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SOCIO ECONOMIC CRIMES

*Anurag Deep**

I INTRODUCTION

CHANGE IS natural and ubiquitous. Social changes lead to "development" and social deviations lead to "criminality". In the words of Prof. Upendra Baxi it is "double transformation."[1] This interface of double transformation of development and criminality has been addressed through ordinary penal enactments like the Indian Penal Code, 1860. With the passage of time it was noticed that ordinary laws were insufficient to tackle the criminality because industrial development and post war situations have changed the nature of criminality in many cases. This new criminality was motivated by a selfish thinking of becoming "over night rich," which generated a new name for certain crimes called as socio-economic crimes. In many cases ordinary criminality changed into extraordinary criminality, also because educated, respectable and powerful people get involved in the crime by "abusing their position". This crime was called as "white collar crime."[2] Both these crimes became menace to economy, health and security of any country in all jurisdictions. In last survey (2016) Gautam Kundu case[3] was analysed where it was rightly reiterated that *s*ocio economic crimes go against "National Economy and National Interest and committed with cool calculation and deliberate design with the motive of personal gain regardless of the consequences to the society." Forty years ago Krishna Iyer, J. referred them as "traumatic threat to the survival of social order."[4] They emerged as stronger enemy.

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1 Upendra Baxi, "Social Change, Criminality and Social Control in India: Trends, Achievements and Perspectives,", in *Essays on Crime and Development*, 227, United Nations Intergenerational Crime and Justice Research Institute, (Rome, 1999).

2 Edwin H. Sutherland, "White-Collar Criminality," *American Sociological Review*, Vol. 5, No. 1 (1940) at 9.

3 *Gautam Kundu* v. *Manoj Kumar*, *Assistant Director, Eastern Region Directorate of Enforcement (Prevention of Money Laundering Act) Govt. of India*, AIR 2016 SC 106. Pl see, arguments of Ranjit Kumar, Solicitor General.

4 *Rajendra Prasad* v. *State of Uttar Pradesh*, (1979) SCC 646 at para 77, 80, 88 and 198. (Capital punishment was suggested in mass death cases in corporate crimes or environmental crimes).

Stronger enemy needs stronger power. To tackle the menace new and special laws were an imperative. Various new laws on corruption, dowry death, money laundering, narcotic drugs, food security *etc.* were passed which created a new legal regime based on new criminal jurisprudence. The classical rules guiding substantive, procedural and evidential content of criminal law were changed drastically.[5] Indeed the pendulum of constitutional philosophy was tilted from individual centric model to "public welfare"[6] centric model. Technological revolution has assisted both, the offenders and the State. It has helped in checking various socio-economic crimes as well as also emerged as another tool in the hands of offenders. While technology is being used for corruption the same technology helps tracking the corrupt money and socio economic offenders. In *Vyayapam* case MBBS seats were manipulated by using technology. The same technology was used by CBI to through social media, credit card payments to track offenders.[7] Money launders use technology to divert money in shell companies. Is the system well equipped to prevent, prosecute and punish socio economic offenders? Can it also perform to reform them? Judicial pronouncements are an effective way to appreciate and examine the strength and weaknesses of the laws dealing with socio-economic crimes. This survey is an attempt to evaluate the intent and content of a few enactments. Due to space limitation, it covers decisions of the Supreme Court where law has been laid down or has lasting impact on legal regime.

II THE PREVENTION OF MONEY LAUNDERING ACT, 2002

Denial of Bail

Section 45 of PMLA was in issue in two important cases. In *Rohit Tandon* v. *Directorate of Enforcement*,[8] the accused was arrested under various provisions including PMLA. His regular bail application was rejected by sessions court and high court on the ground that twin condition of section 45 applies. The Supreme Court had to examine whether twin conditions apply or not? Section 45(1) imposed two conditions for grant of bail where an offence punishable for a term of imprisonment of more than 3 years under Part A of the Schedule to the Act was involved. The conditions were -

i. the Public Prosecutor must be given an opportunity to oppose any application for release on bail and
ii. the Court must be satisfied, where the Public Prosecutor opposes the application,
    a. that there are reasonable grounds for believing that the accused is not guilty of such offence, and

5 Anurag Deep, "Socio-economic Crimes", 903-943 at 903, LII *ASIL* (2016).

6 Francis Bowes Sayre, "Public Welfare Offenses" 33 *Colum. L. Rev.* 55 (1933).

7 *Available at*: https://www.thehindu.com/news/vyapam-scam-cbi-files-charge-sheet-against-592-accused/article 20717050.ece. (Last visited on March 8, 2019).

8 (2018) 11 SCC 46 : 2017 SCC OnLine SC 1304: (2018) 2 SCC (Cri) 339 at page 66. It was decided on Nov 10, 2017 by a Full Bench constituting Dipak Misra, AM Khanwilkar and Dr DY Chandrachud, JJ. Khanwilkar, J. delivered the verdict, *hereinafter* referred as *Rohit Tandon*.

b. that he is not likely to commit any offence while on bail.

The accused was found in his possession certain incriminating materials, *viz*. demand draft of bank in favour of fictitious persons, huge money of demonetized currency and new currency. He maintained inexplicable silence or was reluctant to disclose the source. The statements of witnesses were relied on by subordinate courts and were admissible under law, which made out formidable case that accused was involved in the crime. While rejecting the bail application a Full Bench observed that: [9]

> The consistent view taken by this Court is that economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country. Further, when attempt is made to project the proceeds of crime as untainted money and also that the allegations may not ultimately be established, but having been made, the burden of proof that the monies were not the proceeds of crime and were not, therefore, tainted shifts on the accused persons under section 24 of the 2002 [PMLA]Act.

The facts established that accused failed to overcome twin condition of section 45. The full bench took support from analogous provision under Maharashtra Control of Organised Crime Act, 1999 with the help of *Ranjitsing Brahmajeetsing Sharma* v. *State of Maharashtra*[10] and *State of Maharashtra* v. *Vishwanath Maranna Shetty*.[11] At the stage of grant of bail, the Court is required to consider "whether the accused was possessed of the requisite *mens rea*." There is no need of a positive finding as to the commission of offence. "The duty of the Court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. Further, the Court is required to record a finding as to the possibility of the accused committing a crime which is an offence under the Act after grant of bail."[12] Though the validity of section 45 was also in question, the petitioner requested to deal with bail only. The Court did not go into the constitutional validity of section 45 of PMLA which was decided in *Nikesh Tarachand Shah* discussed below.

PMLA, 2002: meaning of section 3

One of the leading development in the area of socio-economic crime is *Nikesh Tarachand Shah* v. *Union of India*[13] because question of fundamental right violation

9 *Id.* at para 21.

10 (2005) 5 SCC 294 : (2005) SCC (Cri) 1057.

11 (2012) 10 SCC 561 : (2013) 1 SCC (Cri) 105.

12 *Rohit Tandon*, at para 22.

13 (2018) 11 SCC 1. It was decided on Nov 23, 2017 by a Division Bench of RF Nariman and SK Kaul, JJ. Nariman, J. delivered the verdict, *hereinafter* referred as *Nikesh Tarachand Shah*.

was involved in it and the same was accepted. A Division Bench has declared section 45(1) of the PMLA, 2002 as unconstitutional. In the course of this determination it has also delineated on the meaning and scope of section 3 (offence of Money Laundering) of the PMLA, 2002. As the discussion on section 3 is brief, this work will first refer section 3 and then section 45. Regarding section 3 the Court observed as under:[14]

> Under section 3 of the Act, the kind of persons responsible for money laundering is extremely wide. Words such as "whosoever", "directly or indirectly" and "attempts to indulge" would show that all persons who are even remotely involved in this offence are sought to be roped in. An important ingredient of the offence is that these persons must be knowingly or actually involved in any process or activity connected with proceeds of crime and "proceeds of crime" is defined under the Act, by section 2 (u) thereof, to mean any property derived or obtained directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence (which is referred to in our judgment as the predicate offence). Thus, whosoever is involved as aforesaid, in a process or activity connected with "proceeds of crime" as defined, which would include concealing, possessing, acquiring or using such property, would be guilty of the offence, provided such persons also project or claim such property as untainted property. Section 3, therefore, contains all the aforesaid ingredients, and before somebody can be adjudged as guilty under the said provision, the said person must not only be involved in any process or activity connected with proceeds of crime, but must also project or claim it as being untainted property.

This definition is very wide and the *actus reus* points to three things. (i)The definition of the crime is *inclusive* in nature. Therefore, the interpretation of the definition should be broad and not restricted or literal though it is a penal statute. (ii) Proximity with crime is not required the way it is required in classical sense because the provision uses the word *indirectly*. This reduces the use of judicial discretion in favour of accused. (iii) Even the crime of inchoate nature *i.e attempt* is expressly covered under PMLA. Highest degree of *mens rea i.e* intention is not essential. Mere knowledge is sufficient.

Constitutional validity of section 45, PMLA-Arbitrariness

A milestone in 2017 is the constitutional validity of section 45 of PMLA. Section 45 provides for twin condition before bail could be granted. [15]

14 *Id.* at para 11.

15 Relevant part of s. 45 is as under:

> Offences to be cognizable and non- bailable.— (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall be released on bail or on his own bond unless—

The Division Bench deliberated on the history of Bail, discussed development of PMLA Bill to PMLA Act, detected the constitutional flaw manifest in the provision and application and declared section 45(1) as violative of article 14 and 21 of the Constitution of India.

Inconsistency in Purpose

The Court pointed out various situations which are inconsistent in content and beyond any logic in application. (i) If A1 is accused of mere money laundering, he can get bail. If he is accused of money laundering and any offence under schedule B, he may get bail and section 45 of the 2002 Act would not apply. (ii) On the other hand, if A1 is not accused of money laundering even then section 45 applies and he may not get bail. This is because of the fact that the categorisation of offences and situation for application of section 45 follows no logic or pattern. For example, A2 kills D1 for rupees 5 lakh. He shall be prosecuted under section 302 of Indian Penal Code which is a scheduled offence under PMLA but has not committed any offence (like section 3, punishable under section 4) under PMLA because A2 has not done anything either to hide it or to claim it as untainted. He may deny receiving such money also. The money was traced to A3 who projects it as untainted. A3 shall be prosecuted for section 3 PMLA r/w section 302. In the above illustration, A2 applies for bail but section 45 will be applicable though A2 is not being prosecuted under PMLA. A3 is accused of PMLA but section 45 does not apply. A2 is not accused of PMLA but section 45 applicable. Suppose A2 killed D1 and D2 in two separate events. A3 will be prosecuted under section 302 for killing D2. For killing of D1 A2 will be prosecuted under section 302 and A3 for PMLA. When bail application will be moved, A2 will be regulated by section 439 of CrPC 1973 for killing D1 but for killing of D2, A2 will be dealt with section 45 of PMLA. In both killings, the prosecution of A2 is only under 302. But application of bail law will be different because in case of D2, another accused was tried under PMLA. Based on similar illustrations the Nariman, J. held as under:[16]

> All these examples show that manifestly arbitrary, discriminatory and unjust results would arise on the application or non application of section 45, and would directly violate articles 14 and 21, inasmuch as the procedure for bail would become harsh, burdensome, wrongful and discriminatory depending upon whether a person is being tried for an offence which also happens to be an offence under part A of the

(i) the Public Prosecutor has been given a opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:

16 *Nikesh Tarachand Shah* at para 34.

> Schedule, or an offence under part A of the Schedule together with an offence under the 2002 Act. Obviously, the grant of bail would depend upon a circumstance which has nothing to do with the offence of money laundering. On this ground alone, section 45 would have to be struck down as being manifestly arbitrary and providing a procedure which is not fair or just and would, thus, violate both articles 14 and 21 of the Constitution.

As there was no reasonable nexus between the objective of law and the classification made, the provision was declared unconstitutional for the violation of both rules of article 14 *i.e* classification and arbitrariness. The provision was also against justness, reasonableness and fairness under article 21.

If the purpose of section 45 was to make the grant of bail difficult in PMLA cases, the content of section 45 did not serve the purpose. For example in the above illustration the court was required to satisfy two things that, there were reasonable grounds for believing that the accused A2 was not guilty of "such offence," and that A2 was not likely to commit any offence while on bail. "Such offence" does not mean any PMLA offence but scheduled offence. In this illustration the court had to satisfy that A2 was not guilty of murder. For this satisfaction under IPC what was the need and nexus with PMLA. Section 45 of PMLA was applied for murder offence and not applied for PMLA offence. R. F. Nariman, J. therefore held as under: [17]

> Obviously, the twin conditions laid down in section 45 would have no nexus whatsoever with a bail application which concerns itself with the offence of money laundering, for if section 45 is to apply, the Court does not apply its mind to whether the person prosecuted is guilty of the offence of money laundering, but instead applies its mind to whether such person is guilty of the scheduled or predicate offence. Bail would be denied on grounds germane to the scheduled or predicate offence, whereas the person prosecuted would ultimately be punished for a completely different offence - namely, money laundering. This, again, is laying down of a condition which has no nexus with the offence of money laundering at all, and a person who may prove that there are reasonable grounds for believing that he is not guilty of the offence of money laundering may yet be denied bail, because he is unable to prove that there are reasonable grounds for believing that he is not guilty of the scheduled or predicate offence. This would again lead to a manifestly arbitrary, discriminatory and unjust result which would invalidate the Section.

