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SUPREME COURT-IN RETROSPECT AND PROSPECT*

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INDIA HAS had an amazing ancestry of legal tradition that abounds in disparate rules for the day-to-day conduct not only of ordinary individuals but also of different social functionaries including monarchs. Indeed, these rules were inextricably intertwined with religion, probably to compel compliance. Indian tradition travelled beyond its borders and got assimilated by other cultures. However, the disparate rules of law were not identified separately nor were they codified or studied in the modern sense. From the early times, it appears, India was in the process of interaction with other cultures. It has been giving and receiving ideas. Just as it gave the religion to other regions, it freely welcomed new ideas from far-flung areas making it a hub for exchange of ideas. The Indian society was ecumenical, liberal, tolerant and accommodating. It was exceptionally receptive to innovations. This mood helped the Indian society to assimilate the common law with much ease. Moreover, the ability of common law to act as an active agent in effecting social transformation also must have added an impetus to the process of assimilation. The slow and steady, consistent and constructive approach displayed by the Privy Council has also helped the Indian law to reach new heights.

In the initial stages of the institution of the federal court the Government of India has correctly noted the edifice built by the Privy Council and courts in India in ensuring uniformity in the interpretation of laws. It is in this environment congenial to the growth and development of a legal system that the establishment of the federal court – the precursor of our Supreme Court – came as an important landmark in the history of Indian legal system. The edifice of the modern Indian legal

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system was thus built in the incandescence of the rising of the Indian Federal Court in 1937.

The idea of establishing an apex court in India in the sense it is understood today originated in a note entitled 'A Note on Indian Federal Court' marked then 'Secret' in 1931. After outlining the necessity for the setting up of such a court the note dealt with the constitution and functions of the court in an objective manner. It was envisaged to have a chief justice with four *puisne* judges with the hope that the number could increase depending upon the jurisdiction in non-federal matters. Though the note envisaged the power of appointment to be vested in the governor- general, it cautioned that the functions of the court will be of such supreme importance to the new federation, especially in the early days, that nothing could safely be omitted which might tend to increase its prestige or reputation for absolute impartiality; and while the communal question remains acute, appointment by an independent authority would probably be essential.

Though originally the proposal envisaged to have a federal court and a Supreme Court both having jurisdiction to consider appeals in civil cases, questions involving the interpretation of the Constitution Act, or rights or obligations existing thereunder being vested in federal court and the others to the Supreme Court as early as 1932, the Government of India treated these proposals distinctly and expressed its desire to have the federal court.

The proposal to set up the Supreme Court was shot down by the government after getting the considered opinions of Sir Maurice Linford Gwyer, later to be the Chief Justice of India who argued that it is of the greatest importance to maintain the dignity and prestige of the federal court, so that it may attract Indian legal talent of the finest quality and establish its reputation as a wise, prudent and independent tribunal. To secure these objects it ought to have no rival near its throne, and the existence of a second tribunal can only impair the quality and independence of both. When this note was circulated, the legislative department responded positively clarifying that to the extent to which they contemplated having a Supreme Court they intended that it should be a branch or a part of the organization of the federal court but that as a Supreme Court it would only have jurisdiction over the courts of British India. The legislative department ultimately concluded that this proposal to graft a Supreme Court on to the Federal Court was consistent with the recommendation contained in para 105 of the Report of the Federal Structure Sub Committee at the second session of the Round Table Conference. It is interesting to note that this view was also expressed in the Report of the Joint Committee on Indian Constitutional Reform.[1]

1. Vol.-I at 195-197.

Sir Maurice Linford Gwyer was appointed Chief Justice of the Indian Federal Court on September 28, 1937 and he assumed the office on October 1, 1937. He did the preliminary work relating to the establishment of the court as an officer on special duty for a period of three months from January 14, 1937. The *puisne* judges, Jayakar and Sulaiman JJ were appointed from Bombay and Allahabad High Courts, respectively. These judges and the chief justice constituted the Federal Court of India. From October 1937 the Indian Federal Court functioned for more than a decade and delivered judgments on over 100 cases.

In the course of its existence through the turbulent years of World War II and the formative years of the Indian Republic charged with anxiety and aspirations, the Federal Court was made stronger by enlarging its jurisdiction in civil appeals leading to its elevation to the highest level by stripping the Privy Council of its jurisdiction over Indian appeals. At the time of the inauguration of the federal court Sir B.L. Mitter the then AG for India spoke thus: "In this change lie elements of unity and coordination which are calculated to weld India into a nation and to accelerate her constitutional development … The Federal Court is the inheritor of this precious heritage, built by the High Courts in India, with wider jurisdiction, higher authority and larger scope to vindicate supremacy of the law". So in retrospect one feels that on the advent of constitutionalism in India there was already an environment conducive to the development of new institutions of law. The new institutions did not emerge from a vacuum. It did have the advantage of having an edifice already created by the Indian judiciary spread throughout the country. What the Federal Court achieved was cementing the already existing loose mass of law and practice with constitutionalism. And it was from this stage that the Indian Supreme Court took its strides on January 28, 1950 *i.e.* after two days of India's becoming a Republic.

Today the Indian Supreme Court, the sanctum sanctorum of justice envisioned by the architects of the Constitution is the most powerful court in the world. During the last five decades of its excellent existence, to say the least, it has lived up to the expectations of our constitutional fathers. It is the most powerful, least autocratic, most transparent, least secretive in its functioning. It can hear, decide and pronounce on any matter. Its jurisdiction embraces the power to determine disputes between the Union of India and any state and the states *inter se*.[2] The Supreme Court can hear appeals from the high court in civil, criminal and constitutional matters.[3] Its extensive special appellate jurisdiction permits it to hear any appeal from any tribunal or court.[4] This provision enables

2. *The Constitution of India*, Art.131.
3. *Id.*, Arts.132-134.
4. *Id.*, Art.136.

the court to encompass the jurisdiction to hear appeals even from bodies, which are not essentially court but have the trappings of court like industrial tribunal or tax tribunal. It has the power to review its judgments.[5] It can render advice to the executive on references.[6] Not satisfied with this extensive jurisdiction, the Constitution makes a provision empowering the legislature to enlarge the Supreme Court's jurisdiction to pass any decree and orders as is necessary for doing '*complete justice*'.[7] It is a court of record to punish its contemnors.[8] Law declared by it shall be the law of the land.[9] It is this pinnacle of justice, which determines whether the act of the legislature or the executive is within the framework of the Indian Constitution. It is indeed the *sentinel on the qui vive* in the widest possible connotation of the word. Its word is the last word in law.

