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on

“Role of Courts in upholding Rule of Law”

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RULE OF LAW & ACCESS TO JUSTICE

By

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“Be you ever so high, the law is above you.”

- Lord Denning

1 - Introduction

I deem it a matter of pride, pleasure and privilege to be present before this august gathering that have assembled here in this purposeful event and I extend my sincere appreciation to the National Judicial Academy and High Court of Madras for organising the Conference on the “*Role of Courts in Upholding Rule of Law.*” The issues of rule of law and access to justice are very essential ingredients of the justice delivery system and go hand in glove in ensuring its aura reaches the contours of the entire population of a country. The role of the three organs, i.e. the Legislature, Executive and Judiciary are significant in ensuring that the same is upheld and proper mechanisms are implemented for easier and efficient access to justice. The Judiciary in particular, as the Guardian of the Constitution and the people, play an important role in overseeing the same. Hence, through this lecture, I will be explaining the significance of the concept of rule of law, with specific reference to the judiciary and its positive influence in the rendering of justice, along with the concept of access of justice with suggestions in improving its reach.

2 - Concept of Rule of law

As propounded by Massey in his book on ‘*Administrative Law*’, Rule of Law is a dynamic concept and, like many other such concepts, is not capable of any exact definition. However, it does not mean that there is no agreement on the basic values which it represents. Rule of Law collates the rules which are based on the principles of freedom, equality, non-discrimination, fraternity, accountability and non-arbitrariness and is certain, regular and predictable. “*The concept shares the common English inheritance*

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and apart from the statement of generalities, it embraces a body of specific detail.”² It is this detail that furnishes the foundation for a pragmatic system of governance. The editors of Prof. de-Smith explain its content: “that laws as enacted by Parliament be faithfully executed by officials; that orders of courts should be obeyed; that individuals wishing to enforce the law should have reasonable access to the courts; that no person should be condemned unheard, and that power should not be arbitrarily exercised.”³ As Wade⁴ says that the rule of law requires the government should be subject to law, rather than the law subject to the government.

In fact, it could be regarded as a modern name of Natural Law. Jurisprudentially, Romans called it '*Jus Naturale*', mediaevalists called it the '*Law of God*', Hobbes, Locke and Rousseau called it '*Social Contract*' or '*Natural Law*' and the modern jurists call it '*Rule of Law*'. The idea has been developed from the French phrase '*la principe de legalite*', i.e. a Government based on the principles of law and not of men. However, it was Edward Coke who is theoretically the originator when he said that the King must be under God and Law and thus vindicated the supremacy of law over the pretensions of the executives. In India too, the concept of Rule of Law can be traced to Upanishads where it provides that Law is Kings of Kings. Indeed, from the legendary days of Adam and of Kautilya's Arthashastra -- the rule of law has had this stamp of natural justice, which makes it social justice.⁵ Even Plato believed that if ordinary men were allowed to rule by will alone, the interests of the community would be sacrificed to those of the ruler.

In a monarchy, the concept of law was developed to control the exercise of arbitrary powers of the monarchs who claimed divine powers to rule. A.V. Dicey also propounded that wherever there is discretion, there is room for arbitrariness. However, in a democratic set up like India, the concept has assumed a different dimension and amidst all the din and clamour of democracy, justice has been greatly influenced by Rule of Law as a transcendental and paramount value, overseeing the exercise of all powers.

3 - Rule of Law vis a vis Constitution

In Indian Constitution, Rule of Law has been adopted under the Preamble where the ideals of justice, liberty and equality are enshrined. The Constitution has been made the supreme law of the country and other laws are required to be in conformity with the Constitution. Nonetheless, the courts have the onus to declare any law invalid, which is found in violation of any provision of the Constitution.

Part III of the Constitution of India guarantees the Fundamental Rights. Article 13(1) of the Constitution makes it clear that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions of Part III dealing with the Fundamental Rights, shall, to the extent of such inconsistency, be void. Article 13(2) provides that the State should not make any law, which takes away or abridges the fundamental rights and any law made in contravention of this clause shall, to the extent of the contravention, be void. The Constitution guarantees equality before law and equal protection of laws. Article 21 guarantees right to

² Justice J.S. Verma, *50 Years of Freedom under Rule of Law: Indian Experience*, Ed. Soli J. Sorabjee, Law & Justice: An Anthology, Pg. 325, Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2003

³ De Smith, et al: *Judicial Review of Administrative Action*, 5th Ed., pg. 14, 1995

⁴ Wade & Forsyth, *Administrative Law* (2005) at pp. 20-25, 343- 344.

⁵ Mohinder Singh Gill v. Chief Election Commissioner (1978) 1 SCC 405

life and personal liberty. It provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law.

Article 19 guarantees six Fundamental Freedoms to the citizens of India -- freedom of speech and expression, freedom of assembly, freedom to form associations or unions, freedom to live in any part of the territory of India and freedom of profession, occupation, trade or business. The right to these freedoms is not absolute, but subject to the reasonable restrictions which may be imposed by the State.

Article 20(1) provides that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence not be subject to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. According to Article 20(2), no person shall be prosecuted and punished for the same offence more than once. Article 20(3) makes it clear that no person accused of the offence shall be compelled to be witness against himself. In India, the Constitution is supreme and the three organs of the Government viz. Legislature, Executive and Judiciary are subordinate to it. It provides though for encroachment of one organ (eg-Legislature) upon other (eg-Judiciary) if its action is malafide, and the citizen (individual) can challenge under [Article](#) 32 of the constitution if the action of the executive or legislature violates the fundamental rights of citizens before the judiciary.

In India, the meaning of rule of law has been much expanded and applied differently in different cases by the judiciary. It is regarded as a basic structure of the constitution and therefore, it cannot be abrogated or destroyed even by parliament.⁶ The principle of natural justice is also considered as the basic corollary of rule of law. The Supreme Court of India has held that in order to satisfy a challenge under [Article](#) 14, the impugned State act (enactment in the form of law passed by parliament) must not only be non-discriminatory, but also be immune from arbitrariness⁷, unreasonableness or unfairness (substantively or procedurally)⁸ and also consonant with public interest.⁹ In *A.D.M Jabalpur v Shivakant Shukla*,¹⁰ the question before the apex court was, whether there was any rule of law in India apart from [Article](#) 21 of the Indian [Constitution](#). The court by majority held that there is no rule of law other than the constitutional rule of law. However, Justice Khanna did not agree with the above view. He rightly said, “*Even in the absence of [Article](#) 21 of the constitution, the State has no power to deprive a person of his life or liberty without the authority of law.*”

Similarly the Supreme Court while explaining the rule of law in *K.T. Plantation Pvt. Ltd. v. State of Karnataka*,¹¹ held as follows;

“The rule of law as a principle contains no explicit substantive component like eminent domain but has many shades and colours. Violation of principle of natural justice may undermine the rule of law resulting in arbitrariness, unreasonableness, etc. but such

6 *Indira Gandhi v Raj Narain*, AIR 1975 SC 2299 (2369-71),

7 *Nakara v Union of India*, (1983) UJSC 217 (Paras. 13, 14)

8 *Maneka Gandhi v Union of India*, AIR 1978 SC 597

9 *Kasturi v State of Jammu & Kashmir*, AIR 1980 SC 1992 (2000)

10 (1976) 2 SCC 521, AIR 1976 SC 1207

11 (2011) 9 SCC 1

violations may not undermine the rule of law so as to invalidate a statute. Violation must be of such a serious nature which undermines the very basic structure of the constitution and the democratic principles of India. But once the court finds, a statute undermines the rule of law which has the status of a constitutional principle like the basic structure, the said grounds are also available and not vice versa. Any law which in the opinion of the court is not just, fair and reasonable is not a ground to strike down a statute because such an approach would always be subjective not the will of the people because there is always a presumption of constitutionality for a statute.

The rule of law as a principle is not an absolute means of achieving equity, human rights, justice, freedom and even democracy and it all depends upon the nature of the legislation and the seriousness of the violation. The rule of the law as an overarching principle can be applied by the constitutional courts, in the rarest of rare cases and the courts can undo laws, which are tyrannical, violate the basic structure of the constitution and norms of law and justice.”

