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INTERPRETATION OF STATUTES

*Anurag Deep**

I INTRODUCTION

DIAS WHILE sharing his wisdom on 'Statutory Interpretation' rightly says that "The law applicable to the facts of a dispute may be contained in an Act of Parliament, and knowing the law then involves interpreting a legislative text. Unlike case law, where judges construct their own texts out of precedents (*rationes decidends*), with statute law the texts are presented to them."[1] The part played by the judges "enables them to preserve in their hands a considerable measure of power, one aspect of which is that what becomes 'law' is their interpretation of statute through the operation of *stare decisis.*"[2]

The year 2014 survey of the interpretation of statutes deliberates and decides on wide range of issues raised in the area of constitutional law, civil law and criminal law. Like the previous surveys[3] it utilises almost all the major tools of interpretation necessary to find the correct and convincing meaning of a text in question. Real intention of the legislature remained the toughest task as in various cases either the legislative debates are not quoted by the counsel or the courts could not made sincere effort to have a glance over it or it was not at all available since the legislature did not discuss the provision in detail except a few distinguished exceptions. As the spectrum of interpretation is too large to cover all cases decided

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1 RWM Dias, *Jurisprudence,* 166, (*Fifth ed.* Lexis Nexis,). Chapter 8 of this classic work is "Statutory Interpretation."

2 *Ibid*.

3 Anurag Deep, *Annual Survey of Indian Law*, 551-601 XL VIII *ASIL* (2012) and 751-826 601XL IX *ASIL* (2013).

in the year 2014, the survey is destined to be limited to the more important decisions of the Supreme Court.

II BASIC PRINCIPLES

The decisions of the courts follow certain well recognized rules of statutory interpretation which could be conveniently categorized as basic principles and discussed hereunder in separate headings. As proceedings in court begin with certain presumptions they are first among the basic principles.

A. Presumption

A judicial decision has to be based on facts and not on fancies, fictions and presumptions. Moreover judiciary has to be impartial. When you presume in favour of a party you cannot be said to be impartial, at least ideally. Impartiality mandates that the arbitral authority ought not to presume anything. However, a legal system cannot function in an ideal manner because the state is an organisation of compulsion.[4] Sometime it has to presume because of separation of power, in the interest of justice etc.

i. Presumption of constitutionality

In the case of *Dr. Subramanian Swamy* v. *Director, Central Bureau of Investigation*[5] the constitutional validity of section 6A of Delhi Special Police Establishment Act, 1946 (DSPEA)[6] was challenged. The court held section 6A(1) as violative of article 14 of the constitution of India. The constitutional bench reiterated the doctrine of presumption of constitutionality as under:[7]

> Where there is challenge to the constitutional validity of a law enacted by the legislature, the Court must keep in view that there is always a *presumption of constitutionality of an enactment*, and *a clear transgression of constitutional principles must be shown*. The

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4 Roscoe Pound, *An Introduction to the Philosophy of Law*, 160, (Yale Univ. Press, 3rd Indian Reprint 2003). [The book is based on the Store's Lectures delivered at Yale University, in the law school, Year 1921-22.]

5 (2014) 8 SCC 682. The constitutional bench consists of R.M. Lodha CJI, A.K. Patnaik, Sudhansu Jyoti Mukhopadhaya, Dipak Misra, Fakkir Mohamed Ibrahim Kalifulla. The unanimous judgement was delivered on May 6, 2014 by Chief Justice R.M. Lodha, *hereinafter* referred as *CBI 6A* judgement.

6 DSPEA 1946 Section 6-A (1) required prior approval of "Central Government to conduct inquiry or investigation of (a) the employees of the Central Government of the Level of Joint Secretary and above; and (b) such officers as are appointed by the Central Government in corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by that Government.

7 *CBI 6A judgement*, para 49.

> fundamental nature and importance of the legislative process needs to be recognized by the Court and due regard and deference must be accorded to the legislative process.

