CHAPTER 8

RE–ENGINEERING THE GOVERNANCE

8.1 STATE POLICY – GOVERNMENTAL FUNCTION

8.1.1 Creation and Maintenance of Courts

8.1.1.1 Constitutional and Statutory Provisions

Article 124 of the Constitution of India provides for establishment and constitution of the Supreme Court. The Parliament, under Entry 77 of List I (Union List) of the Seventh Schedule to the Constitution of India, can make laws relating to constitution, organization, jurisdiction and powers of the Supreme Court. The High Courts, under the constitutional scheme, are to be set up for each State. Article 214 provides that there shall be a High Court for each State. However, Article 231 carves an exception and permits establishment of a common High Court for two or more States. Under Entry 77 of List I of the Seventh Schedule, the Parliament can exclusively make laws on the subject of constitution and organization of the High Courts. In case of setup of a new State, the Parliament in such enactment which establishes the new State, also provides for establishment of a High Court as well.

So far as the subordinate judiciary is concerned, Entry 11A of List III (Concurrent List) of Seventh Schedule to the Constitution of India contains the legislative entry, 'administration of justice; constitution and organization of all courts, except the Supreme Court and the High Court'. Thus, both the Parliament and the State Legislature can enact laws relating to constitution and organization of the subordinate courts. The 42nd

Constitution Amendment Act, 1976, transferred the expression 'administration of justice' from Entry 3 of List II (State List), in order to make it a concurrent power instead of an exclusive State power. In pursuance to the power conferred on the State under Entry 11A, the State of Karnataka enacted the Karnataka Civil Courts Act, 1964. The Act received the assent of the President of India[1] on 28th March, 1964. This Act provides for a uniform law relating to the constitution, powers and jurisdiction of the Civil Courts in the State of Karnataka subordinate to the High Court of Karnataka. The Act provides for establishment of three classes of Civil Courts subordinate to the High Court, namely, (1) the District Court; (2) the Court of Civil Judge (Senior Division); and (3) the Court of a Civil Judge (Junior Division). Provisions for territorial as well as pecuniary jurisdictions have been given under the Act. For the purpose of establishment of the City Civil Court in the City of Bangalore, the State enacted the Bangalore City Civil Court, 1979 which received the assent of the President on 8th April, 1980. Similar enactments have been made empowering every State in the country pertaining to subordinate Courts. The earliest of such Act dates back to 1887 that is the 'Bengal, Agra and Assam Civil Courts Act, 1887', which applies to States of West Bengal, Bihar, Orissa, Assam and Uttar Pradesh. The Act constitutes four classes of Civil Courts namely, (1) the Court of the District Judge; (2) the Court of the Additional Judge; (3) the Court of the Subordinate Judge; and, (4) the Court of the Munsiff. The State Government has been empowered to fix and alter the local limits of the jurisdiction of any Civil Court under the Act. Similar enactments have been made in different States.[2]

[1] For the purposes of Article 254(2) of the Constitution of India so that, after the Act has received the assent of the President, the same prevails over any law made by the Parliament.
[2] For example, Madras City Civil Courts Act, 1892, Madras Civil Courts Act, 1973

Chapter II of the Code of Criminal Procedure, 1973 makes provision for constitution of criminal Courts. Under the statutory scheme, the respective State Governments have been empowered to establish criminal Courts after consultation with the respective High Courts.

8.1.1.2 Court Strength – Assessment

The need for court strength assessment and judicial manpower planning did not attract the attention of the Indian judicial reformers or academicians till late seventies. Anyhow at least of late now it is being conclusively realized that right from the pre-independence era, lack of such a planning had been a major cause for law's delays and accumulation of arrears.[3] The Law Commission of India in its 14th report has observed that "the root cause of the progressive accumulation of old cases in several states is that, in the past, in spite of the growing volume of work, the strength of the judiciary was not proportionately increased."[4] The Law Commission of India in its 77th Report as well made an observation[5] that "there must be some kind of standard for the number of cases pending in the court. Whenever, there are indications of an increase in the number of cases in a court beyond the prescribed standard, efforts should be made to relieve the congestion by having additional courts." But the Commission did not either prescribe any standard for creating any additional courts or make any scientific analysis based on number of available courts and the corresponding pendencies or rate of case flow. According to Baxi, there has been no realistic assessment of judicial manpower needed for maintaining an efficient and a just justice administration by the state. The Bench and the Bar are

[3] Law Commission of India, 120th Report,
[4] Law Commission of India, 14th Report

equally unconcerned for fixing the optimum strength of the judiciary based on statistical projections of the workload and pending cases. Such an exercise is even more important to be performed at the level of subordinate or grass-roots judiciary.[6]

Judicial administration in India suffers from deficiencies due to lack of proper planning and adequate financial support for establishing more courts and providing them with adequate infrastructure.[7] However, this issue was not completely lost sight of during the per-independence era. Politically, the Indian States since the colonial period, have self-consciously understaffed the judiciary. In 1924, the Government of India appointed the Rankin Committee to review the question of law's delay in its widest aspects. The Committee was charged "to inquire into the operation and effects of the substantive and adjective law" followed by the courts in India in the disposal of civil suits, with a view to ascertaining and reporting whether any and what changes and improvements should be made so as to provide "for the more speedy, economical and satisfactory dispatch of the business transacted in the courts". The Committee was, however, debarred from enquiring into the strength of the judicial establishments maintained in each Province. This was a very significant, even a crippling, restriction as one of the most important factors contributing the law's delay, *viz.*, the paucity of courts, was taken out of the Committee's purview. The reason for this inhibition was that the Government of India, all though of the view that the question of delays is of considerable importance, had no desire to increase expenditure on the Provincial Governments (administration of civil justice was a provincial subject).[8]

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[5] Pr. 6.3 at p. 18, Creation of Additional Courts
[6] U.Baxi, 1981, p. 66-67
[7] Report of the National Commission to Review the Working of the Constitution, pg. 142, pr. 7.6.1
[8] M.P.Jain, Outlincs of Indian Lcgal History, 4th cd., pg. 254-55

After independence too, this colonial mindset was allowed to continue, with the result that the Union of India endorsed it before Judge Keenan of the New York District Court in the Union Carbide litigation.[9] In fact, the first time the judiciary took note of need of additional courts was in Hussainara's case (1979)[10]. While taking a serious note of delays in criminal trials, the Supreme Court took a comprehensive stock of the reasons leading to delayed criminal trials. This case came to be the stepping-stone for the effective realization that there is relationship between judicial manpower planning and court strength and the delays. The Supreme Court in this case, while dealing with the problem of under-trials, called for the year-wise breakup of pending criminal cases and the reasons for their non-disposal from the High Court of Patna. It further called for the number of Courts and Judges necessary to ensure the right of speedy trial, having regard to the pending cases, and the average inflow of cases and the norm of disposals fixed by the High Court for each Court of Magistrates and Sessions Judges. The Supreme Court cautioned that such information would have to be worked out on the basis of a proper and careful analysis and appraisal of the existing and anticipated filing of cases. This was the first judicial notice of the importance of need of additional courts to solve the problem of delays.

This aspect was more elaborately dealt with by the Law Commission of India in its 120th Report and it opined that though there may be various factors which may form the benchmark for court strength planning the general increase in population rate, the litigation rate and the rate of pendencies, it found the ratio of judges strength per million of Indian population to be more comfortably adoptable measure. Accordingly, it opined

[9] U.Baxi, *Mass Disaster and Multinational Liability: The Bhopal case*, 1961 (1986)

that, by taking into account the ratio of individual countries, in India the present ratio of court per million population of 10.5 should be raised to 50. The Supreme Court of India[11] taking a lead from the said Report has now issued a mandatory direction to increase the judge strength from the existing ratio of 10.5 or 13 per 10 lakh[12] people to 50 judges per 10 lakh people The Supreme Court in *P.Ramachandra Rao v. State of Karnataka*,[13] while dealing with the question of delay in criminal cases, observed that, it is the constitutional obligation of the Union of India and the State Governments to strengthen the judiciary – quantitatively and qualitatively – by providing requisite funds, manpower and infrastructure.

8.1.1.3 Follow Up Action by the Union

In compliance with the above direction of the Supreme Court, the Government of India through its Ministry of Law and Justice under its order dated 25.07.2002 has appointed a committee comprising Registrar Generals of Delhi High Court, Karnataka High Court, Calcutta High Court and Secretaries (law)/Joint Secretaries (Law and Justice) of the Governments of Andhra Pradesh, Uttar Pradesh, Maharashtra, the Home Secretary Chandigrah Administration and Joint Secretary Department of Justice.

The terms of reference of committee are as follows :

(a) to examine and recommend norms for creation of judge strength in district/sub ordinate courts keeping in view the judgement of the Supreme Court and also the

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[10] Hussainara Khatoon v. State of Bihar, AIR 1979 SC 1819, pr. 4

[11] All India Judges' Association v. Union of India, (2002) 4 SCC 247, pr. 25 at p.268-69 The Supreme Court has directed that "The increase in the Judge strength to 50 Judges per 10 lakh people should be effected and implemented with the filling up of the posts in the phased manner to be determined and directed by the Union Ministry of Law, but this process should be completed and the increased vacancies and posts filled within a period of five years from today" The date of Judgment is March 21, 2002

[12] 10 lakh = 1 million

policy recommended by the Malimath committee.

(b) to examine and evolve a policy for making an incentive scheme to reward speedy disposal of cases by better performing states.

The committee so constituted is yet to make its recommendations on the above aspects.

8.1.1.4 Physical Infrastructure

It has been pointed out that court facilities need to be upgraded significantly to improve the morale of court officers and the staff and to offer better comforts to the public.[14] In the sphere of setting up of adequate physical infrastructure, the Law Commission suggested that courtrooms, equipped with proper facilities and sufficient accommodation, should be provided. These should be suitably furnished and provided with a sufficient number of books. There should also be provision for a bar room and waiting space for the litigants.[15]

8.1.2 Manpower Planning

8.1.2.1 Judges of the sub-ordinate judiciary

8.1.2.1.1 Constitutional and Statutory Provision

In the Constitution of India, Article 233 provides for appointment of District Judges by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State. The judicial officers in the subordinate judiciary, other than the District Judge, under Article 234, are to be appointed by the Governor of the State in accordance with the rules made by him in that behalf after consultation with the State

[13] (2002) 4 SCC 578, pr. 29(6)

Public Service Commission and with the High Court exercising jurisdiction in relation to such State.

8.1.2.1.2 Filling of Vacancies

The Law Commission in its 77th Report opined that long delays in filling up vacancies of judicial officers should be avoided.[16] For this purpose, recommendations of the High Court for increase in judicial strength should receive prompt consideration from State Government and should not, in the absence of some compelling reason, be turned down.[17]

8.1.2.1.3 Salary and Perks

Table 8.1

Related Issues
- Enhanced uniform age of retirement - Uniform Pay Scale - Residential Accommodation - Library - Transport facility - Conveyance Allowance - Residential Office Allowance - Sumptuary Allowance

The service conditions of the judges of the subordinate judiciary have been now and then a matter of concern. It is necessary for the proper functioning of the lower judiciary that the service conditions like pay scales, perks, accommodation, conveyance, etc. should be befitting enough for the post and should be able to avoid any undermining of the independence of the judiciary. A Judge must have patience, perseverance and painstaking habits. In order that a Judge may be able to put in these aspects into his public functioning it is absolutely necessary that the Judge enjoys freedom from personal worries. A reasonable salary, appropriate allowances and manageable living conditions are, therefore, required to be provided. The Law

[14] IIM Report, pr. 8.5
[15] Law Commission of India, 77th Report, pr.13.3
[16] Law Commission of India, 77th Report, pr.9.11
[17] *ibid* pr.9.12

Commission was of the view that to draw talented young persons to the judicial service, scales of pay and other facilities in respect of judicial officers should be such as to provide a decent standard of living.[18]

The Supreme Court of India in this connection has been giving various directions to the Central and State Governments to ensure that the service conditions of the judicial officers are well kept up to the mark. The judicial officers have themselves been approaching the Supreme Court for this purpose. The initial case was *All India Judges' Association v. Union of India*[19]. The judicial officers had approached the Supreme Court by way of a writ petition seeking Supreme Court's directions for setting up an All India Judicial Service on the basis of the recommendations made by the Law Commission of India in its various reports starting from the 14th Report. The petitioners also sought Supreme Court's directions for bringing about uniform conditions of service and perks for members of subordinate judiciary throughout the country, which till now were different for different States under the State Rules. The Supreme Court, while favouring the idea of setting the All India Judicial Service, asked the Union of India 'to undertake an appropriate exercise quickly so that the feasibility of implementation of the recommendations of the Law Commission may be examined expeditiously and implemented as early as possible'.[20] As regards the uniform age of the judicial officers, the Supreme Court, while agreeing with the petitioners, directed the State Governments that appropriate alterations be made in the Rules in respect of judicial service so as to fix

[18] Law Commission of India, 77th Report, pr.13.1
[19] (1992) 1 SCC 119
[20] *ibid* p. 124, pr. 12

the age of retirement at 60 years from 58 years.[21] Though the Supreme Court agreed that there should be uniform pay scales, it did not find it advisable to decide upon the quantum and directed that as and when pay commissions or committees are set up in the States and Union Territories, the issue of the pay structure of the judicial officers be separately examined and reviewed.[22] With respect to other perks and allowances, the Supreme Court was of the view that a judicial officer is entitled to a residential office allowance,[23] a small library[24] (to be uniform among all the judicial officers) and further, District Judges and Chief Judicial Magistrates are entitled to sumptuary allowance.[25] Provision of an official residence with a separate and exclusive office room for every judicial officer was made mandatory and the State Government was asked to take appropriate steps to ensure the availability of such official residences.[26] Further, it was directed that every District Judge and Chief Judicial Magistrate shall be provided with a car.[27] Thus, the Supreme Court agreed to almost all the benefits prayed for by the judicial officers and directed the Government accordingly.

The above decision came up for review before the Supreme Court in the *All India Judges' Association v. Union of India.*[28] Various objections were raised by the Union of India and various State Governments. Brushing aside all the objections, the Supreme Court reiterated its directions in the previous judgments. However, considering the practical difficulties, certain modifications were made:

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[21] *ibid* p. 128, pr. 25
[22] *ibid* p. 129, pr. 28
[23] *ibid* p. 129, pr. 29
[24] *ibid* p. 130, pr. 31
[25] *ibid* p. 131, pr. 33
[26] *ibid* p. 131-33, prs.34-37
[27] *ibid* p. 133, pr. 38
[28] (1993) 4 SCC 288

a) With regard to enhancement of superannuation age to 60 years, it was held that not all the judicial officers would be eligible for such enhancement. The benefit will be available to those who, in the opinion of the respective High Couts, have a potential for continued useful service. The potential for continued utility shall be assessed and evaluated by the appropriate Committees of Judges of the respective High Courts constituted and headed by the Chief Justice of the High Court and the evaluation shall be made on the basis of the judicial officer's past record of service, character rolls, quality of judgments and other relevant matters.[29]

b) The direction for granting sumptuary allowance to the District Judges and Chief Judicial Magistrates was withdrawn.

c) The direction with regard to grant of residence-cum-library allowance will cease to operate once the judicial officers are provided with the necessary law books in the courts.

d) Since the National Judicial Academy for in-service training had already been established, it was made optional for the States to have their independent or joint training judicial institutes.

Pursuant to the above directions, the Government of India constituted the First National Judicial Pay Commission under the Chairmanship of Mr.Justice K.J.Shetty. Consequently, the reference to the Fifth Central Pay Commission with regard to the fixation of the pay scales of the judicial officers was deleted. The Shetty Commission submitted its report on 11.11.1999. Eight States accepted the recommendations of the

[29] *ibid* p. 306, pr. 30

Commission. The Central Government, however, evolved its own pay scales in the Union Territories. The action came to be considered by the Supreme Court in All India Judges' Association v. Union of India.[30] The Supreme Court, after considering the whole issue, gave the following directions:

a) Pay Scales: The Shetty Commission has taken into consideration the recommendations of the Fifth Central Pay Commission while determining the pay scales for the judicial officers. In the Supreme Court's opinion, the pay scales recommended by the Shetty Commisison are just and reasonable. Considering the years of service put in by the judicial officers at different stages, the parity in the scales of pay recommended by the Shetty Commission for the judicial officers with the scales of pay of IAS officers is not, by and large, disturbed. Supreme Court opined that the pay scales recommended by the Shetty Commission should be accepted.[31]

b) Official Accommodation: The 77th Report of the Law Commission of India had observed that providing residential accommodation to judicial officers is of great importance and suggested that there should be sufficient number of residential houses for judicial officers, which should be at the disposal of, and be allotted by, the District Judge.[32] The Supreme Court directed that the official accommodation which has been allotted to the judicial officers should be free of charge but no house rent allowance should be paid on such an allotment being made.[33]

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[30] (2002) 4 SCC 247
[31] *ibid* p. 266, pr. 20
[32] Law Commission of India, 77th Report, pr.13.4; *see also* IIM Report, pr.8.7
[33] *ibid* p. 273, pr. 35

c) Electricity and water charges: The Supreme Court was of the view that the recommendation of the Shetty Commission regarding reimbursement of 50% of the electricity and water charges of the residences of the judicial officers should be looked into.[34]

Thus, so far as the problem of service conditions including low pay scales and inadequate perks are concerned, the same have been wiped out by appropriate directions of the Supreme Court and consequent actions by the Central and the State Governments to implement such directions as also the recommendations of the Shetty Commission.

The Law Commission in its 77th Report also suggested that in big cities three or four vans should be placed at the disposal of, and be allotted by, the District Judge for bringing judicial officers to the court and for taking them back to their homes.[35]

8.1.3 Financial Autonomy of the Indian Judiciary

The policy makers specially from within the judiciary of late started feeling that the blame for huge backlog of cases cannot be attributed only to the judiciary. According to them, to a great extent the failure of the system has occasioned because of the fact that during the last fifty years after the independence little attention has been paid by the Government for improvement of the infrastructure of the judiciary. There is dearth of courts and judges and buildings both for courts and judges and officers and staff. In several cases, even minimum facilities have not been given. The reason is that there is no planning and proper budgeting for the court's requirements in consultation with the

[34] *ibid* p. 273, pr. 36
[35] Law Commission of India, 77th Report, pr.13.5

judiciary as is done in the other countries nor is there a long range plan or at least a five year plan for the purpose. The result is that most courts are burdened with cases on civil and criminal side, delay results in a serious infraction to speedy trials, violation of human rights in various cases, a stage has reached where the parties are thinking of taking the law in their own hands.[36]

Former Chief Justice of India Mr.A.S.Anand[37] opined that some of the ills with which India's administration of justice is presently afflicted are capable of being cured if financial autonomy is granted to the judiciary. The edifice of the administration of justice rests on the shoulders of the subordinate judiciary, as the majority of the litigants go only up to district level. The High Courts have power of superintendence over the State judiciary but they do not have any financial power to create even one post of a subordinate judge or of the subordinate staff, acquire or purchase any land or building for courts, decide and implement any plan for modernization of court working. Chief Justices and their companion Judges of the High Court are best suited to know the requirements of the judiciary in their respective States. Their assessment and demand should receive proper consideration and should not be "rejected" on account of merely financial constraints. The Chief Justices of the High Courts who are high constitutional functionaries, know the needs of the judiciary of the State. They need to be given financial powers vis-à-vis State judiciary, by transfer of financial powers, from the executive to enable them to function effectively. One of the essential elements of the Rule of Law is judicial independence and every society has seen the need for it. Financial

[36] Consultation Paper on Financial Autonomy of Indian Judiciary circulated by the National Commission to Review the Working of the Constitution, Ch. 1
[37] Presently, Chairman, Human Rights Commission

dependence on the executive, to an extent, impinges upon the independence of the judiciary when it is required to 'negotiate' every time with the largest litigant – the State.[38]

After due deliberations upon the issue of financial autonomy of the judiciary, the National Commission to Review the Working of the Constitution concluded[39] that judicial administration in the country suffers from deficiencies due to lack of proper planning and adequate financial support for establishing more courts and providing them with adequate infrastructure. It further opined that neither has any provision for any funds for the judiciary been made under the five-year plans for several decades nor has the Finance Commission made any separate provision to serve the financial needs of the Courts. In view of these observations, the Commission recommended the setting up of a 'Judicial Council' at the Apex level and Judicial Councils at each State at the level of the High Court. There should be an Administrative Officer to assist the National Judicial Council and separate Administrative Officers attached to Judicial Councils in States. These bodies must be created under statute made by Parliament. The Judicial Councils will be in charge of the preparation of plans, both short term and long term, and for preparing proposals for annual budgets.[40] With regard to a streamlined financial planning for the judiciary, the Commission was of the view that the budget proposals in each State must emanate from the State Judicial Council in regard to the needs to the subordinate judiciary in that State, and will have to be submitted to the State Executive. Once the

[38] Anand, A.S, Approaching the Twenty-First Century: The State of the Indian Judiciary and the Future Challenges *in* Justice for Women: Concerns and Expressions, ed. 2002, pg. 58
[39] Report of the National Commission to Review the Working of the Constitution, 2002, pg. 142, pr. 7.6
[40] *ibid* pr. 7.7

budget is finalized between the State Judicial Council and the State Executive, it should be presented to the State Legislature.[41]

However, the eminent jurist, Dr.Madhav Menon, is of the opinion that though financial autonomy is necessary for improving efficiency and productivity in judiciary, financial autonomy in the present state of the system may not be a wise step in the public interest. If administrative autonomy is not able to arrest the deterioration, giving financial autonomy also without revamping the administration can be potentially counter-productive. No one will dispute the need for more resources, for modernization of infrastructure and court control of administration. But the onus is on the judiciary to demonstrate that judges are determined to put the system back on rails and will ensure optimum use of scarce resources diverted to them from equally pressing demands on public funds.[42]

8.1.4 In-service Training

In all aspects of judicial management, training of the judicial officers to meet new challenges is an essential prerequisite.[43] Training and development of the human resources of the judicial department is an issue that should be addressed earnestly to attain higher efficiency levels. The 54th Report of the Law Commission observed that the law is predominantly an instrument of social engineering in which conflicting views of political philosophy, economic interest and ethical values struggle for recognition which requires to be viewed against the background of history, tradition and development of

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[41] *ibid* pr. 7.8.1
[42] Dr.N.R.Madhava Menon, *State of Justice: An Agenda for Change*, p.8-9, 8th January, 2001
[43] Indian Institute of Management, (Paras 4.11, 8.4 a to d. *Also see* 10.2, 10.47)

legal techniques. As such, working knowledge of all the disciplines is essential for a Judge.[44] The 77th Report of the Law Commission of India emphasized the need for training of the officers of the subordinate judiciary. It was recommended that there should be a training course of about 3 to 6 months for recruits to the Subordinate Judicial office. The recruits should, by such training, be acquainted with procedural requirements for dealing with different stages of cases, including the writing of judgments and interlocutory orders and dealing with administrative matters. Matters like framing of charges by the magistrates in criminal trials[45], ensuring that all incriminating pieces of evidence are put to the accused while recording statements of the accused under Section 313 of the Code of Criminal Procedure, 1973,[46] etc. are matters to be taken up at the time of training itself. To enable judicial officers to meet the various kinds of situations that they have to face in court, there should be a course of training for all judicial officers before they start functioning.[47] In its 117th Report (1986), the Law Commission of India recommended that a Central Academy should be set up at a suitable place in the country for providing intensive training to new entrants to the Indian Judicial Service.[48] This issue was also dwelt upon at the Joint Conference of Chief Justices, Chief Ministers and Law Ministers in 1985 and again in the Chief Justices' Conference in 1988.

Constitution of Judicial Academy

In the first All India Judges' Association case[49], the issue of in-service training came up for discussion before the Supreme Court. The Court directed that an All India Institute of

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[44] p. 332
[45] Law Commission of India, 77th Report, p.57, point (73A)
[46] *ibid* point (73B)
[47] Law Commission of India, 77th Report, prs. 9.8 and 13.2
[48] Chap. IV, p. 13-14
[49] (1992) 1 SCC 119

In-Service Training for higher officers of the judiciary including the District Judges and a State level institute for training of the other members of the subordinate judiciary within each of the States and Union Territories should be set up.[50]

The National Judicial Academy was set up immediately after this judgment. It was established on 17th August, 1993 at Bhopal (Madhya Pradesh) as a registered society fully funded by the Government of India. It fulfilled the long felt need of training judicial officers who require training in law and judicial disciplines. Among other objectives, the Academy aimed to provide training and continued judicial education to the judicial officers of the States/Union Territories and to enhance the capabilities of the existing training institutions for judicial officers of the States/Union Territories to improve their quality of training. A course on 'Gender and Law' has been successfully launched in the Academy and has found positive response. Among other areas in which the Academy proposes to impart training are Civil Procedure, land acquisition laws, environment laws, criminal procedure, intellectual property rights and cyber laws.