Schedule A and B-Irrational Classification

Schedules in enactments are provided to keep one category of matter together which applies to various provisions of a law. PMLA contains two schedules where

17 *Id.* at para 35.

offences of different nature are mentioned. PMLA, section 45 is applicable only if accusation belongs to schedule A. The policy seemed to be that schedule A must be containing those economic offences which are grave in nature because of amount involved. However, in practice they apply discriminately. Nariman, J. has given illustrations. Schedule-A contains murder and schedule-B contains offences under the Customs Act, 1962. In both cases PMLA comes in picture when there is proceed of crimes. Suppose A4 kills D4 and proceed of crime is Rs 50000/ which A4 tries to launder. Here section 45(1)(a) will be applicable. Suppose A4 is caught under the Customs Act [false declaration under section 132 of the Customs Act, punishable with a sentence up to 2 years] with proceed of crime of Rs 1 crore which A4 launders. Section 45(1)(a) will not be applicable because Customs Act is under Schedule B to which section 45 does not apply. While murder is far more heinous offence, PMLA was especially enacted to address the economic offenders. Irony was that stringent provisions of bail under PMLA did not apply to proceed of crime of Rs 1 crore money laundering transaction but applies to the proceed of crime of Rs 50,000/. Based on similar illustration the Court held as under: [18]

> It is clear from a reading of this judgment that offences based on sentencing of the scheduled offence would have no rational relation to the object of the 2002 Act and to the granting of bail for offences committed under the Act, and, therefore, have to be annulled on the basis of the equal protection clause.

Placing the Customs Act, 1962 in schedule-B is meaningless. The right place is schedule-A so that there is nexus of object with the enactment.

Same punishment, different bail condition

Tenure of punishment may be a valid criteria for classification.[19] Such classification cannot always be scientific. However, they must pass the minimum threshold of rationality. Nariman, J. rightly noticed that through illustrations of punishment of life imprisonment and ten years imprisonment that arbitrariness in this classification is too manifest to explain.

Life imprisonment

Suppose A5 is prosecuted under PMLA for sections 232 (counterfeiting of Indian coin) and 238 (import or export of such coin) and also section 255 (counterfeits Government stamps). Both have life imprisonment. Section 232 and 238 is mentioned

18 *Id.* at para 37.

19 CrPC 1973, schedule First, II-Classification of offences against other laws decides whether an offence other than Indian Penal Code, is bailable or non bailable, cognizable or non-cognizable on the ground of tenure of punishment. All offences with 3 years or less imprisonment are non-cognizable and bailable. All offences under special laws or local laws above 3 years are cognizable and non-bailable.

under schedule B. Therefore, strict conditions of bail under section 45 of PMLA will not be applicable on him and simple conditions of bail under section 439 of CrPC 1973 will be applicable. However, for section 255, which is put under schedule A, strict restriction of bail would be applicable. The gravity of offence in both cases is similar because the punishment is same *i.e* life imprisonment. Why should the bail condition be different?

Ten years punishment

The offence of extortion *vis a vis* those dealing with Indian coins or trade in minors for prostitution have ten years imprisonment. Suppose A6 was prosecuted under PMLA for IPC offences of extortion under sections 386 or 388. Twin condition of section 45 will apply because section 386 and 388 are in schedule A. On the contrary, if he is prosecuted under PMLA for section 240 (delivery of Indian coin possessed with knowledge that it is counterfeit); section 251 (same if altered); sections 372 (selling minors for the purpose of prostitution) and 373 (buying for same), twin condition of bail will not apply. As these are roped in schedule B of PMLA, PMLA provision of bail *i.e* section 45 will not apply and CrPC 1973 will apply.[20] There was no logical connection of putting these offences in two different schedule. Section 386, 388 *i.e* extortion may be committed against private persons. Parliament kept them in schedule A, which indicates Parliament feels they are very serious. Section 240, 251 dealing with Indian coins is equally dangerous (indeed it is far more grave). Sections 372, 373 is offence against children and women which in no sense is less serious than extortion. But section 240, 251, 372, 373 was put in the basket of schedule B which did not need twin condition of section 45.

Did Parliament apply its mind?

Not only above classification but a couple of other provisions also establish that the Parliament incorporated section 45 and keep on amending it without giving enough thought on the provisions and their impact on fundamental rights.[21] Nariman, J. exemplified the repetition of provision, proportionality of punishment to establish this fact as under.

NDPS Act 1985 better drafted than PMLA

Schedule A, para 2 of PMLA contains "commercial quantity" provision *i.e* sections 19, 24, 27A and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985. Section 37 of NDPS Act, 1985 expressly provide for same twin condition. What was the need of such repetition?

NDPS Act, 1985 makes difference between (1) a small quantity, (2) above small but below commercial quantity, and (3) above commercial quantity. The punishment

20 *Id.* at para 38.

21 Finance Bill 2018 passed without discussion by Lok Sabha – Livemint, *available at* https://www.livemint.com/.../Budget-passed-without-discussion-in-Lok-Sabha-as-prote, (last visited on Feb 13, 2019).

is different for different quantity. Twin and strict bail condition under section 37 was applicable only for (3) *i.e* commercial quantity. Schedule-A of PMLA neutralized this difference and made twin condition applicable for all cases be it small or commercial. It treated unequal with equal law which goes against the principle of equality. The Court has, indirectly upheld section 37 of NDPS Act, 1985.

Biological Diversity Act, 2002

The Court also illustrated the Biological Diversity Act, 2002. "If a person covered under the Act obtains, without the previous approval of the National Biodiversity Authority, any biological resources occurring in India for research or for commercial utilization, he is liable to be punished for imprisonment for a term which may extend to 5 years under section 55 of the Act." Suppose an accused of this provision comes under PMLA, he will have to satisfy twin condition of section 45 because this Biological Diversity Act finds place in schedule A. The objection of bench was that this provision of section 55 was not serious enough to qualify for section 45. In other words, it failed proportionality test, *i.e* provision must be proportional to the conduct criminalised. The conduct criminalised may be serious but not serious enough or proportional for such strict conditions. However, there is one problem in this fishing inquiry. In such inquiry the Court also opined on wisdom of legislature. This questioning the value judgement of Parliament may emerge again in later cases. Indeed the danger of "arbitrariness test" is that it intrudes into the legislative wisdom of why this provision. "It will create difficulties in policy making and political decisions of State."[22] Therefore, arbitrariness test should not be used the way classification test is used.

Bail and pre bail

Another irony that attracted attention of the bench was that fact that if A1 applies for anticipatory bail, section 45 does not apply. It applies only when a person is arrested. The consequence of the provision was that it discourages an accused to surrender and then apply for bail and encourages him to escape the long arms of law. Suppose A7 is an accused under PMLA and he strongly believes that he is innocent. An innocent person should fear none and therefore in order to cooperate the police, he approaches them. Once he approaches or surrenders he may be arrested. With his arrest twin condition under section 45 (1)(a) applies which makes makes his liberty more difficult. If he plans to skip the clutches of law and applies for pre arrest bail from lower court to higher courts, twin conditions do not apply. This develops a wrong policy of law which cannot be just, fair and reasonable. Due to this "extremely anomalous situation" Nariman, J. again declared it violative of article 14 and 21. This analysis ascertains

22 Anurag Deep, Case Comment of *Shayara Bano* 2017 (9) SCALE 178, *News Letter*, July-Sept 2017, the Indian Law Institute, New Delhi. *See also*, Anurag Deep "Manifest Arbitrariness test and Judicial Review of an Enactment : A critical study of pre *Shayara Bano* to post *Shayara Bano*, in Manoj K Sinha and Furqan Ahmad, *Dispelling Rhetorics*, (forthcoming, Indian Law Institute, 2019).

that the policy under which a law is made by Parliament has also been declared unconstitutional. This again is a new development.

Reasonable grounds *vis a vis Prima facie*: Difference

Section 45 required the court to satisfy itself "that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail." *Reasonable grounds for believing* is subjective satisfaction and next important development of law will center around the interpretation of this phrase.[23] Any satisfaction as to the guilt may have various categories. Three such categories may be, possibilities of guilt based on *prima facie* evidence, probability of guilt based on reasonable grounds and certainty of guilt based on beyond reasonable doubts. First (guilt based on *prima facie* evidence) makes ground for direction to lodge FIR, investigation. Second (guilt based on reasonable grounds) used in declining bail as in section 45 of PMLA or other enactments. Third (guilt based on beyond reasonable doubts) leads to conviction. There can be more than three categories.[24] As second category (section 45 PMLA) was under challenge, it was argued that second category merges into first category in the light of precedent of *Amarmani Tripathi*.[25] This argument of merger was made by Attorney General because "reasonable grounds to believe" sounds like a vague generality. There are no concrete judicial developments on this phrase while *prima facie* is something which is widely, legally and judicially acknowledged. In *Amarmani Tripathi* (para 18) it was held that "for grant of bail, the Court has to see whether there is *prima facie* or reasonable ground to believe that the accused has committed the offence, and the likelihood of that offence being repeated has also be seen." Nariman, J. however, declined to honour this argument. Mathematically speaking *prima facie is not equal to* reasonable grounds but *prima facie* is *less than* reasonable ground. The opinion of Nariman, J. in *Nikesh Tarachand Shah* may be reproduced as under:[26]

> It is obvious that the twin conditions set down in section 45 are a *much higher threshold* bar than any of the conditions laid down in paragraph

23 S. 212(6)(ii) of the Companies Act, 2013 contain similar provision of twin condition. Constitutional validity of Ss 212(6)(ii) and 212(7) of the Companies Act, 2013 is under challenge in the case of *Serious Fraud Investigation officer* v. *Neeraj Singal* by Division Bench constituting Dr DY Chandrachud and A.M. Khanwilkar, JJ. on Sept 4, 2018. The Court is likely to declare the provisions as valid and constitutional with certain guidelines for judicial officers.

24 A fourth category can be guilt based on beyond reasonable doubts and rarest of the rare case which paves way to capital punishment.

25 *State of U.P. through C.B.I.* v. *Amarmani Tripathi*, (2005) 8 SCC 21. This Division Bench decision establishes how an upright police officer (Anil Agrawal, SSP, Lucknow) remained firm before a very strong minister and discharged his duty without fear or favour. He was transferred later on but his investigation, statements in the trial court was crucial in rejection of bail and conviction of a family involved in the murder of a young lady. Pressure from politicians, planning and conspiracy by other police officer, framing innocent persons are part of this case.

26 *Nikesh Tarachand Shah* at para 43.

> 18 of the aforesaid judgment [*Amarmani Tripathi*]. In fact, the presumption of innocence, which is attached to any person being prosecuted of an offence, is inverted by the conditions specified in section 45, whereas for grant of ordinary bail the presumption of innocence attaches, after which the various factors set out in paragraph 18 of the judgment are to be looked at. Under section 45, the Court must be satisfied that there are reasonable grounds to believe that the person is not guilty of such offence and that he is not likely to commit any offence while on bail.

The Court rightly accepted that *prima facie* is not equal to reasonable ground because a number of enactments similar to section 45 of PMLA does contain twin condition and Parliament has used this phrase "reasonable ground" deliberately. It can be safely presumed that the Parliament was aware of the word *prima facie* but used "reasonable ground." *Amarmani Tripathi* could not be a persuasive precedent also because it was on classical criminal law *i.e* Indian Penal Code while the question before the bench was on special criminal law *i.e* PMLA. This argument of *Amarmani Tripathi* was also advanced so that section 45 be read down. However, the content of the provisions are mixed up in such a manner that read down was not possible. The Court rightly pointed out "that merely reading down the two conditions would not get rid of the vice of manifest arbitrariness and discrimination as has been pointed ..."[27]

Nariman, J. referred majority and minority opinion in *United States* v. *Anthony Salerno & Vincent Cafaro*,[28] where a provision of the Bail Reform Act of 1984 which allowed pre trial detention on the ground that he was likely to commit future crimes, was held valid by the majority of the US Supreme Court because it fell "fall within that carefully limited exception." After referring US judgement the Court imported the doctrine of compelling State interest.

Compelling State interest

The bench rightly accepted that section 45 of PMLA is a drastic measure and "we must be doubly sure that such provision furthers a compelling State interest for tackling serious crime. Absent any such compelling State interest, the indiscriminate application of the provisions of section 45 will certainly violate article 21 of the Constitution."[29]

Distinguishing Precedents

(i) *Kartar Singh* not applicable

Attorney General also argued that in *Kartar Singh,* a Constitution Bench upheld similar twin condition of bail in TADA. Can the same be not applicable as binding precedent? Nariman, J. rightly held that the *dictum* of *Kartar Singh* cannot save section

27 Pl see various illustrations referred in this survey of this judgement above.

28 481 US 739 (1987).