4 - Role of Courts vis a vis Rule of Law

"A judge should value independence above gold, not for his or her own benefit, but because it is of the essence of the rule of law."

- Lord Chief Justice Phillips

Dr. Barrack in his book ‘*The Judge in a Democracy*’ has very eloquently described the role and function of a judge:

“As a judge, I do not have a political platform. I am not a political person. Right and left, religious and secular, rich and poor, man and woman, disabled and nondisabled, all are equal in my eyes. All are human beings, created in the image of the Creator. I will protect the human dignity of each. I do not aspire to power. I do not seek to rule. I am aware of the chains that bind me as a judge and as the president of the Supreme Court. I have repeatedly emphasized the rule of law and not of the judge. I am aware of the importance of the other branches of government – legislative and executive – which give expression to democracy. Between those two branches are connecting bridges and checks and balances. I view my office as a mission. Judging is not a job. It is a way of life. Whenever I enter the courtroom, I do so with the deep sense that, as I sit at trial, I stand on trial.”

Indian Courts are bestowed upon with the duty to protect, deliberate and acknowledge the individual rights of the people with the continuing effort of upholding the constitutional beliefs of a democratic country. The initial dogmatic view regarding its role was only to resolve private disputes, predominantly of civil nature. The judges were also required to determine the question of guilt of persons charged with offences and also the degree of punishment that could implement the proper deterrent in the society. However, an indispensable function of the courts, which has now put a test, more particularly since the twentieth century, is its role as the arbiter of disputes between the State and the citizen. Government of a modern State in order to bring about socio-economic changes and reforms would require discretionary power. Such possession of vast powers which operates through a human organization is inevitably threatened with the peril of abuse of power. Our Constitution-makers foreseeing such a danger, have consequently introduced an independent authority to ensure the protection of the individual rights, which are granted in the first place to balance against this government’s discretionary power.

Further, the authority is also responsible to see that the powers are not abused and that those armed with such powers exercise them in accordance with the laws enacted for the required purpose. According to the scheme of our Constitution, such command is exercised by the courts. The purpose of the courts as arbiter of disputes between the State and the citizen highlights the importance of the independence of the courts as an extremely powerful constitutional body, which carries a heavy onus to provide proper checks and balances in the system of governance.

Now, this role requires every judge to understand its basic function which is to interpret the law according to the given facts of the case. In exercising the power of judicial review, there is a theoretical prohibition on courts that it must not replace its ideas against the wisdom behind the legislation. The policy matters fall under the domain of legislature's functions. Nonetheless, the responsibility of the courts is to adjudicate on the validity of the legislations and whether they are in consonance with or in violation of the provisions of the Constitution. Once the courts have done that, their duty ends.

As held in *Narmada Bachao Andolan v. Union of India and Ors.*¹² that:

"It is now well settled that the Courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy-making process and the Courts are ill-equipped to adjudicate on a policy decision so undertaken. The Court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution..."

The courts represent that part of the constitutional wing, which is not democratically chosen. Hence, the Constitution puts an embargo on them to dilute the responsibility of the elected representatives of the people. However, if any judge is faced with such a confrontation with legislature or a government policy, where it is bound by such a restriction, according to me he may use the powerful instrument of judicial interpretation to uphold the constitutional principles no matter how explicitly a legislation or rule has been formulated.

It is imperative for a judge to remember that there is a thin line of difference between judicial interpretation and judicial legislation. The former is permitted but the latter is not. As *Salmond on Jurisprudence*¹³ has said that:

"... it is no part of the judge's function to create rules of law: his only task is to apply already established rules."

A judge therefore according to me, needs to be careful as they cannot allow any political ideology or economic theory, which has caught their fancy, to taint their decision. Their primary duty is to uphold without fear or favour, the laws which are formulated in consonance with the constitutional principles. Once any law goes against the enshrined principles of constitution, they can very well strike it down as unconstitutional. As held by the Supreme Court in *Smt. Ujjam Bai vs. State of Uttar Pradesh*¹⁴ while striking down a provision declared that:

12(2000) 10 SSC 664

13 *Salmond on Jurisprudence (12th Ed.)* Pg. 183

14 AIR1962SC1621. Also refer *Ajay Hasia, (1981) 1 SCC 722*

“if the law is invalid... the petitioner's fundamental right can be enforced. It is said that if a valid law confers jurisdiction on the officer to decide rightly or wrongly, the petitioner has no fundamental right. What is the basis for this principle? None is discernible in the provisions of the Constitution.”

But unfortunately today, as a matter of political expediency, governments tend to knowingly violate the rule of law and the constitution and pass on the buck to the courts to strike down the unconstitutional provisions. It would then become easy for the government in these situations to blame the courts for striking down the unconstitutional provisions, which is not a good trend.¹⁵

Interpretative tool of a judge can make a law serve social purpose. As far as their function in terms of interpretation goes, quoting Justice H.R. Khanna,

“the judges of the higher courts are concerned, their office demands that they be historian and prophet rolled into one, for law is not only as the past has shaped it in judgments already rendered but as the future ought to shape it in cases yet to come.”

However, one constant guide in formulation of these laws remains and that is Rule of Law. India currently has a written constitution, a host of laws, subordinate to the constitution, dealing with assorted subjects, rules and regulations, executive instructions and conventions. All these elements may be generally termed as ‘law’ and their function to populace is the ‘Rule of law’. And the same element of ‘Rule of Law’ is also to be reflected in a judge’s judgment.

5 - Judicial Activism and Rule of Law

Reiterating what I have emphasised in the previous paragraphs that judicial interpretation and judicial legislation has a very thin line of difference; one could easily face confusion while discerning or interpreting the same. Judicial Activism is also alleged to have taken a form of judicial legislation. But it is through this tool, the judiciary has also taken up the responsibility to fill up the legislative vacuum in order to uphold the rule of law. The silence of the Constitution and the abeyances left to be filled by the growth of conventions within the meaning of the enacted provisions. This exercise has been performed by the Supreme Court of India in consonance with the constitutional scheme.

The progress of the Society is dependent upon proper application of law to its needs and the judiciary has to mould and shape the law to deal with such rights and obligations. Initially the court followed a policy of adhering to a narrow principle and tended to shy away from progress of the law. However, the mere existence of a particular piece of beneficial legislation cannot solve the problems of the society at large unless the judges interpret and apply the law to ensure its benefit to the benefactors.

Responding to the changing times and aspirations of the people, the judiciary, with a view to see that the fundamental rights embodied in the Constitution of India have a meaning for the down-trodden and the under-privileged classes, pronounced in ***Madhav Haskot’s case***¹⁶ that providing free legal service to the poor and needy was an essential element of

¹⁵ *Indra Sawhney v. Union of India, (2000) 1 SCC 168*

¹⁶ *AIR 1978 SC 1548*

the ‘reasonable, fair and just procedure’. Again, in *Hussainara Khatoon’s case*¹⁷ while considering the plight of the undertrials in jail, speedy trial was held to be an integral and essential part of the right to life and liberty contained in Article 21 of the Constitution. In *Nandini Satpathy v. D.L. Dani*¹⁸, the Supreme Court held that an accused has the right to consult a lawyer during interrogation and that the right not to make self-incriminatory statements should be widely interpreted to cover the pre-trial stage also. Again, in *Sheela Barse v. State of Maharashtra*¹⁹, the Supreme Court laid down certain safeguards for arrested persons. In *Bandhua Mukti Morcha’s case*²⁰, the Supreme Court held that right to life guaranteed by Article 21 included the right to live with human dignity, free from exploitation. The courts have, thus, been making judicial intervention in cases concerning violation of Human Rights as an ongoing judicial process. Decisions on such matters as the right to protection against solitary confinement as in *Sunil Batra v. Delhi Administration*²¹, the right not to be held in fetters as in *Charles Sobhraj v. Superintendent, Central Jail*²², the right against handcuffing as in *T.V. Vantheeswaran v. State of Tamil Nadu*²³, the right against custodial violence as in *Nilabati Behera v. State of Orissa*²⁴, or the rights of the arrestee as in *D.K. Basu v. State of West Bengal*²⁵, the right of the female employees against sexual harassment at the place of work as in the case of *Vishakha v. State of Rajasthan*²⁶, and *Apparel Export Promotion Council v. A.K. Chopra*²⁷ are just a few pointers in that directions and can be referred to by the members themselves.

