". There was a sigh of relief. Both sides understood and took positions. Together they fought the enemy.

Could there have been better leadership, better Management ?

Today's Court corporation needs such togetherness.

VI. Conclusion

The responsibilities of the bar have increased manifold. They need to maintain global standards. They are watched upon and admired or derided. They are heavy on the purse of litigants. Yet, they are sought just as much. They tend as much to be affected by the system as their clients. Yet they have not spearheaded the movement for reform of the Justice systems.[47] Can they justify their professionalism, ethics, conduct, indispensibility without the corresponding qualitative delivery of goods in the acutely competitive market they have come to do business?

[47] See Deborah L. Rhode, *Access To Justice, Chapter 8 – A Roadmap To Reform*. The Author underlines the axiom that there is public dissatisfaction with lawyers and litigation processes in all the countries. "Too many key participants in the justice system see too much to lose and too little to gain from any fundamental reform." This is discerned in legal journals as well as legal humor sites. "It underscores the need for reform."

Much is required of a Judge too. As Wallace Mendelson[48] put: "He must mediate between the letter and the spirit; between the traditions of the past and the convenience of the present; between society's need for stability and its need for change; between liberty and authority; between the whole and its parts – all this in context that no lawmaking assembly could be expected to foresee. Plainly, this entails high art..."

Litigants prefer a "prompt decision to a perfect but belated one". To give the citizens this basic public service, it is imperative to prevent evidence deteriorating with age. The citizens desire a change in the system because they are the ultimate consumers and the overseers. They would then be assured of their rightful place in a healthier Court Climate.

The ineluctable conclusion for the managerial conduct of Courts is a fine blend of the above management precepts. Such an amalgam has positively affected the western judiciaries. Not heeding the call for change can only beget disaster of the system with its already eroding image.

"You must be the change you want to see in the world"

- Mahatma Gandhi

[48] Wallace Mendelson, *Supreme Court State Craft: The Rule Of Law And Men, Chapter 7 : The Judge's Art.*

JUDICIAL ACTIVISM

Justice Mr. V. G. Palshikar (Retd.)

Since the establishment of Courts as means of administering justice, law is made from two sources. The prime source is from the legislature and the second is the judge-made law, ie judicial interpretation of already existing legislation. The Constitution of India also recognized these 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 establishes the Law of the State. It thus codifies what was hitherto an uncodified convention, namely, recognition of judge-made law.

The process of making law by judges is what I would call Judicial Activism. Judicial Activism as distinguished from Judicial Passivism 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 put it very loosely and 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.

The phenomenon which is now called Judicial Activism is, therefore, not one of recent origin. It originated with the firm establishment of Courts as means of administration of justice.

Several earlier examples of judicial activism can be noted in various judgments delivered by the Privy Council, the Federal Court and the Supreme Court of India in its glorious days of infancy. The recent examples from the time when Judicial Activism was recognized as a mode of legislation in modern India also require to be noticed. The first such monumental judgment is one delivered by the Supreme Court of India in the matter of *Golak Nath*[1] wherein the Supreme Court of India enunciated the Judicial Principle of 'prospective overruling', giving a wider beneficial interpretation to the Constitutional mandate contained in Article 13 of the Constitution. Article 13 mandates that any legislation which conflicts with the fundamental rights guaranteed by the Constitution of

[1] *I.C. Golak Nath and Others* v. *State of Punjab and Another* AIR 1967 SC 1643.

India would be void to the extent of conflict. The necessary consequence of this provision was that all legislation existing prior to 1950 and which conflicted with the provisions of the Constitution, became void from the date the Constitution was promulgated. Several questions arose regarding the legality and validity of the actions which were taken and completed prior to the Constitution under such legislation. It was after taking into consideration all these aspects that the doctrine of prospective overruling was enunciated by the Supreme Court. That is the landmark exercise of Judicial Activism collectively done by the Supreme Court of India. In a nutshell, it was laid down by the Supreme Court of India in *Golak Nath's case* that legislation which is void by reason of application of Article 13 of the Constitution will stand overruled prospectively. Such interpretation was necessary to prevent actions taken under such legislation prior to the enforcement of the Constitution of India being declared illegal retrospectively.