29 *Nikesh Tarachand Shah* at para 46.

45 of PMLA because TADA provision [section 20(8)] was narrowly tailored to TADA crimes only. His reasons were as under: [30]

> It is clear that this Court upheld such a condition only because the offence under TADA was a most heinous offence in which the vice of terrorism is sought to be tackled. Given the heinous nature of the offence which is punishable by death or life imprisonment, and given the fact that the Special Court in that case was a Magistrate and not a Sessions Court, unlike the present case, section 20(8) of TADA was upheld as being in consonance with conditions prescribed under section 437 of the Code of Criminal Procedure. In the present case, it is section 439 and not section 437 of the Code of Criminal Procedure that applies. Also, the offence that is spoken of in section 20(8) is an offence under TADA itself and not an offence under some other Act. For all these reasons, the judgment in *Kartar Singh* (supra) cannot apply to section 45 of the present Act.

Current counter terror legislation, the Unlawful Activities (Prevention) Act, 1967 does contain twin condition of bail under section 43D (5) and (6) but the application is restricted to the UAPA 1967 only.

(ii) *Ranjitsing Brahmajeetsing Sharma*-not applicable

Another precedent was *Ranjitsing Brahmajeetsing Sharma* v. *State of Maharashtra*,[31] which upheld similar twin condition of bail in Maharashtra Control of Organised Crime Act, 1999, (MCOCA). Nariman, J. in *Nikesh Tarachand Shah* refused to be impressed by the precedent on MCOCA. He directed attention again to the fact that MCOCA deals "with the great menace of organized crime to society" and does not contain less serious offence in its cover as PMLA, section 45 does arbitrarily. He also declined to use the precedent of *Gautam Kundu* v. *Directorate of Enforcement*[32] and *Rohit Tandon* v. *The Enforcement Directorate*,[33] because they did not deal with the question of constitutional validity of section 45 and were limited to its application of section 45 of PMLA.

The judgement of *Nikesh Tarachand Shah* was relief for a number of accused most of whom are white collar defaulters. It will discourage those who are fighting 'tooth and nail' against corruption. The Supreme Court has to pronounce it unconstitutional because of sheer poor drafting and casual amendments of section 45. Now for the Parliament the course open was to make necessary amendments in

30 *Id.* at para 47.

31 (2005) 5 SCC 294. It was a full bench opinion.

32 (2015) 16 SCC 1.

33 (2018) 11 SCC 46.

the line of the Bill of 2002.[34] The Parliament has amended the provision to restore section 45 in the light of *Nikesh Tarachand Shah* judgement[35] which is a welcome step.

III THE PREVENTION OF CORRUPTION ACT, 1988

Changed legislative approach

Another tool to tackle corruption is the Prevention of Corruption Act, 1988. It is a perfect illustration of how the legislature has made changes in its approach of law making. The Parliament reduced the elements of crime, created special courts, incorporated presumption clause after foundational facts are established beyond reasonable doubts *etc.* The legislature has changed the way to check this malady of corruption so that the new legislation is not just a bunch of another provisions but falls out as a "result oriented legislation." While the purpose of legal provisions either in previous laws (IPC or PC Act, 1947) or in later law (the PCA, 1988) remains the same (search for purity in society, to check the menace of corruption), the tool was different so that conviction is maximized and minimum punishment is ensured. To realize the *end* (deterrence) the Parliament made the *means* more powerful. Therefore, the legislature was no more 'originalist' in its application of classical theory of criminal jurisprudence and made some departure so that the *product* of penal law (in the form of conviction and incarceration) is more quantitative and purposive.

Should judiciary also change its approach? : Yes

Legislature has changed its approach from due process model to crime control model. Should this change in the approach of legislature in criminal jurisprudence be also reflected in judicial delineation? Should the judiciary also focus more on purposive approach rather than classical approach of interpretation? In other words should the court be adamant to same level of standard of proof of beyond reasonable doubts or should it allow little leeway to prosecution? One of the high profile case connecting

34 Government introduces Bill to amend the Prevention of Money-laundering Act, 2002 through Finance Act, 2018- "Amendment proposed in s. 45(1) would make the applicability of bail conditions uniform to all the offences under PMLA, instead of only those offences under the schedule which are liable to imprisonment of more than 3 years. This will be a significant step forward in delinking the proceedings against scheduled offences and Money laundering offences under PMLA." *Available at*: http://pib.nic.in/newsite/PrintRelease.aspx? relid= 176084, (last visited on Oct 13, 2018). The Bill was finally passed.

35 The amendment states—

(e) in section 45, in sub-section (1), —

(i) for the words "punishable for a term of imprisonment of more than three years under Part A of the Schedule", the words "under this Act" shall be substituted;

(ii) in the proviso, after the words "sick and infirm,", the words "or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees" shall be inserted;

36 (2017) 6 SCC 263. It was a Division Bench judgement constituting Pinaki Chandra Ghose and Amitav Roy, *hereinafter* referred to as *Jayalalitha judgment*. Ms. Jayalalitha with others,

20th and 21st century, decided in 2017 was *State of Karnataka* v. *Selvi J. Jayalalitha*.[36] This case strongly suggest to the later (shift by judiciary from due process model of interpretation to crime control model of interpretation) which can be usefully reproduced in the words of Amitava Roy, J. as under: [37]

> In the above alarming backdrop of coeval actuality, judicial adjudication of a charge based on an anti-corruption law motivated by the impelling necessities of time, has to be informed with the desired responsibility and the legislative vision therefore. *Any interpretation of the provisions of such law has to be essentially purposive, in furtherance of its mission and not in retrogression thereof.* Innovative nuances of evidential inadequacies, processual infirmities and interpretational subtleties, artfully advanced in defence, otherwise intangible and inconsequential, ought to be conscientiously cast aside with moral maturity and singular sensitivity to uphold the statutory sanctity, *lest the coveted cause of justice is a causality*. [Emphasis Added]

In this case the accused, Jayalalitha was convicted under the Prevention of Corruption Act, 1988 by a trial court[38] but was acquitted by the High Court. It was insisted in the Supreme Court that the presumption of innocence was restored. Indeed there is double presumption of innocence. At pre-trial stage, the criminal jurisprudence initiates with presumption of innocence. The same was "reinforced, reaffirmed and strengthened," because of the verdict of acquittal by the high court. The Court, through Pinaki Chandra Ghose, J. observed as under:[39]

> The scheme of the Act 1988, thus ensure a stricter legislation to combat and eradicate corruption in public life and takes within its sweep, not only the public servants but also those who abet and conspire with them in the commission of offences, enumerated therein. The avowed objectives of the statute prompted by the compelling exigencies of

was tried for disproportionate asset for the tenure as Chief Minister of Tamil Nadu in 1991 to 1996. The Supreme Court found that the prosecution successfully proved the case of disproportionate asset beyond reasonable doubts. The Court concluded the hearing and reserved its verdict. Meanwhile, Ms. Jayalalitha died before the pronouncement of judgement. The case against her was abated. Others were convicted and sentenced to imprisonment.

37 *Id.* at para 579.

38 36th Additional City Civil and Sessions Judge (Special Court for trial of criminal cases against Kum. J. Jayalalitha) at Bangalore. Offence punishable under s. 13(1)(e) read with s. 13(2) of Prevention of Corruption Act and under 120-B of Indian Penal Code read with s. 13(1)(e) read with s. 13(2) of Prevention of Corruption Act and the appellant/accused No.1 is sentenced to undergo simple imprisonment for a period of four years, and to pay a fine of Rs.100 crores.

39 *Jayalalitha* at para 166.

40 Comes from the word 'Curia' which means a Court of Justice. Also the class from which, in the Roman provincial towns, the magistrates were eligible.

> time and the revealing contemporary realities, thus demand of a *befitting curial*[40] approach to effectuate the same sans qua the rule of benefit of doubt on intangible and trivial omissions and deficiencies. [Emphasis Added]

The decision of *Jayalalitha* took support from *Shivaji Sahebrao Bobade* v. *State of Maharashtra*[41] where Krishna Iyer, J. has warned forty five years back as under:[42]

> The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to *embrace every hunch, hesitancy and degree of doubt*. *The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma*. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community.

Iyer, J. also referred from Glanville Williams, *Proof of the Guilt* and observed :[43]

> The evil of acquitting a guilty person lightheartedly as a learned author has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished.

The great risk of classical way of looking into penal interpretation is also predicted (and rightly so) as under: [44]

> If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicated 'persons' and more severe punishment of those who are found guilty. Thus too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to

41 (1973) 2 SCC 793. It was a full bench opinion.

42 *Id.* at para 6.

43 *Ibid.*

44 *Ibid.*

> say', with Viscount Simon, that "a miscarriage of justice may arise from the acquittal of the, guilty no less than from the conviction of the innocent."

The full bench through Krishna Iyer, J. produced the solution for judiciary as under:[45]

> In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing enhance possibilities as good enough to set the delinquent free arid chopping the logic of preponderant probability to punish marginal innocents. We have adopted these cautious in analysing the evidence and appraising the soundness of the contrary conclusions reached by the courts below. Certainly, in the last analysis reasonable doubts must operate to the advantage of the appellant.

The case of *Shivaji Sahebrao Bobade* was on murder trial under IPC (a classical penal law). For special penal law like the Prevention of Corruption Act, 1988 the normative observation of Krishna Iyer, J. is applicable with greater force. Therefore, the Division Bench in *Jayalalitha* has imported the purposive jurisprudence invoked by Iyer, J. While Pinaki Chandra Ghosh, J. expressly used this precedent, Amitava Ray, J. has impliedly recognised the same.

Should Prosecution disprove all possible sources of income? : No

Another issue in the *Jayalalitha* judgement was the extent of the liability of prosecution. Should prosecution establish disproportionate income from all possible sources? Section 13(1)(e) uses the words "known sources of income." Known to whom? To prosecution or to accused? Sources known to the prosecution is sufficient. With the help of various precedents the Court again held that the prosecution is not required to hunt for all possible source of income. The reasonable source of income should be established. If the accused had other sources of income like gift, produce of farm, investment from property, *etc.* the prosecution need not to investigate and find these sources. These are within special knowledge of accused and accused needs to disclose them and establish that the source is lawful. Moreover, any excess of income has to be explained by the accused. The Division Bench in *Jayalalitha* also referred a Constitution Bench judgement of *K. Veeraswami* v. *Union of India*[46] where it was observed that :[47]

> …the legal burden of proof placed on the accused was not so onerous as that of the prosecution, it was enunciated that it would not be enough

45 *Ibid.*

46 (1991) 3 SCC 655.

47 *Jayalalitha* at para 239.

> to just throw some doubt on the prosecution version. Referring to the expression "satisfactorily account",[48] it was ruled that due emphasis must be accorded to the word "satisfactorily" which signified that the accused has to satisfy the Court that his explanation was worthy of acceptance. Though it was marked that the procedure was contrary to the well known principle of criminal jurisprudence that the burden of proof lay always on the prosecution and did never shift to the accused, the competence of the Parliament to shift such burden on certain aspects and particular in matters especially in the knowledge of the accused, was acknowledged.

The explanation of excess income should not only be plausible but such explanation should also be worthy of credence. Mere finding holes in the story of prosecution may not help the accused. In other words the responsibility of accused is to produce some positive evidence to defend his or her case. The onus of proof shifts to accused though the standard of proof is same as of accused *i.e* preponderance probability. The standard of preponderance probability needs two proof, namely source of income and the satisfaction of the authority or court as to the source of income. Suppose A1 is a driver of a rented four wheeler. A1 is found in his possession one crore rupees. He says that A2 (a public servant) gave him one crore rupees as gift. This may be a lawful or plausible explanation because A2 can gift one crore rupees to anyone and pay gift tax as per rules. However, mere this explanation may not satisfy the court and the court may seek other explanation. The explanation of driver A1 or A2, though relevant, may not be admissible in context of section 13(1) (e) of the Prevention of Corruption Act, 1988.

Income tax returns as evidence in penal proceedings : not conclusive

Another question was, can the evidence accepted in one proceeding be accepted as binding or final in other proceeding? Jayalalitha argued that the Income Tax proceeding has accepted her returns as sufficient and valid and therefore, the same should be considered as final for other purposes. Pinaki Chandra Ghose, J. did not accept this argument. He relied on the Constitution Bench pronouncement of *Iqbal Singh Marwah* v. *Meenakshi Marwah*[49] which ruled that "there is neither any statutory provision nor any legal principle that the findings recorded in one proceeding may be treated as final or binding on the other as both the cases have to be decided on the basis of the evidence adduced therein." He relied on other precedents and held if

48 S. 13 (1)(e) if he or any person on his behalf, is in possession or has, at any time during the period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income. Explanation.-For the purposes of this section, "known sources of income" means income received from any lawful source and such receipt has been intimated in accordance with the provisions of any law, rules or orders for the time being applicable to a public servant.