When there was no existence of any compensatory jurisprudence, it was the Supreme Court who ushered new hope by introducing right of compensation in case of ‘torture’ including mental torture inflicted by the State or its agencies. Using this weapon, many tortured victims were provided their rightful compensations in cases like: *Rudal Shah v. State of Bihar*²⁸, *Bhim Singh v. State of Jammu and Kashmir*²⁹, *Saheli v. Commissioner of Police*.³⁰

Another significant contribution of Indian courts has been the liberalisation of the rule of locus standi. A large number of people in India still fall under the category of ‘have-nots’ and are not even aware of their constitutional rights. Access to courts for them has become a reality through the means of PIL. The principle underlying Order 1 Rule 8, Code of Civil Procedure has been applied in public interest litigation to entertain class action and at the same time to check misuse of PIL. The appointment of Amicus Curiae in these matters ensures objectivity in the proceedings. Judicial creativity of this kind has enabled realisation of the promise of socio-economic justice made in the Preamble to the

17¹⁷ AIR 1979 SC 1819

18¹⁸ AIR 1978 SC 1025

19¹⁹ 1983 (2) SCC 96

20²⁰ AIR 1984 SC 802

21²¹ 1978 (4) SCC 494

22²² 1978 (4) SCC 104

23²³ 1983 (2) SCC 68

24²⁴ 1993 (2) SCC 746

25²⁵ 1997 (1) SCC 416

26²⁶ 1997 (6) SCC 241

27²⁷ JT 1999 (1) SC 1086

28²⁸ AIR 1983 SC 1086

29²⁹ 1984 (Supp) SCC 504

30³⁰ 1990 (1) SCC 422

Constitution of India. Supreme Court's combined power under Article 32 and Article 142 has enabled to grant relief appropriate in the cause for enforcement of the Fundamental Rights. The horizon of Rule of Law in India has been expanded by judicial activism. Any aberration due to arbitrariness in exercise of public power and misfeasance of public authorities results in violation of the Fundamental Rights of the people of the country. The doctrine of public trust has been introduced by judicial decisions. Preservation of ecology and environment based on the principle is that ecology and environment are incapable of ownership being nature's gift and are to be preserved in trust for the future generations. The present generation is a trustee for its preservation. The Right to equality has been emphasised in the implementation of Rule of Law by activating the investigative agencies to perform their statutory duty of investigative crime alleged to have been committed by holders of high public offices. In several instances of serious economic and other offences of corruption involving higher dignitaries the process of investigation was activated to enforce accountability irrespective of the status of the accused.³¹ Thus, accountability and probity in public life has been enforced judicially.³² Such a course became necessary because of inertia of the investigative agencies to discharge their statutory duty of investigating the crimes and prosecuting the offenders on account of the high offices held by them.³³ The procedure of '*Continuing Mandamus*' was devised by the Supreme Court to direct investigation and monitor its progress till its completion with the filing of the charge-sheet in the competent court to commence the trial according to the prescribed procedure.³⁴ The guarantee of '*equality*', a facet of Rule of Law has thereby been realised.

In this manner by judicial creativity to suit the Indian conditions has furthered the cause of justice, attempting to achieve the constitutional purpose in accordance with the constitutional scheme and thereby ensuring proper implementation of the Rule of Law.

5 - Assimilation of Rule of Law in Judicial Process

To witness the actual assimilation of Rule of law in judicial process, one has to understand the machinery through which the Rule of Law could be furthered. *First* from Dicey's viewpoint, it is the doctrine of separation of powers. In other words, Constitution is supreme and the three organs of the Government *viz.* Legislature, Executive and Judiciary are subordinate to it. The idea of separation of powers in the strict sense may not be feasible for the functioning of a modern state, however, the general object and Montesquieu's great point is that if the total power of Government is divided among autonomous organs, one will act as a check upon the other and in the check liberty can survive.

In *Delhi Laws case*³⁵, the Supreme Court noted the absence of specific provisions in the Constitutional document exclusively vesting legislative powers in the legislature and

31³¹ *2G Spectrum Case (2012) 3 SCC 1; Subramanian Swamy v. Manmohan Singh, (2012) 3 SCC 64*

32 *IR Coelho v. State of Tamil Nadu, (2007) 2 SCC 1*

33 *Manohar Lal Sharma v. Principal Secretary, 2013 (15) SCALE 305*

34³⁴ *Vineet Narain v. Union of India, AIR 1996 SC 3386*

35³⁵ *In Re: The Delhi Laws Act, 1912, the Ajmer-Merwara (Extension of Laws) Act, 1947 and the Part C States (Laws) Act, 1950, 1951 S.C.R. 747*

judicial powers in the judiciary. Did the constitution then, incorporate doctrine of separation of powers at all? The majority opinion, however, imported the ‘essence’ of the doctrine of separation of powers and the doctrine of constitutional limitation and trust implicit in the constitutional scheme. A necessary corollary of this principle, as later predicated in **Chandra Mohan v. State of Uttar Pradesh**³⁶ was the separation and independence of the judicial branch of the state.

Again, in the famous case of **Indira Gandhi v. Raj Narain**³⁷, the doctrine of separation of powers was elevated to the position of a basic feature. It was observed:

“The exercise by the legislature of what is purely and indubitably a judicial function is impossible to sustain in the context even of our co-operative federalism which contains no rigid distribution of powers but which provides a system of salutary checks and balances. It is contrary to the basic tenets of our Constitution to hold that the Amending Body is an amalgam of all powers- Legislative, executive and judicial. ‘Whatever pleases the emperor has the force of law’ is not an article of democratic faith.”

Our Constitution allows encroachment of one organ (Judiciary) upon another (Legislature) in case of mala fide action. Therefore, there has been an expansion of meaning of rule of law in this process. Rule of law is now regarded as a part of the basic structure of the Constitution hence, its abrogation or destruction is not even allowed by the Parliament. As upheld in **Kesavanda Bharti vs. State of Kerala**³⁸, ‘Rule of Law’ and ‘Democracy’ were amongst the ‘Basic Structures’ of the Indian Constitution not amenable to the amending process under article 368 of the Constitution. In **Chief Settlement Commissioner Punjab v. Om Prakash**³⁹, the Supreme Court reiterated;

“In our Constitutional system, the central and most characteristic feature is the concept of the Rule of Law which means, in the present context, the authority of the law courts to test all administrative action by the standard of legality.”

The popular habeas corpus case, **ADM Jabalpur v. Shivakant Shukla**⁴⁰ is one of the most important cases when it comes to rule of law. In this case, the question before the court was ‘whether there was any rule of law in India apart from Article 21’. This was in context of suspension of enforcement of Articles 14, 21 and 22 during the proclamation of an emergency. The majority of the bench (Ray, C.J., Beg, Chandrachud and Bhagwati, JJ.) answered the issue in the negative and observed:

“The constitution is the mandate. The constitution is the Rule of Law... There cannot be any rule of law other than the constitutional rule of law. There cannot be any pre Constitution or post Constitution Rule of Law which can run counter to the rule of law embodied in the Constitution, nor there any invocation to any rule of law to nullify the constitutional provisions during the times of emergency... Article 21 is our Rule of Law regarding life and liberty. No other rule of law can have separate existence as a distinct right... The rule of law is not a mere catchword or incantation. Rule of law is not a law of nature consistent and invariable at all times and in all circumstances... There cannot be a

³⁶AIR 1966 SC 1987, at 1993

³⁷AIR 1975 SC 2299

³⁸AIR 1973 SC 1461

³⁹AIR 1969 SC 33 at 36

⁴⁰AIR 1976 SC 1207

brooding and omnipotent rule of law drowning in its effervescence the emergency provisions of the Constitution.”

Justice H.R. Khanna, however, did not agree with the majority view. In a powerful dissent, His Lordship observed:

“Rule of law is the antithesis of arbitrariness. [It is accepted] in all civilised societies. [It] has come to be regarded as the mark of a free society. It seeks to maintain a balance between the opposite notions of individual liberty and public order. The principle that no one shall be deprived of the life and liberty without the authority of law was not the gift of the Constitution. It was necessary corollary of the concept relating to the sanctity of life and liberty, it existed and was in force before the coming into force of the constitution. Even in the absence of Article 21 in the Constitution, the State has got no power to deprive a person of his life or liberty without the authority of law. This is the essential postulate and basic assumption of the Rule of Law and not of men in all civilised nations.”