While dealing with this aspect, the Supreme Court observed thus:

'Between 1950 and 1967 the Legislatures of various States made laws bringing about an agrarian revolution in our country-zamindaris, inams and other vested rights were created in tenants... All these were done on the basis of the correctness of the decisions in Sankari Prasad's case ([1952] SCR 89), and Sajjan Singh's case, ([1965] 1 SCR 933) namely, that the Parliament had the power to amend the fundamental rights and that Acts in regard to estates were outside judicial scrutiny on the ground that they infringed the said rights. The agrarian structure of our country has been revolutionized on the basis of the said laws. Should we now give retrospectivity to our decision, it would introduce chaos and unsettle the conditions in our country. Should we hold that because of the said consequences the Parliament had power to take away fundamental rights, a time might come when we would gradually and imperceptibly pass under a totalitarian rule. The learned counsel for the petitioners as well as those for the respondents placed us on the horns of this dilemma, for they have taken extreme positions – learned counsel for the petitioners

want us to reach the logical position by holding that all the said laws are void and the learned counsel for the respondents persuade us to hold that the Parliament has unlimited power and, if it chooses, it can do away with fundamental rights. We do not think that this Court is so helpless. As the highest Court in the land we must evolve some reasonable principle to meet this extraordinary situation. There is an essential distinction between the Constitution and statutes. Comparatively speaking, Constitution is permanent, it is an organic statute; it grows by its own inherent force. The constitutional concepts are couched in elastic terms. Courts are expected to and indeed should interpret, its terms without doing violence to the language to suit the expanding needs of the society. In this process and in a real sense they make laws. Though it is not admitted, the said role of this court is effective and cannot be ignored. Even in the realm of ordinary statutes, the subtle working of the process is apparent though the approach is more conservative and inhibitive. In the constitutional field, therefore, to meet the present extraordinary situation that may be caused by our decision, we must evolve some doctrine which has roots in reason and precedents so that the past may be preserved and the future protected.'

Then the Supreme Court went on to observe the necessity of the doctrine of prospective over-ruling. It observed thus:

'It is a modern doctrine suitable for a fast moving society. It does not do away with the doctrine of stare decisis, but it confines it to past transactions. It is true that in one sense the court only declares the law, either customary or statutory or personal law. While in strict theory it may be said that the doctrine involves making of law, what the court really does is to declare the law but refuses to give retroactivity to it. It is really a pragmatic solution reconciling the two conflicting doctrines, namely, that a court finds law and that it does make law. It finds law but restricts its operation to the future. It enables the court to bring about a smooth transition by correcting its errors without disturbing the impact of those errors on the past transactions. It is left to the discretion of the court to prescribe the limits of the retroactivity and thereby it enables it to mould the relief to meet the ends of justice.'

The Supreme Court was definitely alive to its own limitations. It therefore, observed as under:

'As this court for the first time has been called upon to apply the doctrine evolved in a different country under different circumstances, we would like to move warily in the beginning. We would lay down the following propositions:

(1) The doctrine of prospective overruling can be invoked only in matters arising under our Constitution; (2) it can be applied only by the highest court of the country ie the Supreme Court as it has the constitutional jurisdiction to declare law binding on all the courts in India; (3) the scope of the retroactive operation of the law declared by the Supreme Court superseding its earlier decisions is left to its discretion to be moulded in accordance with the justice of the cause or matter before it.'

In 1973, the entire Supreme Court again reassembled. This time 13 Judges, to consider the correctness of the judgment in *Golak Nath's case* while deciding the writ petition in *His Holiness Kesavananda Bharati Sripadagalvaru and Ors.* v. *State of Kerala and another*.[2] By majority view, the Supreme Court overruled the decision in *Golak Nath's case* in so far as it held that Article 368 does not entitle the Parliament to amend the Constitution. However, the application of the doctrine of prospective overruling was not touched. The Supreme Court went on to hold by a majority that the basic structure of the Constitution or the frame-work of the Constitution cannot be amended by recourse to Article 368 by the Parliament. Reading of limitations on the power of the Parliament to amend the Constitution is undoubtedly an exercise in Judicial Activism. In fact a minority view expressed in *Kesavananda Bharati's case* opined that there are no limits on the power of amendment under Article 368. It will, thus be seen that the Supreme Court has very consciously dealt in Judicial Activism. A perusal of the judgment in *Golak Nath's case* as also in *Kesavananda Bharati's case* will thus demonstrate that Judicial Activism has its own limits and is to be exercised in the matter of interpretation of

[2] AIR 1973 SC 1461.

the Constitutional law and to an extent over statutory law, strictly for the purpose of expanding the beneficial application of that law in a fast moving and changing society like ours. In *Kesavananda Bharati's case* the Supreme Court has enunciated in most clear terms as under:

'The true position is that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the Constitution remains the same.'