In Karnataka

In Karnataka, the Karnataka Judicial Academy was established by Karnataka Government on 28th May, 1999 with the objective of imparting training to judicial officers of the State Government, particularly new recruits, besides, conducting refresher courses to in-service judicial officers and also to give training to officers of the State Government connected with administration of justice like police officers, public prosecutors, government advocates, medical officers, etc. The Academy has been

[50] *ibid* p. 139, pr. 57

conducting a number of training programmes. Newly recruited Civil Judges (Junior Division) are required to undergo four months basic training. Refresher courses for in-service Civil Judges (Junior Division), Civil Judges (Senior Division) and District & Sessions Judges are also conducted periodically. Apart from the above training programmes, the Academy has also conducted several workshops in the past and short-term course for officers of State Governments and staff of the High Court of Karnataka. Various areas including gender justice, environmental laws, human rights, labour laws, wildlife laws, civil procedure and criminal procedure have been covered in these training programmes. One would notice that the best of the legal minds including the sitting Judges of the Supreme Court of India, High Court of Karnataka as also the retired Chief Justices and Judges of the Supreme Court and various High Courts and eminent foreign dignitaries, jurists and personalities have addressed the trainee judicial officers during the various training programmes.

Scenario across the country

Likewise, judicial training institutions are being established around the country for in-service training of judicial officers at the subordinate level and to keep them abreast of the developments in law. Today, we have such training institutes in the States of Uttar Pradesh, Andhra Pradesh, Kerala, Tamil Nadu, Maharashtra, Madhya Pradesh, Gujarat, Assam and Jharkhand as also New Delhi. For instance, the Andhra Pradesh Judicial Academy at Hyderabad was set up in 1991 and has designed thirteen courses for various categories of judicial officers and all ministerial officers of the High Court and the subordinate judiciary to provide comprehensive training and learning to acquire legal knowledge in procedural and substantive laws, managerial skills and social

comprehension for fair, better and speedy administration of justice. The Directorate of Training at the High Court of Kerala dates back even earlier to 1986 when need for training of judicial officers took shape by setting up a training institution in the High Court of Kerala. In Gujarat, the Gujarat State Judicial Academy makes a special emphasis on judicial administration and management. The purpose of the Academy is to make the Judges more competent Judges as also more competent judicial managers and administrators. This is being attempted by equipping them with the necessary judicial and management skills. All the 650 judicial officers of all the 20 districts participate in the various workshops being conducted by the Academy.

Thus, the need of in-service training for the judicial officers at the subordinate level, as emphasized by various official reports as well as by the academicians and jurists, has been well taken care of. Various training institutions have come up across the country to cater to the need of training of these judicial officers and no lacuna in terms of appropriate training can now be categorized as the reason for delay in cases.

Training of Court Staff

The Training Institute for Judicial Department employees was established in the year 1993 and since then the training is conducted in the Conference Hall of the City Civil Court Complex, Bangalore.

The Training Institute consists of a Principal in the cadre of Civil Judge (Sr. Division) and two Lecturers from the staff who are in the cadre of Chief Administrative Officer and Assistant Registrar. The other staff are the Superintendent in the cadre of Sheristedar, one FDA, one Typist and two Peons. Presently in the Training Institute, a Civil Judge (Sr.

Division), one CAO, one Assistant Registrar, a Sheristedar, one Typist and one Peon are serving.

Apart from the permanent two Lecturers among the staff as indicated above, Guest Lecturers in the cadre of District Judges, Retired Accounts Officers, P.R.O. are also imparting the training to the judicial employees.

The judicial employees in the cadre of CMP (Sheristedar), FDAs, SDAs and Typist-Copyist are given training in the institute. The period of training is 40 days. Each batch consists of 38-40 trainees and the imparting of training to the judicial employees is a continuous process for the whole year.

The subjects for the training are KCSR, KCS (Conduct Rules), Account Rules, KFC, Sub-ordinate Courts Administration, Civil Rules of Practice, Criminal Rules of Practice, Indian Limitation Act, Karnataka Stamp Act, Karnataka Court Fees & Suit Valuation Act, Code of Criminal Procedure, Code of Civil Procedure, Public Relations, Mind Control & Personality Development. The training also covers visit to various branches of the court and Central Prison. They also conduct examination at the end of each course. Kannada[51] workshop with the help of Kannada & Culture Department is also conducted for 6 days.

[51] Local language in the State of Karnataka

8.2 RE–ENGINEERING THE GOVERNANCE: CIVIL PROCESS

The civil process in Indian subordinate Courts is governed by the Code of Civil Procedure Code, 1908.[52] Though voices had been raised indicating inadequacy of procedural laws to handle the case-load and the need for substantial changes, the Law Commission in its 14th Report categorically stated that, 'THE DELAY RESULTS NOT FROM THE PROCEDURE LAID DOWN BY IT BUT BY REASON OF THE NON – OBSERVANCE OF MANY OF ITS IMPORTANT PROVISIONS PARTICULARLY THOSE INTENDED TO EXPEDITE THE DISPOSAL OF PROCEEDINGS'[53]

However, certain suggestions for amendment to the Code were made from time to time by the Law Commission from the point of view of bringing down the arrears and reduce delays in disposition of cases. A civil case passes through various stages and each stage is governed by the provisions of the Code. The Law Commission, on past experience, has made attempts, to suggest changes relating to these procedural stages so that delay in disposal of cases could be avoided. On the basis of these suggestions, the Code of Civil Procedure was amended by the 1976 amendment[54] and more recently, the 1999[55] and 2002[56] amendments. In the researcher's opinion, these amendments have effectively removed most of the procedural bottlenecks for the smooth progress of a case through its various stages. Initially, the process-control was in the hands of the presiding judge.

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[52] 21st March 1908; This Act has been amended in its application in various States.

[53] Law Commission of India, 14th Report, Vol. 1, p. 263. The Commission further was of the view that, 'The view that attributes delays mainly to the cumbrous procedure fails to take into account numerous extraneous and personal factors responsible for delays like, an inefficient and inexperienced judiciary, insufficient number of judicial officers, an incompetent and corrupt ministerial and process-serving agency, the diverse delaying tactics adopted by the litigants and their lawyers, the unmethodical arrangement of work by the presiding judge and the heavy arrangement of work by the presiding judge and the heavy file of arrears.'

[54] Act 104 of 1976 (w.e.f. 1-2-1977)

Discretion at various levels was given to the presiding judge to take control of the proceedings and ensure the onward movement of the case and its disposition within the time frame provided. However, it was noticed that in due course of time, instead of the judge taking control of this process, it eventually rolled down to the bench clerks, pending clerks, touts and ultimately, in the hands of the lawyers and manipulative litigants. This created vested interests and hindered the smooth flow of the case. Though the Code envisioned the control in the hands of the presiding judge and the judge being the 'process-owner',[57] inapt management at the High Court[58] level and the indifferent attitude of the presiding judge himself has led to the transfer of the control from the hands of the court to the lawyers. To rectify this situation, the recent amendments to the Code have made the civil process legislature-controlled. The Statement of Objects and Reasons of the 1999 CPC amendment states that:

> "In terms of the Common Minimum Programme of the United Front Government, it was envisaged that a Bill on judicial reforms and **disposal of pending cases within a period of three years** may be introduced in the Parliament. With a view to keep the commitment given to the people of India so that speedy disposal of cases may take place within the fixed time frame and with a view to implement the report of Justice V.S.Malimath, it was thought necessary to obtain the views of the State Governments on the subject also. In

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[55] Act 49 of 1999 (w.e.f. 1-7-2002)
[56] Act 22 of 2002 (w.e.f. 1-7-2002)
[57] Report of the Indian Institute of Management, pr.4.11 where the Presiding Judge has been called the 'process-owner' and the need of the responsibility for the pace of litigation to shift from the lawyers and litigants to the courts.
[58] Article 235, Constitution of India – 'The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court..."

the Law Minister's Conference held in New Delhi on 30th June and 1st July 1997, the working paper on the proposed amendments to the Code of Civil Procedure, 1908 was discussed. On the basis of resolution adopted in the said Conference and with a view to implement the recommendations of Justice Malimath Committee, 129th Report of the Law Commission of India and the recommendations of the Committee on Subordinate Legislations (11th Lok Sabha), it is proposed to introduce a Bill for the amendments of the Code of Civil Procedure, 1908 keeping in view, among others, that every effort should be made to expedite the disposal of civil suits and proceedings so that justice may not be delayed."

An analysis of the 1999 and 2002 amendments would reveal that a time schedule has been drawn out for every stage to be followed by the Courts. This would avoid the prolonging of a case at any particular stage beyond a given time frame. The time schedule as provided under various provisions of the Code is in **Annexure II**. A comparative analysis of the provisions before and after amendments is in **Annexure III**.

The 1999 and 2002 amendments of CPC were challenged before the Supreme Court of India in *Salem Advocate Bar Association, Tamil Nadu v. Union of India.*[59] The Supreme Court upheld the constitutional validity of the amendments by holding that-

"In the petitions, the amendments which were sought to be made by the aforesaid Amendment Acts, have been challenged, but we do not find that the said provisions are in any way *ultra vires* the Constitution. Neither Mr. *Vaidyanathan*

[59] (2002) 6 ALD 34 (SC), Para 4

nor any other learned Counsel made any submissions to the effect that any of the amendments made were without legislative competence or violative of any of the provisions of the Constitution. We have also gone through the provisions by which amendments have been made and do not find any constitutional infirmity in the same."

The purpose of going through the above developments is that whatever was required to be done in terms of legislative amendments, has already been done. The Supreme Court has already upheld the constitutionality of these amendments. Thus, so far as procedural laws are concerned, one cannot, at this stage, raise a finger and say that the delay in the system is due to procedural infirmity. It is quite clear that the procedural laws now are quite apt for the reduction of delay and arrears. The reason why even now we are unable to progress is not due to the lack of appropriate procedural laws but as the 14th Report of the Law Commission had emphatically stated in 1958, due to the non-observance of these laws. This in turn reflects upon the casualness of the presiding officers in the subordinate Courts and their obliviousness to the whole situation. Although all the suggestions made by the Law Commission for amendments to the procedural law, such amendments have been carried out, the system has not responded to the need of the people for affordable and speedy justice.

8.2.1 Pre-admission stage – Scrutiny

The Law Commission in the 77th Report suggested that the time taken in scrutiny should not exceed one week (between the filing of the plaint and the registering of the suit).[60]

[60] Law Commission of India, 77th Report, pr.4.1 (*see also* IIM Report, prs. 5.5, 5.6, 5.7 noting registering formalities)

The purpose of scrutiny of the plaint or any original petition filed is to ascertain whether the papers presented before the court are in accordance with the procedural law as provided under Order VI and VII of the Code of Civil Procedure. For this purpose, more detailed provisions have been made in the Rule 14 of Chapter 2 of the Karnataka Civil Rules of Practice, 1967. For the scrutiny of the pleadings, a 'check slip' has been prescribed under the Rules. Under the said Rule, if the Chief Ministerial Officer of the Court finds that there is any non-compliance of the Rules or there is any clerical mistake, the plaintiff or his advocate is required to rectify the same within the prescribed period. Only after the rectification of errors found, the case is to be registered. It is a matter of experience that at the scrutiny level itself, lot of time used to be consumed since the practice had given certain discretion to the ministerial officers, which was exercised leisurely and quite often, for extraneous purposes. This is no longer the case as the entire process has been automated by use of information technology and the scrutiny of pleadings is completed within an hour or so and the case is registered by giving auto generated case numbers. This alpha-numeric number becomes the key for ascertaining the stages of the cases during its life cycle and even thereafter as a key field in the court database.

8.2.2 Pre-hearing Stage

8.2.2.1 Processes-Summons, Notices

1 . Introduction to the Problem

In the paraphernalia of any legal system, the role of process-servers (either sheriffs or bailiffs who serve the court process or summons) is of vital concern. The role of this functionary has a direct bearing on the principle of natural justice, in particular, *audi*

alterum partem. A plaintiff can approach the court with the dispute through his plaint. A judge then calls for the defendant for his reply by way of issuing summons. Now, at this stage, the efficiency and willingness of the process-server in serving the summons to the defendant is crucial to enable him to not only know that such a summons has been issued by a court but also as to when he has to appear before the Court to explain his side of the case. One of the principles of natural justice being that 'no one should be condemned before being heard' is well adhered to when the summons is properly and effectively served on the defendant.

Preparation of Summons

After the court orders issuance of summons to the defendants, under the manual system, the case file goes to the pending clerk for preparing summons by filling the details in the prescribed form. It has been found that most of the times either he does not prepare the summons within the time ordered for its return or he does it by filling wrong particulars. This results in non-service of summons due to the fault of the pending clerk. This goes on for even years unless the litigants and their lawyers are able to persuade him to do the work as the law requires. After the technology driven reform in Karnataka, the computer generates summons within an hour of passing of the order by the judge, completely by-passing the manual intervention.

Service of Summons

A judge enforces his orders, warrants and decrees through the agency of the process server or bailiffs. The process server thus plays an important role in the scheme of

administration of justice, and should be impressed to perform his task with assiduity and honesty. However, in many cases, process servers are reputed to be corrupt. Malpractices on their part are regarded as a major cause of delay in the trial of proceedings. Cases of process-servers furnishing false or incorrect reports of service or non-service are frequent.[61] Thus, the U.P. Judicial Reforms Committee observed in 1951:

> "The process-server is sometimes not a straight-forward or efficient person and he leisurely moves to the beat with a determined effort to make as much out of the business as he can. Sometimes it is a question of bid between the two parties and whichever can exercise greater influence" (over the process server) "obtains a report suiting its need ..... We do not mean to say, however, that there are no scrupulous process-servers. There are many and they do record correct report of service but we feel that all is not well with the majority of this class of government servants."[62]

Complaints are often made against the process servers of conniving with one of the parties to the case and on that account not getting the service effected. Usually, the defendant is interested in delaying the case and in lieu of some gratification, it is stated, the process server makes an incorrect report of his being not available. On other occasions, a plaintiff gets an *ex parte* stay-order or other such order prejudicial to the defendant and is interested in not getting service effected upon the opposite side with a view to prolonging the operation of the *ex parte* order. In such an event, it is not unusual

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[61] Law Commission of India, 14th Report, 1958, p. 305
[62] U.P. Judicial Reforms Committee Reports, p. 13 *quoted at ibid*

for a plaintiff to get an incorrect report from the process server regarding the non-service of the defendant.[63]

Faulty processes create traumatic situations for the defendants against whom these are issued. Such summons, whether served or not served, sets in a recoiling of actions delaying the entire adjudicatory process creating wide gaps. The process baffles the plaintiff and the judge as well. They find themselves caught in the legal web and often become a prey of the system.

2. Technical Terminology

To appreciate the problem at hand better, we first need to have a clear understanding of the concepts of process, summons and return. The process, in the legal parlance, is a court fiat/order for doing or not doing a particular thing non-compliance of which entails certain consequences under law's sanction. A summons is merely a part of the process. A process has been defined as a mandate or writ that serves as a means used to bring a person or thing into court for litigation; the course of procedure in a judicial action or in a suit in litigation; a particular mode or system of doing something.[64] As per Mozley & Whiteley's Law Dictionary, a process is a writ commanding the defendant's appearance in an action. It refers to various writs formerly issued in the course of action.[65] Black's defines 'process' as any means used by court to acquire or exercise its jurisdiction over a person or over specific property. When actions were commenced by original writ, instead of, as at present, by summons, the method of compelling the defendant to appear was by what was termed 'original process,' being founded on the original writ, and so called also

[63] Law Commission of India, 77th Report, 1978, p. 11, pr. 4.3
[64] Law Lexicon, P. Ramanatha Aiyar, ed. 1997, p.1526

to distinguish it from 'mesne' or 'intermediate' process, which was some writ or process which issued during the progress of the suit. The word 'process,' however, as now commonly understood, refers to a summons, or, summons and complaint, and, less commonly, to a writ.[66] On the other hand, a summons is a process issued from the office of a Court of Justice requiring the persons to whom it is addressed to attend the Court for the purpose therein stated.[67] The Indian context thus makes summons a specie of the process. Summons, as per the Mozley and Whiteley's Law Dictionary, is a citation to appear before a judge or magistrate.[68] Black's defines 'summons' as a writ or process directed to the sheriff or other proper officer, requiring him to notify the person named that an action has been commenced against him in the court from where the process issues, and that he is required to appear, on a day named, and answer the complaint in such action.[69]

A Return connoted the sending back of a writ to the court from where it is issued, with a memorandum endorsed, of the manner in which it has been executed.[70] It is a report of a formal or official character giving information as to the number, amounts etc. of the subjects of inquiry.[71] Under the English law as well, 'return' of a writ by a sheriff or bailiff, or other party to whom a writ is directed, is a certificate made to the court of that which he has done, touching the execution of the writ directed to him.[72] Black's explains the meaning of 'return' more specifically as being the act of a sheriff, constable,

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[65] Mozley & Whiteley's Law Dictionary, 9th ed., p. 257, Butterworths
[66] Black's Law Dictionary, 5th ed., p. 1084
[67] Law Lexicon, P. Ramanatha Aiyar, ed. 1997, p.1835
[68] Mozley & Whiteley's Law Dictionary, 9th ed., p. 328, Butterworths
[69] Black's Law Dictionary, 5th ed., p. 1287
[70] Law Lexicon, P. Ramanatha Aiyar, ed. 1997, p.1682
[71] Order 5, Rule 18, Code of Civil Procedure
[72] Mozley & Whiteley's Law Dictionary, 9th ed., p. 301, Butterworths

marshall, or other ministerial officer, in delivering back to the court a writ, notice, process or other paper, which he was required to serve or execute, with a brief account of his doings under the mandate, the time and mode of service or execution, or his failure to accomplish it, as the case may be.[73]

Five Steps of a Process

(A) Order to Issue of Process: Judicial Act

(B) Preparation of Processes (Documented form): Ministerial act

(C) Completion of Service/Communication: Ministerial act

(D) Consequences of non-compliance: Judicial act

(E) Remedy to the aggrieved party (review, revision, appeal): Judicial act

Types of Processes

The Civil Procedure Code contemplates three types of process:[74] (a) those which are required to be served on persons, for example, notices, summonses and injunctions, (b) those which are required to be executed against person or property, such as, warrants for arrest and detention of persons, warrants of attachment, warrants of sale or delivery of possession of property, (c) proclamations. There are also three modes of serving a simple summons or notice upon a defendant or opponent, namely (1) by delivering or tendering a copy to the defendant personally or to his agent or an adult male member of his family who is residing with him, (2) by affixing a copy on the outer door of his house if the defendant or his agent refuses to accept service or cannot be found after due diligence

[73] Black's Law Dictionary, 5th ed., p. 1184

and search, and, (3) by affixing a copy thereof in some conspicuous place in the court house and of the house where the defendant last resided or in such other manner as the court thinks fit after obtaining an order from the court.

Post-amendment changes in the Code of Civil Procedure

Certain amendments regarding summons have been made in the Code by the 1999 and 2002 amendments. In section 27 of the Code which deals with summons to defendants, a time frame has now been provided[75] so that 'where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in manner prescribed *on such day not beyond thirty days from the date of the institution of the suit.*' This amendment has been interpreted by the Supreme Court of India in the *Salem Advocate Bar Association*[76] to mean as under:

> "The words added by amendment, it appears, fix an outer time frame, by providing that steps must be taken within thirty days from the date of the institution of the suit, to issue summons. In other words, if the suit is instituted, for example, on 1st January 2002, then the correct address of the defendants and the process fee must be filed in the Court within thirty days so that summons be issued by the Court not beyond thirty days from the date of the institution of the suit. The object is to avoid long delay in issue of summons for want of steps by the plaintiffs. It is quite evident that if all that is required to be done by a party, has been performed within the period of thirty days, then no fault can be

[74] Law Commission of India, 14th Report, pg. 305, pr. 17
[75] Inserted by Act 46 of 1999, sec. 3 (w.e.f. 1-7-2002)
[76] Supra

attributed to the party. If for any reason, the Court is not in a position or is unable to or does not issue summons within thirty days, there will, in our opinion, [be] compliance with the provisions of Section 27 once within thirty days of the issue of the summons the party concerned has taken steps to file the process fee along with completing the other formalities which are required to enable the Court to issue the summons."

A significant amendment relating to delivery of summons relates to delivery or transmission by registered post acknowledgement due, addressed to the defendant or his agent empowered to accept the service or by speed post or by such courier services as are approved by the High Court or by any other means of transmission of documents (including fax message or electronic mail services) provided by the rules made by the High Court.[77] Hence, there is no need for the court to exclusively rely on the process-servers and can now use the services of private professional couriers. The High Court, in this connection, can frame relevant rules to permit the use of such courier facilities.

8.2.2.2 Written Statement

Earlier to the recent amendment to the CPC by Central Acts of 1999 and 2000, there was no statutory time limit to file the written statements (defense) by the defendants. Therefore in one pretext or the other the defendant conveniently used to delay the proceedings in the case by seeking time for filing the written statement. Now under order V Rule 1 CPC the defendant has to file the written statement within the outer limit of 30 days from the date of service of summons on him. Even the court cannot extend the

[77] Order V, Rule 9, substituted by Act 22 of 2002, sec. 6 (w.e.f. 1-7-2002)

period beyond 90 days. If the defendant fails to file the written statement within the mandatory time frame, then he has to suffer an *exparte* decree.

8.2.3 Determination of Issues

One of the concerns from time to time has been the framing of issues. Order XIV of the Code of Civil Procedure governs this area. Rule 1(5)[78] of Order XIV mandates the Court to frame issues. The Report of the Indian Institute of Management categorized framing of issues as one of the primary duties of the Presiding Officer terming it as a crucial control point.[79] The Law Commission in its 14th Report noted that although suggestions as to the framing of issues may be invited from advocates, judicial officers should invariably frame issues themselves after studying the pleadings and documents and after obtaining relevant information from the parties. Emphasizing the importance of proper framing of issues, the Law Commission observed that the issues constitute the points of dispute on which the parties go to trial and give notice to the parties of the matters on which they have to adduce evidence or expound the law. Therefore, if issues do not reflect the real points in dispute, advantage is likely to be taken of these defects at a subsequent stage or in appeal leading to delay and injustice.[80]

It is quite noticeable that so far as the legislative provisions are concerned, it is on the presiding judge alone who has the power to frame the issues based on the pleadings of the parties. In fact, the court has been empowered, either to amend the issues or frame

[78] "(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after examination under rule 2 of Order X and after hearing the parties or their pleaders, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend."
[79] Report of the Indian Institute of Management, prs. 5.14.1, 5.15.1
[80] Law Commission of India, 14th Report, Vol. 1, p. 312, pr.26

additional issues or strike out any issues wrongly framed or introduced at any time before the passing of the decree.[81] The question then is the use of such provisions by the presiding judge. Court records show that presiding Judges do not frame the issue for years despite completion of pleading, which is also one of the major causes of delay and arrears. Now this problem is being effectively tackled by use of Information Technology. The role of technology to assist the presiding judge in framing of issues has been dealt with in subsequent chapters.

8.2.4 *Discovery, Production and Admission*

The Law Commission of India in its 14th Report observed that the discovery and inspection is adequately used only in the High Courts exercising original civil jurisdiction and in some order Courts in urban areas.[82] The framers of the Code of Civil Procedure anticipated that in mofussil Courts the members of the Bar would not easily or quickly accustom themselves to the new procedure regarding discovery and production of documents and would not avail themselves of its provisions. They, therefore, inserted in section 30[83] of the Code a provision that gives the court authority to order discovery and inspection of its own motion. Their anticipations have unfortunately not been fulfilled

[81] Order XIV, R.5. Power to amend and strike out issues.- (1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as its thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed. (2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

[82] *ibid* pr. 31

[83] 30. Power to order discovery and the like. – Subject to such conditions and limitations as may be prescribed, the Court may, at any time either of its own motion or on the application of any party, - (a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence; (b) issue summons to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid; (c) order any fact to be proved by affidavit.

and the power given to the court has not been utilized.[84] The position today in the matter of discovery and inspection is practically the same. The chief reason for the neglect of the use of the law of discovery by the subordinate courts in the mofussil was also given by the Civil Justice Committee: "the great majority of cases are simple cases about matters of small money value, and because the old practice as to lodging in court the documents relied on is for so many cases regarded as sufficient."[85] The Law Commission was of the view that all parties are defaulters in an equal degree in the matter of production of documents. The provisions of Order VII, Rule 14 requires the production with the plaint of all documents upon which the plaintiff sues and which are in his possession or power and the entering into a list of all other documents upon which he relies as evidence. However, no such obligation had been imposed upon the defendant to produce his document with the written statement.[86]

This concern has already been taken care of by the recent amendment to the Code of Civil Procedure whereby Rule 1A[87] in Order VIII has been inserted[88] imposing a duty on the defendant to produce documents upon which he is claiming relief or such documents which are relied upon by him along with the written statement. Thus, the required

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[84] Civil Justice Committee Report, p. 36, pr. 14
[85] *ibid*
[86] Law Commission of India, 14th Report, Vol. 1, p. 316, pr. 32
[87] "1A. Duty of defendant to produce documents upon which relief is claimed or relief upon by him.- (1) Where the defendant bases his defence upon a document or relies upon any document in his possession or power, in support of his defence or claim for set-off or counter-claim, he shall enter such document in a list, and shall produce it in Court when the written statement is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the written statement. (2) Where any such document is not in the possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is. (3) A document which ought to be produced in Court by the defendant under this rule, but, is not so produced shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit. (4) Nothing in this rule shall apply to documents- (a) produced for the cross-examination of the plaintiff's witnesses, or (b) handed over to a witness merely to refresh his memory."
[88] Inserted by Act 46 of 1999, sec. 18 (w.e.f. 1-7-2002)

amendment has already been made in the Code as per the suggestion of the Law Commission regarding production of documents.