The *secondary meaning* of rule of law is that the government should be conducted within a framework of recognized rules and principles which restrict discretionary powers. The Supreme Court observed in **Som Raj v. State of Haryana**⁴¹ that the absence of arbitrary power is the primary postulate of Rule of Law upon which the whole constitutional edifice is dependant.

The *third meaning* of rule of law highlights the independence of the judiciary and the supremacy of courts. It is rightly reiterated by the Supreme Court in **Union of India v. Raghbir Singh**⁴² that it is not a matter of doubt that a considerable degree that governs the lives of the people and regulates the State functions flows from the decision of the superior courts.

In the case of **Sukhdev v. Bhagatram**⁴³ Mathew J. declared that whatever be the concept of the rule of law, whether it be the meaning given by Dicey in his ‘*The Law of the Constitution*’ or the definition given by Hayek in his ‘*Road to Serfdom*’ and ‘*Constitution of liberty*’ or the exposition set-forth by Harry Jones in his ‘*The Rule of Law and the Welfare State*’, there is, as pointed out by Mathew, J., in his article on ‘*The Welfare State, Rule of Law and Natural Justice*’ in ‘*Democracy, Equality and Freedom*,’ ‘*substantial agreement is in juristic thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary exercise of power, wherever it is found.*’ It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affection of some right or denial of some privilege.

41⁴¹AIR 1990 SC 1176

42⁴²AIR 1989 SC 1933

43⁴³AIR 1975 SC 1331

Simultaneously in *Amlan Jyoti Borooah vs. State of Assam and Ors.*⁴⁴, the judiciary itself has introduced certain restrictions while maintaining a balance between upholding Rule of Law and being mere benevolent. It held:

“Equity must not be equated with compassion. Equitable principles must emanate from facts which by themselves are unusual and peculiar. A balance has to be struck and the Court must be cautious to ensure that its endeavour to do equity does not amount to judicial benevolence or acquiescence of established violation of fundamental rights and the principles of Rule of law.”

As explained in Lord Mansfield in *Tinglay v. Dolby*⁴⁵,

“An appeal to a judge's discretion is an appeal to his judicial conscience. The discretion must be exercised, not in opposition to, but in accordance with, established principles of law.”

In the case of *Bachan Singh v. State of Punjab*⁴⁶, Justice Bhagwati has emphasized that rule of law excludes arbitrariness and unreasonableness. To ensure this, he has suggested that it is necessary to have a democratic legislature to make laws, but its power should not be unfettered, and that there should be an independent judiciary to protect the citizens against the excesses of executive and legislative power. In addition to this in *P. Sambamurthy v. State of Andhra Pradesh*⁴⁷ the Supreme Court has declared a provision authorizing the executive to interfere with tribunal justice as unconstitutional characterizing it as ‘*violative of the rule of law which is clearly a basic and essential feature of the constitution.*’

Yet another case is of *Yusuf Khan v. Manohar Joshi*⁴⁸ in which the Apex Court laid down the proposition that it is the duty of the state to preserve and protect the law and the constitution and that it cannot permit any violent act which may negate the rule of law.

Hence, it could rightfully be said that judiciary in this country has been the most vigilant defender of democracy, democratic values and constitutionalism. Because of courts, the faith of the common man in the Rule of Law has been reinforced.

6 - Access to Justice – An Overview

Having dealt extensively with the contours of the Rule of law and explained its principles and application in detail, especially with respect to the judiciary, I shall now venture and discuss another significant concept which should be read along conjunctively with the rule of law.

‘*Access to Justice*’ in its general term, means the individual’s access to court or a guarantee of legal representation. It has many fundamental elements such as identification and recognition of grievance, awareness and legal advice or assistance, accessibility to court or claim for relief, adjudication of grievance, enforcement of relief, of course this may be the ultimate goal of a litigant public.

44⁴⁴(2009) 3 SCC 227

45 14 N.W. 146

46⁴⁶ (1982) 3 SCC 24

47⁴⁷AIR 1997 SC 947

48⁴⁸AIR 2000 SC 1121

The concept of 'Access to Justice' has two significant components. *First* is a strong and effective legal system with rights, enumerated and supported by substantive legislations. The *second* is a useful and accessible judicial/ remedial system easily available to the litigant public. The Constitution of India is the living document of this Country and the basic law of this Nation. As disclosed in its preamble, it stands for securing justice to all the Citizens. In Article 39A, the Constitution retains its aspiration to secure and promote access to justice, in following terms;

“ The State shall secure that the operations of the legal system promote justice, on the basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities ”.

Access to justice is recognized as a prominent and fundamental right, in several international documents. In India, the National Commission to Review the Working of Constitution (NCRWC), constituted in the 50th year of Independence, in its final report suggested for incorporation of this right as fundamental rights by incorporating Art.30 A, in the Constitution, in the following terms;

“30 A. Access to Courts and Tribunals and Speedy justice.- (1) Everyone has a right to have any dispute that can be resolved by the application of law decided in fair public hearing before an independent court, or where appropriate, another independent and impartial tribunal or forum.

(2). The right to access to courts shall deemed to include the right to reasonably speedy and effective justice in all matters before the courts, tribunal or other for and state shall take all reasonable steps to achieve the said objectives. ”

The identification and recognition of one's grievance has a direct co-relation to his right. This bundle of rights includes natural rights or basic and human rights, fundamental rights, other constitutional rights and statutory rights. Identification and protection of these rights, especially that of the poor and disadvantaged people must be the chief concern, while formulating the principles of access to justice.

Apart from the Universal Declaration of Human Rights, the Constitution of India, guarantees, fundamental rights in its Part III, from Articles 14 to 32. This includes, right to equality, freedoms, right to life, religious rights, minority rights and finally the special right, which guarantees constitutional remedies in cases of infringement of fundamental rights. Though these rights are not absolute, they are protected under Article 13 of the Constitution, which expressly prohibits enacting of any law inconsistent with or in derogation with the fundamental rights. Additionally, any action abridging the fundamental rights are subject to inherent or implied limitation, as per the Doctrine of Basic Structure or Basic Features.

There are other sets of rights guaranteed as per the express provisions in the Statutes. Right of representation in elected bodies, right to maintenance, right to minimum wages, right to social security, right to vote are some of such rights. In India, there are number of statutes dealing with these special kinds of rights, such as Representation of Peoples Act, Minimum Wages Act, Provisions for Maintenance under Section 125 of the Code of Criminal Procedure, Social securities under Workmen's Compensation Act, Industrial

Disputes Act, Employee's Provident Fund and Miscellaneous Provisions Act, Payment of Bonus Act, Payment of Gratuity Act, Employees State Insurance Act etc.

Our country is a secular and democratic republic. Rights of different religious peoples and that of the minorities, linguistic or cultural, are protected under the Constitution itself. Apart from this, the rights under the personal laws and customary rights are protected subject to the provisions of fundamental rights guaranteed in Part III of the Constitution of India. Such rights include the right of inheritance and succession, right to marry, right of performing religious rituals etc.

The concept of access to justice, primarily, necessitates a potential system securing appropriate legal remedies within the Civil and Criminal justice fields. Judiciary, being an integral part and parcel of an effective judicial system, has a greater role in ensuring access to justice. As per V.R. Krishna Iyer, the prominent jurist of our Country and the former Judge of the Supreme Court of India, access to justice, which is fundamental in implementation of every human right, makes the judicial role pivotal to constitutional functionalism.⁴⁹

6.1 - Access to Justice vis a vis Constitution

India became free from British rule after a long battle for independence, and finally we attained our long-awaited desire for self-rule. Our founding fathers drafted for us the basic rule of governance for the country in the form of the constitution. The major task of constitution assembly was to provide us a vehicle of national progress, which reflects best from past experience, catering the need of present and also at the same time having enough resilience to cope up with the demand of the future.