The basic structure may be considered to consist of the following features:

(1) Supremacy of the Constitution;

(2) Republic and democratic form of the Government;

(3) Secular character of the Constitution;

(4) Separation of powers between the Legislature, Executive and the Judiciary; and

(5) Federal character of the Constitution.

Dissenting from the majority, Justice H R Khanna, has very wisely observed that unanimity obtained without sacrifice of conviction commends the decision to public confidence. Unanimity which is merely formal and is obtained at the expense of strong personal convictions is not desirable in a court of last resort. Way back in 1976, Justice Khanna spoke of an appeal to the brooding spirit of law to maintain the independence of the future day in relation to the laying down of Judge-made law. In my opinion, it is a word of caution sagely given by a great Judge. The principle of Judicial Activism is not to be used for seeking popularity at the cost of bartering necessary protection of law. No court can, by taking resort to Judicial Activism, take upon itself, functions squarely enjoined upon some other Institution by the Constitution. Investigative power cannot be assumed by any Court and it is in this regard that the question regarding limitations on the powers of Judicial Activism require close scrutiny.

Yet another example of Judicial Activism is the judgment of the Supreme Court in the case of *Minerva Mills Ltd.* v. *Union of India*.[3] It was held by the Supreme Court of India in this *Minerva Mills* case that in cases of extreme urgency and public importance it may be necessary for an authority, judicial or quasi-judicial or executive, to act quasi judicially to make immediate orders in which circumstances it may not be possible to implement the maxim *audi alteram partem* in its true spirit. It was held that such order would be valid if followed by a post order hearing or post decision hearing. By this judgment the Supreme Court envisaged the quasi-judicial or judicial authorities to be so fair, fearless and confident as to change their earlier decision on patient and impartial hearing after the decision is rendered. It has given yet another dimension to the age old legal requirement of *audi alteram partem*.

The most controversial judgment of the Supreme Court involving Judicial Activism is one delivered in the case of *ADM Jabalpur* v. *Shivkant Shukla*[4] wherein Article 21 which provides that no person shall be deprived of his life or personal liberty except according to procedure established by law was discussed. The majority of the Bench deciding *ADM Jabalpur's case* held that in cases of dire emergency as were existing between 1975 and 1977, a procedure can be established by law, following which even human life can be taken away. Justice Chandrachud who wrote the judgment came under heavy fire for writing a pro-Government judgment but the proposition of law as propounded by him was an excellent example of Judicial Activism. Justice Chandrachud has so interpreted Article 21 and upheld the validity of legislation which require acceptance to maintain the sovereignty of the Country in case it is threatened either by internal aggression or external invasion.

Yet another example of amplifying the law to enhance personal rights and fundamental rights is the judgment of the Supreme Court in *Mrs. Maneka Gandhi's Passport case*[5]. There, the legislation governing grant of

[3] AIR 1986 SC 2030.
[4] AIR 1976 SC 1207.
[5] *Mrs. Maneka Gandhi* v. *Union of India and Another* AIR 1978 SC 597.

passport was interpreted in a manner so as to enhance the rights of personal freedom and personal liberty.

The judgment in *the Hawala Scam case*[6] or the directions issued therein, is nothing but a roving probe or a fishing expedition undertaken by the Supreme Court of India. None of the Articles mentioned in Part IV of Chapter IV of the Constitution of India empower the Supreme Court of India or any of its Judges to issue such directions as have been issued in the *Hawala Scam case*. A Bench of the Supreme Court has virtually taken over the function of Investigating Agency in this case. Orders were issued to the extent of naming the Director of the Central Bureau of Investigation, naming the Officers who should be brought back after retirement, laying down the manner in which investigation shall be undertaken. I for one, could not see any provision of law which empowers the court to issue such directions in the matter of investigation, prior to filling of a *challan* and beyond the powers given by the Criminal Procedure Code. The Supreme Court is, no doubt, supreme but the supremacy is within the limits spelt out by Chapter IV of Part IV of the Constitution. The directions of the kind given in this case cannot be said to be directions under Article 142 of the Constitution, as such directions, of necessity, require existence of a valid *lis* before the Supreme Court, which has been decided by the Supreme Court and for execution of which order, further orders can be made under Article 142 of the Constitution.