(a) Constitutional interpretation: read into

Presumption of constitutionality of a legal provision is well established. The courts make it applicable through various techniques. Read into is one of the technique used by courts to protect provision of law from being declared as unconstitutional or illegal. Reading into is also used some time by courts to interpret a provision in case the law is silent. The controversial collegiums system in appointment of judges has been read into article 124 of the Constitution of India. Similarly 'implied limitation' on the power of parliament to amend the constitution has been read into in the article 368.

A constitution bench declined to use the technique of 'read into' in the case of *Manoj Narula* v. *Union of India*. [8] In this case it was argued that doctrine of implied limitation has been accepted as a principle of interpretation of our Constitution and the same should be applied to the language of article 75(1).[9] The union council of minister (on 24.3.2006 when the petition came for hearing) consisted of ministers who were suspect in serious and heinous crimes. The issue was whether the Supreme Court should "read into the language of article 75(1) of the Constitution to state that the Prime Minister, while giving advice to the President for appointment of a person as Minister, is not constitutionally permitted to suggest the name of a person who is facing a criminal trial and in whose case charge/ charges have been framed."[10] Supportive argument to the above was that:[11]

> *purposive interpretation of the Constitution ... can preserve, protect and defend the Constitution regardless of the political impact.* ...if a constitutional provision is silent on a particular subject, this Court can necessarily issue directions or orders by interpretative process to fill up the vacuum or void till the law is suitably enacted. The broad purpose and the general scheme of every provision of the Constitution has to be interpreted, regard being had to the history, objects and result which it seeks to achieve.

The argument of State was that any limitation regarding criminal conduct is provided under Representation of People Act 1951 which "specifies the stage, i.e., conviction and, therefore, if anything is added to it in respect of the stage, it

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8 (2014) 9 SCC 1.The case was unanimously decided on Aug 27, 2014 by a constitutional bench of Hon'ble Justice Dipak Misra, Justice R.M. Lodha, Justice Sharad Arvind Bobde, Justice Kurian Joseph, Justice Madan B. Lokur. Justice Dipak Misra delivered the judgement, *hereinafter* referred as *Manoj Narula*.

9 Art. 75. Other provisions as to Ministers-(1) The Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister

10 *Supra* note 8, para 29.

11 *Id.*, para 32.

would be travelling beyond the text which would be contrary to the principles of statutory *interpretation.*"[12]

Another line of argument was that except under article 75, oath required to be taken by a Minister under article 75(4) as given in the Third Schedule, section 8A of the 1951, article 84 which specifies certain qualifications for filling up the seats of Parliament, does not state anything as to the character and qualification of a person qualified to sit in the Parliament. Under Article 102(i)(e) there is no other disqualification for a Member of Parliament to hold the post of a minister. Therefore, the criminal antecedents is in the realm of propriety but that cannot be read into the constitutional framework.

It was also urged that, while interpreting article 75(1), the court cannot introduce the concept of rule of law to attract the principle of implied prohibition as rule of law is an elusive doctrine and it cannot form the basis of a prohibition on the appointment of a Minister.

The Supreme Court examined these arguments and counter arguments. It addressed this issue as under:

> ... we are of the convinced opinion that when there is no disqualification for a person against whom charges have been framed in respect of heinous or serious offences or offences relating to corruption to contest the election, *by interpretative process*, *it is difficult to read the prohibition into Article 75(1)* or, for that matter, into Article 164(1) to the powers of the Prime Minister or the Chief Minister in such a manner. That would come within the criterion of eligibility and would amount to prescribing an eligibility qualification and adding a disqualification which has not been stipulated in the Constitution. In the absence of any constitutional prohibition or statutory embargo, such *disqualification*, in our considered opinion, *cannot be read into Article 75(1) or Article 164(1) of the Constitution*. [Emphasis Added]

On the point of the principle of constitutional silence or abeyance(when the constitution is silent the court may interpret) the constitution bench acknowledged the significance as under:

> The next principle that can be thought of is constitutional silence or silence of the Constitution or constitutional abeyance. The said principle is a progressive one and is applied as a recognized advanced constitutional practice. It has been recognized by the Court to fill up the gaps in respect of certain areas in the interest of justice and larger public interest.[13]

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12 *Id.*, para 38.