The Framers of the constitution while keeping in mind the bitter experience of the past made ample provisions for achieving social, economic and political justice to all the sections of society, and for the same reason devoted chapters on fundamental right and directive principle in the constitution. Social justice was the major plank for Dr. B.R. Ambedkar, and even while introducing the draft of Constitution in the Constituent Assembly, he pointed out that with this Constitution we are entering the era of '*one man one vote*', i.e. political democracy, but the social democracy seems to be still a goal not very easy to achieve.

The Preamble aims at securing to all citizens Justice: social, economic and political. Though it is not easy to give a precise meaning of the term justice, by and large, it can be stated that the idea of justice is equated with equity and fairness. Social justice, therefore, according to me would mean that all sections of society, irrespective of caste, creed, sex, place of birth, religion or language, would be treated equally and no one would be discriminated on any of these grounds. Similarly, economic justice would mean that all the natural resources of the country would be equally available to all the citizens and no one would suffer from any undeserved want. Similarly, Political justice entitles all the citizens equal political rights such as right to vote, right to contest elections and right to hold public office etc.

Fundamental rights mentioned in the third chapter include in its content, certain basic rights which every individual enjoys being a part of free nation; it tries to ensure that

⁴⁹ Justice V.R. Krishna Iyer, *Legally Speaking*, Universal Law Publishing Co. Delhi, (2003) at p 171

minimum standards that are required for survival with dignity and respect are not taken away. Directive Principles of State Policy were formulated to lay down directives for the state. Dr. B. R. Ambedkar very eloquently stated;

“Because we did not want merely a parliamentary form of Government to be instituted through the various mechanisms provided in the Constitution, without any direction as to what our economic ideal, as to what our social order ought to be, we deliberately included the Directive Principles in our Constitution. The word 'strive' which occurs in the Draft Constitution, in judgment, is very important. We have used it because our intention is even when there are circumstances which prevent the Government, or which stand in the way of the Government giving effect to these Directive Principles, they shall, even under hard and unpropitious circumstances, always strive in the fulfillment of these Directives. That is why we have used the word 'strive'. Otherwise, it would be open for any Government to say that the circumstances are so bad, that the finances are so inadequate that we cannot even make an effort in the direction in which the Constitution asks us to go.”

The judicially enforceable ‘*Fundamental Rights*’ provisions of the Indian Constitution are set forth in part III in order to distinguish them from the non-justifiable ‘*Directive Principles*’ set forth in part IV, which establish the inspirational goals of economic justice and social transformation. It means that the Constitution does not provide any judicial remedy when directive principles are not followed; but in the words of Dr. Ambedkar

“State may not have to answer for their breach in a Court of Law. But will certainly have to answer for them before the electorate at election time.”

One of our directive principle also talks about free legal aid. It says that the state shall secure the operation of the legal system and promote justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Such provisions became part of our constitution keeping in view the immense poverty in the country, where significant portion of the population find it difficult to arrange for their basic needs, such as food and clothing. In such situations, how could the people think of indulging in costly and time taking litigation when their rights are violated?

Therefore, the Constitution provided for safeguards when the provisions of fundamental right are violated by the state in the form of right to constitutional remedy to move directly to the Supreme Court or High Courts under Article 32 and Article 226 respectively. This is the most unique feature of the Indian Constitution. Article 32 states that:

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part [Part-III] is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

In the Constituent Assembly Debates, Dr. B.R. Ambedkar once said; “*if I am asked which is the most important provision of the Indian Constitution, without which the Constitution would not survive I would point to none other than article 32 which is the soul of the Indian Constitution.*” In addition to this, Constitution includes Article 226 which gives the claimant the opportunity to file a writ in the high court, when there is a violation of a fundamental right or a right guaranteed by a statute. Similarly Article 136 is also a very significant provision in the Constitution. Hence, in our constitutional scheme, the High Court and Supreme Court have been depicted as the guardian of fundamental rights and have been bestowed with the power to make void any law passed by state and union legislature, which is violative of any fundamental right, as enshrined under Article 13 of the constitution and thereby deliver justice.

6.1.1 - Public Interest Litigation

One of the recent modes of getting access to justice is by way of filing a Public Interest Litigation. The term ‘*Public Interest*’ means the larger interests of the public, general welfare and interest of the masses⁵⁰ and the word ‘*Litigation*’ means ‘*a legal action including all proceedings therein, initiated in a court of law with the purpose of enforcing a right or seeking a remedy.*’ Thus, the expression ‘*Public Interest Litigation*’ means ‘*any litigation conducted for the benefit of public or for removal of some public grievance.*’ Now, the court permits public interest litigation at the instance of the so-called ‘*Public-Spirited Citizens*’⁵¹ for the enforcement of Constitutional and Legal rights. Now, any public spirited citizen can move/approach the court for the public cause (in the interests of the public or public welfare) by filing a petition:

1. In the Supreme Court under Article 32 of the Constitution of India;
2. In the High Court under Article 226 of the Constitution of India;
3. In the Court of Magistrate under Section 133 of the Code of Criminal procedure, 1973

The seeds of the concept of public interest litigation were initially sown in India by Krishna Iyer J., in 1976 in ***Mumbai Kamgar Sabha vs. Abdul Thai***⁵² and was initiated in ***Hussainara Khatoon v. State of Bihar***,⁵³ wherein the PIL was filed by an advocate on the basis of a news item published in the Indian Express, highlighting the plight of thousands of undertrial prisoners languishing in various jails in Bihar. These proceedings led to the release of more than 40, 000 undertrial prisoners. Right to speedy justice emerged as a basic fundamental right, which had been denied to these prisoners. The same set pattern was adopted in subsequent cases.

Krishna Iyer J., enunciated the reasons for liberalization of the rule of Locus Standi in ***Fertilizer Corporation Kamgar Union v. Union of India***.⁵⁴ The following were the reasons;

50 (Oxford English Dictionary 2nd Edn.) Vol.XII

51 They are people of this country who do not have direct interest at stake in the PIL filed before a Court but work Pro Bono Publico, i.e. in the larger interests of the public and for their general welfare in good faith. Noted public-spirited citizens in India who have represented mass interests before the Supreme Court and other High Courts are M.C. Mehta and Subhas Dutta

52 AIR 1976 SC 1455

53 AIR 1979 SC 1360

54 AIR 1981 SC 344

1. Exercise of State power to eradicate corruption may result in unrelated interference with individuals' rights;
2. Social justice warrants liberal judicial review of administrative action;
3. Restrictive rules of standing are antithesis to a healthy system of administrative action;
4. Activism is essential for participative public justice.

In 1981 Justice P. N. Bhagwati in ***S. P. Gupta v. Union of India***,⁵⁵ articulated the concept of PIL as follows;

“Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons by reasons of poverty, helplessness or disability or socially or economically disadvantaged position unable to approach the court for relief, any member of public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case any breach of fundamental rights of such persons or determinate class of persons, in this court under Article 32 seeking judicial redress for the legal wrong or legal injury caused to such person or determinate class of persons.”

Further the PIL or Social Action Litigation was put on a firm foundation by Justice Bhagwati in the case of ***People's Union for the Democratic Rights v. Union of India***⁵⁶, wherein he stated;

“It would not be right or fair to expect a person acting pro bono public to incur expenditure out of his bag for going to a lawyer and preparing a regular Writ petition. In such a case a letter addressed by him can legitimately be regarded as an appropriate proceeding”

The Supreme Court has played a crucial role in formulating several principles in public interest litigation cases over diverse subjects of law. For instance, the principle of ‘*Absolute Liability*’ was propounded in the ***Oleum Gas Leak case***⁵⁷, ‘*Public Trust Doctrine*’ in ***Kamalnath Case***⁵⁸ etc., wherein MC Mehta was the main proponent of these petitions. Further, the Supreme Court gave variety of guidelines in various cases of public interest litigation. E.g. ***Ratlam Municipality Case***⁵⁹, ***Taj Trapezium Case***⁶⁰, ***Ganga Pollution Case***⁶¹ etc. on the subject of Environmental Law,

Similarly, the Supreme Court in ***Bandhua Mukti Morcha v. Union of India***, (supra) ordered for the release of bonded labourers; in ***Murli S. Dogra v. Union of India***, banned smoking in public places; in the landmark judgement of ***Delhi Domestic Working***