Similar are the directions issued by the Supreme Court of India in the matter of Smt. Sheela Kaul and Capt. Satish Sharma.[7] The Supreme Court has without trial and without giving them any adequate opportunity to defend themselves or prove their innocence held them guilty of certain misconduct and penalised them with a fine of Rs. 50 lakh. I for one, do not see any provision in the Constitution of India empowering the Supreme Court to impose a fine in such a manner. I see no machinery to recover this penalty if factually not paid by these persons. These persons have been deprived of their regular trial by a Sessions Court and a further appeal from order of conviction if any to the High Court and ultimate right to approach the Supreme Court. Judicial Activism cannot be used

6. *Central Bureau of Investigation* v. *V. C. Shukla and Others* [1998] 1 SCR 1153.
7 *Common Cause, A Regd. Society* v. *Union of India and Others* (1996) 6 SCC 593.

to destroy the statutory rights existing in individuals and distort of the Constitution of India. That, with deepest respect, may amount to misuse of judicial activism.

In recent days, reference is made to Article 142 of the Constitution of India as the source of power for giving of such directions. A scrutiny of Article 142, as it stands in the Constitution today, will demonstrate that no such power can be attributed to Article 142. It has been enacted to give enough power to the Supreme Court of India to see that its orders in litigation which come up before it in its jurisdiction laid down by the Constitution, are properly executed, because no statutory machinery or execution of the orders of the Supreme Court not made in its civil or criminal jurisdiction, is created. The Supreme Court has original jurisdiction under Article 32. Directions for protection of fundamental rights can be issued in such cases under Article 32 and in implementation of such directions, perhaps certain further directions can be issued under Article 142. Article 142 cannot be read to empower any judicial authority howsoever high it may be to do something which cannot be done under the Constitution of India. The Supreme Court cannot under the Constitution, in my humble opinion, legislate or investigate into possible crime and issue day to day directions for such offences as are being done in the *Hawala Scam* or *Fodder Scam*. In fact Article 142 is enacted for enforcement of the decrees and orders of the Supreme Court and orders as to discovery etc. It is clearly stated in Article 142 that the Supreme Court in exercise of its jurisdiction may pass such decree or make such orders as are necessary for doing complete justice in any cause or matter pending before it. In effect, it will be seen that Judicial Activism is to be brought into operation for the limited purposes of giving enhanced beneficial meaning to existing legislation to bring about harmonious interpretation of various provisions of the legislation and to propagate cohesive interpretation of the legislation in light of Constitutional monarchy given by the Constitution. It also can be brought into play for giving beneficial interpretation to the Constitutional provisions also.

In my opinion, Judicial Activism cannot be used for usurping the powers of the Executive or the Legislature. It has been consistently laid down by

the Supreme Court of India that there cannot be a writ of mandamus from any court directing the Legislature to legislate on a given subject. The power to legislate is squarely conferred on the Legislature by the Constitution. No such legislative power is given to the Courts by the Constitution. The legislative action done by the Courts is to be derived from its Judicial Activism done in permissible limits for proper and complete interpretation of the provisions of law. Judicial Activism cannot be used for filling up the lacunae in Legislation or for providing rights or creating liabilities not provided by the Legislation. In this regard, the judgments of the Supreme Court in relation to admission to the Post Graduate education in Medicinal Science need consideration. These judgments, starting with the judgment in *Pradeep Kumar Jain's case*,[8] and then three or four directions issued in *Dr. Dinesh Kumar's case*[9] appear to be yet another avoidable exercise in Judicial Activism. In that period, the Supreme Court of India, under the stewardship of Justice P N Bhagwati as the Chief Justice, had practically undertaken Judicial administration of medical education in India. The Supreme Court went on to lay down the manner in which Post Graduate seats in different Post Graduate Medical Institutions in India would be filled, the manner in which the examination for filling those posts is to be conducted, the manner in which the seats are to be distributed in every discipline, and the manner in which the question of the reservation for backward classes candidates would be dealt with. All this, in my humble opinion, was clearly in the domain of the Executive administering the Department of Education. It was certainly a specialized field which ought to have been left for governing to the Specialized Bodies like the Indian Medical Council. To the same effect are cases in the matter of capitation fees dealing with education in Engineering Branches in particular. In deciding all these cases, and giving numerous directions in those cases, I in all humility, submit that the Supreme Court has transgressed the limits under the specious cover of Judicial Activism.