13 Id., para 65. The court illustrated *locus standi* for the purpose of development of Public Interest Litigation, procedural safeguards in the matter of adoption of indian children by foreigners in the case of *Laxmi Kant Pandey* v. *Union of India*, 2001 (9) SCC 379, *D.K. Basu*, 1997 (1) SCC 416, *Vishakha*, 1997 (6) SCC 241, where the court applied the *principle of constitutional silence*.

The court, however, declined to apply this principle as under:

> The question that is to be posed here is whether taking recourse to this doctrine for the purpose of advancing constitutional culture, can a court read a disqualification to the already expressed disqualifications provided under the Constitution and the 1951 Act. The answer has to be in the inevitable negative, for there are express provisions stating the disqualifications and second, it would tantamount to crossing the boundaries of judicial review.

Doctrine of Constitutional Implications "can be taken aid of for the purpose *of interpreting constitutional provision in an expansive manner*. But, it has its own limitations. The interpretation has to have a base in the Constitution. The Court cannot re-write a constitutional provision. Thus analysed, it is not possible to accept the submission ...that while interpreting the words "advice of the Prime Minister" it can legitimately be inferred that there is a prohibition to think of a person as a Minister if charges have been framed against him in respect of heinous and serious offences including corruption cases under the criminal law. The court exercised restraint for which it deserves appreciation. It provided the prime minister and the parliament one more chance to check the menace of criminalisation of political executives. If the PM or CM did not stop bowing before pressure and keep on inducting those with criminal back ground as minister under the guise of "unless proved guilty beyond reasonable doubts the person is innocent" the Supreme Court might find ways to read into art 75(1) what has been rejected by the Supreme Court in *Manoj Narula*. The parliament must step in to check the menace of criminalisation of politics.

(b) Reading down

In the case of *Dr. Subramanian Swamy* v. *Raju*[14] the issue was whether sections 2(k), 2(l) of Juvenile Justice Act 2006 needs any authoritative interpretation. Should they be read down to mean that juveniles (children below the age of 18) who are intellectually, emotionally and mentally mature enough to understand the implications of their acts and who have committed serious crimes do not come under the purview of the Act. It was further urged that if the Act is not read in the above manner the fall out would render the same in breach of article 14 as inasmuch as in that event there would be a blanket/flat categorisation of all juveniles, regardless of their mental and intellectual maturity, committing any offence, regardless of its seriousness, in one homogenous block in spite of their striking dissimilarities.

The idea of reading down was elaborated as under:[15]

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14 (2014) 8 SCC 390. The unanimous opinion consists of P. Sathasivam, C.J.I., Shiva Kirti Singh and Ranjan Gogoi, JJ, *hereinafter* referred as *Raju Juvenile case*.

15 *Id.*, para 61.

> *Reading down the provisions of a statute cannot be resorted to when the meaning thereof is plain and unambiguous and the legislative intent is clear.* ... Courts must read the legislation literally in the first instance. If on such reading and understanding the vice of unconstitutionality is attracted, the courts must explore whether there has been an unintended legislative omission. If such an intendment can be reasonably implied without undertaking what, unmistakably, would be a legislative exercise, the Act may be read down to save it from unconstitutionality. The above is a fairly well established and well accepted principle of interpretation which having been reiterated by this Court time and again...[16]

Applying the principle of reading down the court held as under: [17]

> In the present case *there is no difficulty in understanding the clear and unambiguous meaning of the different provisions of the Act. There is no ambiguity, much less any uncertainty, in the language* used to convey what the legislature had intended. All persons below the age of 18 are put in one class/group by the Act to provide a separate scheme of investigation, trial and punishment for offences committed by them. A class of persons is sought to be created who are treated differently. This is being done to further/effectuate the views of the international community which India has shared by being a signatory to the several conventions and treaties already referred to.