55 1981 (Supp) SCC 87

56 1992 S.C. Page No. 1473

57 M.C. Mehta v Union of India AIR 1987 SC 965

58 M.C. Mehta v Kamal Nath (1998) 1 SCC 388

59 AIR 1980 SC 1622

60 AIR 1997 SC 734

61 AIR 1988 SC 1037

Women's Forum v. Union of India,⁶² issued guidelines for rehabilitation and compensation for the rape on working women; in *Vishaka v. State of Rajasthan* (supra) laid down exhaustive guidelines for preventing sexual harassment of working women in place of their work and in *Minerva Mills Ltd v Union of India* the Court held that the; “harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution.”⁶³ Since then the judiciary has employed Directive Principles to derive the contents of various Fundamental Rights.⁶⁴ In *TN Godavaram Thirumulpad v. Union of India*⁶⁵, the court examined the issue that where a litigant filing the PIL lacks bonafide, then the court has to decline its examination at the behest of a person who, in fact is not a public interest litigant and whose bonafides and credentials are in doubt. Besides the abovementioned decisions In a recent judgement of the constitution bench in *Lalita Kumari v. Govt. of UP*⁶⁶, my Lord the Chief Justice of India, P. Sathasivam, while dealing with a writ petition regarding FIR and anticipatory bail held as under;

“The underpinnings of compulsory registration of FIR is not only to ensure transparency in the criminal justice delivery system by also ensure ‘judicial oversight’. Section 157(1) deploys the word ‘forthwith’. Thus any information received under Section 154(1) or otherwise has to duly informed in the form of a report to the magistrate. Thus, the commission of a cognizable offence is not only brought to the knowledge of the investigating agency but also to the subordinate judiciary...”

While registration of FIR is mandatory, arrest of the accused immediately on registration of FIR is not at all mandatory. In fact, registration of FIR and arrest of an accused person are two entirely different concepts under the law, and there are several safeguards available against arrest. Moreover, it is also pertinent to mention that an accused person also has a right to apply for ‘anticipatory bail’ under the provisions of Section 438 of the Code if the conditions mentioned therein are satisfied. Thus, in appropriate cases, he can avoid the arrest under that provision by obtaining an order from the court.”

These are but a few decisions portraying the role of the Supreme Court acting as a guardian of justice and providing relief to all those who have been deprived of the same.

Besides the abovementioned decisions, the Supreme Court has evolved certain principles with respect to Public Interest Litigation, which are summarized hereunder:

- The court in exercise of powers under Arts. 32 and 226 of the Constitution of India can entertain a petition filed by any interested person on the welfare of the people who is in a disadvantaged position and thus, not in a position to knock the doors of the court. The court is constitutionally bound to protect the fundamental rights of such disadvantaged people so as to direct the state to fulfill its constitutional promises.

62 (1995) 1 SCC 14

63 *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789, 1806.

64 Jain M.P., “The Supreme Court and Fundamental Rights” in Verma and Kusum (eds), *Fifty Years of the Supreme Court of India*, pp.65–76.

65 (2008)2SCC222

66 2013(13)SCALE559

- Issues of public importance, enforcement of fundamental rights of large number of public *vis a vis* the constitutional duties and functions of the state, if raised, the court treat a letter or a telegram as a public interest litigation upon relaxing procedural laws as also the law relating to pleadings.
- Whenever injustice is meted out to a large number of people, the court will not hesitate in stepping in. Articles 14 and 21 of the Constitution of India, as well as the International Conventions on Human Rights provide for reasonable and fair trial.
- The common rule of locus standi is relaxed so as to enable the court to look into the grievances complained on behalf of the poor, deprived, illiterate and the disabled who cannot vindicate the legal wrong or legal injury caused to them for any violation of any constitutional or legal right.
- When the court is prima facie satisfied about violation of any constitutional right of a group of people belonging to the disadvantaged category, it may not allow the state or the government from raising the question as to the maintainability of the petition.
- Although procedural laws apply on PIL cases but the question as to whether the principles of res judicata or principles analogous thereto would apply depending on the nature of the petition as also the facts and circumstances of the case.
- The dispute between two warring groups purely in the realm of private law would not be allowed to be agitated as public interest litigation.
- However, in an appropriate case, although the petitioner might have moved a court in his private interest and for redressal of the personal grievances, the court in furtherance of the public interest may treat it necessary to enquire into the state of the subject of litigation in the interest of justice.
- The court in special situations may appoint Commission, or other bodies for the purpose of investigating into the allegations and finding out the facts. It may also direct management of public institution taken over by such committee. The court will not ordinarily transgress into a policy. It shall also take utmost care not to transgress its jurisdiction while purporting to protect the rights of the people being involved.
- The court would ordinarily not step out of the known areas of judicial review. The high courts although may pass an order for doing complete justice to the parties; it does not have a power akin to Article 142 of the Constitution of India.
- Ordinarily the high court should not entertain a writ petition by way of public interest litigation questioning the constitutionality or validity of a statute or statutory rule.⁶⁷

67 *Guruvayur Devaswom Managing Committee v. CK Rajan*, AIR 2004 SC 561, para 50.

Hence, Judicial Activism of courts in determining PILs have been very vibrant over the years and have played a significant role in providing access to justice, while also upholding the rule of law.

6.2 - Access to Justice vis a vis Right to Free Legal Aid

The concept of legal aid can be witnessed in the 40th paragraph of the Magna Carta, which is stated as under;

“To no one will we sell, to no one will we deny or delay right or justice.”

Our constitution provides for free legal aid as a right for every individual who due to financial or any other reason cannot afford a lawyer. In this regard the following articles of the constitution can be referred to:

- **Article 14** guarantees equality before law and equal protection of laws. Equality before law necessarily involves the concept that all the parties to a legal proceeding must have an equal opportunity of access to the court and of presenting their cases to the court. For the indigent, who are unable to meet their economic needs, the justice access to the court would remain a myth because their inability to pay court fee and lawyer's fees etc. would also deny him access to the court. Therefore, under Article 14, rendering legal services to the poor litigant is not just a problem of procedural law but a question of a fundamental character. The inequality, instead of being lessened, has enormously increased in a welfare State which has spawned legislation of such complexity that the citizen often finds it difficult to know what his rights are and even more difficult, unless he has ample means, to defend them in a court.
- **Article 21** asserts the right to life and personal liberty. This right cannot be taken away except by procedure established by law. Procedure should be just fair and reasonable. Right to hearing is an integral part of natural justice. If the right to counsel is essential to fair trial then it is equally important to see that the accused has sufficient means to defend themselves. It has been observed and re-observed by the Apex Court that an accused person at least where the charge is of an offence punishable with imprisonment is entitled to be offered legal aid, if he is too poor to afford counsel. Further counsel for the accused must be given time and facility for preparing the defense. Breach of these safeguards of fair trial would invalidate the trial and conviction, even if the accused did not ask for legal aid.
- **Article 22(1)** provides that a person arrested should not be detained in custody without being informed of the grounds for such arrest and should not be denied the right to consult and be defended by a legal practitioner of his choice. *Nandini Satpathy v. P.L.Dani*⁶⁸ is an important case on this proposition.
- **Article 38** urges that the State should strive to promote the welfare of the people by securing and protecting as effectively as it may by a social order in which justice: social, economic and political shall inform all the institutions of national life.

68 AIR1978SC1025

- **Article 39A** of the Constitution, provides for equal justice and free legal aid. It commands the state to secure that the operation of 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 the opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Article 39 A of the Constitution of India provides for equal justice and free legal aid. It is, therefore clear that the State has been ordained to secure a legal system, which promotes justice on the basis of equal opportunity. In **M.H.Hoskot's case** (supra) the Supreme Court did not hesitate to imply this right in Article 22(1) and Article 21 jointly while pressing into service application of a Directive Principle of State Policy under Article 39-A of Equal Justice and free legal aid.

After **Menaka Gandhi v. UOI**, (supra) courts in India widened their perspective with respect to the civil liberties. While disclosing the shocking state of affairs and callousness of our legal and judicial system causing enormous misery and sufferings to the poor and illiterate citizens resulting into totally unjustified deprivation of personal liberty, Justice P.N. Bhagwati, made the following observations:

"This unfortunate situation cries aloud for introduction of an adequate and comprehensive legal service programmes, but so far, these cries do not seem to have evoked any response. We do not think it is possible to reach the benefits of the legal process to the poor to protect them against injustice and to secure to them their constitutional and statutory rights unless there is a nation-wide legal service programme to provide free legal services to them."