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8 *Dr. Pradeep Jain and Others* v. *Union of India and Others* AIR 1984 SC 1420.

9 *Dinesh Kumar and Others* v. *Motilal Nehru Medical College, Allahebad and Others* AIR 1985 SC 1059.

Similarly, the recent judgment in the matter of animal protection also needs consideration. The need for animal protection cannot be exaggerated, yet, no court, can by its judgment, legislate the requirements of environmental protection. To do so is, in my humble opinion, excessive exercise of Judicial Activism. In this light, the judgment of the Supreme Court in the matter of coastal constructions deserves to be considered.

The consideration of Judicial Activism will be incomplete if the judgment of the Supreme Court of India delivered by a Bench headed by Hon'be Dr. Justice A S Anand[10] is not noticed. This judgment was delivered by a Bench of the Supreme Court on the application of the Supreme Court Bar Association seeking review of the order pronounced by the Supreme Court of India in the matter of V C Mishra[11], former chairman of the Bar Council of India punishing him for contempt of Court. The Supreme Court Bar Association claimed that Article 142 envisages that the Supreme Court in order to do complete justice can pass any order laying stress on the aspect of doing complete justice in any matter. I have already dealt with this aspect earlier. It is reported in the press that the Solicitor-General argued that the Court cannot create jurisdiction nor create punishment which is not permitted by law. The Supreme Court of India, has accepting these contentions, issued a notice of caution saying that the courts should be skeptical about taking over power of other statutory organs. 'The Times of India' has commented that Justice Anand's pronouncement has rightly cautioned the highest judiciary against taking over the powers of other statutory organs like the Bar Council of India. According to 'The Times of India', Justice Anand said such a course is not permissible. It will be seen from this judgment that the Supreme Court has come alive to its limitations in this regard. This was ignored by Justice J S Verma and Justice Kuldeep Singh when they were presiding officers of the senior most Benches in the Supreme Court of India.

The consideration of the process of Judicial Activism will be incomplete if we do not take into consideration the reasons for which Judicial Activism has been undertaken in the recent past. One of the prime reasons given

[10] *Supreme Court Bar Association* v. *Union of India and Another* AIR 1998 SC 1845.
[11] *In re : Vinay Chandra Mishra (the alleged contemnor)* AIR 1995 SC 2348.

is inaction on the part of the Executive in performing its statutory or constitutional functions requiring interference by courts to seek performance of those duties and functions by issuing appropriate directions in the nature of mandamus. It may be true that there is inaction on the part of the Executive and getting work done by the person required or enjoined with the duty to do it may be a part of the duty of the court. However, this can be taken up only in valid litigation brought before the court by concerned persons. Even then, the courts should have necessary limitations. The manner in which orders were issued in the matters of *Hawala Scam* or *Fodder Scam* or *Environmental Protection*, it cannot be said that there was a valid exercise of judicial powers. Judicial Activism must exist within the permissible limits which have been explained by me above. Correction of an erring executive is not the function of the judiciary. Judicial Activism cannot therefore, be undertaken for such purposes.

Unfortunately, in spite of so many judgments cautioning the judiciary against excessive exercise of Judicial Activism, in the recent past the Activism has crossed all its permissible limits and restraints. In fact, the interference is so often, that the Activism has ceased to be Judicial. It has become a tool to interfere in the fields of the Executive and Legislature under the omnibus cover of public interest.

A direction issued recently by the Chief Justice of the Bombay High Court, would prove the point I wish to make. In a PIL regarding prevention of recurring injuries of substantial nature due to water logging in the streets of Bombay, the PIL Court directed the Municipal authorities to take all necessary measures to prevent recurrence of 26.7.2005 and then observed that if despite directions, water logging (exceeding six inches) occurred next year, the municipal authorities would be personally penalized. The Court probably forgot to injunct the Rain God from ordering a cloud burst over Bombay City.