49 (2005) 4 SCC 370. This case was on the interpretation of s. 195(1)(b)(ii) of CrPC 1973.

income tax department was satisfied by the return "such returns and orders would not *ipso facto* either conclusively prove or disprove the charge and can at best be pieces of evidence which have to be evaluated along with the other materials on record."[50] Another reason for this conclusion was two facts, (i) that none of the respondents were examined on oath. (ii) The income tax returns as well as the orders passed in the proceedings in favour of accused came after the charge-sheet was submitted. Therefore, "neither the income tax returns nor the orders passed in the proceedings either definitively attest the lawfulness of the sources of income of the accused persons or are of any avail to them to satisfactorily account the disproportionateness of their pecuniary resources."[51]

Genuineness of Gift

A gift does not become lawful or genuine because it came through cheque or draft or banking channel, "unless the identity of the donor, his creditworthiness, relationship with the donee and the occasion was proved. Genuineness of the transaction makes the gift genuine. This genuiness has to be established by the accused. Even if a gift is subjected to income tax, and IT department has scrutinized it, that does not make the gift automatically lawful for the purposes of a charge under section 13(1)(e) of the Act. Independent and satisfactory evidence to that effect will be essential.

Should a public servant accept costly gift?

This question includes a moral dilemma. PC Ghosh, J. recollected from a Constitution Bench observation of *R.S. Nayak* v. *A.R. Antulay,*[52] that public servant must not accept gift from persons who have or may have business interest because "it is likely to influence the public servant to show official favour to the person giving such valuable thing." While gift on birth day celebrations does not amount to windfall or immoral secretions, gift in millions and crores and foreign remittance to Chief Minister of a State, was susceptible to serious doubts and suspicion about the nature of the receipts. It is responsibility of the "public servant" to explain satisfactorily why gifts in millions have been given. If the explanation is unsatisfactory the acceptance of such gift amounts to misconduct under the Prevention of Corruption Act, 1988.

10% Rule of *Krishnanand Agnihotri*-Not applicable

Another significance of *Jayalalitha* case is 10% rule of disproportionate assets. The rule suggests that if the disproportion in the asset is less than 10% of the total, it

50 *Id.* at para 191.

51 *Ibid.*

52 (1986) 2 SCC 716. It was a division bench decision. A trial court framed charges under s. 161, 165, 420, 120B and s.5, PC Act but dropped charges under s.384 IPC. RS Nayak challenged this. The Court held that unlike s.161, under s.165, the question of motive or reward is absolutely immaterial, if a gift is accepted from some one having business interest. [There are two constitution bench decisions also AR Antuley 1984 and 1988].

cannot be a strong evidence for prosecution. In *Jayalalitha* case the High Court relied on this calculation that the surplus money is @ 8% of the total asset which can be condoned. This 10% rule is a judicial invention of 1970s by a full bench finding of *Krishnanand Agnihotri* v. *The State of Madhya Pradesh.*[53] In *Krishnanand Agnihotri* a full bench of the Supreme Court calculated that total income of the Krishnanand Agnihotri for the period of twelve years [1949 (as an Income Tax officer) to 1962] was Rs. 1,27,715.43. Total expenditure was Rs. 83,331.84. Therefore, aggregate surplus income was Rs 44,383.59. However, in his possession the asset found was worth 55,732.25. In other words the disproportionate property was around Rs.11000/- which was around 10% of total income. The full bench in *Krishnanand Agnihotri* held:[54]

> The assets possessed by the appellant were thus in excess of the surplus income available to him. But since the *excess is comparatively small - it is less than ten per cent of the* Rs. 1,27,715.43- *we do not think it would be right to hold that the assets found in the possession of the appellant were disproportionate to his known sources of income* so as to justify the raising of the presumption under sub-section (3) of section 5 [of PC Act, 1947].

In the case of *B.C. Chaturvedi* v. *Union of India*[55] another full bench has observed that this rule was propounded "due to inflationary trend in the appreciation of the value of the assets." The precedent of *Krishnanand Agnihotri* was referred**.** There is another judgement, *State of Maharashtra* v. *Pollonji Darabshaw Daruwalla*[56] which was also decided on the same line. In this case the accused was Appraiser (one who access the value of property) in the customs department. The Division Bench held that it "cannot be said that there is no disproportion or even a sizeable disproportion" and "the finding becomes inescapable that the assets were in excess on the known sources of income" but the "extent of the disproportion" give him a benefit of doubt. In the case of *Anantha Ramulu* v. *State of Madhya Pradesh*,[57] a Cooperative Junior Inspector was found with Rs 2,34000/ as unaccounted wealth. The Supreme Court allowed the accused the benefit of doubts. While Rs 2.34 lakh, was disproportionate, the extent was held to be not sufficient for prosecution. Though the brief order does not contain any reason, the media reports suggest that the Court made following remarks: [58]

53 (1977) 1 SCC 816, *hereinafter* as *Krishnanand Agnihotri* judgment.

54 *Id.* at para 33.

55 1995 SCC (6) 749. It was a full bench opinion.

56 AIR 1988 SC 88.

57 Criminal Appeal No(s). 931 OF 2005, order dated Oct 27, 2010.

58 *Available at*: https://www.deccanherald.com/content/108440/sc-snubs-govt-letting-off.html. (Last visited on Feb 6, 2019).

> You (Government) do not take action against the big sharks and crocodiles. They are allowed to go scot free. If possessing Rs 2.60 lakh is considered to be disproportionate to the known sources of income, then we may have to send every Government official to the jail.[59]

In the light of two full bench precedents and other Division Bench pronouncements it seems the high court has used the rule of 10% as a principle propounded in the case of *Krishnanand Agnihotri* and therefore as a binding precedent. The High Court in *Jayalalitha* calculated total asset under question as Rs.37,59,02,466, and total income as Rs.34,76,65,654. The disproportionate asset was Rs.2,82,36,812 which was around 8%. The Supreme Court in *Jayalalitha,* declined to accept this and held as under : [60]

> We have considered the facts of this case and in our opinion, the percentage of disproportionate assets as 8.12% as computed by the High Court is based on completely wrong reading of the evidence on record compounded by incorrect arithmetical calculations, as referred to herinabove. In view of the regnant evidence on record, unassailably proving the disproportionateness of the assets, as contemplated in section 13(1)(e) of 1988 Act, it is inessential as well to resort to any arithmetic to compute the percentage thereof. In any view of this matter, the decision of this Court in *Krishnanand Agnihotri* (supra) has no application in the facts of this case and therefore, the respondents cannot avail any benefit therefrom.

The Supreme Court found that the asset itself is more than 10% and therefore, there was no occasion to apply *Krishnanand Agnihotri*. A legal commentator expected that *Jayalalitha* should go into the contemporary validity and relevance of 10% rule.[61] Arguments were made by a petitioner as under:[62]

> Dr Subramaniam Swamy, in supplementation has argued that in the teeth of a new legal regime ushered in by the 1988 Act ordaining an uncompromising standpoint in re a charge of corruption more particularly in public life, the High Court did grossly err in acquitting

59 Krishnadas Rajagopal, " 'Disproportionate assets' a vague concept", *the Hindu*, May 12, 2015, *available at* : https://www.thehindu.com/news/national/jayalalithaa-acquittalkarnataka-high-court-takes-liberal-view/article 7194999.ece, (last visited on Dec 4, 2018).

60 *Jayalalitha* at para 566.

61 Krishnadas Rajagopal, *supra* note 59.

62 *Jayalalitha* at para 144.

> the respondents by applying the decision in *Krishnanand Agnihotri*. According to Dr Swamy, not only this decision does not lay down a uniform proposition of law regardless of the textual facts, even assuming without admitting that the computation undertaken by the High Court in evaluating the income, the assets and the expenditure to be correct, the respondents could not have been exonerated of the serious charges levelled against them in the overwhelming perspective of the statutory intolerance against pervasive and pernicious escalation of corruption in public life destroying the vitals of the systemic soul of our democratic polity.

Despite these arguments the Division Bench in *Jayalalitha* did not go deep into it because of two reasons. *One,* The precedents inaugurating (*Krishnanand Agnihotri*) and supporting (*B.C. Chaturvedi*) 10% rule were full bench observation and *Jayalalitha* court was a Division Bench. There were other precedents of Division Bench which followed 10% rule. *Two,* the occasion for such reconsideration of 10% rule did not come because the calculation by the high court was not accepted. However, the Court made it clear that any adherence to rule of beyond reasonable doubts should not lead to unnecessary acquittals because that would defeat the very purpose of the enactment of PC Act. In the light of this, there are two possibilities. (i) A Bench of five judges reconsider 10% rule of *Krishnanand Agnihotri* (ii) The Parliament amends PC Act to neutralise the 10% rule.

10% rule was an exception created by the judiciary which was never intended by the Parliament. It was against zero tolerance policy of the executive.[63] This is another illustration that what Parliament proposes and executive applies, the Supreme Court disposes. Why is the Supreme Court concerned for those who have been found in possession of disproportionate asset (even if it is marginal)? One reason may be the compulsion of minimum punishment. In cases of marginal disproportion, the Court might wish to give punishment of one month or three month. Due to statutory requirement of minimum punishment of one year,[64] the Supreme Court is not able to do so and therefore, the Court is inclined to use the rule of 10%.

The discussion on *Jayalalitha* indicates that like the Parliament, the judiciary also changed its approach from accused oriented interpretation to purposive interpretation which is the need of time.

Another case is *Vasant Rao Guhe* v. *State of Madhya Pradesh*[65] which is again on assets disproportionate to sources of income for which prosecution under section

63 *Avaliable at*: http://pib.nic.in/newsite/PrintRelease.aspx?relid=160118. (Last visited on March 10, 2019).

64 S. 13 (2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which *shall be not less than one year* but which may extend to seven years and shall also be liable to fine.

65 (2017) 14 SCC 442. It was a Full bench consisted of Dipak Mishra, Amitava Roy and A.M. Khanwilkar, JJ., unanimously delivered its opinion on Aug 9, 2017. Amitava Roy, J. delivered the verdict.

13 of the PC Act 1988 was launched. The issue was whether the foundational fact was proved beyond reasonable doubts or not? Foundational fact means the facts which are the foundation or ingredient of the offence. The prosecution alleged disproportionate acquisitions worth Rs. 7,94,033. Trial Court calculated disproportion to be of Rs. 2,15,198 (not given in the Judgement). High court made its own calculation and found the excess amount was 86,045. The Supreme Court quashed the conviction and observed:[66]

> The courts below indulged in voluntary exercise to quantify the pay of the appellant for the periods excluded by the prosecution as well as his agricultural income and premised on presumption with regard to his possible expenditure. A person cannot be subjected to a criminal prosecution either for a charge which is amorphous and transitory and further on evidence that is conjectural or hypothetical. The appellant in the determinations before the Courts below has been subjected to a trial in which both the charges and evidence on aspects with vital bearing thereon lacked certitude, precision and unambiguity. So, the prosecution failed to establish the charges were beyond reasonable doubt.

In this case, the task of prosecution was taken up by the courts. It was the duty of the government officials and the prosecution to calculate and establish the case. This also violates the principle of natural justice because the courts themselves accused him, investigated him and punished him. Moreover, the whole exercise of the decision making of disproportionate asset by the prosecution to subordinate court and high court was so inconsistent in its finding that it creates reasonable doubts as to the possession of disproportionate assets. The foundational fact of asset disproportionate to the income has to be established by the prosecution beyond reasonable doubts. The range of disproportionate acquisitions was Rs. 7,94,033 (by prosecution) to 86,045 (by high court). The last one was on margin. Therefore the Supreme Court rightly used the words "amorphous and transitory and conjectural or hypothetical." The prosecution did not consider relevant things like 12-year salary, agricultural income *etc.* This lack of proper home work speaks about the systematic failure of prosecution in general cases and in particular in corruption cases. This lack of home work may be because of quantitative reasons (non availability of sufficient number of staffs), or qualitative reasons (dearth or non recognition of competent officials). Another reason can be the fact that negligent officials are seldom pointed out. Unless such negligent officials will be made accountable and strong punitive actions are taken, the problem will sustain.

66 *Id.* at para 18.