By 1950 the Federal Court had Chief Justice Sir Harilal Kania, M.C. Mahajan, Saiyid Fazl, M. Patanjali Sastri and B.K. Mukherjea who carried the tradition of erudition and values of independence and courage to the new Supreme Court, which itself inherited a rich tradition from its predecessor as narrated above. S.R. Das J joined the Federal Court on January 20, 1950 before it became the Supreme Court on January 28, 1950. Later Chandrasekhar Aiyar and Vivian Bose JJ also joined the court taking the total number of judges to eight. From its inception this institution has been straining its every nerve to hold at bay the threat to personal freedom of the little Indian. Right from *Gopalan* to *Keshavananda*[10] it has been a tedious journey for this wonderful institution trekking a territory stretching far and wide, mostly unexplored and unexploited, obviously without any lamp posts. It is a matter of pride to note that the court traversed this territory of hills and valley with all their turns and bounds, humps and bumps, marshy at times, mostly slippery, with ease holding the flag of freedom always upright.

If one looks into the Constituent Assembly Debates it can be discerned that although the Assembly on the one side wanted the Supreme Court to have a wide jurisdiction in dealing with issues regarding fundamental rights, on the other side it was skeptical about giving to it such jurisdiction to deal with social and economic policies.[11] This approach obviously presented a conceptual contradiction of the framers

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5. *Id*., Art.137.
6. *Id*., Art.143.
7. *Id*., Art.138.
8. *Id*., Art.129.
9. *Id*., Art.141.
10. *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27; *Keshavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225.
11. *CAD* Vol VIII, at 930-950.

and it seems correct to say that this contradiction is felt and experienced by the court itself in every moment of its existence as is reflected in its decisions. The tension between these approaches has made the court cautious and conscious of its steps and it has always tried to strike a balance. In *Gopalan*[12] even while holding that there was no 'due process' rights, it hastened to add that the 'non-disclosure' of reasons for detention was unconstitutional. Similarly, in the '*Organizer*' case[13] it permitted the restriction on freedom of speech in the interests of 'security of State' while invalidating the pre-censorship even if there was danger to public order.

In *Cow Slaughter* cases[14] the court again struck the balance. It reconciled the Muslim concerns and Hindu sentiments involved in the issue by imposing restrictions on indiscriminate killing of cows while pronouncing that the Muslims do not have any special rights for killing cows. The court's latest decision on cow slaughter ban signifies the agony it experiences to keep the balance in constitutional discourse in the context of the Indian pluralist polity. Likewise, in the *Kerala Education Bill* case[15] the court prohibited exercising restraints on the minority's right to manage its own institutions but permitted the government for keeping a watchful eye to detect and deal with mismanagement. This dichotomy is reflected in the warp and weft of the texture of *T.M.A. Pai*[16] - *Inamdar* [17] genre of 2005.

The court was, however, vehement in invalidating the provisions enabling the court to smash *zamindari* without adequate compensation being paid to the *zamindars*.[18] It struck down the land reforms law making the then Prime Minister Pt. Nehru to make strong criticism of the legal system. Similarly in *Ex-communication* case[19] also the majority of the court was of the opinion that religious heads could resort to ex-communication.

Parliament reacted to the court's decisions by way of bringing amendments to the Constitution and statutes. The court's response was

12. *A.K. Gopalan, supra* note 10.

13. *Romesh Thappar* v. *State of Madras,* AIR 1950 SC 124.

14. *Quareshi* v. *State of Bihar,* AIR 1958 SC 731; *Municipal Corporation of the City of Ahmedabad & Ors* v. *Jan Mohammed Usmanbhai & Anr,* AIR 1986 SC 1205; *Hashmattullah* v. *State of Madhya Pradesh & Ors,* (1996) 4 SCC 391; *State of W.B* v. *Ashuthosh Lahiri,* AIR 1995 SC 464; *Khursheed* v. *State of Haryana,* (2005) 3 SCC 763.

15. *Kerala Education Bill, In re,* AIR 1958 SC 956.

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

17. *P.A. Inamdar* v. *State of Maharashtra,* (2004) 8 SCC 139.

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

19. *Sardar Syedna Taher Saifuddin Saheb* v. *State of Bombay,* AIR 1962 SC 853, see also *Central Board of Dawoodi Bohra Community & Anr* v. *State of Maharashtra & Anr,* (2005) 2 SCC 673.

again cautious. While it did not insist on its view on freedom of speech, it did put its foot down on compensation to be paid to the landlords.

Some fundamental principles of law like principles of legality, *mens rea* etc. also came to be dealt with by the court. In 1965 in *M.H. George* v. *State of Maharashtra*[20] the Supreme Court by a majority (Subbarao J dissenting) decided the issues in favour of the state. It ruled that the English concept of *mens rea* as incorporated in the IPC, if it was not made part of the definition of crime the court need not read it. But when Subbarao J became the chief justice this view was reversed in *Nathu Lal* v. *State of M.P.*[21] and its *ratio* is still valid. Rao J was a champion for the expansion of due process and his enthusiasm resulted in the overturning of the then existing position as to the amending power of the Constitution. The view taken by the court in *Shankari Prasad*[22] and *Sajjan Singh's*[23] cases that Parliament had power to amend any part of the Constitution, when Subbarao J became the chief, in *Golaknath's* case,[24] it categorically ruled that Parliament's power was limited and that it could not amend the basic structure of the Constitution.

The executive tried to counter the impact of this decision by way of 24th and 25th amendments of the Constitution. Also, the executive came to enact laws nationalizing banks[25] and abolishing privy purse.[26] The executive imposed restrictions on import of newsprints.[27] The court's reaction was again balanced. While holding that the legislation nationalizing banks was unconstitutional because of inadequacy of compensation[28] it upheld legislation abolishing privy purse.[29] While it did not permit the government to put pressure on newspapers in the supply of newsprint, the court did permit the government to have some restraints on the newspapers.[30] The impact of 24th and 25th amendment was cushioned by evolving what is now universally known as basic

20. AIR 1965 SC 722.

21. AIR 1966 SC 43.

22. *Shankari Prasad Deo* v. *Union of India,* AIR 1951 SC 458.