8.2.5 *Commissioner*

The Law Commission of India, in its 14th Report, expressed concern regarding delays in execution of commissions which in turn delays the progress of the case. The Court has power to issue commission – (a) for examination of witnesses; (b) for making local investigations; (c) for examining or adjusting accounts; or, (d) making a partition. Delays at times occur when commissions are issued for the examination of a witness or for making a local investigation or adjusting accounts. For this purpose, generally, a pleader is appointed as commissioner for the examination of a witness. Although the court fixes a date for the return of the commission, delays frequently occur and the commissioner applies for an extension of the time fixed for the execution of the commission. The delay may arise by reason of the commissioner being a busy pleader and not being able to devote time to the work entrusted to him especially when the fees payable are unattractive. Delay may also be caused by the parties or their pleaders trying to seek adjournments of the examination before the commissioner.[89]

The commissioner appointed under the Code is an officer of the court and if the court exercises proper vigilance, there should not be any unreasonable delay in the execution of the commissions for examining witnesses residing within the court's jurisdiction. If the delay is occasioned by the default of the commissioner himself, the court would be justified in revoking his appointment and appointing another person instead of extending

[89] Law Commission of India, 14th Report, Vol. 1, p. 353, pr. 97

the time. If, on the other hand, the party at whose instance the commission is issued is guilty of dilatory tactics, the court can still revoke the order of examination by commission and the party in default must take the consequences of such revocation. The Law Commission was of the opinion that this is a matter entirely in the discretion of the court and expedition can be attained if the commissioner is imperatively required to finish his work within a stated period and if his fees are reduced in case of delay in executing the work. Now, after the 1976 amendment to the Code of Civil Procedure, a time framework has been provided for return of Commission. As per the Rule 18B inserted[90] in Order XXVI, the Court issuing a commission shall fix a date on or before which the commission shall be returned to it after execution, and the date so fixed shall not be extended except where the Court, for reasons to be recorded, is satisfied that there is sufficient cause for extending the date. Similar power has been provided[91] to the court under Rule 4(5)[92] of Order XVIII relating to recording of evidence. Thus, the Code has now amply empowered the Court itself to handle the delay in return of commission. And the court is bound to fix a date on which the commissions is to returned. Such date is not to be extended by the court except for any sufficient cause. Now, it is up to the presiding officer to weigh the requirements of the case and decide whether the circumstances necessitate the extension of time. The power has already been given to the judge by the Code to take control of the case and not permit any further delay if situation does not warrant the same.

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[90] Inserted by Act 104 of 1979, sec. 75 (w.e.f. 1-2-1977)

[91] The provision was substituted by Act 46 of 1999, sec. 27 and again substituted by Act 22 of 2002, sec. 12 (w.e.f. 1-7-2002)

[92] "The report of the Commission shall be submitted to the Court appointing the commission within sixty days from the date of issue of the commission unless the Court for reasons to be recorded in writing extends the time."

8.2.6 Evidence – Witnesses

Witnesses

The 14th Report of the Law Commission of India spoke in detail about the problems relating to attendance of witnesses in a trial before the subordinate courts.[93] According to the Commission, at every stage of summoning and attendance of witnesses, hurdles of various kinds either arise or are created so that the case does not progress. Firstly, the parties themselves are not sufficiently diligent in applying for the issue of summonses for the attendance of witnesses. Sometimes a party who for some reason is not interested in the suit being heard on a particular date deliberately applies for issuing summonses to witnesses at a later stage when the chance of effective service on the witness for his attendance has become remote. Another connected problem pointed out by the Commission was the laxity of the presiding officers in this matter which results in frequent adjournments and considerable delays in the disposal of suits. It was suggested by the Commission that Order XVI, Rules 1 and 2 should be amended so that the list of witnesses to be summoned was to be filed, as far as possible, with a time limit from the date of framing of issues. This amendment[94] was duly incorporated[95].

Another proposal raised was that the parties themselves should be initially responsible for procuring the attendance of their witnesses. At the time of consideration before the Commission, this provision was already in existence in the Code. However, the issue

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[93] pg. 324-28

[94] Order XVI, Rule 1 was substituted by Act 104 of 1976, sec. 66 (w.e.f. 1-2-1977)

[95] 1. List of witnesses and summons to witnesses. – (1) On or before such date as the Court may appoint, and not later than fifteen days after the date on which the issues are settled, the parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce documents and obtain summonses to such persons for their attendance in Court.

raised was with regard to the veracity of the witness brought without summons. Generally, and particularly in the rural areas, a witness who appears to support the case of a party without being summoned through the court, is looked upon with suspicion and his detachment and impartiality are not considered above question. It was opined that a rule should be provided to the effect that when the service of summons is arranged by the party, the full process fees should not be payable by the party. This suggestion was accepted and an amendment[96] was made to that effect by inserting Rule 7A(5)[97] in Order XVI whereby where a summons is served by a party under this Rule, the party shall not be required to pay the fees otherwise chargeable for the service of summons.

Other problems pointed out by the Law Commission in its 14th Report were: (a) parties omitting to make an application for summoning their witnesses because the heavy congestion of the court's file makes it unlikely that the case will be heard on the date fixed for hearing and the party wants to avoid the unnecessary expenditure of summoning a large number of witnesses[98]; and, (b) frequently, a witness is treated with scant respect not only by the cross-examining lawyer but even by the presiding officer.[99] We notice that concern to the same effect were voiced by the Law Commission once again in its 77th report with regard to need to avoid harassment of witnesses in the courts because of which all decent, self respecting persons might deter from coming to the witness-box and giving evidence about facts within their knowledge.[100] The Commission was also concerned about the prolix examination of witnesses and "a tendency in India to over-

[96] Inserted by Act 104 of 1976, sec. 66 (w.e.f. 1-2-1977)
[97] Rule 7A was inserted to empower the Court to permit a party to effect service of summons.
[98] 14th Report, pg. 326, pr. 47
[99] *ibid*
[100] Law Commission of India, 77th Report, pg. 19, pr. 6.6

prove essential allegations"[101] and a further "tendency to prove and over-prove unessential allegations".[102] These again are matters to be dealt with by the presiding judge himself.

Evidence

With regard to oral evidence, it was noticed that the plaintiff or the defendant upon whom lies the burden of proving certain issues and who has to give evidence in support of his case is not called as witness before the evidence of the other witnesses is recorded. He is called after all his witnesses have been examined. The underlying purpose of this practice appears to be that the plaintiff or the defendant giving evidence at the end may be able to fill in gaps in the evidence given by his witnesses. This practice was strongly deprecated by the Law Commission of India[103] which recommended that Rule 2 or Rule 3 of Order XVIII of the Code of Civil Procedure be amended so that in case the parties wish to give evidence, they should be required to enter the witness box before any of their witnesses are examined. This provision was embodied in the Code by inserting[104] Rule 3A[105] in Order XVIII of the CPC.

Order XIX of the Civil Procedure Code empowers the court for sufficient reasons to direct that a particular fact or facts be proved by affidavits. In practice, courts generally take evidence by affidavit in interlocutory proceeding, such as applications for temporary injunctions, attachment before the judgment and appointment of interim receivers.

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[101] *ibid*, Rankin Committee
[102] *ibid*
[103] 14th Report, pg. 340, pr. 71
[104] Inserted by Act 104 of 1976, sec. 69 (w.e.f. 1-2-1977)

Affidavit evidence is also taken in applications for setting aside the dismissal of a suit for default or an *ex parte* decree and other miscellaneous proceedings. The Law Commission of India recommended that the courts should make a larger use of this power; and proof by affidavit should be encouraged not merely in *ex parte* and miscellaneous matters but also in contested matters for the proof of simple and incontrovertible facts.[106] This need was reiterated by the Law Commission in its 77th Report. It observed that much time of a number of witnesses whose evidence is of a formal nature and, to some extent, of the courts, would be saved if, instead of producing them in courts, the facts in respect of which they have to depose are proved by means of the affidavit filed by them in accordance with Order XIX, Civil Procedure Code.[107] To effectuate this suggestion, the recent amendment[108] to the Code now provides that the examination-in-chief of a witness shall be on affidavit.[109]

Another difficulty pointed out by the Law Commission was the recording of evidence. It was required by the Judge himself to record the evidence in his own hand which understandably consumed a lot of time of the Court.[110] It was suggested that, in lines of Section 356 of the Code of Criminal Procedure, the Judge should be authorized to either take down the evidence in writing in the language of the court in their own hand or to have it taken down from their dictation in open court or in their presence and hearing and

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[105] "3A. Party to appear before other witnesses.- Where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the Court, for reasons to be recorded, permits him to appear as his own witness at a later stage."
[106] 14th Report, pg. 342, pr. 75
[107] 77th Report, pg. 20, pr. 6.9
[108] Rule 4, Order XVIII substituted by Act 46 of 1999, sec. 27 and again substituted by Act 22 of 2002, sec. 12 (w.e.f. 1-7-2002)
[109] "(1) In every case, the examination-in-chief of a witness shall be on affidavit and copsies thereof shall be supplied to the opposite party by the party who calls him for evidence: Provided that where documents

under their personal direction and superintendence. The Code has been accordingly amended[111] to include this option.[112]

8.2.7 Arguments – Hearings

The major concern in this area has not been the existence of proper rules and guidelines but one of not following them. According to clause (a) of the proviso to sub-rule (2) of rule (1) of Order XVII of the Code of Civil Procedure, when the hearing of the suit has commenced, it shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds that, for exceptional reasons to be recorded by it, the adjournment of the hearing beyond the following day is necessary. The Law Commission of India, in its 14th Report, observed that, "in many States the provision of Order XVII, Rule 1 are disregarded and hearing of a case once begun is not continued from day to day ..... In various States we found that the subordinate judiciary acting as if they understood the Code to provide the contrary. They seemed to think that interrupted hearings should be the rule and day-to-day hearings the exception."[113] The Commission was of the view that the court must insist upon the lawyers appearing in the

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are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court."

[110] 14th Report, pg. 343, pr. 77

[111] Substituted by Act 104 of 1976, sec. 69, for rule 5 of Order XVIII, CPC (w.e.f. 1-2-1977)

[112] "5. How evidence shall be taken in appealable cases. – In cases in which an appeal is allowed, the evidence of each witness shall be. – (a) taken down in the language of the Court, - (i) in writing by, or in the presence and under the personal direction and superintendence of, the Judge, or (ii) from the dictation of the Judge directly on a typewriter; or (b) if the Judge, for reasons to be recorded, so directs, recorded mechanically in the language of the Court in the presence of the Judge."

[113] p. 335, pr. 63. This position again reiterated and agreed upon by the Law Commission of India in its 77th Report, pg. 20. pr. 6.8

case presenting their arguments immediately on the conclusion of the evidence.[114] The importance of adherence to this provision of law was also emphasized by the Law Commission in its 77th Report.[115] This is a matter which has to be exclusively dealt with by the presiding judge himself. In fact, after the 1976 amendment[116] of Rule 1(2) of Order XVII[117], much less scope[118] has been left to grant adjournment to the parties during hearings since the various grounds for adjournments have been virtually eliminated. Further, the recent amendment[119] now permits adjournments of not more than three times to a party during the hearing of the suits. Thus, under no circumstances, can the presiding judge grant more than three adjournments to the party and that too such adjournments can be granted only after recording of the reasons in writing.[120] Therefore, the legislature has already given ample power to the Court to gain full control of hearings and not permit the party to delay the case at this stage.

The Law Commission also suggested that *ex parte* matters may be fixed for hearing along with contested matters but it is necessary that the presiding officer must invariably take

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[114] 14th Report, pg. 346, pr. 82

[115] Law Commission of India, 77th Report, p. 23, pr. 7.1

[116] Substituted by Act 104 of 1976, sec. 68, for the proviso to Rule 1(2) of Order XVII (w.e.f. 1-2-1977)

[117] This rule relates to grant of adjournments during hearing

[118] "... (b) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party, (c) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment, (d) where the illness of a pleader or his inability to conduct the case for any reason, other than his being engaged in another Court, is put forward as a ground for adjournment, the Court shall not grant the adjournment unless it is satisfied that the party applying for adjournment could not have engaged another pleader in time ... ..."

[119] "1. Court may grant time and adjourn hearing.- (1) The Court may, if sufficient cause is shown, at any stage of the suit, grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit for reasons to be recorded in writing: Provided that no such adjournment shall be granted more than three times to a party during hearing of the suits." – substituted by Act 46 of 1999, sec. 26 for sub-rule (1) (w.e.f. 1-7-2002)

[120] Rule 1(1), Order XVII

care to see that such *ex parte* matters are heard and disposed of before the contested work begins.[121]

Regarding the question of prolixity of arguments of the advocates, the Law Commission in the 14th Report was of the view that the control of arguments is a matter, which must pre-eminently be left to the capacity, experience and discretion of the judge and the good sense of the advocate. The Commission did not consider it appropriate to confer any special powers on the judge in this respect.[122] However, the 2002 amendment to the CPC inserted[123] sub-rule (3D) in Rule 2 of Order XVIII which provides that 'the Court *shall* fix such time-limits for the oral arguments by either of the parties in a case, as it thinks fit'. This would solve the problem of unwanted long arguments.

8.2.8 Interlocutory Applications (IAs): A Baffling Phenomena

Simultaneously with institution of civil litigation, the process of filing interlocutory applications (IAs) commences which continues till the judgment is pronounced. Such applications pertain to dispensation with issuance of statutory notices against government and statutory bodies, which otherwise is a condition-precedent for maintainability of such suits, grant of temporary injunction, for directing the defendants to furnish securities, appointment of receivers, issuance of commissions, addition of parties, amendment of pleadings, summoning of witnesses for examination, cross-examination, re-examination and so on and so forth (*See* Box).

[121] 14th Report, pg. 330, pr. 52

Interlocutory Application under CPC normally filed at the time of presenting the suit

- Sec. 80(2): Suit against Government
- Sec. 64(2) (of Bangalore Development Authority Act): Dispensation of notice
- Sec. 482 1(A) of the Karnataka Municipal Corporation Act: Dispensation of notice
- Order 1, Rule 8: One person may sue on behalf of all in same interest
- Order 32, Rules 1,2,3: Minor to sue by next friend
- Order 39, Rules 1,2: Temporary injunction
- Order 38, Rule 5: Attachment before judgment (furnish security for production of property)

Interlocutory Application under CPC, which are normally filed during pendency of the Suit

- Order 1, Rule 10(2): Court may add or strike parties
- Order 5, Rule 20: Substituted Service
- Order 6, Rule 17: Amendment of pleadings
- Order 11, Rule 15: Inspection of documents referred to in pleadings or affidavit
- Order 13, Rules 1-10: Production, impounding and return of documents
- Order 14, Rule 5: Power to amend and strike out issues
- Order 16, Rule 1(a): Production of witnesses without summons
- Order 18, Rule 17: Re-calling of witness
- Order 22, Rule 2-4: Substitution of Legal Representatives on death of a party
- Order 26, Rule 9: Commission to make local investigation
- Order 39, Rule 2A: Disobedience of Temporary Injunction
- Order 40, Rule 1: Appointment of Receivers

It is a matter of record that in long pending contested suits, like OS no. 8943 of 1980, seventy-one IAs had been filed, which had consumed substantial judicial time and

[122] 14th Report, pg. 345, pr. 81
[123] Inserted by Act 22 of 2002, sec. 12 (w.e.f. 1-7-2002)

hindered the progress of the suit but this cannot be said to be a general pattern applicable to all the suits. As I have already noticed elsewhere, 80% of the litigations brought before the Civil Courts are resolved either without trial or without contest. In the remaining 20% of the cases, if an average is taken, hardly two IAs per case can be said to contribute to the Court's delays. The Parliament on the report of the expert bodies like the Law Commission of India took serious notice of the tendency to file IAs only to protract the adjudicatory process. The expert bodies have noticed that 'ironically, sometimes the interlocutory applications become the main issue itself and the suit is put on the backburner'.[124] It was suggested that by amending Rule 23 of Karnataka Civil Rules of Practice, 1967 appropriate provisions should be made limiting the rights of the parties to file maximum three interlocutory applications. The researcher is of the opinion that any such rule may not stand the test of reasonableness because the CPC permits filing of applications at different stages in order to meet the ends of justice, then such applications are to be entertained unless those are found to be frivolous and a major dilatory tactic. Further, if such applications are found to be a major dilatory tactic to delay the disposal of suits, then its dismissal should visit with exemplary costs which is hardly happening at the hands of the trial judges. Even if some judges make an attempt to do so, the costs so imposed are waived in revisional jurisdiction exercised by the High Court. This has encouraged filing of frivolous interim applications and has an effect of demoralizing the trial judges.

An analysis of the recent data captured by the use of information technology in the City

[124] Indian Institute of Management, *Report on Improving Work Methods and work Environment in the Subordinate Courts in India*, January, 1999, Report submitted to the First National Judicial Pay Commission,

Civil Court, Bangalore reveals that, on an average, on every working day, 15 to 20 interlocutory applications are posted before each court for actions like notice to other side, objections by the other side, hearing of such IAs, etc. This process goes on and on. The presiding judge conveniently avoids advancing of main stages in the suits by consuming their time in disposal of such IAs only. Anyhow, the above process of consumption of judicial time in disposal of IAs can conveniently be arrested if the presiding judge strictly adheres to the provisions made in this regard in chapter III of The Karnataka Civil Rules Of Practice, 1967 and does not concede to any unreasonable adjournment.

Interaction with trial judges has revealed that they hardly have control over the IAs filed at different stages and at different points of time in a particular suit. This is happening because the IAs filed are not arranged in a chronological order in a separate folder from which it can be ascertained whether any particular IA has been disposed off or still pending though there is a specific requirement of maintaining a separate file for the purpose, called File No. 2 under Rule 13[125] of Handbook on Administration and Inspection of Civil and Criminal Courts Subordinate to the Mysore High Court framed by the High Court. Now, with the incorporation of very far-reaching amendments[126] in the Code of Civil Procedure, 1908, the flooding of Civil Courts with IAs may considerably be controlled provided the statutory provisions are given due effect with little vigilance both at the level of the trial judges as well as the High Court under its administrative as well as judicial power of control and superintendence.[127]

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[125] 'It is best to arrange papers of each case in a certain definite order dividing the papers according to the subject to which they are related.'

[126] Amendments by Act 46 of 1999 and Act 22 of 2002 (which has come into force with effect from July 1st, 2002)

[127] Articles 225 and 237, Constitution of India

Apart from the above, what is of paramount importance is that there has to be a perfect tracking of institution and disposal of IAs and availability of the information in this regard to the presiding judges. Experience shows that the Court staff, namely, the caseworker, or the bench clerk cannot be relied upon for furnishing such information for various reasons. This can be done only by the use of information technology, which has now been very usefully employed in the District and Subordinate Courts in the State of Karnataka. An excellent database with retrieving facilities has been designed and deployed. This is available to the trial judges in their chambers as well as the court halls in real-time.

8.2.9 Judgments

Order XX of the Code deals with judgments. Rule 1 requires that after the case has been heard the court shall pronounce judgment in open court either at once or on some future date, of which due notice shall be given to the parties or their pleader. Therefore, if the court does not pronounce judgment immediately at the conclusion of the hearing, it will have to fix a definite date for the delivery of judgment and notice of such date will have to be given to the parties. Notwithstanding this provision, the courts however merely reserve judgment without fixing a specific date for its delivery. The Law Commission of India, found this practice undesirable.[128] It was felt that if all the judicial officers were provided with stenographers as was prevalent in the States of Andhra Pradesh and Madras, the judges will be able to deliver judgments at the close of the hearing in a greater number of cases and will be able to deal expeditiously with reserved judgments. The Commission recommended that the assistance of stenographers be made available to

all presiding officers.[129] This suggestion was accepted subsequently by incorporating[130] sub-rule (3)[131] of Rule 1 of Order XX. The Commission further recommended that the rule should provide that judgments should be delivered within two weeks of the close of hearing of the case.[132] As to the time limit for delivery of judgment, sub-rule (1) of Rule 1 of Order XX, after the 2002 amendment[133], provides that when the judgment is not being pronounced in open Court, then within thirty days, endeavour should be made by the Court to pronounce the same and under exceptional and extraordinary circumstances, such day can be extended but not beyond sixty days from the date on which the hearing of the case was concluded.[134] Hence, as per the suggestion of the Law Commission, the outer time limit for pronouncement of the judgment has been provided for in the Code itself.

8.2.10 Decrees

In its 77th Report, the Law Commission of India indicated that the time lag between pronouncement of judgment and preparation of decree should not be long. At pr.7.8 of

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[128] Law Commission of India, 14th Report, pg. 346, pr. 84

[129] *ibid*, pg. 347, pr. 84

[130] Inserted by Act 104 of 1976, sec. 70 (w.e.f. 1-2-1977)

[131] "The judgment may be pronounced by dictation in open Court to a shorthand writer if the Judge is specially empowered by the High Court in this behalf: Provided that, where the judgment is pronounced by dictation in open Court, the transcript of the judgment so pronounced shall, after making such correction therein as may be necessary, be signed by the Judge, bear the date on which it was pronounced, and form a part of the record."

[132] *ibid*, pg. 347, pr. 85

[133] Rule 1 renumbered as sub-rule (1) of that rule by Act 104 of 1976, sec. 70 (w.e.f. 1-2-1977) and substituted by Act 22 of 2002, sec. 13 (w.e.f. 1-7-2002)

[134] "(1) The Court, after the case has been heard, shall pronounce judgment in an open Court, either at once, or as soon thereafter as may be practicable and when the judgment is to be pronounced on some future day, the Court shall fix a day for that purpose, of which due notice shall be given to the parties or their pleaders: Provided that where the judgment is not pronounced at once, every endeavour shall be made by the Court to pronounce the judgment within thirty days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Court shall fix a future day for the pronouncement of the judgment, and such day shall not

the Report, the Commission voiced its concern regarding the preparation of decree:

> "The necessity of avoiding delay in the preparation of the decree after the pronouncement of judgment must also be emphasized. In this context, we would like to invite attention to Rule 6A inserted in Order XX of the Code of Civil Procedure by Act 104 of 1976. According to sub-rule (2) of the newly added Rule, every endeavour shall be made to ensure that the decree is drawn up as expeditiously as possible, and, in any case, within fifteen days from the date on which the judgment is pronounced; but where the decree is not drawn up within the time aforesaid, the Court shall, if requested so to do by a party desirous of appealing against the decree, certify that the decree has not been drawn up and indicate in the certificate the reasons for the delay."

However, this problem too has been solved by the 1999 Amendment[135] whereby a party is not permitted to prefer an appeal even without filing a copy of the decree and for the purpose of Rule 1 of Order XLI[136], the copy of the judgment made available to the party shall be treated as the decree.[137]

8.2.11 Certified Copies

The Law Commission in its 77th Report suggested that where a carbon copy of the

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ordinarily be a day beyond sixty days from the date on which the hearing of the case was concluded, and due notice of the day so fixed shall be given to the parties or their pleaders."

[135] Rule 6A substituted by Act 49 of 1999, sec. 28 (w.e.f. 1-7-2002)

[136] Form of Appeal – What to accompany memorandum

[137] "6A. Preparation of Decree.- (1) Every endeavour shall be made to ensure that the decree is drawn up as expeditiously as possible and, in any case, within fifteen days from the date on which the judgment is pronounced. (2) An appeal may be preferred against the decree without filing a copy of the decree and in such a case the copy made available to the party by the Court shall for the purposes of rule 1 of Order XLI be treated as the decree. But as soon as the decree is drawn, the judgment shall cease to have the effect of a decree for the purposes of execution or for any other purpose."

judgment is not available, certified copies by mechanical or electronic process should be supplied within 15 days. Carbon copies, if ready, must be furnished immediately under Order 20 Rule 6B[138] of the Code of Civil Procedure.[139] The Report of the Indian Institute of Management, while emphasizing the managerial aspect, suggested that there should be greater control by the Presiding Officer in expediting the issuance of certified copies. This, the Report suggested, can be ensured by better-organised work methods. Any instruction by the High Court in this regard should be accompanied by other instructions concerning better working procedures.[140]

[138] "6B. Copies of judgments when to be made available.- Where the judgment is pronounced, copies of the judgment shall be made available to the parties immediately after the pronouncement of the judgment for preferring an appeal on payment of such charges as may be specified in the rule made by the High Court."
[139] Law Commission of India, 77th Report, pr.13.12
[140] Report of the Indian Institute of Management, pr. 5.17.1

8.3 RE-ENGINEERING THE GOVERNANCE: CRIMINAL PROCESS

8.3.1 Speedy Trial – Delay in Investigation and conclusion of trial.

The right to a fair, just and reasonable procedure is implicit in Art. 21[141]. It creates a right in the accused to be tried speedily. Speedy trial in criminal cases though may not be a fundamental right, is implicit in the broad sweep and content of the said Article. Speedy trial is part of one's fundamental right to life and liberty.[142]

The provisions of the Code of Criminal Procedure provide for an early investigation and for a speedy and fair trial. If only the provisions of the Code are followed in their letter and spirit, there would be little room for any grievance. The fact however, remains that these provisions are honoured more in breach.