IV THE PREVENTION OF CORRUPTION ACT, 1988 AND ARTICLE 142

Coal block Scams and interpretation of section 19 (3)

Can the Supreme Court make exceptional orders (exclusion of jurisdiction of high court) in corruption cases of exceptional nature? Can the power of judicial review under article 226, which is a part of basic structure of the Constitution of India be eclipsed by a judicial order under article 142 because a case contains corruption of huge nature? Can the Supreme Court create an original jurisdiction in corruption cases? *Girish Kumar Suneja* v. *CBI*[67] addresses this question, genesis of which is *Manohar Lal Sharma* v. *Principal Secretary*.[68] The Government of India allocated various coal blocks. There were serious allegations of corruption in this allocation for which cases were registered under the Indian Penal Code, 1860, Prevention of Corruption Act, 1988, and Prevention of Money-Laundering Act, 2002, *etc.* As the dimension of corruption was huge and many influential people were allegedly involved, a PIL was filed, where the Supreme Court directed to set up a special court to exclusively try this case. The Court also made an order that "any prayer for stay or impeding the progress in the investigation/trial can be made only before this Court and no other Court shall entertain the same."[69] Pursuant to this order of the Supreme Court, a special court was set up which started its proceedings. The special sessions court framed various charges against various accused including one Mr Suneja for offences punishable under sections 120-B/409/420 of the Indian Penal Code and sections 13(1)(c) (d) of the Prevention of Corruption Act, 1988. Against this order of framing of charge by sessions court, the accused filed a case in the Delhi High Court for stay. The High Court dismissed the case on the ground of maintainability because of the prohibitory order of the Supreme Court as above. Therefore, the case again came to the Supreme Court in appeal. There were issues as to the validity of the prohibitory order of the Supreme Court. One of the grounds[70] of challenge was based on the interpretation of section 19(3)(c) of the PC Act.[71] Whether this provision

67 (2017)14 SCC 809, decided by a full bench constituting Madan B. Lokur, Kurian Joseph and A.K. Sikri, JJ, *hereinafter* referred as *Girish Kumar Suneja*.

68 Order dated July 25, 2014, also called as *Coal Block Allocation* cases.

69 *Id.* at para 10.

70 Other grounds were basic structure theory (judicial review (art. 226) is a part of basic structure and cannot be excluded by a judicial order]; principle of equality (preferential selection of Coal block cases *vis a vis* other corruption cases is violation of art. 14 and due process under art. 21), inherent jurisdiction (that s. 482 CrPC 1973 is a statutory remedy and cannot be taken away by Supreme Court order).

71 S. 19 Previous sanction necessary for prosecution—

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),

(b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a *failure of justice*;

(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.

conceives an absolute bar on stay of sessions court proceedings? The argument was that, though section 19(3) (c) of the PC Act restricts stay in proceedings but "in an appropriate case, a stay of proceedings could be granted in favour of an accused person particularly when there is a failure of justice. Any restrictive reading would entail a fetter on the discretion of the High Court which itself might lead to a failure of justice." The Supreme Court identified the elements of section 19(3) (b) and (c) of the PC Act as under:[71A]

> Sub-clause (b) deals with a stay of proceedings under the PC Act in the event of any error, omission or irregularity in the grant of sanction by the concerned authority to prosecute the accused person. It is made clear that no court shall grant a stay of proceedings on such a ground except if the court is satisfied that the error, omission or irregularity has resulted in a failure of justice-then and only then can the court grant a stay of proceedings under the PC Act… Sub-clause (c) provides for a blanket prohibition against a stay of proceedings under the PC Act even if there is a failure of justice [subject of course to Sub-clause (b)]. It mandates that no court shall stay proceedings "on any other ground" that is to say any ground other than a ground relatable to the error, omission or irregularity in the sanction resulting in a failure of justice.

When can a criminal proceeding under PCA be stayed?

After giving a conjoint reading of sub-clause (b) and (c) of section 19(3) of the PC Act the Court rightly concluded that a stay of proceedings before a trial court could be granted if following things are established by the accused-

i. Sanction was granted for prosecution. This is an objective fact which can be established through the sanction order.
ii. There was an error, omission or irregularity in the sanction granted for the prosecution. This can be both objective and subjective fact.
iii. Such error, omission or irregularity has resulted in a failure of justice. This is subjective and discretionary but requires careful inference of the above two facts.

The Court held that "there is no other situation that is contemplated for the grant of a stay of proceedings under the PC Act on any other ground whatsoever, even if there is a failure of justice." The Court also noted that clause (c) additionally mandates a prohibition on the exercise of revision jurisdiction in respect of any interlocutory order passed in any trial such as those that we have already referred to. In the opinion of the full bench, in *Girish kumar*, the provisions of section 19(3) (b) and (c) of the PC Act when "read together were quite clear and did not admit of any ambiguity or the need for any further interpretation."

71A *Girish Kumar Suneja* at para 64.

Lokur, J. also took note of section 4 of the PC Act[72] as under:[72A]

> Sub-section (4) of section 19 of the PC Act is also important in this context inasmuch as the time lapse in challenging an error, omission or irregularity in the sanction resulting in a failure of justice is of considerable significance. Unless the challenge is made at the initial stages of a trial and within a reasonable period of time, the court would not be obliged to consider the absence of, or any error, omission or irregularity in the sanction for prosecution. Therefore, it is not as if the accused can, after an unreasonable delay, raise an issue about the sanction; but if that Accused does so, the court may not decide that issue both at the appellate stage as well as for the purposes of stay of the proceedings.

The full bench took support from a division bench decision of *Central Bureau of Investigation* v. *V.K. Sehgal*[73] which was also on sanction under PC Act.

Objection to sanction: when raised

Suppose an objection is raised to the sanction in the higher courts is find whether it was raised at trial stage or not. There are two options, *viz*. that it was raised and that it was not raised. If it was raised but the trial court did not take note of it (sanction was absent), or did not found it meritorious (argument that sanction was not granted by competent authority). It does mean that a provision of law was not observed which was mandatory . Does it necessarily mean justice was not done to the accused because a provision of law regarding sanction was not followed? Generally yes. However, section 19 (3) protects such issue of sanction by providing that the court will not declare it unlawful and will examine the effect of such want of sanction or infirmity in sanction. Unless it leads to "failure of justice" the Court will proceed with the trial.

Objection to sanction: when not raised

Second situation is, when such objection has never been raised. Suppose, there was no sanction order and the trial commenced leading to conviction. Though an objection was not raised, but a higher court can see this situation as violation of fair trial, or breach of an implied right of an accused or violation of an essential duty of

72 S. 19 (4) In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings. Explanation.—For the purposes of this section,—

(a) error includes competency of the authority to grant sanction;

72A *Grish Kumar Suneja* at para 66.

(b) a sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature.

73 MANU/SC/0650/1999 : (1999) 8 SCC 501, *hereinafter* referred as *VK Sehgal*.

the prosecution. In both situations, a trial proceeding could be quashed. In first case a higher court can quash it easily in comparison to the latter case. In first situation an accused may get a technical acquittal while in second situation he may get a benefit of doubt. This can be done even if the conviction was based on uncontroverted material as to the foundational facts of the offence. In many situations "the absence or error or omission or irregularity" in the grant of sanction "would actually become a surplusage." Section 19 (3) addresses this mischief by reducing the discretion of the court, restricts the right of the accused in such a manner that conviction does not become a casualty of mere technicalities, and legalism. The purpose of prior sanction before trial under section 19 is to protect honest officers, who are required to take strong and sometime unpopular decisions. Sanction is required to be done through an executive filtering process. However, if the same objective is served through judicial filtering process, the purpose of law would be achieved. The Court rightly quoted from *V.K. Sehgal* that "the necessity of a sanction is only as a filter to safeguard public servants from frivolous or *mala fide* or vindictive prosecution. However, after judicial scrutiny is complete and a conviction is made out through the filtration process, the issue of a sanction really would become inconsequential."[74] However, what needs notice is the fact that in counter terror legislations the Supreme Court has held that the requirement of sanction is essential and has quashed various proceedings.[75] Will the idea of judicial filtration as a substitute to executive filtration as propounded in *Girish kumar* hold good for faulty sanction orders under counter terror laws? Probably not, because there was/is no provision in counter terror legislations which was/is equivalent to section 19(3) or (4) of Prevention of Corruption Act, 1988.

The legal position is that, the argument regarding sanction can be entertained only if there is "failure of justice." If the objection regarding sanction was not raised at all in a previous proceeding, the trial cannot ordinarily be questioned at later stage. Therefore, the scope of a *textual approach or interpretation* has been ruled out by the Parliament. Even if the objection was raised, and the appeal court finds merit in the argument of sanction, that may not be "failure of justice" though, it may be against the highest pedestal of due process model. The court will examine the standard of proof whether in fact the want of sanction process occasioned in failure of justice or not. It has to make " close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage." If it satisfies the requirement of beyond reasonable doubts, the court will not interfere for want of or irregularity as to sanction because such corrupt officers do not deserve any filtering protection. The provision of law under section 19 (3) directs that the courts are required to follow *contextual* or *purposive* approach rather than literal or classical approach of accused oriented interpretation.

74 MANU/SC/0650/1999, at para 67.

75 *Seeni Nainar Mohammed* v. *State Rep. by Deputy Superintendent of Police*, 2017 (5) SCALE 392, decided by a division bench of Pinaki Chandra Ghose and Rohinton Fali Nariman, JJ. on April 27, 2017.

Lokur, J. in *Girish Kumar Suneja* concluded:[76]

> In enacting section 19 of the PC Act in the manner which it did, Parliament has made it abundantly clear that it is extremely concerned about ensuring that trials under the PC Act are concluded expeditiously not only in the interest of the Accused but also in public interest. This concern of Parliament must be respected.

Another provision which also became one of the *reasons* of this judgement (*Girish kumar*) was section 22 (d) of the PC Act[77] which amends section 397 of CrPC 1973. Section 397, CrPC deals with power of sessions judge and high court while exercising powers of revision against a subordinate court. Both have authority to call the records of subordinate court. When records will be called, the trial court proceeding would be stopped and proceeding will be delayed. This will amount to indirect stay on the trial court proceedings. Section 22(d) provides a way out that the revisional court ought to call for records only under certain circumstances if the trial is under PC Act. This provision also ensures that there is no "indirect stay" on any trial of corruption cases.

The Court successfully attempted to find the intention of the Parliament to ensure speedy trial under PC Act. The Parliament "doubly ensured" that any stay, directly under section 19(3) or indirectly under section 22(d) ought to be avoided so that "there should not be any impediment in the trial of a case under the PC Act."

Failure of Justice

Another significance of this judgement (*Girish Kumar*) is that the Court has directly examined the question "what does the expression 'failure of justice' mean?"[78] In order to appreciate the situation of 'failure of justice' the full bench took support from a *Shamnsaheb M. Multani* v. *State of Karnataka*[79] which was a dowry death case. In this case the question before the Court was whether an accused can be convicted

76 *Girish Kumar Suneja* at para 68.

77 S. 22 of the PC Act- The Code of Criminal Procedure, 1973 to apply subject to certain modifications - The provisions of the Code of Criminal Procedure 1973, shall in their application to any proceeding in relation to an offence punishable under this Act have effect as if, (d)In sub-section (1) of s. 397, before the Explanation, the following proviso had been inserted, namely: -

"Provided that where the powers under this section are exercised by a court on an application made by a party to such proceedings, the court shall not ordinarily call for the record of the proceedings-

(a) Without giving the other party an opportunity of showing cause why the record should not be called for; or

(b) If it is satisfied that an examination of the record of the proceedings may be made from the certified copies."

78 *Girish Kumar Suneja* at para 71.

79 MANU/SC/0047/2001 : (2001) 2 SCC 577.

under section 304B (IPC) if there was a trial of section 302 (IPC) only? The Court held that such conviction would be "failure of justice" because section 304B rests on shall presume unlike section 302. Accused needed to be given fair chance to defend. As *Shamnsaheb M. Multani* was relied on in *Rattiram* v. *State of M.P.,*[80] this judgement (*Girish Kumar*) also relies on them for the purpose of the meaning of "failure of justice." The purpose of reliance was to understand the difference between two categories of nature of lapse. Those lapses that may amount to failure of justice and those which do not amount to failure of justice. Should all procedural lapses be treated *equally* as "failure of justice" or only a few "be given a privileged place on the pulpit." Should the Court consider certain hierarchy of lapses, like serious, less serious and technical? Only those lapses which are at the heart of due process and fair trial, such lapse would amount to "failure of justice." Is the court looking for zero lapse? Is there something called as zero tolerance for non observance for legal provision? "If the failure of justice is not bestowed its due signification in a case of the present nature, every procedural lapse or interdict would be given a privileged place on the pulpit." This would be "unnecessary interpretative dynamism," which may "have the effect potentiality to cause a dent in the criminal justice delivery system and eventually, justice would become illusory like a mirage"[81] and the "the intendment of the legislature in the plainest sense is that every stage is not to be treated as vital and it is to be interpreted to subserve the substantive objects of the criminal trial."[82]

State of M.P. v. *Bhooraji*[83] was also referred to understand the situation of failure of justice, where the Court made a principle statement as under:[84]

> A *de novo* trial should be the last resort and that too only when such a course becomes so desperately indispensable. It should be limited to the extreme exigency to avert a failure of justice. Any omission or

80 (2012) 4 SCC 516, *hereinafter* referred as *Rattiram*. The case was decided by a full bench constituting Dalveer Bhandari, T.S. Thakur, Dipak Misra, JJ. Dipak Misra, J. delivered the unanimous verdict. The issue before the Court was, whether a sessions court can take direct cognizance of a case under SCST Act, bypassing committal proceeding. In other words, whether non-compliance of s. 193 of CrPC 1973 is so vital that it amounts to failure of justice. The Court held that there was no failure of justice.