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

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

25. Banking Companies (Acquisition and Transfer of Undertakings) Act 22 of 1969.

26. The Constitution (Twenty Sixth Amendment) Act, 1971 where a new Art. 363A was inserted.

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

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

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

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

structure doctrine as part of our constitutional discourse.[31] Despite several attacks this doctrine still survives and the court's control continues to have its sway in constitutional discourse. This conflict between the executive and the judiciary culminated in a declaration of emergency in 1975 and the court was constrained to decide issues of personal freedom in the context of national emergency in *ADM, Jabalpur* case.[32] The majority of the judges in the bench fell in line with the view against protection of personal liberty in emergency provoking the dissenting judge, H.R. Khanna J to burst out thus: [33]

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

The lifting of emergency resulted in a vigorous Supreme Court collecting courage and constructing craft to respond to the post-emergency developments in law and practice. The post-emergency court went out of the usual mould and started extending its jurisdiction overturning even the age-old 'keep out' notices standing on rules like *locus standi*.[34] The epistolary jurisdiction,[35] public interest litigation,[36] environment litigation[37] and internationalisation of the municipal laws[38] in the light of the international developments have made the court

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31. See *Keshavanada Bharati* v. *State of Kerala,* AIR 1973 SC 1461; *Indira Nehru Gandhi* v. *Raj Narain,* AIR 1975 SC 2299; *Minerva Mills* v. *Union of India,* AIR 1980 SC 1789; *State of U.P* v. *Dr. Dina Nath Shukla,* AIR 1997 SC 1095 *etc*.

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

33. *Id.* at 1277. For a detailed examination of the view expressed by H.R.Khanna J at 1241-1277.

34. *Mumbai Kamgar Sabha* v. *Abdullbhai,Faizullabhai,* AIR 1976 SC 1455; *S.P.Gupta* v.*Union of India* ,AIR 1982 SC 149; *Janata Dal* v. *H.S.Chowdhury,* AIR 1993 SC 892; *Ranji Thomas* v. *Union of India,* (2000) 2 SCC 81.

35. *S.P.Gupta* v. *Union of India,* AIR 1982 SC 149; *Sunil Batra* v. *Delhi Administration,*AIR 1980 SC 1579; *State of H.P.* v. *A Parent of a Student of Medical College,Shimla,* AIR 1985 SC 910; *D.S. Nakara,* v. *Union of India,* AIR 1983 SC 130; *Mohanlal Sharma* v. *State of U.P.*, (1989)2 SCC 600, *etc.*

36. The PIL cases starting from *Mumbai Kamgar Sabha* v. *Abdullbhai, Faizullabhai,* AIR 1976 SC 1455 and *S.P.Gupta* v.*Union of India,* AIR 1982 SC 149 to till date

37. See cases like *Bandhua Mukti Morcha* v. *Union of India,* AIR 1984 SC 802, *Subhash Kumar* v. *State of Bihar,* AIR 1991 SC 420, *etc.*

38. See examples like *Jolly George Verghese* v. *Bank of Cochin,* AIR 1980 SC 465; *Gramaphone Co. of India Ltd* v. *Birendra Bahadur Pandey,* AIR 1984 SC 667; *Githa Hariharan* v. *Reserve Bank of India,* AIR 1999 SC 1149, *etc.*

a busy body embracing all aspects of human lives, encompassing everything around and endeavouring to endearing it to the little Indians. In *Vishaka* v. *State of Rajasthan*[39] the court keeping up the tradition of upholding the dignity of women declared sexual harassment at place of work as amounting to violation of article 14,15 and 21.

No doubt the Supreme Court has lived up to the expectations of masses in providing rule of law but there comes a time in the life of every institution to pause and introspect and take stock of its working. Therefore an attempt is being made to appraise the working of the court in the preceding year in the light of its glorious history which the authors have tried to bring to full glory.

Supreme Court during 2004 - 2005

It is felt that the apex court is really a dynamic presence in the midst of non-acting agencies of governance The Supreme Court continued to win laurels from the legal fraternity in many branches of law because of its illuminating decisions bringing luminosity to the labyrinthine recesses of law Its engagement with several issues of national importance has made it an important institution of public governance in the Indian democracy. Indeed, such an institution has to have the share of wrath from the critics who in a free democracy indulge in ruthless evaluation. This is true of the Indian Supreme Court as well. It bears the scars of criticism. While some judgements, brought luminosity in several branches of law, it not only failed to clear the cob-webs in some areas but also obscured certain corners. For example, it could be said that it created confusion and conflict in the discourse on education.

The decisions in *TMA Pai Foundation*[40] to *Inamdar*[41] signify that the court in its enthusiasm to set things right in the vital area of higher education created conflicts calling for legislative intervention. It is not known whether these interventions would be looked upon kindly by the court later. So the confusion still exists demanding debates and discussions at all levels. The court's role in generating debates in this vital area cannot be forgotten however. Sometimes developmental jurisprudence emerges from conflicts and in this sense it could be said that the court did its duty of generating debate that may lead to social change.

Probably, it may be right to say that what the court did in this area is the right thing to do for a superior court. In fact by opening up the areas of conflict it did call upon the executive to do what it is expected

39. (1997) 6 SCC 241.
40. *Supra* note 16.
41. *Supra* note 17.

to do under the Constitution. It is heartening to note that the legislature has of late come up with a legislation to resolve the conflicts in the area of higher education. It is hoped that the issues would be solved; or else they may be resolved by the court later. Thus, in any sense the court has played its role. It tried to resolve the conflict giving rise to new conflicts. The court invited the executive to resolve them. If the executive fails, the court may step in again. It thus becomes a constant promoter of changes – a role an activist judiciary should play in a vibrant democracy.

One of the major decisions in the area of constitutional law was on the question of authority of the state to sub-classify certain castes for the purpose of giving the benefit of reservation etc. Sub-classification of SC/ST identified in the presidential order passed under article 326 of the Constitution by the state was held unconstitutional in *E.V. Chenniah* v. *State of A.P.*[42] The Supreme Court categorically ruled that a state cannot do this. Reservations to a class can be made but this clause could not be sub-divided by the state to give preference to some group in the class.