The question whether the right to speedy trial has been infringed depends upon various factors. A host of questions may arise for consideration: Was there delay? How long was the delay? Was the delay inevitable having regard to the nature of the case, the sparse availability of legal services and other relevant circumstances? Was the delay unreasonable? Who was responsible for the delay?[143] Was any part of the delay caused beyond the control of the prosecuting and defending agencies? Did the accused have the ability and the opportunity to assert his right to a speedy trial?[144] Was there a likelihood

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[141] Article 21 provides that "No Person shall be deprived of his life or personal liberty except according to procedure established by Law"

[142] *Madhu Mehta v. Union of India*, (1989) 4 SCC 62, 69; *A.R.Antulay v. R.S.Nayak*, (1992) 1 SCC 225, pr. 86; Abdul Rehman Antulay v. R.S.Nayak, AIR 1992 SC 1701 (pr. 50)

[143] 'Delay is a known defence tactic'. Since the burden of proving the guilt of the accused lies upon the prosecution, delay ordinarily prejudices the prosecution. Therefore, in every, case where the right to speedy trial is alleged to have been infringed, the first question to be put and answered – who is responsible for the delay? – *See ibid* pr. 86(4)

[144] The Supreme Court has held that the 'demand rule' that is whether the accused had at any time demanded speedy trial is of no consequence to enforce the right to speedy trial. It held that the failure of the

of the accused being prejudiced in his defence? Irrespective of any likelihood of prejudice in the conduct of his defence, was the very length of the delay sufficiently prejudicial to the accused? There may be other questions as well. But the question of infringement of right to speedy justice is ultimately one of fairness in the administration of criminal justice even as 'acting fairly' is one of the essence of the principles of natural justice and a 'fair and reasonable procedure' is what is contemplated by the expression 'procedure established by law" in Art. 21.[145] It may be mentioned here that the right to speedy trial is relevant at all stages.[146]

The Supreme Court has even extended this principle to post-sentence period. It has held that the procedure established by law does not end with the pronouncement of **sentence** but includes the carrying out of the sentence. Prolonged detention to await the execution of a sentence of death is an unjust, unfair and unreasonable procedure and the only way to undo the wrong is to quash the sentence of death.[147] As to what would constitutes 'delay' in such cases, the Supreme Court held that making all reasonable allowance for the time necessary for appeal and consideration of reprieve, delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Art. 21 and demand the quashing of the sentence of death.[148]

While a **speedy trial** is an implied ingredient of a fair trial, the converse is not

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accused to demand speedy trial at an earlier stage would not deprive him of enforcing his right at a later stage. *See A.R.Antulay v. R.S.Nayak*, (1992) 1 SCC 225

[145] *Raghubir Singh v. State of Bihar*, (1986) 4 SCC 481, 491, 492

[146] *P.Ramachandra Rao v. State of Karnataka*, (2002) 4 SCC 578, pr. 32

[147] *T.V.Vatheeswaran v. State of T.N.*, (1983) 2 SCC 68: *Madhu Mehta* , (1989) 4 SCC 62

[148] *T.V.Vatheeswaran* (supra) (pr.21)

necessarily true. A delayed trial is not necessarily an unfair trial. Whether a conviction should be quashed on the ground of delayed trial depends upon the facts and circumstances of the case.[149] The assessment of the factors necessarily vary from case to case. It would, therefore, follow that no general and wide proposition of law can be formulated that whenever there is inordinate delay on the part of the investigating agency in completing the investigation, such delay, ipso facto, would provide ground for quashing the first information report or the proceedings arising therefrom.[150]

However, the Supreme Court in *Common Cause* and *Raj Deo Sharma* case (as indicated above) did, on the ground of delay of case and right to speedy trial, make an attempt to clear the backlog of cases with a single sweeping direction. However, the same was held to be not a good law in *P.Ramachandra Rao.*[151] The Supreme Court however specifically clarified that:

> "Though we are deleting the directions made respectively by two- and three-Judge Benches of this Court in the cases under reference, for reasons which we have already stated, we should not, even for a moment, be considered as having made a departure from the law as to speedy trial and speedy conclusion of criminal proceedings of whatever nature and at whichever stage before any authority or the court. It is the constitutional obligation of the State to dispense speedy justice, more so in the field of criminal law, and paucity of funds or resources is no defence to denial of right to justice emanating from Articles 21,

[149] *State of Maharashtra v. Champalal Punjaji Shah*, (1981) 3 SCC 610, 613, 616
[150] *State of Andhra Pradesh v. P.V.Pavithran*, (1990) 2 SCC 340, prs.9, 10
[151] (2002) 4 SCC 578

19 and 14 and the preamble of the Constitution as also from the directive principles of State policy."

Thus, right to speedy trial `is a firmly embedded principle in the Indian criminal jurisprudence. Any delay in the investigation and trial does violate the right of an accused to speedy trial. However, as already indicated above, this principle should be applied only on a case-by-case basis and should not be used as a tool for any gallant endeavour to reduce the docket arrears before the criminal courts in India or as a one-time *ad hoc* solution to mend our years of negligence and indifference towards criminal justice.

8.3.2 General causes of delay in criminal cases

In the backdrop of the above discussion, courts have attempted to devise some solutions. How apt or appropriate these have been, particularly, looking at the purpose of criminal jurisprudence is to be the subject matter of wider discussions. In order to search an answer to these enigmatic questions, one needs to have a glance at the efforts so far made to sort out the problem.

As it has already been noticed, in post-constitutional era, repeated efforts have been made at the State level to ascertain the cause of delay in criminal trials and inquiries and to secure remedial measures for avoiding such delays. It has been authoritatively realized and accepted that the very pendency of the criminal proceedings for a long period by itself operates as an engine of oppression.[152] The 14th Law Commission Report had suggested host of remedial measures for disposal of criminal proceedings within a reasonable time. The 77th Report of the Law Commission as well suggested certain

[152] *Common Cause v. Union of India*, (1996) 4 SCC 33

measures to eliminate delay in the trials. It will be seen that the remedial measures suggested by the Law Commission of India in both the reports have considerably been complied with.

First of the suggestions in the 14th Law Commission Report was that the judiciary should be separated from the executive to ensure the speedy disposal of cases. To this effect, Article 50 of the Constitution, which is one of the directive principles of State policy, declares that, 'the State shall take steps to separate the judiciary from the executive in the public services in the State'. The Law Commission had found that it is necessary to do so for quicker disposal of criminal cases. The Commission with the experience gained in some of the States observed that necessary expedition can be achieved only by a close and continuous scrutiny of the magistrates' work by a High Court Judge which is possible only if judiciary is separated and put under the control of the High Court. This object has been achieved with the enactment of the Code of Criminal Procedure, 1973.[153]

Witnesses

The 14th Law Commission Report suggested various measures related to witnesses. It recognized that witnesses including the investigating and other police officers fail to attend the courts, and in consequence, cases have to be frequently adjourned. The **adjournments** cause considerable hardship to the accused, specially if he is in custody. It was stated by the judicial officers before the Commission that the police did not **serve the summons** in time, while the police stated that the **summonses were issued too late** by the Courts for service in time. The Commission opined that these matters should be dealt with at the district level by a close co-operation between the Sessions Judge or the

District Magistrate and the District Superintendent of Police. The Commission also opined that the Magistrates must undoubtedly share part of the blame for the failure of witnesses to attend which, not frequently, arises from **careless postings**, and a failure to **examine witnesses** who have attended court and are present.[154]

The practice followed in 1956 for service of summons was that the Magistrates generally send a packet containing summonses by post to the concerned police station within whose jurisdiction the witnesses reside. Generally **no record** is kept by the Station House Officer to show the **receipt of the packet of summonses**. Often the police officers allege that these summonses were not received by them or did not reach them in time to effect service. To meet the situation, the Commission opined that the **police officers** or constables of the attached police station should **appear** in the Court of the magistrate either in connection with a pending case or for the delivery of property or the return of warrants and other purposes. The summonses should be **handed over** to the police officer on such occasions and his acknowledgement should be taken in a **register** kept for the purpose. Similar **register** was required to be maintained at the police station in which receipt of the summonses is recorded against the name of the court. It was expected that **immediate action** will be taken for service of **summonses** and the served copies thereof will be sent to the court in advance for hearing. In order to meet the need of service of summonses well within time, the Law Commission of India in its 77th Report suggested that at least two police officers at every police station should be set apart for service of summonses upon witnesses for cases relating to that police station and for ensuring their presence on the date of hearing.

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[153] Act no. 2 of 1974 which came into force w.e.f. 25.1.1974
[154] Law Commission of India, 14th Report, Vol. 2, Chap. 36, pr. 3, p. 776

A recent report received from the Senior District and Sessions Judge working in the State of Karnataka shows that despite the recommendations of the Law Commission of India since 1956, the situation instead of improving has gradually deteriorated.[155] The police officials show scanty interest in the service of summonses or other processes entrusted to them by the Magistrates. As the suggestions have come, this is happening to enable the accused to take the benefit of a direction of the Supreme Court issues in the case of *Common Cause v. Union of India*[156] according to which, if a criminal case involving offences of a particular nature are not concluded within a time specified, the accused has to be discharged or acquitted as the case may be and the proceedings have to be closed. Taking the totality of the situation into consideration and to make the criminal justice system effective and more meaningful within its intended purpose, the judicial wing of the State should prevail over the State Government to create a separate police wing at least for the purpose of causing effective and early service of summonses and warrants issued both to the accused and witnesses so that criminal case could be disposed of without loss of time. Further, the entire process pertaining to service of summonses right from judicial order passed in this regard, its preparation, issue, transmission to the serving officials and its return can be effectively monitored only by use of the present information technology, which has not been pressed into service with well designed modules both for civil and criminal cases. Its efficacy is under supervision and it is showing desired result.

One of the suggestions in the 14th Report related to providing of adequate **batta** to the witnesses. The Commission was of the view that the scales of traveling allowance and

[155] Original copy of the report is with the researcher.
[156] (1996) 4 SCC 33

daily batta paid to the witnesses are very inadequate in many States. It frequently happens that the budget provision for these expenses and batta is itself inadequate so it soon gets exhausted and witnesses attending the courts, after the allotted sum is spent, are not paid even the inadequate traveling allowance and batta that is sanctioned.[157] This was also emphasized in the Report on Improving Work Methods and Work Environment in the Subordinate Court in India[158] in the following words:

> "6.7 There is common complaint that no allowances or compensation of any kind are paid to witnesses in criminal cases (as also in civil cases) though in practice they attend the court on several occasions. This undermines the faith of the public in our judicial system. The Presiding Officer should be provided with sufficient funds and authorized to reimburse the cost of travel and out of pocket expenses of the witnesses who, after all can make all the difference to a case and who should not be neglected in the interest of justice and fair play. It is expected that controlling this expenditure would indirectly reduce the number of times a witness is called to the Court. It is necessary that the ministerial officers of the court appreciate the importance of treating witnesses fairly, as many of them travel from far off villages and cannot afford to fend for themselves in cities and towns."[159]

The payment of batta to the witnesses has been provided in the Code of Criminal Procedure, 1973 at two instances. Firstly, under Section 160(2), when a police officer, under sub-section (1), requires the presence of a witness during an investigation, the State

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[157] Law Commission of India, 14th Report, Vol. 2, p. 777

[158] Indian Institute of Management, Bangalore, January 199, submitted to the First National Judicial Pay Commission

Government may, by rules made in this behalf, provide for the payment by the police officer of the reasonable expenses of every person, attending under sub-section (1) at any place other than his residence. Pursuant to this power, the Government of Karnataka has framed the Criminal Procedure (Payment of Expenses to Persons Attending Before Police Officers) (Karnataka) Rules, 1979 whereby, under Rule 3, a person called upon to appear before a police officer for investigation of any criminal case may be paid single second class railway fare or bus fare for, to and fro journey and daily allowance not exceeding Rs.6-50 per day for days of halt at Bangalore and Rs.5-50 per day for days for halt at other places.

The second provision for the payment of batta is under Section 312 of the Code of Criminal Procedure whereby subject to any rules made by the State Government, any criminal court may order payment, on the part of Government, of the reasonable expenses of any complaint or witness attending for the purposes of any inquiry, trial or other proceeding before such Court. Hence, the court itself has been empowered to pay the batta. However, the same has been made subject to the rules made by the State Government. In Karnataka, the State Government has framed the Karnataka Payment by Government of Expenses of Complainants and Witnesses (Attending Criminal Courts) Rules, 1967. Under Rule 4, batta would include diet charges and travelling allowance. Witnesses have been bifurcated into two classes. Class I witnesess are those witnesses whose annual income is Rs.20,000 per annum or more. Class II witnesses are those whose annual income is less than Rs.20,000 per annum. Different batta and travelling

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[159] *ibid* p.44, pr. 6.7

allowance has been provided for different classes of witnesses. This is the present scheme in Karnataka.

Even though provisions have been made by the State Government towards payment of batta to the witnesses attending to the criminal courts, yet not only such provisions are evidently inadequate, reports suggest that even this batta is not given to the witnesses for want of adequate funds available to the criminal courts for this purpose. Even though every year, provisions are made in the State budget allocating a certain amount for batta purpose, the same are not in effect given to the criminal courts. This results in the loss of interest of the witnesses to go to the criminal courts at all.

There are certain practical obstacles that go with batta payments. In the budget, the funds for this purpose is allotted by the Government to the High Court. The High Court distributes it to the various District Judges who in turn pass it on to the Trial Judges. When there is a need for money for payment of batta, the Trial Judge sends a requisition to the Treasury which in turn makes the actual payment of money to the Trial Judge who then pays it to the witness. This is the procedure for release of money from the Treasury. As regards sanction of funds is concerned, two distinct problems arise, (1) Funds as estimated and asked for by the High Court are not allotted at first instance; (2) Some funds are allotted during the end of the financial year which could not be utilized and hence, has to be returned back to the Treasury. What the Government attempts to show here is that though the amount is sanctioned, finally it remains unutilized and is returned back. However, as it is quite apparent, the problem is of delayed sanction which frustrates the whole purpose of the sanction itself.

Batta is actually in the form of compensation to the witnesses for attending the courts. It is necessary that such compensation is adequate. However, the present compensation being paid to the witnesses under the Rules are ridiculous. Even the classification made between Class I and Class II witnesses under the Rules today has absolutely no practical value since even the lowest Government salary today is more than Rs.20,000/- per annum. As a matter of fact, even the minimum wages prescribed under the Minimum Wages Act provides for more than Rs.20,000/- per annum. In such situation, each and every person, for the purpose of batta, falls under Class I and the classification made remains merely for statute book with no practical significance at all.

Apart from inadequacy, non-payment of batta amounts to violation of the witness's right of liberty under Article 21. If the witnesses are not compensated adequately, then they will not be inclined to appear before the criminal courts leaving behind their daily vocation and that too without any proper arrangements within the court premises for their convenience. However, they can be compelled to attend the courts by way of issue of warrant of arrest under the Criminal Procedure Code. This would directly hit their right to personal liberty under Article 21 which can be curtailed only by way of procedure established by law. Admittedly, the law mandates that they should be adequately compensated in case they are required to attend the criminal courts. But this is not being done. This amounts to violation of their fundamental rights at the hands of the Courts itself, which has a constitutional duty to protect such rights. It is in this direction that it is of utmost importance that the criminal justice system in our country take due notice of this problem.

The solution to the problem of batta however can be tackled. There lies a fairly good

basis for convincing the Government to sanction the entire batta budget at the beginning. The Government should not cut this expense since it is a constitutional obligation to pay this statutory compensation to the witnesses. The entire estimated amount should be allotted at the beginning of the year itself. This amount should be segregated from the other expenses and allowed to be withdrawn separately to be placed in a nationalized bank situated nearer to the concerned Court of Judicial Magistrate or Trial Judges. To ensure immediate payment of batta to the witnesses, the trial judge, while discharging the witness, should make the payment through a bearer cheque to the witness in his presence which can be duly recorded in the computer. There is no need of any via media to pay the witnesses. Also, the Rules should be amended to adequately compensate the witnesses. As regards the mode of calculation of batta is concerned, it is suggested that it should be simplified and computerized by using slab system and should be co-related with the cost of living index..

Further, the 14th Report has suggested that there should also be provisions for **summary punishment** of recalcitrant witnesses in Section 485A of the Criminal Procedure Code should be made effective by a suitable amendment of Section 487. In such situations, Presiding Officers should not hesitate to take firm action against **witnesses** who remain absent notwithstanding service of summons by the issue of warrants, forfeiture of bonds, and by instituting prosecutions. This suggestion has been adopted by incorporating Section 350 in the Criminal Procedure Code, 1973. A summary procedure for punishment for non-attendance by a witness in obedience to summons has been provided. The Criminal Court is empowered to sentence such recalcitrant witness to fine. Sub-section

(2) of Section 350 provides that in every such case the court shall follow, as nearly as may be practicable, the procedure prescribed for summary trials.

With regard to witnesses, the Law Commission in its 77th Report, suggested that every criminal court should keep a **register** showing the number of witnesses summoned for a date, the number examined, the number sent back and reasons for sending them back without examination. Now, with the use of computers, such registers can be very well developed and maintained electronically.

The Law Commission was of the view that the **summonses** are to be served in time. One of the suggestions was that a register of summons should be maintained both in the Court as well as in the Police Station. For this purpose, again computer can be made use of. Already the Police Department in the State of Karnataka is equipping itself with the latest technology systems. Similar work is being done in the Courts in the State. We can develop electronic registers at both the ends and eventually, connect the two for better transmission of data and more effective supervision over the process of summons by the courts.

The suggestion in the 14th Report relating to necessity of a strict system of **supervision** to prevent delays arising from unmethodical postings relates to court management. With use of information technology, this cause of delay can comfortably be eliminated.

The 14th Report made certain suggestions regarding the **strength of the magistracy**. There was a suggestion that the strength be increased to the required level wherever the existing strength is inadequate. For this purpose, provision should be made for the accommodation of new courts when they are established. However, no guidelines have

been set out as to how one would actually determine the need for additional courts. This part, I have already dealt with, under the State Policy where certain ways of ascertaining the need of more courts and infrastructure has been given.

The concept of **pleading guilty** in petty offences without appearing before the Courts, as provided in Section 130 of the Motor Vehicles Act, 1939, was suggested by the Law Commission in its 14th Report to be introduced. It was of the view that there are a large number of offences which can be compounded on payment of a penalty fixed by the prosecuting department. Same suggestions came forth by the Commission even in its 77th Report.[160] Section 206 of the Code of Criminal Procedure, 1973 in this respect provides for special summons in cases of **petty offences**. The Section provides that the Magistrate can proceed to dispose of the case summarily by permitting the accused to plead guilty to the charge without appearing before the Magistrate, and transmit before a specified date the said plea in writing and the amount of fine specified in the summons. For the purpose of this provision, sub-section (2) of Section 206 defines 'petty offences' as such offence which is punishable only with fine not exceeding one thousand rupees.

The Law Commission also took up the issue of mobile courts in its 14th Report. It suggested that in the large cities, mobile courts on the lines of those now working in Kolkata and chennai, should be established. Mention be made of the Rules framed by the High Court of Karnataka, pursuant to its power under Article 227 of the Constitution of India, namely the Rules to Regulate the Working of the Mobile Traffic Court, Bangalore City.[161] Under the Rules, a Mobile Traffic Court shall function in selected centers in

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[160] Law Commission of India, 77th Report, p. 44, pr. 12.10

[161] Published in the Karnataka Gazette, dated 22-7-1971, *vide* Notification No. R.O.C. 16/1969-GOB-I, dated 14-7-1971.

Bangalore City fixed from time to time by the Sessions Judge, Bangalore, in consultation with the Commissioner of Police. The officer detecting the offence shall serve a copy of the notice and if the accused pleads guilty, he can pay the amount of fine. Though the Rules were framed by the High Court and the Mobile Courts were being made use of, by a notification but they were finally discontinued.

The Law Commission in its 77th Report suggested that the law should be amended to enable a Sessions Judge to act on **evidence** partly or wholly recorded by his predecessor.[162] This suggestion was accepted and incorporated in Section 326 of the Code of Criminal Procedure, 1973.[163] Now Section 326 applies to 'any Judge or Magistrate' instead of 'Magistrate' only.[164]

The 77th Report suggested that officials at the police station who are concerned with **investigation** should concentrate on investigation. As far as possible, they should not be deputed for other purposes.[165] The Law Commission also expressed the desirability of separating the investigation agency of the police from that dealing with law and order.[166] The question whether the investigating agency should not be susceptible to executive interference and, for that purpose, be independent of executive also, in the Commission's view, required consideration. This laudable and far reaching suggestion is yet to be

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[162] Law Commission of India, 77th Report, p.41, pr.12.3

[163] 326. Conviction or commitment on evidence partly recorded by one Magistrate and partly by another.- (1) Whenever any Judge or Magistrate after having heard and recorded the whole or any part of the evidence in the inquiry or a trial, ceases to exercise jurisdiction therein and is succeeded by another Judge or Magistrate who has and who exercises such jurisdiction, the Judge or Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself: .....

[164] The word 'Magistrate' was substituted by words 'Judge or Magistrate' by Act No. 45 of 1978, s.27 (w.e.f. 18-12-1978).

[165] Law Commission of India, 77th Report, p.43, pr.12.9

[166] *ibid* pr.12.9A

attended by the policy makers. Supreme Court of India should take a lead in this regard following the path set out in *Vineet Narain.*[167]

8.3.3 Plea Bargain

Introduction

It is becoming increasingly apparent to criminal justice scholars that single theory models of criminal procedure – whether termed inquisitorial or adversarial – are being stretched beyond their capacity by the phenomena they were designed to control. Virtually everywhere, formal systems of charge and adjudication cannot possibly be enforced in accordance with the premises underlying them. There are simply too many offences, too many offenders and too few resources to deal with them all. One result has been a steady movement towards a convergence of legal systems – towards borrowing from others, those institutions and practices that offer some hope of relief.

In this transitional effort to cope with system overload, two issues have emerged as more than ordinarily significant. The first is the desirability of abandoning the principle of obligatory prosecution, so common in Continental Europe, and turning instead to the exercise of prosecutorial discretion. The second is the question whether the ban on guilty pleas and plea bargains should be lifted, as in adversarial systems. In Germany, where the concept of obligatory prosecution once reigned supreme, prosecutorial discretion is now recognized, efforts are being made to regulate its exercise, and plea bargains have made a limited appearance. In Italy, where guilty pleas had never existed and plea bargaining was anathema, the adversary trial has been introduced and with it the guilty plea and the

[167] AIR 1998 SC 889

explicit grant of sentencing concessions for such pleas. Even more dramatically, in Central and Eastern Europe, as nations turn away from Soviet-influenced 'inquisitorial' systems, debate now rages as to whether to build anew along Anglo-American lines – by abandoning principles of obligatory prosecution and recognizing guilty pleas and plea bargaining. From an entirely different direction, many nations using accusatorial systems have been looking in the direction of the European continent for guidance on how to reconcile discretion and plea bargaining with principles of legality. In sum, earlier reservations about the propriety of prosecutorial discretion, guilty pleas and plea bargains are being overwhelmed by principles of utility as each criminal justice system seeks the uniquely appropriate solution to its dilemma.

Plea bargain is understood to mean "the process whereby *the accused and the prosecutor work out a manually satisfactory disposition of the case subject to court approval.* It usually involves the defendant's pleading guilty to a lesser offence or to only one or some of the counts of a multi-count indictment in return for a lighter sentence than that possible for the graver charge."[168]

Seeds of Plea Bargain in Indian Criminal Justice System

Though the plea bargain concept is alien to both adversarial as well as inquisitorial systems, but, in the Indian Criminal Administration System, seeds of the said doctrine has been sowed in the post-Constitutional enactment of the Code of Criminal Procedure, 1973.

Now, in case of a petty offence as defined under Section 6(2), the Magistrate taking

[168] Black's Law Dictionary, pg.1037

cognizance has been empowered special summons proposing the amount of fine to be imposed in case the accused agrees for pleading the guilt through correspondence or any authorised representative and remits the amount of fee proposed.

Supreme Court of India on Plea Bargaining

The concept of plea bargaining, which is common in the US system of law has not been recognised by the Indian Supreme Court. The Court, in 1999, has held that such a bargain is impermissible under the Indian laws and our system of criminal justice does not allow such bargaining tactics between the accused and the Bench with the assistance of the Bar. In fact this opinion was delivered by the Supreme Court as early as in 1968 itself when in *Madanlal Ramchandra Daga v. State of Maharashtra*,[169] it opined that:

> "In our opinion, it is very wrong for a court to enter into a bargain of this character. Offences should be tried and punished according to the guilt of the accused. If the court thinks that leniency can be shown on the facts of the case it may impose a lighter sentence. But the court should never be a party to a bargain by which money is recovered for the complainant through their agency. We do not approve of the action adopted by the High Court...."