81 *Rattiram* at para 65.

82 *Ibid.*

83 (2001) 7 SCC 679 : MANU/SC/0481/2001 : The police, submitted a chargesheet under s. 302 read with s. 149 IPC and s. 3(2) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. Without any committal proceeding, the Additional Sessions Judge framed charges against all the eleven persons proceeded with the trial. During trial proceedings the Supreme Court decided *Gangula Ashok* v. *State of A.P*. [2000 (2) SCC 504] in which it was held that committal proceedings are necessary for a specified court under the SC/ST Act to take cognizance of the offences to be tried. The high court quashed the whole proceeding. The issue was whether the high court should quash the whole proceeding and direct a trial *de novo*? The SC held that no *de novo* trail is required in this case.

84 *Id.* at para 8.

> even the illegality in the procedure which does not affect the core of the case is not a ground for ordering a de novo trial.

The reason for this principle statement was-

i. the appellate court has plenary powers to re-evaluate or re-appraise the evidences
ii. it can even take additional evidence itself or
iii. it can also direct additional evidence to be collected by the trial court.
iv. calling all witnesses, accused, victims, police, prosecution again for repeat depositions is replay of the whole laborious exercise,
v. it would be a sheer waste of time, energy and costs.

Such course for a *de novo* trial can be resorted to only when otherwise would amount to the miscarriage of justice. Such pedantic approach will only add burden to court "crammed with dockets." It will also "inflict hardship on many innocent persons." Law should be used as an instrument of justice dispensation and not as a technical tool to inflict sufferings on the people.

Failure of Justice : External Aid from International Instruments*[85]*

After using the domestic precedents from India, *Girish kumar* also relies on an advisory opinion of International Court of Justice (ICJ) which also believes in two types of error in a trial. Fundamental error and non fundamental error. A few fundamental errors may occasion to failure of justice while other few errors may not though they may also be crucial or fundamental. It was proposed that a review should be permissible if and only if the error is "a fundamental error in procedure which has occasioned a failure of justice.[86] The ICJ has also illustrated an un-exhaustive list of what may constitute failure of justice as under:[87]

> the fundamental right of a staff member to present his case, either orally or in writing is denied, the right to an independent and impartial tribunal established by law; the right to have the case heard and determined within a reasonable time; the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent case; the right to equality in the proceedings *vis-à-vis* the opponent; and the right to a reasoned decision.

85 *Girish kumar* at para 74-76.

86 "Has the Tribunal (United Nations Administrative Tribunal) committed a fundamental error in procedure which has occasioned the failure of justice as contended in the application to the Committee for Review of Administrative Tribunal Judgments?" In the advisory opinion the International Court considered article 11 of the Statute of the United Nations Administrative Tribunal (as it then stood).

87 *Girish kumar* at para 76.

The full bench explored the meaning of "failure of justice" through the spectrum of reasoning from the intention of Parliament to judicial precedents of Indian Courts to international court. Exploring the interpretation of section 19 of the Prevention of Corruption Act, 1988, Madan B. Lokur, J. concluded that:[88]

> An allegation of "failure of justice" is a very strong allegation and use of an equally strong expression and cannot be equated with a miscarriage of justice or a violation of law or an irregularity in procedure—it is much more. If the expression is to be understood as in common parlance, the result would be that seldom would a trial reach a conclusion since an irregularity could take place at any stage, inadmissible evidence could be erroneously admitted, an adjournment wrongly declined, etc. To conclude, therefore, section 19(3)(c) of the PC Act must be given a very restricted interpretation and we cannot accept the overbroad interpretation canvassed by the learned counsel for the appellants.

Failure of justice, therefore is not just a legal irregularity, or a violation of mandatory provision of law. It is more than these connotations. This leads to which rules of interpretation to be made applicable for section 19 (3) (c). And the rule is, strict interpretation (which goes against accused) rather than a overbroad interpretation.

Article 226 *vis a vis* 142

With the help of *Centre for Public Interest Litigation* v. *Union of India*[89] (*2G Spectrum Scam* case) and *Shahid Balwa* v. *Union of India*[90] Lokur, J. could successfully demonstrate that a Supreme Court order under article 142 can exclude the jurisdiction under article 226 are 227.[91] *Girish kumar*, a full bench decision, therefore, also endorses both decisions which were Division Bench opinion.

Girish kumar has created an exception to basic structure doctrine. By implication, it has also diluted the doctrine and restricted the scope of basic structure in corruption cases. This trend was started in *2G* spectrum (2011) and *Shahid Balwa* case (2014) as mentioned earlier and now in *Girish kumar* (2017). All three are cases of corruption. Exclusive jurisdiction to the Supreme Court is called as original jurisdiction. In 1976 the Constitution of India was amended to incorporate article 131A which "gave to the Supreme Court exclusive jurisdiction to decide the constitutional validity of a Central law and thus deprived the High Courts of their jurisdiction in respect of the same." In the same amendment, article 226A was incorporated to bar the High Courts from

88 *Girish kumar* at para 77.

89 (2012) 3 SCC 117.

90 (2014) 2 SCC 687, decided by G.S. Singhvi and KSP Radhakrishnan, JJ. on Sept. 3, 2013. Radhakrishnan, J. delivered the verdict.

91 In *Shahid Balwa* case the Division Bench hold "The parties, in such a case, cannot invoke the jurisdiction under art. 226 or 227 of the Constitution of India." *Id.* at para 23.

deciding the validity of any Central law. Both, 131A and 226A were repealed by the Constitution (Forty-third) Amendment Act, 1977. The Supreme Court in *Girish kumar* has done similar thing in corruption cases though the purpose of both are different. *Girish kumar* was also criticised for not "engaging with the argument, but by avoiding it altogether."[92] However, the comments and criticism has no bearing on PC Act but on exclusion of judicial review of article 226. Though this is an exception to the doctrine of basic structure theory. The author of this survey respectfully agrees with the *Girish Kumar Suneja* judgement for the reasons given by the Court.

V CORRUPT PRACTICES, MBBS ADMISSION AND ARTICLE 142

Professor Ronald Dwarkin propounds that "hard cases" are those cases "in which the result is not clearly dictated by statute or precedent."[93] Every judiciary has to deal with "hard cases." *Nidhi Kaim* v. *State of Madhya Pradesh*[94] (*Vyapam* case) is one of those hard cases where the law on consequence proceeding is not clear (and cannot be reasonably settled). When an action (especially State action) is declared illegal and void, what is the next course of action for law *i.e.* what is the consequence proceeding ? Should the whole transaction be declared void (on the date of judicial declaration) or should it be void *ab initio* because they are product of "fruit of the poison tree" ? Or should a court allow some sympathetic considerations to the unlawful transactions based on lapse of time, benefit to society, resource utilization *etc*. Such cases have always posed confusion and curiosity because of uncertainty of law or judicial precedents. Should law consider circumstances in cases of "privileged class deviance" or should it be zero tolerant to socio economic defaulters? Is there any role of equity? If it is a wrongful conduct committed at mass level and in the area of education that too professional education *i.e* MBBS, should a court be lenient (if not generous), in case the life and future of 634 juvenile delinquent is involved? Corrupt practices in professional education is one of the major reasons of crisis in education. One United Nations document rightly refers that "Education is an endangered resource …Often quality is low, efficiency weak, relevance questionable and wastage significant, while aims and goals are frequently unclear."[95] While catching corrupt officials and

92 Abhinav Sekhri, "A Pulpit or a Courtroom – Exclusion of Jurisdiction and the decision in *Girish Kumar Suneja*", *available at* : https://indconlawphil.wordpress.com/2017/07/14/guest-post-a-pulpit-or-a-courtroom-exclusion-of-jurisdiction-and-the-decision-in-girish-kumar-suneja/ (last visited on Feb 18, 2019).

93 Ronald Dworkin, "Hard Cases," 1057-1109, at 1157, *Harvard Law Review*, Vol. 88, No. 6 (Apr., 1975), *available at* : http://www.jstor.org/stable/1340249 (last visited on March 03, 2019).

94 (2017) 4 SCC1. It was a full bench decision of J.S. Khehar, CJI, Kurian Joseph and Arun Mishra, JJ., *hereinafter* referred as *Nidhi Kaim, Vyapam*.

95 Jacques Hallak and Muriel Poisson, "Corrupt schools, corrupt universities: What can be done?", International Institute for Educational Planning, (2007), UNESCO, *available at* : http://unpan1.un.org/intradoc/groups/public/documents/UNESCO/UNPAN025403.pdf (last visited on Feb 19, 2019).

beneficiaries is a big challenge, another challenge is the nature of remedy and corrective measures. *Nidhi Kaim* v. *State of Madhya Pradesh*[96] (*Vyapam* case) centers round this controversy which "demonstrates a deep rooted conspiratorial design" in professional education *i.e* MBBS. In the MBBS admission in colleges of Madhya Pradesh, it was found that an organised gang of government officials, doctors, middle man, juvenile students, and their parents conceived "meticulously orchestrated plan, to circumvent well laid down norms," successfully deceived and manipulated hundreds of seats. Between 2008 to 2013 fake identity was used. Examination process was systematically tampered and the credibility of the examination process was completely destroyed. White collar criminality merged with socio-economic criminality because power and position met greed to be rich through short cut means. The "extent and proportion of the shenanigans" can be understood by the fact that around 634 admissions were found to be the product of organised fraud and forgery. The government and intelligence machinery did not smell anything for five years or remained reluctant to some indications. However, after enquiry, the government of Madhya Pradesh declared all these admissions as illegal and cancelled these admissions. They were cancelled from back date. The students challenged such declaration of illegality in general and cancellation of all from back date in particular. The matter finally came to the highest seat of judiciary. The Division Bench of the Supreme Court upheld the illegality but was divided on the cancellation from back date, *i.e* consequence proceeding as to the illegality. This type of illegality leads only to two consequences. Natural consequence and alternative consequence. Natural consequence means all admissions should be cancelled. In other words all students who committed fraud and forgery at any stage, be it MBBS 3rd or 4th year or even received degree, will be affected. They will be dragged back to their original position. The alternative consequence was that the admissions of all should not be cancelled considering the fact that the MBBS students passed various phases of classes, gave their practical and appeared in various class test, annual examinations during their study programme, huge government resources were used on them. Cannot there be other mode of corrective measures (punishment)? In other words the issue was- once it is found that the procedure of getting admission in MBBS was absolutely corrupt and criminal and therefore *ultra vires* the law and the Constitution, should the doctrine of *ultra vires* be rigidly applied or should it give some space of flexibility for *factum valet*? Should it apply retrospectively or prospectively? One judge (Chelameswar, J.) was of the opinion that article 142 of the Constitution of India should be used so that the life of 634 youngsters is not ruined. MBBS students should be allowed to continue with their degree with certain unconventional and strict riders like unpaid community service for few years. Other member of the bench (Sapre, J.) quashed the whole admission as *void ab initio*, because the beneficiaries were one among socio-economic deviants. Therefore they deserve to be deprived of pursuing their class or availing their degree of MBBS even if they have covered half of the course or are at the advance stage of their MBBS programme.

96 (2017) 4 SCC1.

In other words, both judges have entirely different views on consequence proceedings. The matter was listed before a full bench to resolve the dispute. The Court had to address following issues—

1. Whether article 142 can be used in cases of established fraud, mass deception and organised racket?
2. Whether or not, they were entitled to retain and use the "knowledge" acquired by them, for their own benefit, and for the benefit of the society at large?

The full bench at first upheld the common law doctrine that "fraud unravels everything."[97] They decided to quash all 634 admission from the beginning of 2008 showing no mercy. As to the application of article 142 Khehar, J. referred *Union Carbide Corporation* v. *Union of India*,[98] where a Constitution Bench laid down two parameters for the application of article 142. They are, "larger interest of administration of justice", and "preventing manifest injustice". He rightly held that in the *Vyapam* case none of the two was present. Indeed granting some concession or sympathy would result into "manifest injustice."[99] Though the students gained "knowledge", any permission to use this knowledge is "allowing a thief to retain the stolen property."[100] Exercising article 142 "would amount to espousing the cause of 'the unfair'" and to give favour to "sacrilegious."[101]

Another reason preferred by Khehar, J was based on the balance of truth *vis a vis* falsehood and fraud. He observed:[102]

> where two options are open to a Court, and both are equally beckoning, it would be most prudent to choose the one, which is founded on truth and honesty, and the one which is founded on fair play and legitimacy. Siding with the option founded on the deceit or fraud, or on favour as opposed to merit, or by avoiding the postulated due process, would be imprudent. Judicial conscience must only support the righteous cause. If, despite its being righteous, a decision is seen as causing manifest

97 *Lazarus Estates, Ltd.* v. *Beasley*, (1956) 1 All E.R.341, by Denning, L.J. in the Court of Appeal. *Collins* v. *Blantern* (1767) (2 Wils. K.B. 342), *Duchess of Kingston's* Case (3) (1776) (1 Leach 146), and, *Master* v. *Miller* (1791) (4 Term Rep. 320).