But the same judicial acumen was not shown in *Zoroastrian Coop Housing* case[43] where restriction on basis of religion in a private arrangement came for consideration. The bone of contention was whether exclusion of subsequent non-Parsi purchaser under the byelaw was inconsistent with the mandate of article 15 of the Constitution. The court taking a restrictive view of fundamental rights as applicable only against state action came to the conclusion that even though it may seem retrograde in secular India, the enactment did not bar cooperative societies from discriminating on the ground of religion. The court instead of taking the vertical trajectory as regards fundamental rights could have perhaps served public policy better by taking a horizontal one.[44]

However, the Supreme Court added another feather to its cap by its decision on noise pollution.[45] It has an outstanding record of upholding the right of the citizenry to live in pollution-free environment. Invoking article 21, the court categorically declared that nobody could indulge in noise pollution making it impossible for the people to live in peace and comfort. This judgment stands out as a landmark decision in terms of its texture's reasoning and reach. Holding that restriction on noise pollution is not violative of freedom of speech and expression and right to religion, court made ground rules for the control of noise pollution by laying down restrictions reducing noise between 10 p.m. to 6 a.m. In many

42. AIR 2005 SC 162.

43. *Zoroastrian Coop Housing Society Ltd.* v. *Distt. Registrar, Coop Societies (Urban)*, (2005) 5SCC 632.

44. Ashish Chugh, "Fundamental Rights – Vertical or Horizontal?" (2005) 7 SCC (Journ) 9-18.

45. *Noise Pollution (V), In re*, (2005) 5 SCC 733.

ways it is an epoch-making decision spelling reprieve and relief for the public from the menace of noise pollution in the name of political activities or religious rituals. It is interesting to note how the courts have tried to expand the ambit of article 21. Further, in environmental cases the right to information and community participation for protection of environment and human health is regarded as flowing from article 21.[46]

Yet in another landmark case, *Prof. Yashpal* v. *State of Chhatisgarh*,[47] the court was constrained to think anew of the state and status of university education in India. Overturning the impression scholars had about the stand of the Supreme Court with reference to the dominant status of the UGC *vis-à-vis* the universities established by various states in India, the court in this decision gives the message that the centre's supremacy through the media of 'maintenance of standards' in item 66 of list I of schedule VII of the Constitution is not easily questionable.

The courts' reasoning seems to embrace everything connected with higher education within the ambit of this item in as much as it observes after citing *Preeti Srivastava (Dr.)* v. *State of MP* thus:[48]

> The standard of education in an institution depends on various factors like (i) the calibre of teaching staff; (ii) a proper syllabus designed to achieve a high level of education in a given span of time; (iii) the student-teacher ratio; (iv) equipments and laboratory facilities; (v) calibre of the students admitted; (vi) adequate accommodation in the institution; (vii) the standard of examinations held including the manner in which the papers are set and examined; and (viii) the evaluation of practical examinations done.

Higher education has thus been integrated. The judicial craftsmanship displayed in the *ratiocination* of this judgment has to be appreciated and approbated. The willingness and capability of the Supreme Court for undertaking intellectual exercises with the help of research is signified in the famous *Sarbaranda Sonowal* v. *Union of India*[49] holding that illegal migration of foreigners to Assam amounts to external aggression and internal disturbance as enjoined under article 355 of the Constitution. It was indeed a bold decision on a vital question of national importance with political overtones. But the criticism could not prevent the court

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46. *Research Foundation for Science Technology National Resources Policy* v. *Union of India*, (2005) 10 SCC 510. It was held in this case that the Basel Convention effectuates the fundamental rights guaranteed under Art. 21.

47. (2005) 5 SCC 420.

48. (1999)7 SCC 120.

49. (2005) 5 SCC 665.

from coming up with a bold decision. In fact the court must have kept in view the debate-surrounding article 2(4) and 51 of the UN Charter in reaching its conclusion that there is external aggression when there is influx of illegal migrants to the country spelling doom for its economy and security. A well-reasoned decision that will be appreciated by all.

Among the decisions on constitutional issues the decision in *Shoba Hemavati Devi*[50] is not an encouraging one. In contrast to *Noise Pollution* case[51] or *Sarbananda Sonowal*,[52] it is poorly reasoned. Arguments buttressing its conclusions seem to be weak and less compelling. However, it is a case to be examined by a student of Indian jurisprudence. The principles governing reservation under article 15(4) and 16(4) came to be made applicable to the reservation of seat in legislature provided for under article 332. In this case the petitioner's election to the AP Legislative Assembly was set-aside on the ground that she being the daughter of an upper caste man cannot have the benefit of reservation. In fact the petitioner was born out of a marriage between her mother who belonged to scheduled tribe with her father who belonged to an upper caste. Her plea that her mother was actually married to a man belonging to scheduled tribe though she was born out of the informal marriage of her mother with her father and hence she, in law belongs to the scheduled tribe was turned down by the court. Her plea that she belongs to the ST because of her marriage with a man belonging to the scheduled tribe was also rejected by the court which commanded to its aid the usual variables like acceptance by the tribe and continued working in the area occupied by the tribe etc. It is strongly felt that the court should have been progressive and innovative with cases like this inasmuch as it was a case of political representation. At least it should have been left to the executive or the legislature to take a decision. The usual jargon stressing the need of the person to suffer disabilities attached to a caste, the unfortunate insistence for his being accepted by the community as its member etc to give him the status of a particular caste has been echoed in this case also. These are secondary rules of interpretation providing much space for manipulation, judicial or administrative. These *obiter* observations have had their toll. In *Meera Kanwaria* v. *Sunita & Ors*.[53] the Delhi High Court giving importance to the fact of the converted individuals acceptance by the scheduled caste upheld her election from a reserved constituency in Delhi. Ultimately, it was set aside by the Supreme Court on the ground that an upper caste individual cannot have the benefit of reservation by

50. *Sobha Hymavathi Devi* v. *Setti Gangadhara Swamy*, AIR 2005 SC 801.
51. *Supra* note 45.
52. (2005) 5 SCC 665.
53. 2005 (10) SCALE 39.

conversion. However, the court chose to stick to its array of unwarranted admixture of factors as criteria leading even the Delhi High Court to err. It is a high time the Supreme Court bid farewell to these loose criteria. With regard to investing and divesting high courts and lower courts of their jurisdiction the constitutional bench of the Supreme Court gave the ruling that the state legislatures are empowered to invest jurisdiction with courts other than the Supreme Court by virtue of entry 11 A of list III in schedule VII of the Constitution.[54] The court found support for this view in items 13 and 46 of list III.

The Supreme Court in 2005 uprooted an existing milestone to replace it with another brand new one.[55] *Mohd. Hanif Qureshi* v. *State of Bihar*,[56] was indeed a milestone which attempted to be shaken several times but survived the onslaught with firmness.