It is necessary that the image of the Indian Judiciary is not allowed to be tarnished any further. The responsibility to do so lies squarely on the shoulders of both the Judiciary and the legal profession. The decline in the standards of the judiciary has direct nexus with the standard of the

legal profession. The profession must stop this decline and rise back to its glorious heights. It must stop this regular erosion of justice administration and decorum, by firmly and politely pointing out to the Courts its limitations in the matters of jurisdiction whether in PIL or other litigation as was done by the Additional Solicitor General of India, Shri Vikas Singh, before the Supreme Court of India. May the breed of such lawyers increase by leaps and bounds to bring back to the Indian Judiciary its pristine glory.

IS ARBITRATION LAW REQUIRED TO BE REVIEWED URGENTLY? SUGGESTIONS FOR LAW REFORMS

Justice D. R. Dhanuka (Retd.)

The Indian judiciary occupies a place of pride under our Constitution. The provision for moving the Hon'ble Supreme Court to enforce fundamental rights is itself a fundamental right under Article 32 of the Constitution. It is however a ground reality and an acknowledged fact that our Hon'ble courts are not able to cope up with lakhs and crores of cases pending before them and the law's delays have therefore led to frustration and the additional/alternative mechanism to obtain redress and pursue other legal remedies is the need of the hour. In view of this alarming situation, our law makers have rightly enacted provisions providing mechanisms for resolution of disputes through Arbitration, Conciliation, Mediation and Lok Adalats, by enacting the *Arbitration and Conciliation Act, 1996* and Section 89 of the *Code of Civil Procedure, 1908*.

In this short article, I propose to examine the issue as to whether the mechanism of arbitration law is partially a failure and whether it is necessary to strengthen the arbitral mechanism by amending and supplementing the law after reviewing the legislation in force. At the outset, I must say that it is the opinion of several members of the legal fraternity that arbitration law must be reviewed expeditiously and it is the need of the hour that it is updated in all respects so as to serve the consumers of justice swiftly and at minimum cost.

Legislative History of Arbitration Law

The Bengal Regulation of 1771 provided that the parties to the disputes relating to accounts must refer the same to arbitration. The Bengal Regulations IV and VII of 1827 made rules for an arbitral mechanism in detail. The Madras Regulation IV of 1816 made similar provisions. In 1859, the *Code of Civil Procedure* was enacted. The parties to the suit were enabled to seek order of reference to arbitration in pending suits. The Code was repealed by Act X of 1877. The *Arbitration Act of 1889* made provisions for reference to arbitration without intervention of courts. The *Code of Civil Procedure, 1908* replaced the Code of 1882. Sections 89 and

104 of the Second Schedule to the Code made elaborate provisions for arbitration. Then came the enactment of the *Arbitration Act* of 1940. The Law Commission of India made its 76th report making its recommendations for amendments in the Act of 1940. The United Nations Commission on International Trade Law (UNCITRAL) was established by a General Assembly Resolution which led to the formulation of model law on 21 June 1985. On 11 December 1985, the General Assembly passed a resolution recommending to all the states to give due consideration to the model law in respect of International Commercial Arbitration in view of the desirability of uniformity of law.

It has been very common for 'trade associations' throughout the world to resolve disputes between their members through arbitral mechanisms, expeditiously and at minimal cost. We have institutional arbitrations, ad-hoc arbitrations, statutory arbitrations, domestic arbitrations and international commercial arbitrations. With the efforts of the UN General Assembly, a model law has been formulated with the recommendation to the participating countries to shape their arbitration law on the basis of the model law with suitable variations. In our country, we have enacted the *Arbitration and Conciliation Act, 1996* more or less on the basis of the model law. Section 89 of the *Civil Procedure Code* read with Order X of the Code enables the court to refer the disputes which are the subject matter of civil suits to Arbitration, Conciliation, Mediation and Lok Adalats and encourage settlements by invocation of Alternate Dispute Resolution (ADR). It is an acknowledged fact that several disputes are resolved through arbitral mechanisms. The scope of judicial intervention in arbitral matters is very much restricted. Sometimes it is said, litigation is born once again after an award is made. By reason of legal ingenuity, the narrow grounds available for setting aside the awards in rare cases, as set out in Section 34 and other enabling provisions of the Act of 1996 are sought to be enlarged. Once an award is made, ordinarily, it should be considered final and binding. The judicial intervention must be restricted only to grounds like 'corruption' and 'public policy, in its narrower concept' and nothing more. There must be a time limit for concluding arbitral proceedings.