98 (1991) 4 SCC 584.

99 *Nidhi Kaim, Vyapam*, at para 89.

100 *Id.* at 92. This argument seems not very strong because a thief commits trespass and take property of somebody else. The students were trespasser and procured the seat of somebody else but they earned the property themselves. However, overall *rationale* of Khehar, J. was outstanding.

101 *Ibid.*

102 *Id.* at para 97.

> injustice, the exercise of the power under article 142 of the Constitution, would be prudent. In such situations, an onerous duty is cast on the Court, to step in, to render complete justice. This is the manner that we commend, judicial exercise of discretion, under article 142 of the Constitution.

Can fraudulent transaction be condoned under article 142? The Court answered in unequivocal terms as under: [103]

> We are of the considered view, no matter how extensive the societal gains may be, the jurisdiction conceived of under article 142 of the Constitution, to do complete justice in a matter, cannot be invoked, in a situation as the one in hand. Even the trivialist act of wrong doing, based on a singular act of fraud, cannot be countenanced, in the name of justice. The present case, unfolds a mass fraud. The course suggested, if accepted, would not only be imprudent, but would also be irresponsible. It would encourage others, to follow the same course… Truthful conduct, must always remain the hallmark of the rule of law. No matter the gains, or the losses. The jurisdiction exercisable by this Court under article 142, cannot ever be invoked, to salvage, and legitimize acts of fraudulent character. Fraud, cannot be allowed to trounce, on the stratagem of public good.

The Court also distinguished *Nidhi Kaim,* from *Priya Gupta*.[104] In *Priya Gupta*, the candidate secured the MBBS seat through fraudulent means but the Supreme Court exercised the power under article 142 and allowed the candidate to go with MBBS degree. This was a case not only of socio-economic crime but of white collar crime also because the father of a candidate was Director of Medical Education, State of Chhattisgarh. Dean of the Medical College was also involved. After admission on the basis of merit list certain seats of MBBS remained unfilled. The fair and legal course was to issue and publish a supplementary merit list. These unfilled seats were not intimated to the public. This was done deliberately by authorities to give undue favour to kith and kin of authorities who had low merit list. With that merit the daughters of authorities could have got admission in private medical college but could not secure admission in government medical college. Resultantly, candidates with higher merit did not come for admission. "Wards, having support of officialdom, who could exercise influence, were successful in gaining admission, surreptitiously." The full bench distinguished *Priya Gupta* from *Nidhi Kaim*. The difference lies in the fact that in *Priya Gupta*, the candidate could get admission in private medical college because of their merit. Due to deceitful means, they were able to get a seat in

103 *Id.* at para 98.

104 *Priya Gupta* v. *State of Chhattisgarh*, (2012) 7 SCC 433.

government medical college where the fees were less. In other words, these two candidates appeared in the medical test, qualified it like others, came in merit list but the position in the merit list was not high. They were entitled for admission in MBBS course, but the place of seat was manipulated so that substantially less fees (may be better education also) could be charged. The Supreme Court in *Priya Gupta* exercised article 142 to condone the deceit but loss of fees was compensated by asking them to deposit Rs 5 Lakh as a measure of deterrence. The mischief, in this case was largely rectified. But in case of *Nidhi Kaim, (Vyapam* case) the candidates never appeared in the admission test. They never qualified and never came in any merit list. It was an imposter who did it. Therefore, the loss could never be compensated in monetary terms.

Sheela Barse v. *Union of India*,[105] is relevant here. In *Sheela Barse* it was observed that a relief should always *look to the future*, should be generally *corrective*, and in some cases *compensatory* because "the court is not merely a passive, disinterested umpire or onlooker, but has a more dynamic and positive role with the responsibility". In *Priya Gupta* the Supreme Court has used all three means. In *Nidhi Kaim, (Vyapam* case) the Court did not impose any compensation. The Court, in *Priya Gupta* allowed leniency though the government had cancelled the admission. In *Nidhi Kaim,* the full bench endorsed the decision of the government, followed "no mercy" and the rule of "fruit of the poison tree." *Priya Gupta* should have also followed zero tolerance approach or the corrective measures and should have been more severe, like three years of unpaid community service in a rural area.

Fuller has once observed as under: [106]

> Do we use law as an instrument of constraint to keep people from evil or damaging behavior, or do we, through rules of law, provide for our citizens a framework within which they can organize their relations with one another in such a manner as to make possible a peaceful and profitable coexistence? This question asks whether law, on the one hand, is assigned the purpose of achieving social control over the behavior of human beings; or whether, on the other hand, its function is to provide a means for facilitating human interaction.

The approach of Chalemeswar, J. was to use judicial order under article 142 to "make possible a peaceful and profitable coexistence." Therefore he opened some scope of equity in socio-economic deviations "for facilitates human interaction." On the other hand Khehar. J. used law as a means "of achieving social control over the

105 (1988) 4 SCC 226, 1988 Indlaw SC 747 at para 14.

106 Lon L. Fuller, "Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction," 1975 *BYU L. Rev*. 89 (1975), *available at*: https://digitalcommons.law.byu.edu/lawreview/vol1975/iss1/5 (last visited on Feb 19, 2019).

behavior of human beings." Therefore, he did not allow the rule of equity through article 142. The approach of Khehar, J. sounds a better way to address the growing menace of corrupt practices in education sector.

VI DOWRY DEATH

Among socio-economic crimes, dowry transection has became an acceptable norm. Dowry death provision under the Indian Penal Code, 1860 *i.e* section 304B was incorporated to check the menace of dowry as well as dowry death. Therefore, the judiciary should be careful that for the want of technicalities the accused is not acquitted. On the other hand section 304B is an extraordinary measure because it does not follow the ordinary principles of criminal jurisprudence. Accused is in disadvantageous position because of reverse onus clause. Therefore, the police, the prosecution and specially the judiciary should be additionally cautious that sympathy to a victim oriented interpretation does not lead to miscarriage of justice. The correct interpretation lies in between these two approaches. More so, when there is temptation to include as many accused as possible as a mode of vengeance and pressure.

Change of misuse

Archana Mishra v. *State of U.P.*[107] can be a good illustration. Archana Mishra (*devrani* of deceased) was one of the accused in the FIR in a dowry death case. However, in the investigation it was found that she was not involved in the crime committed in 2011. The prosecution was started against other family members. After two and half years,[108] during evidence, father informed that her daughter herself told him that family members including Archana Mishra used to beat her for dowry. The statement of father was a hearsay evidence but could not be dismissed in this case because that was the only evidence available. The prosecution moved application under section 319 of CrPC 1973 to summon Archana Mishra.[109] The additional sessions judge (ASJ), Deoria summoned Archana Mishra. The validity of this order of summon was challenged in the High Court. High Court did not interfere and therefore approved

107 2017(4) RCR (CR.)736. It is a full bench order of J. Chelameswar, Prafulla C. Pant and S. Abdul Nazeer, JJ. This is a small order of two pages. The statement of father was made in 2013. The ASJ order of summon based on the statement of father was issued in 2015. The high court (Allahabad) approved the order in the same year *i.e* 2015. The Supreme Court quashed the order in 2017 *i.e* it took two years. The judicial process to decide the validity of summoning order took 4 years. The case was listed before the Supreme Court 5 times, *viz*. 31-03-2016, 26-04-2016, 02-05-2016, 19-09-2016, 28-08-2017. The time should be reduced by reducing number of hearings by half.

108 "During the course of the evidence PW1 (the father of the deceased), on 19.07.2013, after a passage of about two and a half years from the date of filing of chargesheet, stated that his daughter had disclosed that her husband, father-in-law, devar, devrani and nanad gave her beating and abused her."

109 Power to proceed against other persons appearing to be guilty of offence.

the summon order of ASJ. This was challenged in the Supreme Court. The Supreme Court quashed the summon order and held that ASJ was not justified in summoning Archana Mishra.

The Supreme Court has not given any reason for quashing *in this order* except that "the evidence produced does not show the involvement of the appellant in the offences." However, in a previous order[110] the Court mentions that the bench looked upon the investigation carried out and found that (i) The chargesheet reveals that Archana Mishra was at her parental house and not at her in Laws residence, whereas occurrence has taken place on Oct 26, 2011. (ii) Copy of Family Register (Annexure-F) stated that Archana Mishra had gone to her husband's house for the first time on March 8, 2012, well after the date of occurrence i.e. Oct 26, 2011. This indicates that the statement of father that her daughter told her that Archana Mishra also used to beat her was very suspicious. It is possible only if the records of the family register may be proved doubtful. Another problem with the statement of father was the fact that this statement of the father came after one and half year of the submission of chargesheet. His statement did not come during investigation. When final report in favour of Archana Mishra was presented, the father did not object. When the charges were framed against other family members, the father did not inform the court that Archana Mishra was equally culpable. Prosecution started and then the father during evidence made this statement as to the culpability of Archana Mishra. Should such statement be relied on *prima facie*? The time span of one and half year, the non-use of previous opportunity by father creates reasonable doubt on the reliability of his statement. It also increases the chances of afterthought. In the light of the competing claims discussed above and the practice of implicating all members of accused family, the Supreme Court has rightly quashed the summoning order. The order of the additional sessions judge and the High Court was victim oriented while the order of the Supreme Court was balanced.

This judgement indicates the scope of improvement in the quality of judgement. Two reasons of not relying on the statement of father were given in two different orders. In final order all the reasons should be given. The Supreme Court refers annexure "F" but the same is not a part of the order, nor any annexure is uploaded with any judgement, be it the government website or private website. Can all annexure be uploaded on the website subject to consent, privacy and copy right? These days all such annexure are given in soft copy to the registry. The same may be uploaded. It will make task of lawyers, researchers easier and better comment may be advanced on the judgements.

Lack of clarity in order

Sarada Prasanna Dalai v. *Inspector General of Police, Crime Branch, Odisha*[111] is another judgement to indicate that lack of all material facts keeps the readers guessing

110 Dated 02-05-2016.

111 (2017) 5 SCC 381.

what is the *ratio* of the judgement. In *Archna Misra* similar difficulty was highlighted. In *Sarada Prasanna Dalai*, a case was registered under section 4 of the Dowry Prohibition Act, 1961; section 34, 302, 306, 304B and 498A of IPC. However, after five days of institution of FIR, the investigation officer (IO) dropped the charge of section 302 because the medical officers, who had conducted the post mortem, opined that the hanging was suicidal in nature. A suicidal homicide can be prosecuted under section 306, or 304B but never under section 302. Only possibility is abetment to suicide and presence of the accused at the suicide place. Victims (brother of deceased) wanted the case to be prosecuted under section 302 besides other. The high court declined but the Supreme Court asked the sessions court to consider the matter. The Supreme Court held that the sessions judge should consider the material to prosecute under section 302 also. No reason was given for the same. The relevant part of very brief order (1-2 pg) can be reproduced for clarity:[112]

> we are of the view that it is just and proper for the Sessions Court before whom the case is pending to consider framing of an additional charge under section 302 of the IPC. Therefore, the Sessions Court is directed to peruse the entire material on record in order to consider the aspect of framing of an additional charge for the offence punishable under section 302 IPC. However, this shall not be construed as our opinion on merits of the case.

There is no reason what compelled the Supreme Court to make this order? It seems certain material evidence and record convinced them, which is not recorded in the Supreme Court judgement. They could have referred a few of them. A few paragraphs were not only desirable but also essential as a part of *ratio decidendi*. Some of the judgements are so bulky that they run into 500 pages. Some are 2 page orders. Judgements and orders need to be clear, at least to the law students. If it is not clear to law students, the fate of a layman can be only imagined.

Bhan Singh v. *State of Punjab*[113] is significant because it is on sentencing. In this case Bhan Singh was sentenced to undergo imprisonment for seven years under section 304B, five years under section 306 and two years under section 498A of IPC, all rigorous imprisonment. He was 99 years of age. He had suffered sentence of one year and nine month. The Court reduced his punishment to undergone and ordered his release. The basis was his age and role played. Age, one can understand. But how 'role played' is relevant is not mentioned in the order. A few sentence on the role played should have educative value in future. The order also says that this order is issued "without making it precedent in any other case." The principle of precedent is compromised in this case. If similar situation emerges, why this order cannot be used as precedent, is not understandable.

112 *Id.* at para 4.