In the opinion of Justice Bhagwati in **Hussainara Khatoon v. State of Bihar** (supra)

"The procedure under which a person may be deprived of his life or liberty should be 'reasonable fair and just.' Free legal services to the poor and the needy is an essential element of any 'reasonable fair and just' procedure. Article 39A also emphasizes that free legal service is an inalienable element of 'reasonable, fair and just' procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. The right to free legal service is therefore, clearly an essential ingredient of 'reasonable, fair and just' procedure for a person accused of, an offence and it must be held implicit in the guarantee of Art. 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services, on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer."

Justice Bhagwati in the same case directed the government of introducing a dynamic and comprehensive legal services program, since this is not only a mandate of equal justice implicit in Article 14 and right to life and liberty conferred by Article 21, but also the compulsion of the constitutional directive embodies in Article 39A.

6.2.1 - The Free Legal Services include:

- Payment of court fee, process fees and all other charges payable or incurred in connection with any legal proceedings;
- Providing Advocate in legal proceedings;
- Obtaining and supply of certified copies of orders and other documents in legal proceedings;
- Preparation of appeal, paper book including printing and translation of documents in legal proceedings.

6.2.2 - Eligible Persons For Getting Free Legal Services Include:

- Women and children;
- Members of SC/ST;
- Industrial workmen;
- Victims of mass disaster; violence, flood, drought, earthquake, industrial disaster;
- Disabled persons;
- Persons in custody;
- Persons whose annual income does not exceed Rs. 50,000/-
- Victims of Trafficking in Human beings.

The Constitution of India calls upon the state to provide for free legal aid to ensure that opportunities for securing justice are not denied to any citizen by reason of economic inability. In India, socio-economic conditions warrant highly motivated and sensitized legal service programs, as a large population of consumers of justice (heart of the judicial anatomy) are either poor or ignorant or illiterate or backward, and as such, at a disadvantageous position. The State, therefore, has a duty to ensure that the operation of legal system promotes justice on the basis of equal opportunity. Alternative dispute resolution is, neatly, worked out in the concept of Lok Adalat. It has provided an important juristic technology and vital tool for easy and early settlement of disputes. It has proved to be a successful and viable national imperative and incumbency, guest suited for the larger and higher section so the present society of Indian system. The concept of legal services which includes Lok Adalat is a '*revolutionary evolution of resolution of disputes.*' Lok Adalats provide speedy and inexpensive justice in both rural and urban areas. They cater the need of weaker sections of society. The object of the Legal Services Authority Act, 1987 was to constitute legal services authorities for providing free and competent legal services to the weaker sections of the society; to organise Lok Adalats; to ensure that the operations of the legal system promoted justice on a basis of equal opportunity.

6.2.3 - Criterion for Providing Legal Aid:

Section 12 of the Legal Services Authorities Act, 1987 prescribes the criteria for giving legal services to the eligible persons. Section 12 of the Act reads as under:-

Every person who has to file or defend a case shall be entitled to legal services under this Act if that person is-

- (a) a member of a Scheduled Caste or Scheduled Tribe;

(b) a victim of trafficking in human beings or beggar as referred to in Article 23 of the Constitution;

(c) a woman or a child;

(d) a mentally ill or otherwise disabled person;

(e) a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; or

(f) an industrial workman; or

(g) in custody, including custody in a protective home within the meaning of clause (g) of section 2 of the Immoral Traffic (Prevention) Act, 1956 (104 of 1956); or in a juvenile home within the meaning of clause

(h) of section 2 of the Juvenile Justice Act, 1986 (53 of 1986) or in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of section 2 of the Mental Health Act, 1987 (14 of 1987);

(i) in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Govt., if the case is before a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Govt., if the case is before the Supreme Court. (Rules have already been amended to enhance this income ceiling).

Legal Services Authorities after examining the eligibility criteria of an applicant and the existence of a prima facie case in his favour, provide him a counsel at expense of the State, who pay the required Court Fee in the matter and bear all incidental expenses in connection with the case. The person to whom legal aid is provided is not called upon to spend anything on the litigation once it is supported by a Legal Services Authority.

6.2.4 - Other provisions relating to legal aid are;

- **Criminal Procedure Code, 1973**

Section 304 provides that where in a trial before the Court of Session, the accused is not represented by a pleader and where it appears to the court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State; and the section further empowers the State Government to extend the application of the above provision in relation to any class or trials before other courts in the State. Besides this, Section 482 of the code provides for inherent powers of the court make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Section 320 which deals with compounding of offences is also another important provision for the accused.

- **Civil Procedure Code, 1908**

Order 33 provides for filing of suits by indigent persons. It enables persons who are too poor to pay court-fees and allows them to institute suits without payment of requisite court fees. Section 151 of the code provides for inherent powers of the court make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

- **Universal Declaration of Human Rights**

Article 8. Everyone has the right or an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the Constitution or by law.

- **International Covenant on Civil and Political Rights**

Article 14(3) guarantees to everyone: The right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him in any case where the interests of justice shall require, and without payment by him any such case if he does not have sufficient means to pay for it.

7 - Access to Justice vis a vis ADR

Justice Warren Burger, the former CJI of the American Supreme Court had observed, while discussing on the importance of ADR:

“The harsh truth is that we may be on our way to a society overrun by hordes of lawyers, hungry as locusts, and bridges of Judges in numbers never before contemplated. The notion-that ordinary people want black robed judges, well-dressed lawyers, fine paneled court rooms as the setting to resolve their disputes, is not correct. People with legal problems like people with pain, want relief and they want it as quickly and inexpensively as possible”. Based on this above quote, I would like to enumerate the benefits or advantages that can be accomplished by the ADR system. They are summed up here briefly:

1. Reliable information is an indispensable tool for the adjudicator. Judicial proceedings make a halting progress because of reluctance of parties to part with inconvenient information. ADR moves this drawback in the judicial system. Information can be gathered more efficiently by an informal exchange across the table. Therefore, ADR is a step towards success where judicial system has failed in eliciting facts efficiently.
2. In Mediation or Conciliation, parties are themselves prodded to take a decision, since they are themselves decision-makers and they are aware of the truth of their position, the obstacle does not exist.
3. The formality involved in the ADR is lesser than traditional judicial process and costs incurred is very low in ADR
4. The cost procedure results in a win-lose situation for the disputants
5. Finality of the result, the time required to be spent is less, efficiency of the mechanism, possibility of avoiding disruption.

Besides these advantages, I also wish to enumerate certain provisions from the civil procedure code and certain other statutes, which encourage or promotes settlement, via ADR, and the crucial role played by judges in these scenarios. Section 89 is generally understood as the only provision in CPC which provides for out of the court settlement; but this I have to state is a misconstrued notion among the legal members, as there are many other provisions under the act which support & promote settlement. Even prior to the existence of Section 89 of the Civil Procedure Code (CPC),⁶⁹ there were various

69 Refer *Afcons Infrastructure Ltd. vs. Cherian Varkey Construction Co. Pvt. Ltd.*, (2010) 8 SCC 24

provisions that gave the power to the courts to refer disputes to mediation, which sadly have not really been utilized. Such provisions, inter alia, are in the Industrial Disputes Act, 1947⁷⁰ the Hindu Marriage Act, 1955 (Section 23(3)) and the Family Courts Act, 1984 (Section 9)⁷¹ and also present in a very nascent form via Section 80 (Notice),⁷² Section 107(2) (Powers of the Appellate Court), Section 147 (Consent or agreement by persons under disability)⁷³, Order 23 Rule 3(Compromise of Suit),⁷⁴ Rule 5 B of Order 27(Duty of Court in suits against the government or a public officer to assist in arriving at a settlement),⁷⁵ Order 32 A(Suits relating to matters concerning the family)⁷⁶ and Order 36 (Special Case)⁷⁷ of the CPC, 1908. A trend of this line of thought can also be seen in **ONGC v. Western Co. of Northern America and ONGC Vs. Saw Pipes Ltd.**⁷⁸

It has been rightly said that: '*An effective judicial system requires not only that just results be reached but that they be reached swiftly.*' But the currently available infrastructure of courts in India is not adequate to settle the growing litigation within reasonable time. Despite the continual efforts, a common man may sometimes find himself entrapped in litigation for as long as a life time, and sometimes litigation carries on even on to the next generation. In the process, he may dry up his resources, apart from suffering harassment. Thus, there is a chain reaction of litigation process and civil cases may even give rise to criminal cases. Speedy disposal of cases and delivery of quality justice is an enduring agenda for all who are concerned with administration of justice.