In *Hanif Qureshi* the Supreme Court upheld prohibition of slaughter of the cow of all ages and calf of buffaloes (male and female) and she-buffaloes, breeding bulls and working bullocks. So far as bull and bullocks were concerned, when they ceased to be draughtable, prohibition of their slaughter was not held valid in public interest. The view was that the cattle which had lost their utility could be slaughtered with regard to draught cattle, bulls, bullocks and buffaloes. In *Abdul Hakim* v. *State of Bihar*[57] the court stuck to its guns while noting that bulls, bullocks and buffaloes become useless after the age of 15. The court stood steadfast with its view that prohibition of slaughtering of cattle after their utility was over, would violate fundamental rights of petitioners engaged in slaughtering.

Again in *Haji Usmanbhai Hassanbhai Qureshi* v. *State of Gujarat*[58] the Supreme Court had to deal with a demand for relooking at *Mohd. Hanif Qureshi*. Indeed, the court had to agree that bulls and bullocks below 16 years of age should not be slaughtered as the court was concerned about their utility on the basis of the state's averments. Thus, one exception which the state engrafted to the *Mohd. Hanif Qureshi* doctrine by way of legislative additions came to be handy for the *Usmanbhai Hasanbhai Qureshi* court to shake the *Mohd. Hanif Qureshi* milestone.

Now with the shovel made of article 48-A and 51-A (g) the Supreme Court removed all the cementing around the milestone and uprooted it with ease. The court categorically states it so:[59]

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54. *Jamshed N. Guzdar* v. *State of Maharashtra*, (2005) 2 SCC 591.

55. *State of Gujarat* v. *Mirzapur Moti Kureshi Kassab Jamat & Ors.*, (2005) 8 SCC 534.

56. AIR 1958, SC 731.

57. AIR 1961 SC 448.

58. (1986) 3 SCC 12.

59. *Supra* note 55 at 569.

> The decision in Qureshi in which the relevant provisions of the three impugned legislations was struck down on the singular ground of lack of reasonability, would have decided otherwise if only Article 48 was assigned its full and correct meaning and due weightage was given thereto and Articles 48-A and 51-A (g) were available in the body of the Constitution

The court in the present case shows an unusual courage, vigor and aggressiveness in its reasoning that the time has changed and the law has to move with the times. Academics should be especially happy that the apex court dared an entry into the difficult terrain of jurisprudence commanding to its aid scholars like Lloyd, Salmond, Julious Stone, Holmes etc. Probably it was not necessary. It is usual for the court to reverse its ruling if a change was desirable. It is not known why the court strained itself a lot to buttress its stand to replace the milestone in its way to do justice to the bovine cattle in India.

The court's willingness to accept material, which are usually not relied upon as a matter of routine came to be accepted with respect and put to use to change the law. Whether one likes it or not a milestone laid in 1958, which was held sacrosanct, as representing resolution of conflicting interests came to be shaken in 1986. It is now gone. The space is vacant.

Dissolution of Bihar Assembly by the apex court is a case study in itself. The court permitted the Election Commission to issue the date for elections when the matter was *sub judice*. Even after stating that the report of the governor was *malafide* and the dissolution of the Bihar Assembly was unconstitutional it did not restore the *status quo ante*. It held that election may be carried out taking into consideration practical realities, including the fact that preparations for elections were already underway and large amount of resources had been invested by the Election Commission. Is not it a mockery of the system? Moreover, the decision casts a doubt as to the governor being made a scapegoat in this exercise. Notice could not be issued against the governor as he enjoys immunity under article 361. But the repercussion of it was that principle of natural justice *audi alteram partem* - nobody should be condemned unheard - was flouted. Moreover RPA is envisaged for the election process and we need not read provisions of RPA into the Constitution, which is complete and comprehensive in itself. The court's combined reading of section 73 of the RPA and article 172(4) to drive home the point that an Assembly or House is deemed to be constituted the moment the results of the election are notified by the Election Commission and for this we need not wait for the first meeting is, therefore, erroneous.

Election law got a boost by a momentous decision of the constitution bench of the Supreme Court in *K. Prabhakaran* v. *P. Jayarajan*

and *Ramesh Singh Dalal* v. *Nafe Singh*[60]

The majority while interpreting section 8(3) of the RPA to determine disqualification has laid down that the word 'any' has been used as an adjective qualifying the word 'offence'. Hence, the expression "a person convicted of any offence" has to be construed as all offences of which a person has been charged and held guilty at one trial. It is submitted that this seems to be an erroneous interpretation and the dissenting judgment seems more reasonable when it says that the word 'any offence' has to be interpreted strictly and it is clear that in order to incur disqualification the person must have been convicted of any offence and sentenced to imprisonment for not less than two years. According to the judge, in order to tackle the menace of criminalization of politics the court should not interpret the words in a very expansive manner so as to include within its ambit the persons who are strictly not coming within its purview, especially when the disqualification is not only from contesting the election but is to continue for a further period of six years since the release. The opinion of the court as far as section 8(4) is concerned is praiseworthy. It is of the view that once the House is dissolved and the person ceases to be member on the date of filing the nomination there would be no difference between him and any other candidate who was not such a member. The exception provided in the section was not to confer an advantage on a person but to protect the House since the number game is very important in the House. The legislators did not want the government to fall due to disqualification and ultimately a situation may arise where a higher court of appeal acquits the person. The provision of three months is provided in the section so as to enable such member to file an appeal or revision and get the disqualification deferred till the time it is disposed by the superior court. This is a welcome step and section 8(4) will no longer be available for misuse by the legislators.

The Supreme Court has not been lenient in awarding proper punishment even in the field of industrial adjudication.[61] It is common knowledge that as part of agitation workmen sometimes indulge in destroying public property or causing injury to the adversaries. In such a case where the high court substituted the order of dismissal of two workmen who assaulted their general manager during a strike, withholding of one increment was held highly disproportionate. The Supreme Court considered it a misconduct deserving dismissal. This decision shows the realistic approach gradually evolved by the court in response to the need for discipline and peace in industrial relations.

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60. (2005) 1 SCC 754.

61. *Employers, Management, Colliery, M/S Bharat Coking Coal ltd.* v. *Bihar Colliery Kamgar Union through Workmen*, AIR 2005 SC 2006.