In *Murlidhar Meghraj Loya v. State of Maharashtra*,[170] the Supreme Court held that the concept of 'plea bargaining' is against the societal interests and directly hits the legislative intent and object expressed by statutory provisions to provide a minimum

[169] AIR 1968 SC 1267
[170] (1976) 3 SCC 648

sentence for any offence concerned. The Supreme Court observed[171] as under:

"To begin with, we are free to confess to a hunch that the appellants had hastened with their pleas of guilty hopefully, induced by an informal, tripartite understanding of light sentence in lieu of *solo contendere* stance. Many economic offenders resort to practices the Americans call 'plea bargaining', 'plea negotiation', 'trading out' and 'compromise in criminal cases' and the trial magistrate drowned by a docket burden nods assent to the *sub rosa* ante-room settlement. The businessman culprit, confronted by a sure prospect of the agony and ignominy of tenancy of a prison cell, *'trades out' of the situation, the bargain being a plea of guilt, coupled with a promise of 'no jail'. These advance arrangements please everyone except the distant victim, the silent society.* The prosecutor is relieved of the long process of proof, legal technicalities and long arguments, punctuated by revisional excursions to higher courts, the court sighs relief that its ordeal, surrounded by a crowd of papers and persons, is avoided by one case less and the accused is happy that even if the legalistic battles might have held out some astrological hope of abstract acquittal in the expensive hierarchy of the justice system he is free early in the day to pursue his old profession. It is idle to speculate on the virtue of negotiated settlements of criminal cases, as obtains in the United States but *in our jurisdiction,* especially in the area of dangerous economic crimes and food offences, *this practice intrudes on society's interests by opposing society's decision expressed through predetermined legislative fixation of minimum sentences* and by subtly

[171] *ibid* at pr.13

subverting the mandate of the law. The jurists across the Atlantic partly condemn the bad odour of purchased pleas of guilt and partly justified it philosophically as a sentence concession to a defendant who has, by his plea 'aided in ensuring the prompt and certain application of correctional measures to him'."

(emphasis supplied)

This view was reiterated by the Supreme Court in *State of U.P. v. Chandrika*[172] where it held that the concept of "plea bargaining" is not recognised and is against *public policy* under our criminal justice system. The Court observed that it is **settled law** that on the basis of plea bargaining the court cannot dispose of the criminal cases. The Court has to decide it on merits. If the accused confesses his guilt, an appropriate sentence is required to be imposed. Mere acceptance or admission of the guilt should not be a ground for reduction of sentence. Nor can the accused bargain with the court that as he is pleading guilty, the sentence be reduced.

Thus the concept of 'plea bargain' has not been found to be entertainable by the Supreme Court addressing itself only to the statutory framework of Indian criminal procedural code. The Supreme Court has not held that any such provision if incorporated in the Code empowering the Magistrate to offer a permissible sentence and award the same on accused pleading guilty would not be good law. As a fact, the legislation itself has provided for compounding of offences under the Indian Penal Code[173] and other special Acts.

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[172] (1999) 8 SCC 638, pr.3
[173] Sec. 320, 321

However, we need to look at the whole situation more objectively. On a closer scrutiny of criminal trials in India, one can observe that 97% to 98% of the accused are found 'not guilty' that is to say they are acquitted[174]. Reasons for this are many and varied. Many a time, during these trials, both oral and documentary evidence is lost. In a large number of cases, witnesses become hostile either because of threats by professional criminals having muscle power, or, threats by politicians/executives because of wielding of executive power of harassment, or, allurement of money given to persons, in case of wealthy accused, or, persuasion of friends, near relatives and family members, or, maybe just out of disgust. Many times, the loss of memory due to lapse of time leads witnesses to forget many material aspects of the incident like time, day, date, manner of occurrence, etc. which leads to intra-witness contradictions[175] or inter-witness contradictions.[176] This creates a reasonable doubt about the truthfulness of the occurrence and the accused get acquitted on the plea of benefit of doubt because the criminal justice system inherited by India from British vintage postulates that the prosecution must prove the guilt beyond any reasonable doubt. Therefore, most of the times, either at the trial level or at appellate stages, even an insignificant dent found in the prosecution case based on evidence produced by it results in the acquittal of the accused.Instead of permitting such acquittals, a better alternative would be to permit a pragmatically oriented 'plea bargain' concept within the system. Already, as pointed out above, the relevant provisions exist in our criminal procedure laws. It is only a matter of making actual use of them and releasing ourselves from the mental bondage of the concept of 'plea bargaining' being against the societal interest. In fact for petty offences, it happens regularly in traffic offences. In the

[174] Data compiled in statistical branch, High Court of Karnataka
[175] Contradiction in deposition of a witness in the examination-in-chief and then during cross-examination.
[176] Contradicting statements made by different witnesses during their depositions.

present day scenario, it should be accepted as a dire need to evolve a method of awarding punishments to guilty persons by abridging the trials by accepting the concept of 'plea bargain' with suitable shedding of environmental ills.

8.3.4 Under-trial Prisoners, non-production of – successfully remedied

It was always felt and the data supported it that non-production of under-trial prisoners (UTPs) by the police on the date fixed has been one of the major causes for delay in conclusion of criminal trials. This has been so recognized by the Supreme Court of India as well.[177] Acting on a press report on this score, the researcher took up the matter on the judicial side by getting a public interest litigation[178] registered. On the first date of hearing, that is 09.02.2000, the State Public Prosecutor stated that detailed affidavit of either Home Secretary or Director General of Police will be filed to ensure that the under UTPs are produced before the courts on the dates fixed in the criminal case. Reports were called for from the police administration as well as the District and Sessions Judge of all the districts in Karnataka to ascertain the frequency of non-production of UTPs despite court orders and the reasons for such failure or non-compliance on the part of the police officials. The facts which came on record were quite startling. The affidavit of Director General of Police and Inspector General of Police of Karnataka as well as Secretary of Government (Prisons, Crimes & Auxiliary Services) admitted the laches in non-production of UTPs and the failure on the part of police officials in producing the UTPs on the date fixed in the trials.

[177] 'Common Cause' v. Union of India, (1996) 4 SCC 33, pr. 4 – Instances have also come before courts where the accused, who are in jail, are not brought to the court on every date of hearing and for that reason also, the cases undergo several adjournments.'
[178] Writ Pctition no. 34816 of 1999

Reports were received from all the courts in 22 districts regarding non-production of UTPs. These revealed that during the months of January to March, 2000, 2,564 UTPs were not produced before the concerned courts despite Court orders. Primarily, three reasons were assigned by the police authorities for non-compliance in this regard:

a) There was no requisition from the jail authorities to the concerned police officers for escorting the undertrials from jail premises to the courts on the dates given by the judicial magistrates.

b) Some of the accused persons had been lodged in jails situated at other places and it was for the jail authorities and police force from those places to produce the undertrials before the courts concerned.

c) The Police Forces were diverted to discharge duties pertaining to law and order and the like.

Further excuse taken by the police was that because of sudden law and order problems or visit of the VIPs, the concerned police station found it difficult to provide the escort parties to the prisons for escorting the UTPs to the courts.

Brushing aside all the above reasons, the High Court found it desirable that the State Government should take a policy decision to earmark a section of police personnel for discharge of the duties pertaining to investigations, trials and under-trials prisoners under the Cr.P.C. by setting up of a separate wing which may be dedicated for discharge of the said duties on priority basis.The Director General of Police was directed to state on affidavit the action he proposes to take or has already taken in this regard. On 24.03.2000, by an affidavit, the Director General of Police in principle agreed to the

suggestions made by the Court. However, the implementation required a positive decision to be taken by the State Government where the proposals are pending. To pass this hurdle, the Home Secretary to the Government was directed to state on affidavit as to whether any such proposal is pending and if so within what time appropriate decisions are expected to be taken.

On 07.04.2000, the Home Secretary, on affidavit, stated before the Court that appropriate measures are being taken for increasing the number of police personnel keeping in view the suggestions given by the Director General of Police. The Secretary to Government (Prisons) stated that the Principal Secretary to the Government (Home and Transport), DG & IG (Police) and IG (Prisons) have agreed to make over the escort staff sanctioned in various police units for escorting the UTPs. Another problem which crept up was the non-availability of space for housing the UTPs within the court complex. For this purpose, directions were made for construction of 'holding areas' and the concerned authorities including the Registrar General of the High Court, Law Secretary and Chief Engineer, PWD were issued relevant directions.

The Secretary to the Government, Home Department (Prisons, Crimes & Auxiliary Services) stated that a policy decision has been taken to the effect that the responsibility of production of prisoners before the courts can be entrusted to the Prisons Department at least in respect of 22 prisons. The Court was informed that a formal proposal had already been sent to the Finance Department for sanction of posts. In view of this development, the Court directed the Secretary, Finance Department, to examine the proposal sent by the Home Department and take appropriate decision. The Secretary, Finance Department, agreed to create 627 additional posts on temporary basis for a period of 2 years in 22

jails. Pursuant to this decision, the Home Department passed an order dated for sanctioning 627 additional posts to Prisons Department to facilitate the production of UT prisoners to various courts. Meanwhile, finances were sanctioned for construction of the 'holding house' and the Court gave a time frame within which all the necessary administrative approvals be taken and tenders invited.

With all these well-intended efforts, a well-devised infrastructure was made available to all the prisons in the State. This came out with a very promising result. Now we find hardly any complaint of non-production of UTPs before the criminal courts on due dates except in stray cases where the same UTP is required to be produced before two different courts at two distinct places on the specific date. This happens because the respective courts or even the police of the Prison Department do not have the means of knowing the date of production of the specific UTP. This problem is expected to be well attended by interlinking the courts and prisons through close-ended networking system and video-conferencing which is now in the process of being implemented in the State of Karnataka.

8.3.5 Docket Overloading/Criminal Cases – Sweeping Broomstick of the Supreme Court

Another of the Supreme Court's efforts to bring down the load of criminal cases has been by giving various judgments with sweeping effects so as to dispose of certain kind of criminal cases if they happen to meet a certain *ad hoc* criteria laid down by the Supreme Court. In the *Common Cause*[179] case, the Supreme Court in one sweep, directed that in

[179] *"Common Cause", A registered Society v. Union of India*, (1996) 4 SCC 33, pr.4

certain cases[180] which have been pending for a given number of years, the accused should be acquitted though on a subsequent followup,[181] the Supreme Court enumerated certain offences to which the directions would not apply and further made certain clarifications.[182]

In another instance of a 'sweeping broomstick' direction[183], the Supreme Court directed that those undertrials against whom cases of attempt of murder are pending for more than two years were to be released on bail forthwith to the satisfaction of the trial court. Similarly, those undertrials against whom cases of kidnapping, theft, cheating, offences under Arms Act, counterfeiting, customs, riots, and under Sections 326, 324 and 354 of Indian Penal Code are pending for more than one year, were to be released on bail forthwith to the satisfaction of the trial court. It was further directed that such cases where the undertrial persons may not be in a position to furnish sureties, etc., the trial courts may consider – keeping in view the facts of each case especially the period spent in jail – releasing them on bail by furnishing personal bonds.[184]

In *Raj Deo Sharma (I) v. State of Bihar*[185], the Supreme Court laid down certain additional guidelines for disposition of cases in view of the large pendency of criminal cases specially with reference to check of prosecution evidence within a certain period of

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[180] To take an instance, such traffic offence cases which have been pending for two years or more due to non-serving of summons to the accused, the accused should be discharged and the cases closed. In another direction having wider implications, in any case, in which trial has not started and has been pending for two years or more, the accused should be discharged or acquitted after hearing the public prosecutor and other parties.

[181] *"Common Cause", A registered Society v. Union of India*, (1996) 6 SCC 775

[182] For instance, the directions given shall not apply to cases wherein such pendency of the criminal proceedings is wholly or partly attributable to the dilatory adopted by the accused concerned or on account of any other action of the accused which results in prolonging in the trial.

[183] *R.D. Upadhyay v. State of A.P.*, (1996) 3 SCC 422

[184] *ibid* pr. 3

[185] (1998) 7 SCC 507

time and if unable to do, the consequences in terms of grant of bail. However, certain clarifications as to the applicability of this decision were made in *Raj Deo Sharma (II) v. State of Bihar.*[186] It is not necessary to go into details of these directions since the Supreme Court in *P.Ramachandra Rao v. State of Karnataka,*[187] by a seven-Judges Bench, watered down the directions given in *Raj Deo Sharma* cases on the ground that the Court could not have prescribed periods of limitation beyond which the trial of a criminal case or a criminal proceeding cannot continue and must mandatorily be closed followed by an order acquitting or discharging the accused. The Court was of the view that such directions amount to judicial legislation, which is not permissible in our constitutional setup. The Court at pr. 27 of the Report held as under:

> "Prescribing periods of limitation at the end of which the trial court would be obliged to terminate the proceedings and necessarily acquit or discharge the accused, and further, making such directions applicable to all the cases in the present and for the future amounts to legislation which, in our opinion, cannot be done by judicial directives and within the arena of the judicial law-making power available to constitutional courts, howsoever liberally we may interpret Articles 32, 21, 141 and 142 of the Constitution. The dividing line is fine but perceptible. Courts can declare the law, they can interpret the law, they can remove obvious lacunae and fill the gaps but they cannot entrench upon in the field of legislation properly meant for the legislature. Binding directions can be issued for enforcing the law and appropriate directions may issue, including laying down of time-limits or chalking out a calendar for proceedings to follow, to redeem the

[186] (1999) 7 SCC 604
[187] (2002) 4 SCC 578

injustice done or taking care of rights violated, in a given case or set of cases depending on facts brought to the notice of this court. This is permissible for the judiciary to do so. But it may not, like the legislature, enact a provision akin to or on the lines of Chapter XXXVI of the Code of Criminal Procedure, 1973."

Keeping the above decision in mind, it is clear that the Courts in future would not make any attempt to lay down sweeping *ad hoc* directions in an attempt to clear backlog and arrears before the Indian courts. Such attempt even for practical purposes does not work as well it is expected to be. Firstly, instead of smooth movement of a criminal case, it actually hampers the flow of any criminal case in its disposal. The reason being is that with such successive quick *policy* decisions made by the Apex Court, the presiding judge is not clear as to what law is and what he has to follow. He needs to follow the Code of Criminal Procedure but at the same time is bound by the directions of the Supreme Court. Quick changes in

the directions made by the Supreme Court by way of subsequent clarifications or additional directions also hinders appropriate training/education to the presiding judges at such a short notice making the judgment of the Supreme Court nugatory and without much practical significance. With the dictum of the Supreme Court in *P.Ramachandra Rao*, one can reasonably expect that the practice of such sweeping directions in the name of speedy trial and reduction of docket loads will come to an end.

8.3.6 Public Prosecutor

One of the concerns in the 77th Report of the Law Commission of India was the inadequacy of public prosecutors. The Commission opined that there were not enough

number of prosecutors, particularly in cases under the Prevention of Food Adulteration Act and those investigated by the Central Bureau of Investigation and suggested that steps should be taken to ensure that there are as many prosecutors as there are Criminal Courts.[188] The Supreme Court too in *P.Ramachandra Rao* indicated absence of, or delay in appointment of, Public Prosecutors with the number of courts/cases as one of the factors contributing to the delay at the trial.[189] The following information is secured over the phone from Sri M.R.Devappa, Director of Prosecution. The sanctioned, current strength and the cadre with the scale of the Director, Joint Directors, Prosecutors is as under:-

Table – 8.2

Sl. No.	Cadre	Sanctioned Strength	Current Strength	Vacancy	Scale of Pay
1	Director of Prosecution	1	1	Nil	12800-16720
2	Joint Director of Prosecution	3	2	1	10620-14960
3	Public Prosecutors cum Deputy Director of Prosecution	82	76	6	9580-14020
4	Senior APP cum ADP	96	85	11	7400-13120
5	APP	226	200	26	6000-11200

The appointment of Asst. Public Prosecutors is by direct recruitment on the basis of the written test followed by vica-voce as contemplated in the Cadre and Recruitment Rules

[188] Law Commission of India, 77th Report, p. 45, pr. 12.14

of the Department of Prosecution and Government Litigation.

Only the cadre of APP is direct recruitment, whereas the other posts are on promotion. In order to secure promotion as Senior APP he had to serve minimum 5 years as APP. Likewise, after 5 years of service as Senior APP, he is eligible to be promoted as Public Prosecutor. The Public Prosecutor can be promoted as Joint Director of Prosecution after satisfying 3 years of service as Public Prosecutor. Similarly for the promotion to the post of Director of Prosecution one has to serve minimum 3 years as Joint Director of Prosecution.

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[189] (2002) 4 SCC 578, pr. 20

8.4 RE–ENGINEERING THE GOVERNANCE: COURT MANAGEMENT & ADMINISTRATION

Indian constitution envisages a three-tier judiciary with subordinate courts at the floor level, the High Court at the State level and the Supreme Court at the Union level. The provisions with regard to the union Judiciary that is the Supreme Court are to be found in Chapter IV, those regarding High Courts in the States in Chapter V and subordinate courts in Chapter VI of Part VI of the Constitution.[190]

Article 235[191] of the Constitution of India declares that the control over the district courts and courts subordinate thereto shall be vested in the High Court. The word 'control' in Article 235 is used in a comprehensive sense. It is now well crystallized by a catena of judicial pronouncements of even the Apex Court of India that the control over the subordinate judiciary vested in the High Court under Article 235 is exclusive in nature, comprehensive in extent and effective in operation.[192] In Article 235, the word 'control' is accompanied by the word 'vest' which shows that the High Court alone is made the sole custodian of the control over the subordinate judiciary. The control vested in the High Court being exclusive, and not dual, no other authority can exercise it.[193] Therefore, so far as the administration and management of subordinate courts and its efficient functioning is concerned, neither the State Government nor the Supreme Court can

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[190] Justice Ahmadi in *Second Judges* case in AIR 1994 SC 268, (1993) 4 SCC 441

[191] 235. ~~The control over district courts and courts subordinate thereto including the posting and promotion~~ of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorizing the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.

[192] *Chief Justice, A.P. v. Dikshitulu*, AIR 1979 SC 193, pr.38

[193] *State of W.B. v. Nipendra Nath Bagchhi*, AIR 1966 SC 447; *Shamsher Singh v. State of Punjab*, AIR 1974 SC 2192; *Punjab and Haryana High Court v. State of Haryana*, AIR 1975 SC 613

interfere with the same. The general perception is that the lack of good administration and proper management of subordinate courts has led to its failures in imparting justice in time. "The shocking collapse of justice system is too serious and its salvaging operation too strategic for the plan of reconstruction to be left to the judges alone. They are *innocents in the art and arrogantly reject their naivety.* Management incompetence is writ so large in the system that a grocer's shop is better managed than a munsiff's court and a business house has infinitely superior management skills than High Courts and Supreme Court. Of course, judges, wise in other ways, are *infants in judicial business management.*"[194]

Even in the English and American experiences, the area of judicial mismanagement has been strongly worded. Lord Devlin complained of British judicial management in strong words:[195]

> "If our business methods were as antiquated as our legal methods, we should be a bankrupt country. There is need for a comprehensive inquiry into the roots of our procedure, backed by a determination to adapt to fit the conditions of the Welfare State."

Chief Justice Warren Burger of the U.S. Supreme Court was quite direct in his words when he referred to his country's backwardness in court management[196]:

> "In the final third of the century we are still trying to operate the courts with fundamentally the same basic methods, the same procedures and the same

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[194] V.R.Krishna Iyer, *Justice at Crossroads*, p. 150
[195] *ibid* p.150-51
[196] *ibid* p.151

machinery, Roscoe Pound said not good enough in 1906. In the super-market age we are trying to operate the courts with cracker-barrel corner grocer methods and equipment – vintage 1900."

The eminent jurist, Dr.N.R.Madhav Menon, has in most vehement words spoken of the present judicial mismanagement:

"Among the three branches of Government, it is only the judiciary which seems to have no set goals or planning to achieve whatever targets in its assigned functions. Any organization, management science tells us, will perform only if it has clear shared goals and specific time-bound plans to achieve them. The goals and plans of the judicial system if available, are not known to the outside world. Judicial polices are supposed to be discussed in judicial conferences which the Chief Justice of India convenes annually involving all State Chief Justices. With most Chief Justices having relatively short tenures, policy development suffers. In the absence of efficient in-house implementation mechanisms, implementation and monitoring are often neglected. Judicial performance is, if at all, audited by judges themselves which leaves no scope for objective assessment under empirically verified criteria. The annual administration of justice reports which the High Courts prepare and the monthly statements which judges of the State judiciary submit speak very little about the real state of affairs.

Every system has certain limits of performance based on the capacity of each of its components. Too much of overload tends to result in under performance, quality deterioration, system breakdown and ultimate collapse. Avoiding such developments through continuous monitoring and re-distribution, diversion and

prioritization are usually employed to calibrate and maintain systems. However, periodical review and maintenance, research and development are seldom employed in the judicial system. The result is lack of information on the health of the system, on its malfunctioning parts and on how re-arrangement can possibly help better performance.

Management of judicial system is in very bad shape. Assuming every judge as an administrator and demanding time and attention of judges on managing systems in every court, has not been a useful policy. Corruption grew under the very nose of the judges without their realizing it. Statistics on disposals and pendency are often "manufactured" to satisfy formalities. Judge loses control of the functioning of courts and no one is clear about the flow of cases and the time of disposal. Everybody is dissatisfied except the corrupt court staff and the parties and their lawyers who want to use the judicial process to buy time or delay justice. Computers wherever supplied are mostly lying idle. Senseless routinisation, repeated adjournments on silly grounds, extended call hours wasting judicial time, scant regard for the witnesses summoned, total confusion with too many cases scheduled for the same period, lack of punctuality and preparedness on the part of lawyers and judges have all become characteristic features of many subordinate courts in the country. The regret is that nobody within the system seems to be concerned except in holding occasional meetings and seminars which invariably give the usual justification for the situation.

It is time that **court management** is taken out of the control of judges and entrusted to **trained administrators** who are made accountable to the tasks of

modernizing, maintaining and showing performance at all levels of judicial establishment. Judicial time should be devoted to judicial work only."

In a similar tone are the concerns and suggestions of Upendra Baxi:[197]

"... It is quite possible to devise simple procedures and controls over the court-room bureaucracy: judges ought not feel shy of consulting management experts for working out of these procedures. There is clearly a need for modernizing court management including its supervisory role in relation to the subordinate judiciary. A manual of court management should be prepared for all levels of judiciary; the judicial officers of court-system should occasionally meet at training programmes and seminars to understand the new and comparative methods of court management."

The Report of the Indian Institute of Management submitted to the First National Judicial Pay Commission states that reduction of delays is a specific managerial task. Process Management can be termed as Case Management in the legal context.[198] The Indo-US Study Group organized by Chief Justice Ahmadi[199] categorized 'discontinuity, repetition, and fragmentation of the legal processes, without early or accountable judicial interventions such as court administration and case management mechanisms' as one of the procedural causes of backlog and delay.[200]

For understanding the need of court management, one is required to firmly bear in mind

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[197] Upendra Baxi, *The Crisis of the Indian Legal System*, p.69
[198] p.16-17
[199] Hiram *et al*, *Indian Civil Justice System Reform: Limitation and Preservation of the Adversarial Process*, JILP, 1997-98, Vol.30:1
[200] *ibid* p. 25

that the only object of establishing courts and which alone justifies its existence is to resolve disputes between two or more persons approaching it in accordance with the relevant set of laws, which we commonly call impartation of justice. This needs to be done at an expected pace. If it does not happen, then it results in gaps, that is, delays and mounts arrears. It is the interest of the justice seeker which has to be looked at as supreme. His interest can be served only by redressal of his grievance within a reasonable time frame. Back in 19th century, the great British statesman William E.Gladstone had said, 'Justice delayed in justice denied'.[201]

The empirical data and close analysis of the working of present day Courts in India demonstrates that the problem of delays and mounting arrears have primarily sprung from a management crisis. Under the procedural laws, both civil and criminal, the control over the proceedings and its smooth and timely journey till its completion in terms of disposition was to be with the Trial Judge. But for want of training to manage the Court and the Court proceedings in a scientific manner with the goal at the forefront, the Judges have failed to discharge the same. The control over the proceedings except in passing orders and delivery of judgments passed to the hands of other actors of the system like the Court staff, advocates, touts or the influential and manipulative litigants.

The findings of the earlier studies reveal that the judicial system in India at subordinate levels has primarily failed for want of appropriate administrative control which, under Article 235 of the Constitution of India, has been entrusted to the High Court. This has resulted in the mounting problem of back-breaking backlogs, good deal of

[201] Bruce and Allan Zullo, eds. And Kathryn Zullo, comp. *Lawyer's Wit and Wisdom: Quotations on the Legal Profession, In Brief* (Philadelphia, Pa.: Running Press, 1995), p. 139

inconveniences and expenses to the litigants and long delays amounting to denial of justice.