In this context, there is an imminent need to supplement the current infrastructure of courts by means of Alternative Dispute Resolution (ADR) mechanisms. Apart from bringing efficiency in working of the judiciary, measures are being taken all over the world for availing ADR systems for resolving pending disputes as well as at pre-litigation stage. Efforts towards ADR have met with considerable success and good results elsewhere in the world, especially in the litigation-heavy United States, where professional teams of mediators and conciliators have productively supplemented the dispute resolution and adjudication process. Therefore, with the advent of the ADR, there is a new avenue for the people to settle their disputes. More and more ADR centres should be created for settling disputes out-of-court as is being done in many other countries. ADR methods will really achieve the goal of rendering social justice to the people, which really is the goal of the successful judicial system.

8 - Access to Justice vis a vis Information Technology

Technological Developments in the field of information and introduction of computers have made a turning point in the history of human civilization. It has brought about a sea

70 *Rajasthan State Road Transport Corporation v. Krishna Kant*, 1995 SCC (5)75

71 *K.A.Abdul Jalees v. T.A.Sahida*, (2003) 4 SCC 166

72 *Ghanshyam Dass v. Domination of India*, (1984) 3 SCC 46; *Raghunath Das v. UOI*, AIR 1969 SC 674

73 *Bishundeo Seogeni*, AIR 1951 SC 280

74 *Mamju Lata Sharma v. Vinay Kumar Dubey*, AIR 2004 All 92 (94) (DB); *Banwari Lal v. Chano Devo*, AIR 1993 SC 1139

75 *PP Abubacker v. Union*, 1972 K 103,107

76 *Pushpa Suresh Bhutada v. Subhash Maheshwari*, AIR 2002 Bom 126

77 *Ramdhan Sinha v. Notified Area Authority*, AIR 2001 Gau 149

78 AIR 2003 SC 2629

change in all fields of human activity. It has resulted in enhanced efficiency, productivity and quality of output in every walks of life.

The information technology has been advocated in the western countries for the last two or three decades, but hardly any worthwhile effort has been made till recently, particularly, in judicial administration of subordinate courts in our country. According to me, there is an immediate need for exposing our legal profession, judicial fraternity and court management to the update computerised technology so as to render speedy justice with better legal outputs.

Most of the bottlenecks referring to delays, arrears and backlog can be partly overcome if a sound judicial management information system is introduced in India. Case Management, File Management and Docket Management will be vastly improved by resorting to the use of computers. In particular, the following are areas where use of computer will result in enhanced productivity and reduction of delays;

- a) Legal Information Data Bases
- b) On line query system for precedents, citations, codes, statutes etc.
- c) Generation of Cause List and on line statistical reports
- d) On line Caveat matching
- e) On line updation of data, monitoring and '*flagging*' of events
- f) Pooling of orders and judgements
- g) Daily List generation with historical data of each case
- h) Word processing with standard templates including generation of notices/processes
- i) Access to international data bases
- j) Feedback reports for use of various levels.

The above are some of the areas where information technology can be introduced after due preparation. In particular, tracking of cases would result in better monitoring and control of cases by the Presiding Officers, rather than by the lawyers.

Therefore, computerisation should be supplemented by the use of Fax, E Mail, Video conferencing and other facilities for higher productivity and quicker decision making at all levels. All the above mentioned suggestions facilitate dissemination of information, creation of data, upkeep of the judicial records and better judicial delivery system. This system though already prevalent in the Supreme Court and some High Courts, should slowly extend to the rest of the states as well. The increasing backlog of cases is a serious threat to our judicial system. In the Indian context, this is a clear violation of '*Right to Speedy Trial*' as conferred by Article 21 of the Constitution of India. The Supreme Court has realized this and an e-committee has been formulated. This committee has initiated steps for the computerization process of the Supreme Court and other courts.

9 - Access to Justice vis a vis Media

The media enables the sentiments of the people to be conveyed both domestically and internationally. It highlights the collective grievances of the people, as well as the deplorable plight of certain individuals or groups of individuals. It also serves as an informed critic of government policies and attracts intellectual attention to the most pressing issues in all walks of life. This is essential in a democracy, for utmost secrecy in administration of justice is also undesired.

Mahatma Gandhi understood that the key to satyagraha was through the method of non-violent resistance and was making the injustice being experienced visible to all, including the perpetrators, by way of using the media, which made it effective. Gandhi was an avid proponent of the printed word and its mass distribution in support of the cause of independence. He understood that any struggle for justice that '*relies chiefly upon internal strength (satyagraha) cannot be wholly carried on without a newspaper.*' He helped publish and extensively wrote for a number of publications including the Indian Journal, which was an early example of creating non-commercial, community-supported media, aiming to '*transcend the flattery of advertisers,*' thus ensuring its independence, making it a real political force to be reckoned with (Fischer, 1962). There was also the bilingual Indian Opinion first published in 1903 and Young India, which Gandhi termed as '*viewspaper*', spread around the country en masse and read aloud in countless villages to the predominantly illiterate populations. This had the effect of transforming the evolution and expansion of political consciousness of many Indians towards the resistance to British rule. Similarly in *Hussaianra khaton vs. State of Bihar* (supra) a case was filed by an Advocate, based on the newspaper article published in the Indian Express of the hardship of under trial prisoners of Bihar prison.

Therefore, media in its campaign of generating awareness amongst marginalised people and women can help them to claim their legal entitlements and access justice more emphatically. Media being a fourth pillar of democracy plays a vital role in highlighting the gap between the reality and legality in the project area.

10 - Conclusion

The precepts of Law according to me are;

- To live harmoniously;
- To injure no other man;
- To render everyone his due.

Every government has one major role to play in a democracy that is to protect the rights of all its citizens. In our country also, steps are been taken by both the parliament and judiciary to secure the ends of justice. Many Government schemes were started for removing poverty across the country, scholarships were given to the weaker sections of society so that they can pursue their education without any financial burden; many important beneficial legislations were also passed. The Indian judiciary which is well

regarded domestically and internationally for its progressive role in interpreting various provisions of the Constitution also took its work remarkably with a view to promote social, economic and political justice to all the sections of the society. Expanding the interpretation of the fundamental rights enshrined in the Constitution, overcoming restrictions based on rules relating to locus standi, creating new avenues for seeking remedies for human rights violations through public interest litigation pleas and promoting genuine judicial interventions in the areas of child labour, bonded labour, clean and healthy environment, and women's rights are but a few examples of successful judicial interventions to uphold the rule of law and ensure justice. The courts are the only forum where both a poor man and a retired Supreme Court judge can approach and access it for justice. They are therefore, rightfully called the '*Guardians of Justice*'. Despite of all this effort, at the same time it can't be denied that the intention of the constitution to achieve social, economic and political justice is yet unfulfilled.

The occurrence of long delay in conclusion of litigation and huge arrears of cases are the major headaches in the administration of justice and to a greater level, affect the programmes for strengthening access to justice. In conclusion it will be important to stress that India has not the shortage of laws for securing justice; it has only the shortage of commitment for implementation of the laws. It will be very beneficial for the political elite to understand that no country can be called as developed in a true sense until it secures justice to each and every section of the society. It should also be remembered that it is not only the responsibility of the political elite to work for achieving justice to all the sections of the society, but in fact it is duty of every Indian to assist his country man so that justice can be secured to every section of the society.

On this note, I would like to conclude with an apt quote by *Abraham Lincoln*, the 2nd President of the United States of America;

“if you once forfeit the confidence of your fellow citizens, you can never regain their respect and esteem. It is true that you can fool the people some of the time and some of the people all the time, but you cannot fool all the people all the time.”

With these few words of wisdom, I wish you all nothing but the best.