Generally speaking, the judiciary has displayed restraint and caution in dealing with family matters. But where an issue as grave as legal right of the second wife to claim compensation was being contested the court was duty-bound to lay down a law on this precarious issue, which it chose not to.[62]

As regards the decisions on juvenile justice the court has been vacillating and has rendered contradictory opinions in *Umesh Chandra*[63] and *Arnit Das*[64] and finally in 2005 in *Pratap Singh* v. *State of Jharkhand & Others*[65] revisited *Umesh Chandra* overruling *Arnit Das*.[66] One is tempted to endorse the viewpoint in *Arnit Das* as in the Juvenile Justice Act, 1986, as held by Lahoti J, 'the field sought to be covered by the Act is not the one which had led to juvenile delinquency but the field when juvenile having committed a delinquency is placed for being taken care of post delinquency'. It seems to be the popular notion that the Juvenile Justice Act is meant for the treatment and rehabilitation of a juvenile rather than the determination of guilt of the accused. Hence the age at the time of commission of offence cannot be taken into consideration in applying the provisions of the Act.[67] The hypothetical question raised by Lahoti J is still begging an answer, despite the expansive reasoning of Sinha J traversing the whole area of juvenile jurisprudence spread through the municipal law and international law. The implications are grave since the juvenile status gives a kind of immunity from the general criminal law of the land, hence it should be bestowed with caution. The Juvenile Justice Act is a beneficial legislation aimed at making available the benefit of the Act to the neglected and delinquent juveniles. But there seems no reason to club the two categories *viz*. offences by juveniles who are juveniles at the commencement of the trial and offences by juveniles who cease to be juveniles at the commencement of the trial. The Act aimed at insulating the juveniles from ordinary criminals. The juveniles should not be allowed to be contaminated with hardened criminals. This aim is proposed to be achieved by putting them in institutions dealing with treatment of juveniles exclusively. But this holds no water once the offender ceases

62. *Narinder Pal Kaur Chawla* v. *Manjeet Singh Chawla,* (2004) 9 SCC 617.

63. *Umesh Chandra* v. *State of Rajasthan,* (1982) 2 SCC 202.

64. *Arnit Das* v. *State of Bihar,* (2000) 5 SCC 488.

65. *Pratap Singh* v. *State of Jharkand,* (2005) 3 SCC 551.

66. For academic debates see, B.B. Pande, "Setting the Juvenile Justice Course Right: A Critique of *Pratap Singh* v. *State of Jharkand*" (2005) 6 SCC (Journ)1; B.B. Pande, Rethinking Juvenile Justice: *Arnit Das* Style" (2000) 6 SCC (Journ) 1 ; Ved Kumari, Relevant Date for Applying the Juvenile Justice Act" (2000) 6 SCC (Journ) 6; Ved Kumari, "In Defense of *Arnit Das* v. *State of Bihar*: A Rejoinder" (2002) 2 SCC (Journ)15.

67. K.N.C. Pillai, "Editorial Comment" (2001) 2 SCC(Journ) 9-10.

to be a juvenile. A relook on the lines of *Arnit Das* is perhaps desirable.

Further, the court's encroachment in the area of alternative dispute resolution is not satisfactory. The court by majority over-ruled the stand taken in *Konkan Railway* case[68] and held that the chief justice or his designate functioning under section 11 (6) of Arbitration and Conciliation Act, 1996 is exercising a judicial function and not merely an administrative function.[69] The reasoning given is that the chief justice or his designate has to see other relevant considerations as to the appointment of arbitrators as well as validity of arbitrator agreement. Hence the nature of function is adjudicatory thereby determining the rights and liabilities of parties concerned. But if the court decides to sit as an adjudicatory body and not as an administrative one then the whole purpose of having arbitration would be defeated. It would be appropriate if this decision is reviewed lest the Arbitration and the Conciliation Act should not have any force.

The Supreme Court has made several strides in enlivening criminal jurisprudence. It has handed down several landmark decisions having a bearing on different aspects of criminal law and criminal procedure altering the contours of its territory and injecting new vigor and rigor in the statutory provisions. A bench of the Supreme Court, which generally handled the criminal cases, showed that it was not for soft handling of the hardened criminals.[70] The court has also shown that it was not happy if the media interfered with administration of criminal justice system.[71] As regards non-observance of procedure, generally speaking, the courts have shown a tendency to condone an irregularity.[72] The procedure should be the handmaid and not the mistress of legal justice. A residuary power should vest in the judges to act *ex debito justiciae* where the tragic sequel otherwise would be wholly inequitable. The court is of the opinion that the exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt by the prosecution, at times even when the prosecuting agencies are themselves fixed in the dock, ignoring the ground realities, often results in miscarriage of justice and makes the justice delivery system suspect and vulnerable.[73]

Jacob Mathew v. *State of Punjab*[74] is a reflection of the judiciary's penchant for writing long judgments, following no chronological order

68. *Konkan Railway Corpn. Ltd.* v. *Rani Constructons Pvt. Ltd.,* (2002) 2 SCC 388.

69. *SBP & Co.* v. *Patel Engg. Ltd.* (2005) 8 SCC 618.

70. *State of M.P.* v. *Babbu Barkare,* (2005) 5 SCC 413.

71. *M.P. Lohia* v. *State of W.B.,* AIR 2005 SC 790.

72. *Sheikh Salim Haji Abdul Khayamsab* v. *Kumar* (2006) 1 SCC 46.

73. *Munshi Singh Gautam & Ors.* v. *State of M.P.,* (2005) 9 SCC 631.

74. (2005) 6 SCC 1.

leading to confusion. The court dealing with the liability of a medical practitioner in criminal law discussed in detail the law of medical negligence in general and indicated the parameters of fixing liability. To do this the courts not content with the latest case law[75] reverted back to cases as old as1902[76] and a catena of other cases to finally come to the conclusion that Bolam test[77] is applicable for fixing liability in such cases. The court started analyzing criminal responsibility of doctors and ended in speaking on the need for exercising caution in launching proceedings against medicalmen. So far as the theory of criminal or civil liability of doctors the discussion in the judgment is *obscurum per obscurious*. It could have been possible for the court to have a relook of the subject in the context of the writings referred to in a comment on *Suresh Gupta's* case,[78] the predecessor of *Jacob Mathew*.

The court dealing with the appellate jurisdiction in *Parliament attack* case,[79] wherein during hearing of the case the respondent applicant was shot at and he moved an application seeking entrustment of investigation to CBI, categorically stated that it would not be appropriate for the court hearing criminal appeal to deal with an application of this nature especially when other remedies are open to the party. Still one is constrained to note the public urge to have independent investigations by an impartial body.