113 MANU/SC/0662/2017.

Dowry death and *de novo* trial

In *Ajay Kr. Ghoshal* v. *State of Bihar*[114] the death of wife took place within three months of marriage. The trial court convicted accused under section 304B. The high court set aside the conviction and a retrial *de novo* was ordered. The Supreme Court held that retrial *de novo* is an exceptional measure which can be ordered if there are extraordinary situations like (i) the court had no jurisdiction, or (ii) trial was vitiated by serious illegality or irregularity on account of the misconception of nature of proceedings, or (iii) wrong admission or wrong rejection of evidences or (iv) the Court refused to hear certain witnesses who were supposed to be heard, *etc*. The high court did not mention how any alleged lapses pointed out by it have resulted in miscarriage of justice. Moreover, the first appellate court is duty bound to consider the evidence on record and independently arrive at a conclusion. In this case high court was first appellate court. Therefore, in this case, the High Court erred in remitting the matter back to the trial court for fresh trial. High court is required to consider the matter afresh. Though this case has no direct bearing on dowry death but is significant because it restated the established principles on *de novo* trial as well as the duty of first appellate court.[115]

Horizontal expansion of Dowry

Another disturbing trend is the horizontal expansion of the menace of dowry among Muslim communities. *Shaman Saheb M. Multani* v. *State of Karnataka*,[116] a case of 2001 can be referred as an illustration. The trend has not stopped. In 2017, *Bibi Parwana Khatoon* v. *State of Bihar*[117] further establishes this expansion. It is no more limited among Hindus but has already infected Muslim communities. In this case, the bride was alleged to be killed within eight months of marriage. Faisal, the brother of the deceased alleged that he saw burn injuries of her sister. Medical Officer opined that the deceased died of asphyxia due to strangulation. After four years the trial court convicted four accused under section 304B read with section 34 of Indian Penal Code. The high court acquitted one (father in law) and confirmed conviction of others. The convicted persons, including sister-in-law, Parwana Khatoon appealed the Supreme Court.

The Supreme Court examined the evidence on record and found serious lapse on the part of trial court and high court which makes the presence of accused at the spot or near the place of death doubtful. The incident took place in Kali Prasad Tola, Madhubani, where the deceased used to live with her husband. The accused argued

114 (2017) 12 SCC 699.

115 The courts below (members of the bench especially author of order or judgement) should be conveyed the fate of their orders. It will be enriching experience for him and he may not commit the mistake again. It is difficult to say whether there is any such practice or not.

116 AIR 2001 SC 921.

117 (2017) 6 SCC 792. The hearing was held on eight dates *viz*. 04-05-2017, 20-04-2017, 13-04-2017, 05-12-2016, 09-09-2016, 05-09-2016, 01-08-2016 and 09-05-2016. The hearing needs to be reduced to three for early disposal.

that they used to live in village Sabutar (Purnea). This was supported by family member of accused. Another defence witness Raghunandan Yadav, (resident of Kali Prasad Tola but belongs to village Sabutar) stated that the appellants used to live in Sabutar. Besides, the four neighbours (three- Nakir Yadav, Dhani Yadav and Sanni Yadav and one Md. Jasir) also corroborated the fact that Parwana and her husband Hasan used to live in Sabutar. The witnesses were neighbour of deceased. In other words, not only family member but neighbours also stated that the usual stay of accused was not place of death but other village. The witnesses were of different religion. Therefore, the Supreme Court reached to the conclusion that the record sufficiently shows that the accused used to live in a different village. For section 34 of IPC, the physical presence of accused near the place of death is essential. As this was reasonably doubtful the Supreme Court acquitted the accused.

Moreover the three documentary evidences [PAN number, service book of one accused who was primary teacher and certificate of SDO) proved that the accused stay in Sabutar and not in Kali Prasad Tola. Why the courts below have not considered oral and documentary evidences of *alibi* in favour of accused, is not explained by them. This creates reasonable doubts in the mind of the Court. Therefore, both sister in law Bibi Parwana Khatoon @ Parwana Khatoon and, Md. Hasan @ Hasan Raja (husband of Bibi Parwana Khatoon) were acquitted. However, the husband of the deceased victim was not acquitted. The significance of this case lies in the disclosure that Muslim community is also target of dowry. The evidences are not appreciated by the courts below and there is no reason why the high court has not taken note of the evidence of *alibi*. And the acquittal of other family members of the husband also indicates that there are chances that the aggrieved father or brother of the deceased girl may have falsely implicated other family members.

In the case of *Ananda Bapu Punde* v. *Balasaheb Anna Koli,*[118] Poonam, the wife of accused was found dead in a well. It was alleged that Poonam was first murdered and then was thrown into the well. However, the Court declined to convict under any relevant provision, *viz*. sections 498A, 304B, 306 and 302 read with section 34, Indian Penal Code because of following reasons-

1. The inquest report and the postmortem report both deny any sign of injury or torture. The reason of death given in the postmortem report was asphyxia.
2. The prosecution witnesses (father, brother and mother of deceased woman) did not support prosecution story and indeed declared hostile.
3. There was no evidence of demand of dowry.

They ruled out the application of sections 498A, 304B or 302. It was a case of suicide.

118 (2017) 4 SCC 642. The case was heard on eight dates *viz*. 09-03-2017, 10-02-2017, 13-04-2016, 23-02-2016, 04-01-2016, 02-07-2015, 15-05-2015, 01-05-2015. The dates need to be reduced to three hearings for early disposal.

4. There was an allegation that two days before suicide, the deceased saw her husband in compromising position with another lady. This cannot be proximate and positive reason for abetment to commit suicide. Therefore, section 306 was also ruled out.

The death took place in 2002. The trial court acquitted them in 2012 *i.e.* eleven years. The high court also approved the trial court decision in 2013 itself, *i.e.* one and half years. The SLP was filed in 2017 and the case was decided by the Supreme Court in 2017. There is no explanation why there was delay. The case took 16 long years.

VII CONCLUSION

The foregoing analysis of various judicial pronouncements suggests that even if a law dealing with socio-economic crimes relies more on "crime control model", and an accused cannot enjoy all the benefits of "due process model", minimum constitutional norms have to be followed in the drafting of a provision. An express reflection of this conclusion is *Nikesh Tarachand Shah* where section 45(1) of PMLA dealing with twin condition of bail has been declared unconstitutional for want of article 14 and 21. *Nikesh Tarachand Shah* was first important application of the arbitrariness principle established by a Constitution Bench in *Shayara Bano*.[119] The provision of section 45(1) of PMLA, 2002 was enacted with the idea that an accused of PMLA ought not to get bail easily, because most of the accused are high and mighty. The underline philosophy is that public welfare is served better in denying bail than in granting bail in PMLA cases because PMLA not only contation black money but also dirty money and terror money. In such exceptical cases public welfare gets priority over personal liberty. While such policy can be tolerated, it cannot be extended in such a manner that the law makes mockery of its purpose and, rationality is an absolute casualty. The way the Parliament has played with section 45 of PMLA through various amendments directs to only one point, that the legislative drafting is a casual business for law ministry and other executive bodies involved in drafting. The illustrations provided by Nariman, J. in *Nikesh Tarachand Shah* establishes that the Parliament is not serious to its own exclusive function and obligation. Though the judgement is silent on the parliamentary debate, this author has scanned the debate in Rajya Sabha where general statements have been made about section 45.[120] Government and the

119 *Shayara Bano* v. *Union of India* (2017) 9 SCC 1. This was a Constitution Bench decision where the issue was whether instant triple talaq was valid under law or not. While declaring this as invalid the Court also examined the question whether arbitrariness can be a ground to declare an enactment as unconstitutional or not. Nariman, J. (with Uday Umesh Lalit, J.) deliberated on the issue of arbitrariness extensively and declared that arbitrariness can be a ground to declare any enactment as unconstitutional. Kurian Joseph, J. accepted this finding though he did not elaborately discuss it.

120 *See, Rajya Sabha Debates* of July 25, 2002. Sri Ram Gopal Yadav, Kapil Sibal, T. Subbarami Reddy, H K Javare Gowda has raised concern for s. 45 of PMLA, which are mostly superficial in nature, *available at*: rsdebate.nic.in (Last visited on April 24, 2019).

Parliamentarians are trying to find short cuts to address the growing menace of money laundering which cannot be sustained or legitimized even if the interpretation is very liberal. The twin condition of bail under section 45 in PMLA are similar in many other laws. Will *Nikesh Tarachand Shah* affect other provisions also like those in UAPA 1967 or NDPS Act 1985 or section 212 of the Companies Act *etc.*? The answer is No, because PMLA was not tailor made but other provisions of various laws are carefully drafted to satisfy the compelling interest of State. Indeed it may not be an exaggeration to conclude that Nariman, J. upheld the validity of section 37 of NDPS Act 1985 which does contain twin condition for bail. Another redeeming feature of the survey of the judgements of 2017 is the use and refusal to use article 142 in corruption cases. In *Girish Kumar Suneja* v. *CBI*[121] a full bench of the Supreme Court reiterated that in corruption cases the jurisdiction of article 226 can be barred by a Supreme Court order under article 142. This was a unique decision (rather follow up of precedents on same issue) which carved out an exception to the basic structure theory propounded by the biggest bench ever. Though there is no generalised finding for all cases on the Prevention of Corruption Act, 1988, and for exceptional cases of *Coal block scams*, the reasoning given by the Supreme Court is that if article 226 jurisdiction is permitted in routine manner in *Coal block* cases, the purpose of Prevention of Corruption Act, 1988 would be frustrated. *Coal block* scam cases also witnessed the same verdict. This is a welcome development because multiplicity of forums of judicial decisions in the name of justice lead to delay and is favourable to the white collar criminals. The full bench also explored the meaning of "failure of justice."

Another case where article 142 finds elaborate mention is *Nidhi Kaim* v. *State of Madhya Pradesh*[122] (*Vyapam* case) which was a perfect example of Ronald Dwarkin's "hard cases." It was found that 634 students of MBBS took admission by means of fraud, forgery and cheating with the help of an organised gang. While declaring the admission as illegal was easy, difficult task was what to do for consequence proceedings. Should the labour, energy and resources of MBBS students and State go in vain or should some flexibility be allowed. It was also an illustration of role of morality, honesty and probity in decision making. The case highlights the clash of two interests. The full bench of the Supreme Court decided that the MBBS students deserve no mercy and cancelled all admission. The Court declined to use article 142 for something based on frand and forgery. The sympathy for 634 MBBS students and resources was misplaced became admission was based on "rotton foundation".

"High and mighty" slipping from the long arms of law is no surprise. However, a careful investigation and conscious judiciary can create exception. *State of Karnataka* v. *Selvi J. Jayalalitha*[122] was a difficult case because a powerful Chief Minister with

121 (2017)14 SCC 809, decided by a full bench constituting Madan B. Lokur, Kurian Joseph and A.K. Sikri, JJ.

122 (2017) 4 SCC1. It was a full bench decision of J.S. Khehar, CJI, Kurian Joseph and Arun Mishra, JJ., *hereinafter* referred as *Nidhi Kaim, Vyapam*.

great popular mandate was involved in the disproportionate asset case. The Division Bench convicted the offenders involved though the case against *Jayalalitha* was abated due to her death. The Court reiterated that there should not be "exaggerated devotion to" the doctrine of standard of proof and beyond reasonable doubts should not be extended in such a manner that offenders get benefit due to marginal slips in the evidences especially in white callat crimes. The judicial pronouncements on corruption is a reflection of "society's search for purity."[123]

The survey of dowry death cases lead to more than one inference. *Bibi Parwana Khatoon* shows that the problem is escalating and greed knows no religious boundaries. Dowry death in Muslim communities are also raising tentacles. Muslim jurists should be active to address the menace. One can hardly find issues and concerns like those of dowry death in the main stream discourse among Muslims or by Muslims. *Archana Mishra* shows that dowry laws have potential to be misused. Section 304B (or other female related laws) are "not made an offence in order to minister to the wounded vanity of" parties. Therefore, the courts should be cautious to the abuse of laws. A few orders of the Supreme Court on section 304B are not well reasoned orders, for example *Archana Mishra*, *Sarada Prasanna Dalai* and *Ananda Bapu Punde*. In the same case during various hearings on various dates reasons are given but the final hearing order does not contain the reasons. Many times it is difficult to discover reasons of acquittal, conviction, or reduction of punishment *etc.* The judiciary needs to improve its judgement writings. It ought to be short, crisp and reasoned. In certain judgements, the survey also took note of the time taken by the case so that judicial delay can be addressed. In the survey of dowry death cases, number of hearings have been mentioned. For example *Archana Mishra* took five hearings. *Bibi Parwana Khatoon* and *Ananda Bapu Punde* were heard on eight dates in the Supreme Court. If hearings in the Supreme Court could be reduced to 2-3 dates some problem of pendency and delay may be addressed.

123 (2017) 6 SCC 263.

124 Fali S Nariman, *The State of The Nation*, 269, (New Delhi, Hay House India, 2013). He refers John T. Noonan (Jr), *Bribes,* (Macmillan, New York, 1984).