The above aspect was noticed even in early fifties by the law commission of India in its fourteenth report.[202] The commission observed that –

> "In the earlier chapters, we have seen that apart from the inadequacy of Judicial officers, the main cause of delay in all courts – civil and criminal, original or appellate in not the defective procedure but the failure of the two arms of the judicial administration, the bench and the bar to follow the prescribed procedure, and the adoption by them of unsystematic and dilatory methods of work. These defects are capable of being remedied by the exercise of a ***continuous vigilance on the part of the superior courts*** – which will ensure the adoption of proper method of work.
>
> Our survey has also shown us that when adequately supervised, the courts in our country can under the existing procedure dispose of proceedings expeditiously. This is demonstrated by the experience of States where a strict system of methodical supervision obtains. The importance and the need for adequate supervision and control cannot therefore be over emphasized."

Reduction of delays and increasing of judicial productivity is thus primarily a managerial task. The responsibility for pace of litigation at least in India is squarely on Courts. This is not so in foreign jurisdictions like USA, UK and Canada, where efforts are being made

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[202] at Pg. 230, chapter 10, (Supervision and Control of Subordinate Courts)

to ensure that control over the progress of cases lies with the Court.[203]

The High Court of Karnataka, like other High Courts in the country, published a Handbook of Instructions and Inspections in 1971. It was meant to acquaint the judicial officers with the administrative task they were required to discharge. An overlook and reminder of the administrative function has been set out right at the outset in the Handbook:

> "Although certain staff is allocated to every Court and the Presiding Judicial Officer is given the assistance of a Chief Ministerial Officer who is in direct contact with the staff and is charged with the responsibilityof supervising their work, the ultimate responsibility for due administration of the Court rests on the Presiding Judicial Officer himself. He is a person the bulk of whose time is taken up by judicial work. He cannot; therefore, like an ordinary administrator be in constant and continuous touch with every detail of administration. The first problem therefore which he has to face and solve is the distribution of work among the members of the staff and allocation of responsibility at various levels of administration in such a way as to admit of efficient supervision of the entire administration by himself."

The efficiency of the Court and efficacy of its management is measured in terms of its capacity to manage the cases to ensure expeditious disposals without creating 'gaps' and by increasing the clearance rates. This can be achieved only by way of case management, which forms the heart and core of court management.

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[203] *See* David, Case Management, p. 1, foot note 1

In terms of management science, case management in the legal context can be viewed as what is known as process management in business and industrial organizations.[204] Case management as stated in the Report of Lord Woolf[205] has the following dimensions:

1. Identifying key issues in a case.
2. Encouraging parties to settle cases or agree on issues.
3. Summary disposal of weak cases and trivial issues.
4. Deciding the order in which the issues are to be resolved.
5. Fixing time table for parties to take specific steps.
6. Limiting disclosure and expert evidence.
7. Allocating each case to specific track (Fast Tack/Multi Track).
8. Achieving transparency, control of costs.
9. Fixing and enforcing time table for procedural steps before and during trial, limiting length of trial strictly and the judge to ensure effective use of allotted time.

The American gap studies have conclusively demonstrated that the case flow management is at the conceptual heart of court management in general.[206] The centrality of the case flow management to court management is apparent from a brief review of

[204] IIM Report, pr. 4.12
[205] Access to Justice: Final Report, *available at* http://www.lcd.gov.uk/civil/contents.htm
[206] David C.Steelman etc., *Caseflow Management*, National Center for State Courts, ed. 2000, Introduction

American court reform efforts in the twentieth century.[207]

8.4.1 Case flow Management

Case flow management is the coordination of court processes and resources so that court cases progress in a **timely fashion** from filing to disposition. Because excessive delay undermines the quality of justice and the purpose of courts. Courts must assume responsibility for supervising case progress and managing court caseloads. Best case flow management practices include setting case disposition time standards; early court intervention and continuous court control of case progress; use of differentiated case management; establishing meaningful pretrial events and schedules; maximizing dispositions before setting specific trial dates; limiting continuances; effective calendaring and docketing practices; setting firm trial dates; monitoring caseload information systems; and effective post-disposition.

Case flow management has been defined as 'management of the continuum of processes and resources necessary to move a case from filing to disposition, whether that disposition is by settlement, guilty plea, dismissal, trial or other method.'[208] The goals of case flow management are, (1) to expedite the disposition of all cases in a manner consistent with fairness to all parties; (2) to enhance the quality of litigation; (3) to assure equal access to the adjudicative process for all litigants; and, (d) to minimize the uncertainties associated with processing cases.[209]

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[207] For a detailed discussion of the American court reform movement in the 20th century, *see* Robert W.Tobin, *Creating the Judicial Branch: The Unfinished Reform* (Williamsburg, Va.: National Center for State Courts, 1999), chaps. 6-9.

[208] Maureen Solomon, *Case flow Management in the Trial Court*, p.1 *quoted in* Perry S.Millar & Carl Baar, *Judicial Administration in Canada*, p. 201

[209] *ibid*

Professor Ernest Friesen asserts that delay undermines the very purposes of courts and that **control of delay** is what makes case flow management critical:

> "The study of delays is not the study of inefficiency, but is the study of the very purposes for which courts exist. ... Justice is lost with passage of time. ... No matter how you look at it, whether it's a civil or a criminal matter, time destroys the purposes of courts. We study case management because case management is the way we get rid of the waiting time, [by] which we control delay, [and by] which we enhance the purposes of courts. Case management is what we're about in controlling delay."[210]

Courts with successful case flow management programs know what they are trying to accomplish because their goals are reflected in the case **processing time standards** that they have adopted. Case processing time standards or guidelines should reflect what is reasonable for citizens to expect concerning the prompt and fair conclusion of most cases of a given type.[211]

In respect of case flow management goals, keeping current with incoming caseload is an important element of optimal performance by a trial court. With regard to its pending inventory, a court may have two goals: reducing the size and age of the inventory, and maintaining it at a level that will permit the court to comply with its time standards.[212]

Another aspect of the case flow management policies should be related to the court's

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[210] Ernest C.Friesen, *"The Delay Problem and the Purposes of Courts"*, in National Center for State Courts, Institute for Court Management, *Caseflow Management Principles and Practices: How to Succeed in Justice* (Videotape, 1991)
[211] David C.Steelman etc., *Case flow Management*, National Center for State Courts, ed. 2000, p.105
[212] David C.Steelman etc., *Case flow Management*, National Center for State Courts, ed. 2000, p. 114

efforts to **avoid future backlog** and maintain a pending case inventory that is manageable in terms of workload of judges and court staff members. What constitutes a "manageable" pending case inventory? In simplest terms, it is the number of pending cases that the court can maintain and still meet its time standards without heroic efforts on the part of judges and staff or undue burdens on parties and counsel. If, after having eliminated its backlog, a court disposes of as many cases each year as are filed, the size of the pending case inventory should remain relatively stable and manageable. (The court must not be misled that it can keep its pending case inventory manageable simply by **disposing all of its easiest cases,** leaving all the more difficult cases unresolved. In that event, the mix of older and more complex cases in the inventory may increase even if the overall size of the inventory does not.)[213]

Successful case flow management requires that a court **continually measure its actual performance** against the expectations reflected in its standards and goals.[214] Therefore, the court should regularly measure times to disposition and the size and age of its pending caseload as well as determine whether it is disposing of as many cases as are being filed, and assess the rates at which trials and other court events are being continued and rescheduled.[215]

Court managers need regular **case flow management reports** that are useful to judges and themselves. Case flow management reports are of greatest utility when they are generated to monitor court performance that is related to case processing time standards

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[213] *ibid* p. 115
[214] *See* Chapter 1 of this thesis relating to time standards.
[215] *ibid* at p. 120

or goals.[216] Various case flow management reports would include reports on case filings,[217] clearance ratio,[218] pending caseload,[219] backlog index[220] and statistics on the performance of individual judges.

Courts recognize that cases differ substantially in the time required for fair and just dispositions. Rather than processing cases on a first-in/first-out basis, courts use **differentiated case management** (DCM) to create multiple case processing paths in order to expedite case processing times and public policy priorities – tailoring specific judicial resources, processes, time frames, to specific case types. DCM tracks can be established for civil or criminal case types, as needed depending upon caseload composition, resources, etc. Expressions such as 'fast tracking' and 'rocket dockets' are often synonymous with DCM initiatives.[221]

Clearance Rates help courts monitor how well they are managing their caseloads. Clearance rates are calculated by dividing the number of case filings by the number of case dispositions. The importance of monitoring clearance rates is that significant court delay can occur in just a few short years as the result of cumulative yearly backlogs. A clearance rate of 100 per cent indicates that a court is disposing all incoming court cases each year. A clearance rate under 100 is an indication of the percentage of backlogged

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[216] *ibid* at p. 130

[217] Everyone should be able to accurately track and report the number of cases filed by general use category (civil, criminal, etc.).

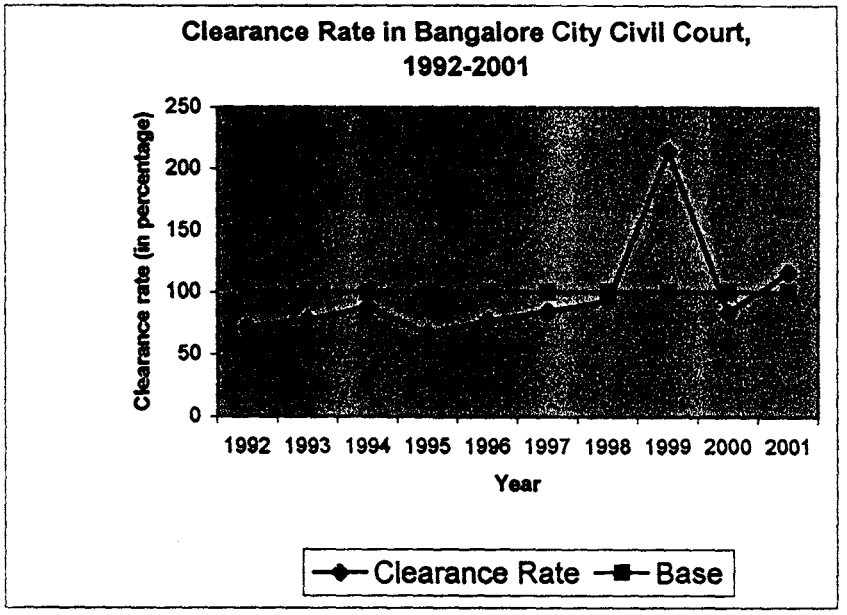
[218] Total number of cases of a given type disposed during the year divided by the total number of cases of the given type that were filed during a period.

[219] Those cases that have been filed but not disposed of as yet.

[220] It is the number of cases of a given case type pending at the beginning of the year, divided by the total number of cases of the given case type disposed during the year.

[221] David Steelman, John Goerdy, and Jim McMillan, *Caseflow Management: The Heart of Court Management in the New Millennium* (Williamsburg, VA: National Center for State Courts, 2000); Thomas A Henderson, *Differentiated Case Management: Final Report* (Williamsburg, VA: National Center for State Courts, 1990). This report evaluates DCM in six demonstration sites and presents conclusions

cases in a given year. Clearance rate over 100 per cent indicates that a court is clearing all current cases and simultaneously reducing backlog.



222

Clearance Rate in Bangalore City Civil Court
Figure 8.1

The development of **time standards for case processing** is important for effective case management and monitoring of case disposition times. Standards provide a means for identifying cases still in the system beyond a specified time that is considered appropriate for case disposition. Time standards help courts monitor delay reduction efforts by providing a method by which to evaluate the progress made. To the extent that reasonable goals are met, courts may say that they have eliminated, or reduced to a minimum, unnecessary delay in the handling of cases.

8.4.2 Practice of Case Management in Karnataka Judiciary

So far as data is concerned, there are various kinds of reports and data statements which

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concerning cost savings, reduction in disposition times, use of judge and attorney time, scheduling, participant satisfaction, and informational development – distinguishing between civil and criminal DCM.

are poured into the High Court of Karnataka at monthly, quarterly, half-yearly and yearly rests from the subordinate courts. These reports are received by the Tappal branch of the High Court, verified and then separated to be dispatched to the concerned branches. Among the annual judicial statements are the Annual Judicial Civil Statements nos. 1 to 12 relating to administration of Civil Justice and the Annual Judicial Criminal Statements nos. 1 to 8 relating to administration of Criminal Justice. Data is divided with reference to District Judges, Civil Judge (Sr. Division) and Civil Judge (Jr. Division). After the manual preparation, it is sent to the Law Department from where, after re-verification with the High Court, the data is printed. These statements are then preserved for about 10 years unless, on orders of the Registrar General, they are destroyed.

There are certain monthly Special Statements No. I to VI preserved in a Miscellaneous File and is made use of as and when information is asked for by the Chief Justice or the Administrative Judge or the Registrar available in those Statements. For practical purposes, these statements are hardly used.

Table 8.3

Yearly Institution, disposal and pendency ofcivil cases in Karnat 1998

Year	Opening Balance	Filed	Total	Disposed	Closing Balance	Blr
1987-88	421536	158947	580483	182697	397286	647
1988-89	397786	164096	561882	151864	410018	704
1989-90	410018	234089	644167	216462	427645	782
1990-91	427645	170407	598052	55466	442586	788
1991-92	442586	186248	628834	212127	416707	816
1992-93	416707	208982	625689	179138	446551	865
1993-94	446551	254132	700683	209041	491642	104
1994-95	491624	211242	702884	209894	492990	106
1995-96	492990	265731	758721	252368	506353	112
1996-97	536353	232776	739129	203018	536111	113
1997-98	536111	208725	744836	198875	545962	109

[222] This graph is based on the data drawn from the yearly "Report on the Administration of Civil And Criminal Justice in Karnataka State" under the authority of High Court of Karnataka, Bangalore

The Civil Monthly Statements include the statement showing institution / disposal / pendency of all types of civil cases, as also reasons for low disposals in case the Presiding Officer did not reach the quantum, statements showing the work done by judicial officers, time devoted for civil and criminal work, disposal by considered judgment of all civil cases, disposal of original suits by considered judgments, showing number of cases settled at Lok Adalat / Brihat Lok Adalat.

The Criminal Monthly Statements include statements showing institution/disposal/pendency of all types of criminal cases, work done by the judicial officers, equation statement showing equation of quota of work done by the presiding officers and reflecting pendency of cases in which the accused are in custody for more than two months. The details of these statements are entered in the relevant registers maintained in the High Court and placed before the Administrative Judge. In case any presiding officer falls below the prescribed quota, he is informed of the same. After that the statements are rolled in a bundle and kept.

The Quarterly Statement shows the cases dealt with under the Suppression of Immoral Traffic in Women and Children Act and the Probation of Offenders Act, 1958.

For the foregoing facts, it is clear that though monthly, quarterly and yearly reports were reaching the High Court disclosing most of the material information regarding institutions, disposals and pendencies of cases in subordinate courts, the number of witnesses examined, the nature of disposals, the performance of individual judges of subordinate courts, but these returns and statements were and are being used only for the purpose of compilation and publication of hand-picked data. The secured information had never been used for working out either the flow of cases or the reasons which were

obstructing the flow. No load reduction policies were ever-evolved by working out feasible case clearance rates or devising a bench mark for differentiating the cases based on the criteria like number of parties, nature, number of issues involved, number of witnesses or the documents to be produced in evidence though the judicial officer comes to know about it before the case enters the trial. If these management skills would have been applied, the justice delivery system of India would not have lost its credence and respectability.

One positive aspect which is typical to Indian justice system is that under its procedural law, the legislature has vested the control over the court proceedings and the calendaring of such proceedings to the trial judge which was lacking in other jurisdictions. But this aspect was allowed to be gradually diluted by virtually mortgaging the system in the unscrupulous hands of other actors/players of the system.

The present clinical study shows that information technology is capable of restoring what has been lost. Further, with the recent amendments to the Code of Civil Procedure, within five and a half months, the Court has to reach the evidence stage. The parties are required to give the list of witnesses and the documents on which they intend to reply in support of their case, to the Court by then. Hence, whether the case is a fast track or slow track can be ascertained by the court before entering the trial

All empirical data right from 1956 as noticed by the 14th Report of the Law Commission of India, till date shows that 80% of the civil cases do not reach the trial. As of fact, cases start shedding by the time it reaches the stage of evidence. This happens because of various reasons like, (i) in suits for permanent injunction, if temporary injunction is not granted, (ii) the case is frivolous, (iii) the plaintiff finds his case to be weak; and, (iv)

particularly in view of the law relating to court fees, according to which if the case is compromised or withdrawn before recording of evidence, the party would be entitled to refund of 50% of the court fees. Therefore, if the stages of the case are quickly advanced to bring it upto the stage of recording of evidence, the overload would automatically start dwindling giving comfortable time to the trial judge for attending to the genuine disputes which require adjudication at the hands of the courts.

8.5 RE–ENGINEERING THE GOVERNANCE: JUDICIAL PROCEEDINGS MANAGEMENT

8.5.1 Distribution of Judicial Work

The 14th Report of the Law Commission of India emphasized that efforts should be made to distribute work among judicial officers in a systematic fashion. Now, with the use of information technology and proper administration, the cases are being assigned to the judicial officers in a more scientific manner. The practical implementation and success has been well demonstrated by the researcher in Chapter 9 relating to disposal of early cases by effective distribution among the judicial officers.

8.5.2 Nature of Adjournment Behavior: Unique to Indian Judicial System

All expert bodies right from Justice Rankin Committee till date have identified grant of frequent and indiscriminate adjournments and extensions at all stages of the trial as one of the major causes for undue delay in disposal of trials, both Civil and Criminal[223]. The 54th Report of the Law Commission of India[224], while dealing with the problem of adjournments has, after review of earlier reports, indicated the following situations which lead to adjournments.-

(a) Where number of cases set down for trial on a day proves to be excessive, then some of them have normally to be given later trial dates. Such adjournments should not

[223] Civil Justice Committee Report Pg 53 Pr. 13, 14th LCI Report Pg 337 Pr 66, 27th LCI Report at Pg 15, Pr. 31-34, 54th LCI Report at page 157, Ch. 17, 77th LCI Report at Pr. 6.10, Indo US Group at Pg. 39.11, IIM Pr. 3.5.1. 3.6.3. 5.15.1-3.
[224] See at page 157

be long. The fact that on a particular day a number of cases have to be adjourned shows lack of care in the organisation of the business of the court.

(b) Sometimes, the court has time to try the case, but the parties themselves desire adjournment. Such adjournments with consent can be avoided, if the members of the Bar cooperate with the court in the efficient and expeditious disposal of business.

(c) Sometimes, a case is substantially heard, and then adjourned at the end of the day. Adjournments may be unavoidable in such situations and all that can be suggested is that the time likely to be taken should be estimated as accurately as possible.

The Law Commission of India in its 27th report[225] made a very frank admission about the reasons for grant of frequent adjournments. The Commission says that grant of adjournments for convenience of counsel is practical and not a legal problem. Civil work is generally concentrated among few leading lawyers. There is always desire of the members of the Bar to accommodate each other. Although under the law, a judge can refuse adjournment on the ground of convenience of the counsel; in practice, he rarely does so. **A judge becomes unpopular if he refuses an adjournment on such grounds.** The remedy for this evil lies in the hands of the Bar and a strong judiciary.

The problem also arises from leniency of the presiding judges at unwarranted instances. The grant of unnecessary adjournments on mere asking adds to the problem.[226] Generally both counsels have an interest in increasing the number of court dates. This, too, damages the concept of an adversarial proceeding. Instead of objecting to the

[225] See at page 16 Pr. 34

delaying tactics of the opposing counsel and requesting that the court take some action, the advocate against whom the tactics are used often acquiesces.[227] The Bar, unfortunately is known to seek adjournments for reasons that have nothing to do with the case, and more unfortunately, many judges are incapable of standing up to the Bar.[228] Occasions have been many, when the counsels to both the parties got adjournments of cases on the mere pretext of mood, indisposition or bad weather, as a result of which litigants attending Courts from hundreds of miles go back despaired.[229]

The Supreme Court[230] taking judicial note of the problem of adjournments was of the view that the act of seeking unwarranted adjournments is in itself a professional misconduct. In the words of the Apex Court, 'Seeking adjournments for postponing the examination of witnesses who are present in court even without making other arrangements for examining such witnesses is a dereliction of an advocate's duty to the court as that would cause much harassment and hardship to the witnesses. Such dereliction if repeated would amount to misconduct of the advocate concerned.' Apart from the question of professional misconduct of the lawyers, the Court was also of the view that 'the Judicial Magistrate, who yielded to all the procrastinative tactics, should be made answerable to the High Court so that action could be taken against the Magistrate on the administrative side for such serious latches'.

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[226] A.S.Anand, *Approaching the Twenty-First Century: The State of the Indian Judiciary and the Future Challenges*, Dashrathmal Singhvi Memorial Lecture *compiled in Justice for Women: Concerns and Expressions*, 2002, p.56

[227] Moog, Robert S., Whose Interests are Supreme?, Published by Association of Asian Studies, Michigan,1997

[228] Speech on 26.11.2001 (Law Day) at Supreme Court *at* 2001 NLR J-13

[229] Justice Guman Mal Lodha, *Judiciary: Fumes, Flames and Fire*, 1989, p. 323

[230] N.G.Dastane v. Shrikant S.Shivde, (2001) 6 SCC 135

When parties do appear, extensions and adjournments are regularly requested and generously granted without imposing available costs, even for defendants who repeatedly fail to answer the plaintiff's allegations. These allowances enable defendants (and plaintiffs who have been awarded interim relief) to delay with impunity.[231]

Statutory Provisions

Order XVII[232] of the CPC empowers the Court to grant adjournments. Rule (1) of this Order, as originally enacted, conferred a discretion on the Court in the matter of granting adjournment though it was required to be exercised judiciously and not capriciously or arbitrarily.[233] But since, the Court failed to exercise this discretion as per expectations for the reasons indicated above, the Parliament made crucial amendments[234] adding the following proviso[235] to Rule (2) of Order XVII. But despite these amended provisions, the grant of adjournment continued to be a regular feature in the Indian courts adding to the plight of the helpless litigants. Consequently, Parliament, acting on the recommendation of the Committee on Subordinate Legislation (11th Lok Sabha), further

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[231] Hiram E.Chodosh, Stephen A.Mayo, A.M.Ahmadi, A.M.Singhvi, *Indian Civil Justice System Reform: Limitation and Preservation of the Adversarial Process*, Journal of International Law and Politics, Volume 30, Fall 1997 – Winter 1998, p. 39

[232] **Court may grant time and adjourn hearing.** (1) The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit.

[233] Sukhlal v. Kalyan, AIR 1963 SC 146 at p.150

[234] CPC (Amendment) Act, 1976, Sec. 68 (w.e.f. 01-02-1977)

[235] "Provided that, - (a) when the hearing of the suit has commenced, it shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Court finds that, for the exceptional reasons to be recorded by it, the adjournment of the hearing beyond the following day is necessary, (b) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party, (c) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment, (d) where the illness of a pleader or his inability to conduct the case for any reason, other than his being engaged in another Court, is put forward as a ground for adjournment, the Court shall not grant the adjournment unless it is satisfied that the party applying for adjournment could not have engaged another pleader in time, (e) where a witness is present in Court but a party or his pleader is not present or the party or his pleader, though present in Court, is not ready to examine or cross-examine the witness, the Court may, if it thinks fit, record the statement of the witness, and pass such orders as it

amended Order XVII drastically cutting the discretion of the Court by specifically providing that 'no adjournments shall be granted more than three times to a party during hearing of the suits'.[236] This amendment further provided that the court shall make such order as to costs occasioned by the adjournment or such higher costs as the court deems fit thus making awarding of costs to be mandatory having nexus to the actual cost suffered by the adverse party.

Law Commission of India

In its 14th Report, the Commission was of the view that day after day, the cases were/are adjourned either because the lawyers are engaged elsewhere or because the court is otherwise busy. Indeed, so chaotic were the files, that cases often adjourned to a future date only for the purpose of fixing the next date of hearing.[237] Unfortunately, in practice even after the case has reached the stage of trial, its progress is impeded by frequent adjournments. Adjournments are sometimes granted for the mere asking especially in the heavier cases. Quite often a litigant comes to court ready with witnesses to go on with a trial and is told that the case has been adjourned. Thus parties are forced to incur needless expense and parties and witnesses are harassed. The most frequent cases of the adjournment of a hearing are that the court is pre-occupied with other cases and has no time to take up the case or cases or that the date is inconvenient to the parties or their pleaders.[238] Even in its 77th Report, the Law Commission was found still voicing the same concerns. The Commission observed that practice which prevails in some courts of

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thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be, by the party or his pleader not present or not ready as aforesaid."

[236] Substituted by Act 46 of 1999 (w.e.f. 01-07-2002).