Time and again the court has been reiterating the need for high courts for adducing reasons for their decisions. A perusal of the case law of every year would signify that the high courts, generally speaking, do not adduce reasons for their decisions, particularly in matters of appeals which are rejected. This practice necessitates the Supreme Court to reappreciate the evidence and arguments. Despite the repeated reiterations by the Supreme Court, the high courts still continue their practice. Be that as it may, generally speaking, the Supreme Court did a lot of soul-searching in the matter of its approach towards punishment. It may be correct to say that it has moved towards crime control model of criminal justice rather than justice model of criminal justice administration. The court's often-quoted concern for societal security makes it to abandon the much benign rehabilitation and to embrace retribution as the aim of punishment. In *State of M.P.* v. *Balu*[80] Hegde J specifically referred to the statement of Krishna Iyer J in *Phul Singh*[81]

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75. *Suresh Gupta (Dr.)* v. *Govt. of NCT of Delhi,* (2004) 6 SCC 422.

76. *Emperor* v. *Omkar Ram Pratap,* (1902) 4 Bom LR 679.

77. (1957) 2 All ER 118.

78. Jyoti Dogra Sood. "Responsibility of Doctors for Rash or Negligent Act" 46 *JILI* 588-92 (2004).

79. *State (NCT OF Delhi)* v *Navjot Sandhu,* (2005) 11 SCC 797.

80. (2005) 1 SCC 108.

81. *Phul Singh* v. *State of Haryana*,(1979) 4 SCC 413.

which in turn was quoted in *T.K.Gopal* v. *State of Karnataka*[82] and categorically declared that the court was not willing to give emphasis on reformation. A clear shift the court before ten years could have made with much trepidation!

The decision in *Saibanna* v. *State of Karnataka*,[83] stands as the insignia of the court's *avatar* in matters of punishment. Turning down the request for commutation of death penalty imposed on a double murderer, the court refused to be swept away by the new wave for abolition of capital punishment. It vehemently rejected the plea for reducing capital punishment to long-term imprisonment though earlier it did do so in cases like *Bhagwan* v. *State of Rajasthan*.[84] In 2005 the court thus declares that it stands for crime control and protection of society rather than to experiment with new theories of punishment. One could see this trend as a positive reaction of the court to the popular demand for protection from crime. Turning down request for award of compensation allegedly for police torture, which could not be established in an independent investigation by the CBI, the Supreme Court ruled that in such cases it would not award compensation under the public law.[85] It reviewed its precedents and reiterated the position. The court with a view to avoid police overreach suggested the following:

(a) Police training should be re-oriented, to bring in a change in the mindset and attitude of the police personnel in regard to investigations, so that they will recognize and respect human rights, and adopt thorough and scientific investigation methods.

(b) The functioning of lower level police officers should be continuously monitored and supervised by their superiors to prevent custodial violence and adherence to lawful standard methods of Investigation.

(c) Compliance with the eleven requirements enumerated in *D.K. Basu*[86] should be ensured in all cases of arrest and detention.

(d) Simple and foolproof procedures should be introduced for prompt registration of first information reports relating to all crimes.

(e) Computerization, video-recording, and modern methods of records maintenance should be introduced to avoid

82. (2000) 4 SCC 413.
83. (2005) 4 SCC 165
84. (2001) 6 SCC 296
85. *Sube Singh* v. *State of Haryana*, 2006 (2) SCALE 161.
86. *D.K. Basu* v. *State of West Bengal*, (2003) 11 SCC 725.

manipulations, insertions, substitutions and ante-dating in regard to FIRs, Mahazars, inquest proceedings, port-mortem; reports and statements of witnesses etc. and to bring in transparency in action.

(f) An independent investigating agency (preferably the respective Human Rights Commissions or CBI) may be entrusted with adequate power, to investigate complaints of custodial violence against police personnel and take stern and speedy action followed by prosecution, wherever necessary.

The endeavour should be to achieve a balanced level of functioning, where police respect human rights, adhere to law, and take confidence building measures (CBMs), and at the same time, firmly deal with organized crime, terrorism, white-collared crime, deteriorating law and order situation etc.

The Supreme Court's concern for doing justice makes it to re-appreciate evidence and decide cases on its own sometimes differing with the high courts which are considered final courts on evidence. All the decisions in this field have not been encouraging. There were some disturbing decisions like *Dilip Singh* v. *State of Bihar*[87] wherein a woman who had a child by a man who much against her wish had sexual intercourse with her. He was held to be not responsible for rape as she allowed him to continue the relation knowing that they were not to marry despite his assurance to the contrary. Despite its holding him not guilty for rape the court ordered him to pay a sum for the maintenance of the child. It was really unfortunate that the man was held not guilty for rape inasmuch as the woman did not give consent. In some cases the Supreme Court did not register a decision though it discussed the issues and left them for decision by the high courts. Such decisions in fact do not add to the credibility of the Supreme Court.

For example, in *Poonam Chand Jain* v. *Fazru*,[88] the Supreme Court after taking the parties through the difficult terrain of the decisional jurisprudence remitted the case to the high court for a decision. Such decisions stand apart from good decisions rendered by the court earlier. There have been occasions where the court under great stress of mounting arrears responded by way of advice that the parties may be required to exhaust their remedies before they come to the Supreme Court under article 32.[89] Probably this could be taken as an advice as the constitutional right under article 32 cannot be trimmed even by the

87. SCC 2005(I) 88.
88. 2005 SCC (Cri) 190.
89. *Union of India* v. *Paul Manickam,* AIR 2003 SC 4622.

Supreme Court by way of employment of conditions. Such cases cannot have any precedential value at all.

It is interesting to see that the Supreme Court evolved a pattern of entertaining curative petitions. This remedy was made available only for rarest of rare cases where very strong reasons exist and was not to be used by way of another regular appeal. To ensure against this malpractice a condition was laid down that it should carry a certificate of a senior advocate that:[90] (1) there is a violation of principles of natural justice (2) where in the proceedings a learned judge fails to disclose his connection with the subject matter or the parties giving scope for an apprehension of bias and the judgment adversely affects the petitioner. But it seems creation of such a remedy does not augur well for the court as the decision in *Sumer* v. *State of U.P.*[91] has shown. It was a criminal case dealing with sections 302/149 of the IPC. The requirement of a certificate was fulfilled but it was filed in a very casual manner and the senior advocate did not apply his mind to the requirements of a curative petition. Creation of such a remedy has opened the floodgates for filing a second review petition. In the present case the court should have imposed exemplary cost but it chose not to due to it being a criminal appeal.