Provisions For Setting Aside Awards — The Need For Judicial Restraint

It is unfortunate that sometimes, the awards are set aside on technical grounds or for procedural deficiencies in the arbitration proceedings even if the same are substantially just. The courts must not set aside the award even if there is an irregularity unless the irregularity has caused or will cause *substantial injustice* to the applicant. Even there, in appropriate cases, the court may correct the award to the extent possible instead of setting it aside extremely. At times, it is observed in the orders of Hon'ble courts that there is no legal infirmity in respect of the majority of terms of disputes adjudicated upon; but in respect of few of the remaining items, there is scope for judicial intervention. In such cases, the awards should not be set aside in entirety by the courts and the same can be set aside in part by applying the doctrine of severability. The awards can be modified and corrected by the courts within the parameters of law. In a large number of cases, the Apex Court and High Courts have been modifying the awards in exercise of their own powers implicit in the power to set aside the award in an endeavour to render substantial justice and effectuate the object of the Act so that finality is reached and the disputes are not required to be litigated or arbitrated once again. This exercise if obligated, would cause tremendous problems to the litigating members and lead to frustration. Under the *Arbitration Act* of 1940, there were specific provisions for the modification of an award as well as for remission thereof to the Arbitrator/s for reconsideration. Under the Act of 1996, there is no specific provision empowering the courts to modify the award or remit the same to the arbitrators save in one situation. The Act of 1996 must be amended forthwith so as to contain specific provisions regarding the power of courts to modify an award or remit the award for re-consideration. There is a conflict of opinion amongst the learned judges of the High Court of Bombay as to whether under the New Act, the courts have any powers to modify an award or whether they are bound to set aside the award in its entirety. The Hon'ble Mr. Justice D K Deshmukh has taken the view that under the New Act the courts have no power to modify an award and if even a small part of the award suffers from deficiency it must be set aside in entirety. The Hon'ble Mr. Justice D G Karnik has taken a different

view and referred the matter to a Division Bench. The learned judges of courts are modifying awards in respect of 'interest', 'claim for damages', some of the items pertaining to disputes between contractors and builders. The English *Arbitration Act, 1996* contains a specific provision to enable the courts to correct an award or remit it to the same Arbitral Tribunal for re-consideration. Reasonable provisions must be made in the Act so as to avoid second and third rounds of arbitration or litigation.

If an award is finally made, it can be challenged before the court of competent jurisdiction on one or more grounds specified in Section 34 of the Act. No such challenge should be permissible unless security is furnished for compliance with the award in the event of the petition being dismissed. Section 36 of the Act provides that the award shall be enforceable as if it were a decree of the court. These words should be interpreted in a manner so as to treat award decrees on par with decrees of civil courts for all purposes including the issue of an insolvency notice.

No employee of a party to the dispute should be allowed to act as an arbitrator, not even in the case of a government or public sector undertaking. Independence and impartiality must be the very essence of the arbitral process in all situations.

The definition of an arbitration agreement contained in Section 7 of the Act should be amended so as to eliminate the provision for signature on contract where it is already acted upon, as for example, in the case of brokers' notes.

The interim orders of the Arbitral Tribunal should be made specifically enforceable and executable, if necessary by amending Section 36 of the Act.

In England, the Departmental Advisory Committee on Arbitration Law (DAC), made extensive reports under the chairmanship of distinguished jurists. Our law commission presided by the Hon'ble Mr. Justice B P Jeevan Reddy had made an extensive report for the amendment of the *Arbitration and Conciliation Act, 1996.* There was a countrywide debate. But no law reform has been introduced. The 76th Report of the Law

Commission of India is also an eye-opener. The legislative wheels and the government may kindly take steps much faster in public interest.

Having acquired considerable experience in the practical working of arbitration law and its partial failure, let us review the arbitration law once again and make its provisions updated so as to serve the problem of consumers of justice.