[237] 14th Report, pg. 335, pr. 63

[238] 14th Report, pg. 337, pr.66

fixing a number of cases on a day on which there is no reasonable chance of their being taken up for hearing, should be avoided. As it is, we find that some courts spend half an hour every day in calling certain cases with a view to adjourn them to a future date. The time spent for this purpose can hardly be considered to have been put to any constructive use.[239]

Adjournment Trends

The data captured by use of I.T. reveal that it had been quite usual to adjourn a particular case even three times a month. The inquiries disclose that there was hardly any reason for fixing a case like this except that some players of the system had financial benefits out of it. The presiding officers had clearly lost control over the posting of the cases which had passed on in the hands of the bench clerks. It was also lost sight of that each posting and adjournment of a case takes a minimum of 2-3 minutes of the judicial time and if a case remains pending for ten years which is not very abnormal, only adjournments consume 18 judicial hours. The Court works for five hours. Thus, one case which remains pending for 10 years takes 6 judicial days[240]. The Courts in the State of Karnataka in average are having 1000 cases on their docket. With this adjournment trend, just the bare adjournments consumes 3,600 judicial days, that is, 12.8 judicial years[241]. This is a mere glimpse of the colossal waste of judicial time. Still no lesson is being learnt because any effort to correct the malice of adjournments certainly will lead to opposition from vested interests which deters the administration from such a reformatory and much needed

[239] 77th Report, pg. 18, chap. 6, pr. 6.2

[240] One judicial day equals 5 judicial hours.

[241] On an average, a Court works for 280 days in a year. Thus the total number of judicial days is being divided by 280 days for calculating the judicial years.

action. But now if the system has to survive, bold steps to curb this evil have become imperative.

Under the amended provisions of Order XVII and even otherwise, the recommendations of the expert bodies for curbing unwarranted and impermissible adjournments can be taken care of only if the information regarding grant of such adjournments can dependably be secured. Only this has become possible due to use of a computerized information retrieval system where under the court schedules and action taken thereon have been made available online and at all administrative levels which can appropriately be processed and the erring officials can be warned or disciplined in the required manner. This is one of the major benefits of introducing e-governance in the judiciary.

Adjournment Policy

It is essential to devise an adjournment policy in keeping in view the nature, age and stage of the case apart from the requirement of hearing any particular case at an early date because of directions of the superior Courts or the general policy like hearing of the cases of the senior citizens. One of the factors can be that keeping in view the age of the case, once the case attains the stage of hearing that is when the issues or charges are framed, the case should be set for final hearing on a date keeping in view the load on the court docket on such date, when in all probabilities, it can be heard. For this purpose, the presiding judge has to be always vigilant about the number of cases pending for hearing on his docket and fix the case keeping in view such pendencies. Similarly, for advancing the cases upto the stage of hearing, the cases should be posted as per the time schedule now provided under the amended CPC (see annexure II) . Unnecessary crowding of the cases in the daily cause lists merely shows the inefficiency of the presiding judge in

managing his work load and day schedules. A policy of this nature has been recently evolved in consultation with the experienced trial judges, the leaders of the Bar and is being meticulously enforced and supervised by the High Court by using wider area networking (WAN) facilities. According to this scheme now approximately thirty cases falling under various stages are listed before the court for judicial dispatch. This practice has increased the use of judicial time for enhanced disposals.

8.5.3 Calling Work

The Court starts calling the cases which are posted on the day's schedule to ascertain the presence of the parties and grant adjournments. This happens because of over-scheduling of cases which the courts can hardly handle. At times, more than hundred cases are listed under various heads and at the end of the day, hardly one or two cases are taken up either for evidence or arguments. This process by itself consumes 60% to 70% of the judicial time and results in its collosal wastage. The Report of the Indian Institute of Management observed that 'calling work' consumes substantial time and comparatively less time was being utilized for actual trial procedure. It recommended that the Presiding Judge should delegate such functions (with the overall control remaining in his hands) and devote more time to functions of direct judicial functions.[242] The researcher made a close analysis of the practice throughout Karnataka as also in other parts of the country. With constant administrative vigil and devising a rational method of listing not more than 30 cases, this non-productive exercise is being gradually checked with the shortening of the cause-list (daily schedule) of the cases and their listing in a more rational manner. In the City Civil Court, Bangalore, the calling hour is reduced to 20-30 minutes.

[242] Pr. 6.3.4

8.5.4 Cause List – listing system – docket management

8.5.4.1 Introduction to the Vice

The list of the cases posted before a Court for taking any step, hearing or argument on an application on the merits of the case, is customarily known as the 'cause list' of the day. The preparation of a cause list is an essential attribute of case management and optimizes use of judicial time. But for one or other reason, the Courts in India had not been paying proper heed to this aspect resulting in delays and arrears which is also contributing to 'gaps'.

The Law Commission of India in its 14th Report discussed in detail as to the problem of cause list prevalent in the system. It observed that as a rule the courts fix considerably more work than they can possibly dispose of on any one day. Consequently, the litigants and their witnesses are in a large number of cases compelled to come to the court and go back, time and again, without their evidence being recorded. The practice results in considerable delays and an increase in the costs of litigation. The practice prevails not only in courts with heavy arrears but also in courts which have only a normal pending file of not more than one to one and half year's institution. The practice of fixing more work than can be finished in a day seems to have arisen from a desire to provide against a possible breakdown of the day's file by reason of unforeseen circumstances. It is also due to the presiding officer not giving his personal attention to the fixing of his daily list and leaving it to his bench clerk or other ministerial officer of the court to post cases for hearing. In courts with a considerable amount of work, all the cases ready for trial cannot be set down for hearing within a reasonable time from the date of settlement of the issues.

Even if a distant date is given, there is no certainty that the case will be taken up on the date so fixed.[243]

It was proposed by the Law Commission that *ex parte* matters should be set down for hearing from time to time in a separate ***ex parte* list** and judgment should be signed forthwith on the verified statement in the plaint and without taking evidence. The position under the Code is that if the defendant does not appear when the suit is called on for hearing and it is proved that the summons was duly served upon him, the court may proceed an *ex parte* decree forthwith because the law requires that the plaintiff should make out a *prima facie* case and the mere absence of the defendant does not of itself justify the presumption that the plaintiff's case is true.[244] If the plaintiff is present, the courts generally take his evidence in support of the claim before posting the *ex parte* decree. However, very often the plaintiff who is represented by a lawyer is not present on the first date of hearing in the belief that the defendant will appear and ask for time to file his written statement. In such cases, if the defendant has not appeared to contest the suit, the courts make an order against him that the suit be heard *ex parte*. The *ex parte* hearing takes place thereafter on a future date. There is of course no harm in setting down such cases for hearing in a separate *ex parte* list. However merely maintaining such separate lists of *ex parte* cases will not result in their expeditious disposal. *Ex parte* matters may be fixed for hearing along with contested matters but the presiding officer must invariably take care to see that the *ex parte* matters are heard and disposed of before the contested work begins. (pg. 329-30, pr.52)

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[243] Law Commission of India, 14th Report, pg. 330-31, pr. 54
[244] Mulla's Civil Procedure Code, 12th ed., pg. 639

The Report of the Indian Institute of Management also identified this problem and observed that there was wide agreement that the present practice of posting of cases is very unrealistic with too many cases being posted on a day without adequate screening. The suggestion most widely accepted was that posting should be based on assessing reasonable work load that could be handled in a day and should not be done indiscriminately.[245]

8.5.4.2 Solution Proposed and Implemented

To arrest the above infirmity in the system, appropriate computer programs have been developed whereby automated assistance is given to the Court for proper scheduling of the cases and maintaining the work load within the Court's capacity to attend and dispose of the cases. At present, the practice of listing only thirty cases under various heads has been introduced from 1st of January, 2003 and that started working well.

8.5.5 Court Diary

In the matter of controlling the court diary and in fixing cases for each working day, the trial judges discharge a very important duty. The daily dockets in many of our courts are overloaded because the question of fixing dates for the hearing of suits is not given the attention which it deserves by the presiding officer. There is quite often a tendency on the part of presiding judges to leave the matter of fixing dates to their readers or sheristadars. This is extremely undesirable, because such a practice is liable to be abused by the readers or sheristadars. The question as to how many cases of various categories should be fixed on a day calls for a judicious appraisement of the capacity of a judge to deal with

[245] Report of the Indian Institute of Management, pr. 3.6.1

a number of cases within the limited court time.[246] It is of the utmost importance that at the time of fixing dates, the presiding officer should, in consultation with the advocates, attempt to estimate[247] the time required for the trial so as to ensure that all the work fixed on a particular date will be disposed of on that day.[248]

Referring to the practice of some courts fixing more work than they could complete on the ground that if work just sufficient for the day were fixed, some cases might collapse and the presiding officer might thus be left without full occupation, the Rankin Committee observed[249]:

> "The utmost concession that should be made to this view, would be to fix for hearing on one day perhaps one quarter more than could be done on it and to give the undone work precedence on the next date. We have been unable to find in the majority of cases that any such practice has been adopted. More work is fixed for the day than can possibly be got through, whatever drops out, and precedence is not given to the undone work on the next date.
>
> In any circumstances the principle is vicious. It appears to be based upon the idea that the courts may safely ignore the convenience of the public, in order to enable them to show a tale of work, which they suppose will be considered satisfactory by the higher authorities. It must be impressed and

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[246] Law Commission of India, 77th Report, pg. 18, chap. 6, pr. 6.1

[247] "A reasonable estimate can be framed as how long a particular suit will take to hear. The time required for the purpose may exceed the estimate; it may be below the estimate. The death of a party may prevent the suit being heard on the day on which it is fixed, the plaintiff may withdraw the suit, the parties may compromise. If the suit comes on for hearing, the hearing may take a longer period than the period estimated by the presiding officer. But over the greater part of India no attempt is made to make such estimates, and more work is fixed in a day than can possibly be done in the day." *See* Report of the Civil Justice Committee, p. 26, pr. 2

[248] Law Commission of India, 14th Report, pg. 331-32, pr. 57

[249] Rankin Committee

impressed very clearly that the first consideration should be the convenience of the public and that all other considerations should give way to that."

To resolve this problem, the Law Commission of India, in its 77th Report, suggested that there must be some kind of standard for the number of cases pending in court. Whenever there are indications of an increase in the number of cases in a court beyond the prescribed standard, efforts should be made to relieve the congestion by having additional courts.[250]

For proper court management, it becomes necessary that a court not 'overbook' itself. It should be able to well anticipate the number of cases which it can handle in a single day and accordingly, only such number of cases be posted. A court that does not take care of this aspect, may in due course find that its dispositions are not keeping pace with new filings, that the age of pending cases is increasing beyond time standards, and that the backlog (the number of cases that cannot be concluded within tolerable time limits) is growing.[251]

The Karnataka Civil Rules of Practice, 1967 makes a specific provision[252] for maintaining the case diary recording the adjourned dates and action taken by the Court on a given day. Now, the Court diary is being prepared by the computerized method and takes care of human errors or laxities since it is being done by capturing the court actions

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[250] Law Commission of India, 77th Report, pg. 18, pr. 6.3

[251] David C.Steelman etc., *Caseflow Management*, National Center for State Courts, ed. 2000, p.11

[252] '37. Court Diary.- In every Court a Court Diary (Register No. IX) shall be maintained in which the Bench Clerk shall at the end of each working day, briefly note the proceedings of that day in each case and shall also note the dates of adjournment and post the cases adjourned from that day to the pages in the book for such further dates. The Court Diary shall always be left in a conspicuous part of the Court Hall and shall be accessible to all persons.'

on adjourned dates, simultaneously with the order passed by the Court during the court proceedings itself.

8.5.6 Punctuality of Officers

The problem of punctuality of judicial officers in the subordinate judiciary is a matter of concern[253] which was voiced as early as in 1972 by the High Court Arrears Committee. In the words of the Committee:[254]

> "Complaints were voiced before us by the members of the Bar in certain places that Judges do not sit in Court in time. We were told that some of the Judges in one High Court used to sit after more than an hour of the scheduled court time and then leave the Bench earlier. Unless Judges sit in the Court punctually and for at least five hours on every working day, it would not be possible to obtain the maximum turnover in the matter of disposal. This is one of the factors which certainly contributes to the accumulation of arrears."

This was reiterated in the Report of the Arrears Committee, 1989-90.[255] The 77th Report of the Law Commission of India suggested that to ensure punctuality, it is necessary that the District Judge should pay surprise visits to the different courts and take necessary action against those who are recalcitrant.[256] This has been taken care of with the use of information technology because the computer records the time of the sitting and rising of the judges.

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[253] Anand, 2001, p. 57 (noting that court time is sacrosanct and no Judge has any right to waste it. The judges of all levels must, therefore, respect the court time and remain punctual. Not adhering strictly to court timings is a serious aberration.)
[254] High Courts Arrears Committee, 1972, Vol. 1, p. 45, pr. 27
[255] p. 41, pr. 9.3
[256] Law Commission of India, 77th Report, pr. 13.14

8.6 RE-ENGINEERING THE GOVERNANCE: ECONOMICS OF LITIGATION : COSTS

One of the concerns voiced by Justice A.S.Anand was that of high cost of litigation.[257] The cost of litigation many a time becomes a prohibitive factor for the parties. The cost of litigation is directly proportional to the time taken in the disposition of the case. More the time taken to dispose of a case, greater is the cost incurred by the litigant.

The court has the power to determine as to who shall pay the costs and how much.[258] Including compensatory costs in respect of false or vexatious claims or defences[259] and costs for causing delay.[260] Order XXA of the Code of Civil Procedure lays down the various costs which can be awarded by the Court. These include[261] the expenditure incurred for the giving of any notice required to be given by law before the institution of the suit, expenditure incurred on any notice which, though not required to be given law, has been given by any party to the suit to any other party before the institution of the suit, expenditure incurred on the typing, writing or printing of pleadings filed by any party, charges paid by a party for inspection of the records of the Court for the purposes of the suit, expenditure incurred by a party for producing witnesses even though not summoned through Court and in the case of appeals, charges incurred by a party for obtaining any copies of judgments and decrees which are requied to be filed along with the

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[257] A.S.Anand, *Approaching the Twenty-first Century: The State of the Indian Judiciary and the Future Challenges*, in Justice for Women, Concerns and Expressions, Universal, 2002, p.58

[258] Section 35 of the Code of Civil Procedure: 'Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be n o bar to the exercise of such powers.'

[259] Section 35-A, Code of Civil Procedure

[260] Section 35-B, Code of Civil Procedure

[261] Order XXA, Rule 1, Code of Civil Procedure

memorandum of appeal. Under Rule 99 in Chapter XIII of the Karnataka Civil Rules of Practice, 1967, other costs which can be awarded by the court to a party include the court fees,[262] batta paid to the witnesses, cost incurred in interlocutory matters which are made costs in the cause, costs for each process at a prescribed rate, advocate's fee[263] and any other costs incidental to the suit or proceeding. These are certain costs which have been statutorily recognized as being costs in a suit.

In litigation, the cost primarily consists of the lawyer's fee. However, there is another kind of payment for which the litigant has to loosen his pocket.. These are the illegal gratifications and tips he has to part with at various stages of the litigation in order to move the case forward.

So far as the lawyer's fee is concerned, it essentially depends on the contract between the lawyer and the litigant. There is no statutory provision for regulating it. The Supreme Court of India however has held that the remuneration to a lawyer proportioned to the results of litigation or a claim whether in the form of a share in the subject matter, a percentage or otherwise would offend the rules of the profession. The Supreme Court observed that the rigid English rules of champerty and maintenance did not apply in India, an agreement as this one with an advocate as a party cannot be permitted.[264] In

[262] Rule 99(1)(a). – Court fee paid on – (i) his pleadings, (ii) the documents required to be produced by him, (iii) the vakalat filed by him (one set only); (iv) the processes and postage issued at his instance; (v) the certified copies furnished to him as per rules an filed by him as required by any law or as ordered by the Court, as exhibited in the case; (vi) interlocutory applications other than applications seeking adjournments.
[263] Calculation of advocate's fee is governed by Rule 100. However, in actual practice, the fee is much more.
[264] *In the matter of 'G' a Senior Advocate of the Supreme Court*, AIR 1954 SC 557

fact, any such agreement would be in contravention to Section 23 of the Indian Contract Act, 1872 being against the public policy.[265]

As regards the tips made to the court staff is concerned, making such payments is an offence under the Prevention of Corruption Act and also the Indian Penal Code. But still these are often made with the full knowledge of the Presiding Judge and to their bench clerks sometimes in the court halls itself. It is continuing conveniently from the British time. These payments are made for seeking certain procedural benefits like delaying or speeding the proceeding in the main case or interlocutory application.

This practice has grown over the period of time because gradually the control over the stages of the cases, assignment of date (calendaring or case scheduling) has passed into the hands of the court staff though the written procedural law and instructions[266] clearly provided that the control over the stages and other judicial process should be scrupulously retained by the Judge. This has happened for many reasons, which the researcher does not wish to put on record because it may reflect on the perception of morality of judges at all levels.

This impermissible practice has been effectively reduced with the use of information technology and court management by which control over the proceedings have been restored in the hands of the Presiding Judges. Now very little remains with court staff to favour or disfavour a litigant. All the information relating to court process has been made transparent and systematic with effective court management.

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[265] *See* Pollock & Mulla, *Indian Contract and Specific Relief Acts*, 11th Ed., Vol. 1, p. 380
[266] Hand Book of Instructions

On an overall analysis, one can consider costs to be the costs as enumerated under the statutory provisions indicated above, the lawyer's fee and the illegal gratifications and tips. So far as the former cost is concerned, that is more or less a fixed cost. It would not alter with the delay in a case. Whether the case concludes within a month or gets prolonged for years, the court fees to be paid remains the same. However, the direct effect of the delay in a case is on the advocate's fee and the illegal gratifications. As the case gets delayed further, these costs increase. Hence, more the 'gap', the higher are the costs.

The off-shoot of increase in costs in a litigation (specially if one wishes to approach the Supreme Court) has been so prohibitive that the Supreme Court itself, while dealing with the challenge to Articles 323A and 323B of the Constitution of India excluding the jurisdiction of "all courts' except that of the Supreme Court, observed that, 'the remedy provided in the parent statutes, by way of an appeal by special leave under Article 136 of the Constitution, is too costly and inaccessible for it to be real and effective.'[267] The researcher in one of the cases[268] dealing with Central Excise and Salt Act was confronted with the situation where the appellant filed an affidavit stating that keeping in view the cost factor involved in preferring an appeal to the Supreme Court, such a remedy has become nugatory and therefore, the High Court was requested to interfere in the matter. Speaking for the Division Bench, keeping in mind the affidavit filed, the researcher observed that:

> "We do not propose to comment on the statements made in the above said paragraph because if the said statements are to be taken note of as a fact and if

[267] *L.Chandra Kumar v. Union of India*, AIR 1997 SC 1125, pr.91

for that reason it has to be held that remedy by way of appeal to the Supreme Court even for an economically viable and profit making company like the present petitioner, has become nugatory, then in our opinion, it is not only indicative of the failure of the Indian judicial system, but also amounts to denial of the constitutional rights of the citizens of India as enshrined in our Constitution. But we do not propose to deal with these aspects any further since in our opinion, it is high time that these aspects should be taken note of and attended to with all seriousness at the appropriate levels so that the judicial system may keep inspiring confidence in the seekers of justice."

[268] *M/s Premier Irrigation Eqpt. Ltd. v. Union of India*, ILR 1998 Kar 1235

8.7 RE–ENGINEERING THE GOVERNANCE: ALTERNATIVE DISPUTE RESOLUTION SYSTEMS

8.7.1 Introduction

Alternative dispute resolution refers to resolving of disputes other than by way of litigation or adjudication by the state courts. Among the popular alternative dispute resolution systems available are negotiation, mediation, conciliation and arbitration. It has been noticed in recent times that disputants prefer these methods to solve their disputes than by way of litigation.

However, there are two distinct concepts which should be clearly borne in mind as far as use of alternative dispute resolution systems is concerned.

One is that unless the adjudicatory system at any place is not strong, the success of the use of alternative dispute resolution cannot be ascertained. The main criticism of alternative dispute resolution methods, voluntary or otherwise, is that such mechanism generally works better when the courts are efficient. In other words, parties to a dispute have incentives to settle when they know what court judgments they will get; courts complement ADR systems. However this is clearly not the case in many developing countries, where ADR systems function as substitutes. But to function in this matter, they need to effectively represent the community for whom they adjudicate. The *Lok Adalats* in India, for example, are not very popular since they do not offer adequate compensation

for victims, who face high cost in the courts to enforce their rights. These are more likely to be the poor people.[269]

Secondly, it is worthwhile to notice that an over-emphasis on the use and implementation of the alternative dispute resolution, and thereby according a back-seat to the Courts, would actually result in hampering and weakening the judicial system itself. The more time and efforts and money we spend over establishment of alternative dispute resolution systems, the lesser are we attending to the task of strengthening our judicial system. The discounting of everyday civil justice in the state courts, the official pessimism about reform, the 'load shedding' into Lok Adalats, and the flourishing of alternative forums reflect a 'hollowing out' of the Indian state.[270]

A cumulative analysis of the above to propositions would entail us to ponder over the excessive use and stress over the alternative dispute resolution. Until and unless our foundations are strong, the structure above it cannot stand the test of time. Our courts are the foundation. We need to make that strong with regular study and necessary reforms. Only then will the alternative dispute resolution in whatever form would be a success.

8.7.2 Legal Service Authority – Lok Adalat

In India, free legal aid is a constitutional guarantee. Article 39-A of the Constitution of India lays down that the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for

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[269] World Bank Development Report, 2002, Chapter 6, Judicial System, p.127

[270] Marc Galenter, *Debased Informalism: Lok Adalats and Legal Rights in Modern India*, March 16, 2002, p. 61

securing justice are not denied to any citizen by reason of economic or other disabilities. This Article directs the State to provide free legal aid to all those who need it.

The objectives of legal aid are as follows:

(a) Legal aid to an indigent or poor person who wants to approach a court of law to redress any grievance that he may have or who wants to defend an action filed against him. In countries following the common law system, traditionally, a counsel is provided to a person who is accused of a cognizable offence. But the purpose of the present day legal aid is to provide legal assistance to all those persons who cannot afford legal services, both in criminal and civil cases, and in litigation against a private individual or against the government.

(b) To encourage resolution of disputes without recourse to a court of law by discussion, persuasion and counseling by competent persons;

(c) To give legal advice to a person who has a grievance or dispute so that he knows his correct position. This legal advice is also to be made available to those who have already crossed threshold of the Court;

(d) To provide para-legal education to social workers and others to make them aware of the people's rights and obligations, including the forum, which should be approached. Some further training should follow this to those who show keenness in the legal aid programmes. This will lead to having a cadre of para-legal advice.

(e) To organize legal aid camps and Lok Adalats with a view to enabling the people to resolve their disputes on the spot with the mediation of lawyers, retired judges, law

teachers, social workers, elders of the locality and to tender legal advice to those who wish to seek it.

With the objectives and constitutional mandate in mind, Government of India had, by a Resolution dated the 26th Sept., 1980 appointed the "Committee for Implementing Legal Aid Schemes" (CILAS) under the Chairmanship of Mr.Justice P.N.Bhagwati (as he then was) to monitor and implement legal aid programmes on a uniform basis in all the States and Union Territories. CILAS evolved a model scheme for legal aid and advice Boards were set up in the States and Union Territories. CILAS was funded wholly by grants from the Central Government. The Government was accordingly concerned with the programmes of legal aid as it was the implementation of a constitutional mandate. But on a review of the working of the CILAS, certain deficiencies came to the fore. It was, therefore, felt that it will be desirable to constitute statutory legal services authorities at the National, State and District levels so as to provide for the effective monitoring of legal aid programmes. Accordingly, the Legal Services Authorities Act, 1987 was enacted by the Parliament. This Act provides for the composition of the authorities and for the funding of these authorities by means of grants from the Central Government and the State Governments. The Act also empowers the National Committee and the State Committees to supervise the effective implementation of legal aid schemes.

The Legal Services Authorities Act also formerly organizes the Lok Adalats. The expression "Lok Adalat" comprises of two words, "Lok" and "Adalat". "Lok" is a Sanskrit word. It means people. "Adalat" is an Arabic word commonly used in Hindi which means court. Therefore, "Lok Adalat" means people's courts. Before the enactment of the Act, the institutions of Lok Adalats were functioning through voluntary

and conciliatory agencies without any statutory backing for its decisions. It proved to be very popular in providing for a speedier system of administration of justice. In view of the growing popularity, there was a demand for providing a statutory backing to this institution and the awards given by Lok Adalats. It was felt that such a statutory support would not only reduce the burden of arrears of work in regular courts, but would also take justice to the door-steps of the poor and the needy and make justice quicker and less expensive. To appreciate the success of Lok Adalats, a glance of the disposal figures in Karnataka would be helpful during the years 1997-2001.