The court has obliterated the confusion with regard to the judicial scheme in *Sompal Singh* v. *Sunil Rathi & Anr.*[92] The court held that in the hierarchical judicial system, it is not for any court to tell a superior court as to how a matter should be decided when an appeal is taken against its decision to that superior court. Such a course would be subversive of judicial discipline on the bedrock of which the judicial system is founded and finality is attached and orders are obeyed. Further, in *Central Board of Dawoodi Bohra Community* v. *State of Maharashtra*[93] the court set at rest the confusion, if any, regarding judgments delivered by different benches and held:

(1) The law laid down by the Supreme Court in a decision delivered by a bench of larger strength is binding on any subsequent bench of lesser or coequal strength.

(2) A bench of lesser quorum cannot disagree or dissent from the view of the law taken by a bench of larger quorum. In case of doubt all that the bench of lesser quorum can do is to invite the attention of the chief justice and request for the matter being placed for hearing before a bench of larger

90. *Rupa Ashok Hurra* v. *Ashok Hurra*, (2002) 4 SCC 388.
91. (2005) 7 SCC 220.
92. (2005) 1 SCC 1.
93. (2005) 2 SCC 673.

quorum than the bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.

(3) The above rules are subject to two exceptions: (i) the above said rules do not bind the discretion of the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular bench of any strength; and (ii) in spite of the rules laid down hereinabove, the matter has already come up for hearing before a bench of larger quorum and that bench itself feels that the view of the law taken by the bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way proceed to hear the case an examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of the chief justice constituting the bench and such listing. Such was the situation in *Raghubir Singh*,[94] and *Hansoli Devi*.[95]

Granting of anticipatory bail has always been involved in controversy. The Supreme Court had an interesting issue recently. In one case[96] the accused was granted anticipatory bail and no period of its operation was mentioned so that the person may get protection from arrest for a longer period. On the petition of the complainant, the court clarified that such orders cannot be passed by court under section.438 Cr PC. The order is to be in operation till an application for regular bail is made. This decision may arrest the trend of misusing this provision.

As the apex court of the country it has been enforcing judicial discipline wherever it was found necessary. The Supreme Court had an occasion to chide a high court judge in the context of granting bail.[97] Where a request for bail was asked to be reconsidered, the high court reclamping its earlier decision of granting bail opined that bail orders are interlocutory orders and therefore the Supreme Court should refrain from interfering with the orders. This was severely criticised by the Supreme Court, which reminded the judge that it was not for any court to advice the Supreme Court as to how the cases should be decided by itself.

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94. (1989) 2 SCC 754.
95. (2002) 7 SCC 273.
96. *Adr Dharan Das* v. *State of W.B.*, (2005) 4 SCC 303.
97. *Sompal Singh*, *supra* note 92.

The apex court introspecting on the sentencing process quoted from Friedman in his *Law in Changing Society* that: "State of criminal law continues to be - as it should be - a decisive reflection of social consciousness of society." Therefore, it felt that in operating the sentencing system law should adopt a corrective machinery or deterrent approach to be adopted depending upon the factual matrix of the case. The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the state. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross cultural conflict where living law must find answer to new challenges and the courts are required to mould the sentencing system to meet the challenges. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Inevitably these considerations cause a departure from just deserts as the basis of punishment and create cases of apparent injustice that are serious and widespread. By deft modulation sentencing process should be stern where it should be, tampered with mercy where it warrants to be.[98]

The court's engagement with international law in 2005 has raised some fundamental questions of legitimacy. These came to the force in the context of incorporating of international legal norms into the municipal law. In *PUCL* v. *Union of India*,[99] Hegde J identified the issues thus: -

> In arriving at his decision Hon'ble Sabharwal, J. has treated the Paris Principles and the UN General Assembly Resolution as covenants. Thereafter he has applied the law applicable to international convenants and/ imported the obligations under the Paris Principles and the UN General Assembly Resolution as if they are binding as legal obligations on India even in the municipal context. While doing so he has relied obligations upon the judgments of this Hon'ble Court in *Mackinnon Muckenzie Ltd.* V. *Andrey D' Costa*.[100]
>
> Having noted the above we would with respect like to point out that neither the Paris Principles nor the subsequent UN General Assembly Resolution could be exalted to the status of a covenant in International Law. Therefore, merely because India is a party to these documents does not cast any binding legal obligation on it. Further, all the above cases, which Hon'ble Sabharwal, J. has relied upon deal with the obligations of the Indian State

98. *Shailash Jasvantbhai* v. *State of Gujarat*, (2006) 2 SCC 359.
99. (2005) 5 SCC 363.
100. (1987) 2 SCC 469.

> pursuant to its being a party to a covenant/ treaty or a convention and not merely a declaration in the international fora or a UN General Assembly Resolution.
>
> Apart from the above, the fact that the field in relation to the constitution of NHRC is covered by an Act of the Indian Parliament, it follows that neither the Paris Principles not the UN General Assembly Resolution can override the express provisions of the Act."

These issues still demand clear-cut answers in as much as the court even in *Nilabati Behera* v. *State of Orissa*[101] skirted a proper analysis of the issues at theoretical level. Instead it pegged its discussion on the trial reasoning that so long as there is no conflict between an international legal norm and the constitutional norm there is no harm in enforcing the norm as part of municipal law.[102]

In short, in retrospect, the Supreme Court stood erect as a consoling presence to the little Indian, as a pillar of strength against executive excesses, as a watchdog of democracy and rule of law and as an ombudsman ensuring accountability of all functionaries in the governance of this great country signifying its role as the sentinel on the *qui vive*. In the accomplishment of this great task it maybe alleged by the critics that the court deviated from its course, fumbled at times, slipped away from its path, played different tunes or blew hot and cold. But none can allege that it did so for itself. It has a clean record. Its image remains clear and glowing. Its unblemished record of service to the people makes it stronger day by day making unjustified criticisms irrelevant.

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101. (1993) 2 SCC 746.

102. India ratified the ICCPR in 1979 with reservations on some articles including Art. 9(5), which states that 'Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation'. But despite this reservation the court in *Nilabata Behara* while granting compensation held that Art. 9 (5) of ICCPR also indicates that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right.