Table – 8.4

Year	*Total Lok Adalats Organised*	*No of Cases Settled*						
		Civil	*Criminal*	*LAC*	*Bank*	*MVC*	*Others*	*Total*
1997	80	0	0	0	0	3088	3388	6476
1998	409	0	0	99	296	8841	31742	40978
1999	622	8017	23778	1993	131	7668	4953	41587
2000	400	7118	11773	3420	40	1406	3118	26875
2001	678	10732	19191	90	0	1975	4785	36773
TOTAL	**2189**	**25867**	**54742**	**5602**	**467**	**22978**	**47986**	**152689**
Permanent Lok Adalats 1999 - 2001	134	432	5830	0	0	55466	632	12494
Grand Total	**2323**	**26299**	**60572**	**5602**	**467**	**28444**	**48618**	**165183**

Source: Report of the Member Secretary, Karnataka State Legal Services Authority, Bangalore dated 07.02.2002

8.7.3 Various Schemes and Efforts to Augment Speed in the System – Pilot Project and Fast Track Scheme

Pilot Project in Karnataka[271]

The concept of Pilot Project was floated by the Chief Justice of India while delivering the inaugural address at the 6th Karnataka Judicial Officer's Conference held on the 13th of March, 1993. The basic theme was to make a particular area litigation-free by the end of two years starting from the date the pilot project was to commence in that area. All cases, except those which were stayed by the superior courts, were to be disposed of within those two years. Of course the litigation-free concept would not mean no litigation or no pendency at all but rather being able to wipe off such litigations which have been lingering for many years and needs to be adjudicated upon at the earliest.

In Karnataka, the scheme was launched in 1993. With due authorization of the Full Court of the High Court, a Committee was made to select the Districts and/or Taluks where the Project was to be implemented. After pinpointing the areas, the Administrative Judges of those areas were made members of the Committee and they were authorized to take all necessary steps to implement the scheme.

At the initial stage, the Committee resolved to introduce the scheme in the districts of Mandya, Bijapur, Kodagu and Chikmaglur w.e.f. 31.05.1993. The Committee resolved on three moot issues: (a) the Presiding Officers of the area covered by the four districts shall dispose of more cases by considered judgments being not less than 12 Sessions Cases or equivalent for District Judges, not less than 12 suits or equivalent for Civil

Judges and not less than 24 suits or equivalent for Munsiff Magistrates; (b) all the existing vacancies of stenographers, process servers and typists should be filled up; (c) additional courts are to be set up and the recommendation to be sent to the government for effective implementation of the Project.

In pursuance to the above resolution the, Pilot Project Scheme was introduced in the districts of Mandya, Bijapur, Kodagu and Chikmaglur w.e.f. 31.05.1993. The aim was to dispose of all the cases within a period of two years that is by 31.05.1995 except those which were stayed by the superior courts. What is noticeable is that not only additional courts were set up, but also that efforts were made in the direction of ensuring effective working of the Presiding Officers and also, co-operation from the Bar. Circulars were issued to all the Presiding Officers working in the area covered under the Project asking them to work hard with sincerity and devotion to achieve the object of the scheme. They were asked to aim at working in increasing the disposals but also at the same time, to ensure that the quality of judgments should not be compromised with. In another circular to Bar, the members were informed of the object of the Project and their full co-operation was requested to enable the Judicial Officers to decide the cases speedly.

All these efforts *in toto* did produce good results. Considering the pendency of the case in these areas, the scheme was required to be extended from time to time and by a resolution dated 30.09.1996, it was finally extended upto 31.12.1996. As regards the disposal of cases, the following comparative statement shows the progress achieved by the Presiding Officers in disposing of cases covered under the Project:

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[271] Based on the archives of the High Court of Karnataka

Another extension was sought for working of the Pilot Project. The proposal was to extend the Project for a further period of one year from 01.10.2000. The Pilot Project Committee, at its meeting held on 26.09.2000, in view of the progress achieved in the districts of Gulbarga, Chitradurga and Kolar, resolved to shift the scheme to the districts of Belgaum, Mysore and Dakshina Kannada, Mangalore. Information was received from the District Judges of these districts with regard to additional courts required, availability of accommodation for housing the additional courts and any other infrastructure required for implementation of the Pilot Project Scheme. It transpired that in the districts of Belgaum and Dakshina Kannada and Mangalore, there is need for additional courts to implement the Pilot Project. Also, accommodation is not available for housing the additional courts to be created. However, there were no impediments to launch the Project at Mysore. The Full Court of the High Court in its meeting on 27.11.2000 accepted the recommendation of the Pilot Project Committee for shifting the Pilot Project Scheme to Mysore district. The Project was thus extended to Mysore District with effect from 02.04.2001.

Fast Track Courts

The scheme of Fast Track Courts was initiated by the 11th Finance Commission, as proposed by Mr. N.C.Jain, Member, Finance Commission, with a purpose of clearing backlog of pending cases. As per the Scheme proposed, there were to be two salient features: (a) ad hoc courts upto the limit of five courts per district to clear off the arrears of cases pending in subordinate district courts shall be established for a period extending to a maximum of 4 years; (b) retired sessions judges and additional sessions judges shall

be considered for appointment as ad hoc judges, specifically to dispose off pending sessions cases.

The Eleventh Finance Commission allocated Rs. 502.90 crores under Article 275 of the Constitution for the purpose of setting up 1,734 courts in various States to deal with long-pending cases, specially sessions cases. It is creation of additional courts to deal with old Sessions cases. The allocated amount was to be utilized within a period of five years. The State Governments were required to take necessary steps to establish such courts.

To begin with, a meeting of Law Secretaries and the Registrar Generals of all the High Courts was held in Delhi on 05.01.2001. In the meeting at Delhi, it was decided among other things that:

a) In each State, a State Level Committee headed by the Chief Secretary of that State be constituted to monitor the construction of the buildings for ad hoc courts.

b) All steps shall be taken for each State to begin the construction of buildings for such ad hoc courts and necessary proposals be sent by the Registrar General of the High Court.

c) Wherever possible, the construction of such ad hoc courts may be on the existing court buildings or on vacant places available within the court premises.

d) Wherever appointment of retired judicial officers to such ad hoc courts is not possible, steps shall be taken to grant ad hoc promotions for judicial officers to preside over such courts.

e) Concerned states shall be asked to appoint public prosecutors to such ad hoc courts.

f) The Registrar General shall send a report within a week about the steps taken.

The constitutionality of the Fast Track Courts Scheme was challenged in *Brij Mohan Lal v. Union of India*[272] before the Supreme Court of India. The Court, while upholding the constitutionality of the Scheme, observed that merely because the suggestion has stemmed from the Central Government, it cannot be said that there has been any violation of any constitutional mandate. Though the Scheme is envisaged by the Central Government on the basis of the views indicated by the Finance Commission, yet appointments to the Fast Track Courts are to be made by the High Court keeping in view the modalities set out.[273] The Supreme Court also laid down the following directions which, it was felt, would be "sufficient to take care of initial teething problems highlighted"[274] in the case. The directions, in summarise, are as under:

(a) With respect to the appointment to Fast Track Courts, the first preference is to be given by ad hoc promotions from amongst eligible judicial officers, then to retired judges who have good service records (excluding those who had been dismissed or removed) and lastly, to the members of the Bar for direct appointment in these courts. Overall preference shall be given to eligible officers who are on the verge of retirement subject to their being physically fit.

(b) The recommendation for selection shall be made by a committee of at least three Judges of the High Court, constituted by the Chief Justice of the High Court concerned in this regard. The final decision in the matter shall be taken by the Full Court of the High Court.

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[272] (2002) 5 SCC 1, pr. 9

(c) Priority shall be given by the Fast Track Courts for disposal of those sessions cases which are pending for the longest period of time and/or those involving undertrials.

(d) A Public Prosecutor may be earmarked for each such Fast Track Court. Further, court staff like stenographer, orderly and peshkar/superintendent should also be earmarked for each Court.

(e) A State Level Empowered Committee headed by the Chief Secretary of the State shall monitor the setting up of earmarked number of Fast Track Courts and smooth functioning of such courts in each State, as per the guidelines already issued by the Government of India.

(f) At least one Administrative Judge shall be nominated in each High Court to monitor the disposal of cases by Fast Track Courts and to resolve the difficulties and shortcomings, if any, with the administrative support and cooperation of the State Government concerned.

(g) The High Court concerned shall periodically review the functioning of the Fast Track Courts.

Implementation of Fast Track Courts Scheme in Karnataka

A total amount of Rs. 27.02 crores was allotted for the Fast Track Courts in Karnataka to be set up during 2000-2005. After the meeting of the Law Secretaries and Registrar Generals of all the High Courts at Delhi, in different meetings convened in March and April 2001, decisions were taken regarding the places where the Fast Track Court would

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[273] *ibid*

be set up as also the number of retired judicial officers available and willing to serve as presiding officers in such Courts. The Registrar General of the High Court had sent proposal for establishing 40 Fast Track Courts for the year 2000-01. The proposal was placed before the State Level

Empowered Committee. Further, request was made by the Registrar General to immediately start 13 courts. In pursuance of this request, the Government of Karnataka, by a government order dated 29.05.2001, sanctioned the set up of 13 Fast Track Courts. Thereafter, by a notification dated 10.08.2001, the High Court of Karnataka appointed 11 presiding officers of the Fast Track Courts as Additional Sessions Judges.

From the above scheme and implementation, it is quite clear that the fast track courts is the nomenclature given to the additional courts which have been created for disposal of old sessions cases. This has certainly helped in clearing the backlog of such criminal cases which were lingering for a long time and warranted immediate disposals.

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[274] *ibid* pr. 10

8.8 RE–ENGINEERING THE GOVERNANCE: ROLE OF THE LEGAL PROFESSION

8.8.1 Nature and importance of legal profession

Legal profession is essentially a service-oriented profession.[275] The legal profession is a solemn and serious occupation. It is a noble calling and all those who belong to it should be its honourable members. Although the entry to the profession can be had by acquiring merely the qualification of technical competence, the honour as a professional has to be maintained by its members by their exemplary conduct both in and outside the court. Both as a leading member of the intelligentsia of the society and as a responsible citizen, the lawyer has to conduct himself as a model for others both in his professional and in his private and public life. The society has a right to expect of him such ideal behaviour. It must not be forgotten that the legal profession has always been held in high esteem and its members have played an enviable role in public life.[276] There has been a saying as old as the profession itself that the court and counsel are two wheels of the chariot of justice. As responsible officers of the court, as they are called – and rightly, the counsel have an overall obligation of assisting the courts in a just and proper manner in the administration of justice.[277] A lawyer in discharging his professional

Table 8.7

Total number of lawyers on the Roll:	
In the Country	7.62 lakhs
In Karnataka	42,485

[275] *State of U.P. v. U.P.State Law Officers Association*, (1994) 2 SCC 204, pr. 14
[276] *In Re: Sanjiv Datta*, (1995) 3 SCC 619, pr. 20
[277] *D.P.Chadha v. Trigugi Narain Mishra*, (2001) 2 SCC221, pr. 24

assignment has a duty to his client, a duty to his opponent, a duty to the court, a duty to the society at large and a duty to himself.[278]

The Bar Councils are enjoined with the duty to act as sentinels of professional conduct and must ensure that the dignity and purity of the profession are in no way undermined. Its job is to uphold the standards of professional conduct and etiquette. Thus every State Bar Council and the Bar Council of India has a public duty to perform, namely, to ensure the monopoly of practice granted under the Act is not misused or abused by a person who is enrolled as an advocate. Since the duty of a lawyer is to assist the court in the administration of justice, the practice of law has a public utility flavour and, therefore, he must strictly and scrupulously abide by the Code of Conduct behoving the noble profession and must not indulge in any activity which may tend to lower the image of the profession in society.[279]

8.8.2 Relationship between lawyer and client

The relationship between the lawyer and his client is one of trust and confidence. The client engages a lawyer for personal reasons and is at liberty to leave him also, for the same reasons. The lawyer is not an agent of his client but his dignified, responsible spokesman. He is essentially an adviser to his client. He demeans himself if he acts merely as a mouthpiece of his client.[280] The advocate is the agent of the party. His acts and statements, made within the limits of authority given to him, are the acts and statements of the principal i.e., the party who engaged him. So important is this relationship that the Supreme Court has held that though in certain situations, the court

[278] *ibid* pr. 22
[279] Indian Council of Legal Aid & Advice v. Bar Council of India, pr. 3

may, in the interest of justice, set aside a dismissal order or an ex parte decree notwithstanding the negligence and/or misdemeanour of the advocate where it finds that the client was an innocent litigant but there is no such absolute rule that a party can disown its advocate at any time and seek relief.[281]

8.8.3 Professional Fee

The Supreme Court of India in R.D.Saxena v. Balram Prasad Sharma[282] had the occasion of dealing with the issue of professional fees. The Court traced the history of professional fee for lawyers starting from it being an honorarium to the present day trend of remuneration. The Court observed[283] that:

> "According to the ancient traditions, the professional services rendered by the lawyers were honorary and the reward given to him was not a compensation for discharge of his legal obligations or legal assistance but in the nature of gratitude in recognition of the honorary services rendered by him. Among the Romans, it was one of the duties which the patrician as patron owned to the plebeian to give protection to the latter in his law suits. For those who rendered legal assistance, Gibbon says in his book *Decline and Fall of the Roman Empire*:
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> 'On the public days of market, or assembly, the masters of the art were seen walking in the forum ready to impart the needful advice to the meanest of their citizens from whose votes on a future occasion they might solicit a grateful return. As their years and honours increased, they seated themselves at home, on a chair or throne, to expect with patient

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[280] State of U.P. v. U.P.State Law Officers Association, (1994) 2 SCC 204, pr. 15
[281] Saiii Dutta v. T.M. and M.C. Private Ltd., (1993) 2 SCC 185, pr. 8
[282] (2000) 7 SCC 264
[283] *ibid* prs. 29 & 30

gravity the visits of their clients, who at the dawn of day, from the town and country, began to thunder at their doors.'

However, with the passage of time professional assistance ceased to be gratuitous. With the multiplicity of the proceedings, increase in litigation and complicacies of law, the legal assistance could not be in the nature of a mere social obligation and the services rendered as honorary, because a great deal of time was needed by a lawyer to equip himself with the laws, which prevented him from earning his livelihood from other sources. The ancient tradition having ceased to exist, the profession of law could have flourished only if those who pursued it were allowed remuneration for the services rendered."

The Supreme Court in the above case held that the case papers entrusted by the client to his counsel are the goods in his hand upon which he can claim a retaining lien till his fee or other charges incurred are not paid.[284]

8.8.4 Misconduct

The term 'misconduct' has not been defined in the Advocates Act, 1961. However, it is an expression with a sufficiently wide meaning. In view of the prime position which the advocates occupy in the process of administration of justice and justice delivery system, the courts justifiably expect from the lawyers a high standard of professional and

Table – 8.8

Total No. of Law Colleges

India	*Karnataka*	*Bangalore*
492	66	19

Source: Bar Council of India, Karnataka State Bar Council, 2001

[284] *ibid* pr. 41

moral obligation in the discharge of their duties. Any act or omission on the part of a lawyer which interrupts or misdirects the sacred flow of justice or which renders a professional unworthy of right to exercise the privilege of the profession would amount to misconduct attracting the wrath of disciplinary jurisdiction.[285] Misconduct is not necessarily something involving moral turpitude.[286]

Charge of professional misconduct is in the nature of a quasi-criminal charge.[287] Therefore, in such cases, the evidence adduced should be of such a character and intrinsic value which may not admit any element of a reasonable doubt about alleged misconduct or guilt. In other words, the evidence should be beyond all reasonable doubt.[288] Punishment awarded should be commensurate with the gravity of the delinquent lawyer's misconduct.[289]

Table 8.9

Number of Law Colleges in India

State	*No. of Law Colleges*
Andhra Pradesh	43
Assam	17
Bihar	17
Chandigarh	2
Delhi	7
Goa	2
Gujarat	29
Haryana	3
Himachal Pradesh	2
Jammu & Kashmir	3
Karnataka	66
Kerala	7
Madhya Pradesh	81
Maharashtra	49
Manipur	3
Meghalaya	3
Mizoram	1
Nagaland	2
Orissa	24
Pondicherry	1
Punjab	5
Rajasthan	9
Sikkim	1
Tamil Nadu	5
Tripura	1
Uttar Pradesh	42
West Bengal	9
TOTAL	**434**

Source: Bar Council of India, Karnataka State Bar Council, 2001

[285] *D.P.Chadha v. Trigugi Narain Mishra*, (2001) 2 SCC221, pr. 21
[286] *ibid* pr. 22
[287] *Pawan Kumar Sharma v. Gurdial Singh*, (1998) 7 SCC 24, pr. 7
[288] *R.D. Bhatia v. Rajinder Kaur*, (1996) 6 SCC 627, pr. 6
[289] *L.C.Goyal v. Suresh Joshi*, (1999) 3 SCC 376, pr. 14

Thus, an advocate carrying firearm (licensed revolver) while attending court,[290] or retaining a brief though not attending a particular court not due to personal inconvenience but as a permanent feature,[291] or obtaining stipends by making false statement about income,[292] or asking money from client to pay to judge as bribe,[293] or failure to pay the arrears of maintenance deposited by husband in court in favour of wife after withdrawing the same,[294] or purchase of property at throw-away price from client whose title is in doubt and selling to third party to create more legal complication,[295] or asking repeated adjournments to postpone examination of witnesses in spite of presence of all the witnesses in the court at each occasion,[296] or involvement of personal interest of an advocate in a litigation[297] have all been declared by the Supreme Court of India as instances of professional misconduct.

By a recent decision,[298] the Supreme Court debarred an advocate permanently from practicing for fraudulently misappropriating the sale proceeds of a client's house. Holding that the advocate 'has committed a grave professional misconduct', the Bench observed that the 'relationship between an advocate and his client is of trust and therefore sacred'. The importance of such a relationship has been more because today hundred per cent recruitment to the Bench is from the Bar starting from the subordinate judiciary to the higher judiciary.[299]

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[290] *U.P.Sales Tax Service Association v. Taxation Bar Association, Agra*, (1995) 5 SCC 716.
[291] *Mahabir Prasad Singh v. Jacks Aviation Pvt. Ltd.*, (1999) 1 SCC 37
[292] *N.K.Jagannivasa Rao v. N.Shivananda Rao*, (1997) 11 SCC 100
[293] *Shambhu Ram Yadav v. Hanuman Das Khatry*, (2001) 6 SCC 1
[294] *B.R.Mahalkari v. Y.B.Zurange*, (1997) 11 SCC 109
[295] *P.D.Gupta v. Ram Murti*, (1997) 7 SCC 147
[296] *N.G.Dastane v. Shrikant S.Shivde*, (2001) 6 SCC 135
[297] *Rajendra V.Pai v. Alex Fernandes*, (2002) 4 SCC 212
[298] *Vikas Deshpande v. Bar Council of India*, decided on 29.11.2002
[299] J.Venkatesan, *SC upholds debarment of advocate*, The Hindu, Saturday, Dec. 7, 2002, p. 9

8.8.5 Disciplinary Proceedings under the Advocates Act, 1961

Legal profession is not a trade or business. It is a noble profession. Members belonging to this profession should not encourage dishonesty and corruption but have to strive to secure justice to their clients, if it is legally possible. The credibility and reputation of the profession depends upon the manner in which the members of the profession conduct themselves. There is a heavy responsibility on those on whom duty has been vested under the Advocates Act, 1961 to take disciplinary action when the credibility and reputation of the profession comes under a clout on account of acts of omission and commission by any member of the profession.[300]

The law relating to disciplinary proceedings is contained in the Advocates Act, 1961, Chapter 5, which deals with conduct of advocates[301] including disciplinary proceedings for misconduct. Briefly, the scheme[302] is as follows. Where, on receipt of a complaint or otherwise, a State Bar Council has reason to believe that any advocate on its roll has been guilty of professional or other misconduct, it shall refer the case for disposal to its Disciplinary Committee.[303] The Disciplinary Committee of a State Bar Council, after giving the advocate concerned and the Advocate-General an opportunity of being heard, may make any of the following orders, namely[304]:

(a) dismiss the complaint or, where the proceedings were initiated at the instance of the State Bar Council, direct that the proceedings be filed;

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[300] *Shambhu Ram Yadav v. Hanuman Das Khatry*, (2001) 6 SCC 1, pr. 1
[301] Sections 35 to 44, Advocates Act, 1961
[302] As explained by the Law Commission of India, 75th Report on Disciplinary Jurisdiction under the Advocates Act, 1961, pg. 1, pr. 3
[303] Section 33(1), Advocates Act, 1961
[304] *ibid*, Section 35(3)(a) to (d)

(b) reprimand the advocate;

(c) suspend the advocate from practice for such period as it may deem fit;

(d) remove the name of the advocate from the State roll of advocates.

The Commission was dealing with the issue as to whether the control over disciplinary proceedings, which before the Advocates Act, 1961 was in the hands of the High Court and after the enactment, was shifted to the Bar Council of India, should be reverted back to the High Court. Tracing the history of the enactment, it concluded that the trend of legislation in India has been gradually towards greater autonomy in the field of disciplinary proceedings against the member of the profession and thus, *prima facie*, it would be a retrograde step if this trend is reversed and disciplinary jurisdiction is sought to be restored to the High Courts.[305]

To press Section 35 of the Advocates Act, 1961 into service, the Supreme Court[306] has held that the following two requirements of misconduct have to be alleged and proved before any disciplinary proceedings can result in punishment of the delinquent advocate:

(1) The advocate concerned must be alleged to be guilty of professional or other misconduct.

(2) Such misconduct must have been committed by him while he was a practicing advocate enrolled as such on the roll of the State Bar Council concerned.

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[305] Law Commission of India, 75th Report on Disciplinary Jurisdiction under the Advocates Act, 1961, pg. 4, pr. 12

[306] Baldev Singh Dhingra v. Madan Lal Gupta, (1999) 2 SCC 745, pr. 10

8.8.6 Boycotting of Courts

Judicial function cannot and should not be permitted to be stonewalled by browbeating or bullying methodology, whether it is by litigants or by counsel. Judicial process must run its even course unbridled by any boycott call of the Bar, or tactics of filibuster adopted by any member thereof. High Courts are duty bound to insulate judicial functionaries within their territory from being demoralized due to such onslaughts by giving full protection to them to discharge their duties without fear.[307] The Supreme Court has held that no advocate or a group of them can boycott the courts or any particular court and ask the court to desist from discharging judicial functions. At any rate, no advocate can ask the court to avoid a case on the ground that he does not want to appear in that court.[308]

8.8.7 Right to Strike – destructive and obstructive

The question of right of the lawyer to strike has been a long drawn one in India. The balance to be maintained is between the rights of a lawyer vis-à-vis its duty toward the litigants in specific and the society in general and whether, being a professional, he goes on strike. The Courts in India have been always discouraging this trend.

In U.P.Sales Tax Service Association v. Taxation Bar Association[309], the local Bar, while accusing one of the judicial officers of 'demanding illegal gratification in the discharge of his duties as appellate authority' and asked for his removal, went on indefinite strike. When the matter came before the Supreme Court, the Court found, on a perusal of the confidential records, that the officer in question was competent and honest. Coming down

[307] Mahabir Prasad Singh v. Jacks Aviation Pvt. Ltd., (1999) 1 SCC 37, pr. 2
[308] *ibid* pr. 18
[309] (1995) 5 SCC 716

heavily on the members of the local Bar, the Supreme Court observed[310] that in the recent past, the advocates strike work and boycott the courts at the slightest provocation overlooking the harm caused to the judicial system in general and the litigant public in particular and to themselves in the estimation of the general public.

When the advocate engaged by a party is on strike there is no obligation on the part of the court either to wait or to adjourn the case on that account.[311] Time and again the Supreme Court of India has said that an advocate has no right to stall the court proceedings on the ground that advocates have decided to strike or to boycott the courts or even boycott any particular court.[312] Generally strikes are antithesis of progress, prosperity and development. Strikes by the professionals including the advocates cannot be equated with strikes undertaken by the industrial workers in accordance with the statutory provisions.[313] With the strike by the lawyers, the process of court intended to secure justice is obstructed which is unwarranted under the provisions of the Advocates Act. Law is not trade and briefs of the litigants are not merchandise. By striking work, the lawyers fail in their contractual and professional duty to conduct the cases for which they are engaged and paid.[314] Recently, in *Harish Uppal v. Union of India*,[315] a five-judge constitution bench of the Apex Court held that lawyers have no right to strike or give a call for boycott, not even on a token strike. Taking a serious note of the situation, it warned that if self-restraint is not exercised, then the courts can think of framing rules debarring striking lawyers from appearing for cases. Soli Sorabjee, the Attorney General

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[310] *ibid* pr. 15
[311] Mahabir Prasad Singh v. Jacks Aviation Pvt. Ltd., (1999) 1 SCC 37, pr. 16 : Koluttumottil Razak v. State of Kerala, (2000) 4 SCC 465, pr. 1
[312] *Ramon Services Pvt. Ltd. v. Subhash Kapoor*, (2001) 1 SCC 118, pr. 5
[313] *ibid* pr. 22
[314] *ibid* prs. 23, 25

of India, is of the view[316] that lawyers, though are officers of the Court and have to assist in the administration of justice and cannot be equated with another section of the society, might abstain from work for 'temporary duration' in 'rarest of rare cases'.[317]

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[315] Decided on 17.12.2002

[316] *Panel to keep tabs in judges' conduct in* Times of India, Dec. 31, 2002, Tuesday, p. 6

[317] *ibid*, examples of 'rarest of rare cases' given by Soli Sorabjee: situation where there is a legislation curtailing the independence of the judiciary or abolition of the Bar Council of supercession of Judges or things of that nature. In such instances, lawyers might abstain from work for a day as protest. But lawyers must not resort to indefinite strike paralyzing the system because it would be the litigant public who would be the sufferers.