The judgement has followed the cannons of interpretation but fact is that intellectuals and legislatures have more than one opinion. India should change the law to lower the age of juvenile as it is already in place in various countries. Moreover India cannot be too sympathetic to juvenile offenders that it starts creating trouble for victims. If victims and the family members do not get justice from law, street justice might get some space in society.

In the case of Charu Khurana v. *Union of India* [18] the court referred to *Society for Unaided Private Schools of Rajasthan* v. *Union of India*,[19] and *Paramati Educational and Cultural Trust (Registered)* v. *Union of India* [20] where "it has been held that the court is required to interpret the fundamental rights in the light

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16 The name of Sawant, J. (majority view) in *Delhi Transport Corporation* v. *D.T.C. Mazdoor Congress* has been mentioned.

17 *Raju Juvenile case*, para-62.

18 2015 (1) SCC 192, 2014 (12) SCALE 701.

19 (2012) 6 SCC 1.

20 (2014) 8 SCC 1.

of the directive principles. [21] The court also referred *Ramlila Maidan* case[22] and observed: [23]

> The purpose of referring to the same is to understand and appreciate how the Directive Principles of State Policy and the Fundamental Duties enshrined under Article 51A have been elevated by the interpretative process of this Court.

ii. Competing theories: presumption in criminal law

In Criminal Justice System presumption acts as a balancing wheel. First case decided by a constitution bench[24] in 2014; *Hardeep Singh* v. *State of Punjab*[25] which acknowledges this function of presumption. It reiterates the established principle that "presumption of innocence is the general law of the land as every man is presumed to be innocent unless proven to be guilty." The court also acknowledges in context of section 319 of Cr PC 1973 as under: [26]

> Alternatively, *certain statutory presumptions in relation to certain class of offences have been raised against the accused whereby the presumption of guilt prevails* till the accused discharges his burden upon an onus being cast upon him under the law to prove himself to be innocent. These competing theories have been kept in mind by the legislature. The entire effort, therefore, is not to allow the real perpetrator of an offence to get away unpunished. This is also a part of fair trial and in our opinion, in order to achieve this very end that the legislature thought of incorporating provisions of Section 319 Cr.P.C.[27]

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21 *Charu Khurana* at para 30.

22 *Ramlila Maidan Incident, In Re*, (2012) 5 SCC 1. The unanimous opinion of Justice Swatanter Kumar and Justice B.S. Chauhan .

23 *Charu Khurana*, para 32.

24 In 2014 the constitution bench of the Supreme Court decided sixteen cases.

25 (2014) 3 SCC 92.The case was unanimously decided on Jan 10, 2014 by a constitutional bench of Hon'ble Justice Balbir Singh Chauhan, Justice P. Sathasivam, Justice Ranjana Prakash Desai, Justice Sharad Arvind Bobde, Justice Ranjan Gogoi. Justice Balbir Singh Chauhan delivered the judgement, *hereinafter* referred as *Hardeep Singh*.

26 *Hardeep Singh*, para 9.

27 CrPC 1973 319. Power to proceed against other persons appearing to be guilty of offence-

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the court may proceed against such person for the offence which he appears to have committed.

Presumption of innocence is a part of the traditional or old criminal jurisprudence. The new or modern criminal jurisprudence without neutralising the old one heavily relies on the theory of presumption of guilt, though in India one may found the recognition of 'shall presume' in the Indian Evidence Act 1872. The presumption of guilt has been criticised by many scholars and human rights expert without noticing the fact that new sophisticated crimes need this presumption badly without which the prosecution machinery is rendered inefficient.

iii. Retrospective effect

Another presumption regarding date of effectiveness of a law is regarding its prospectivity, *ie* law applies from a future date and not from past date. This presumption, however, is a rebuttable presumption and a law in some cases may be retrospective in operation. In the case of *Dr. Suhas H. Pophale* v. *Oriental Insurance Co. Ltd.*[28]one of the issue was "can the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 be given retrospective effect?' The court reiterated the legal position referring two constitutional bench judgement of fifties. Referring *Janardan Reddy* v. *The State* it observed: [29]

> ...if there are rights created in favour of any person, whether they are property rights or rights arising from a transaction in the nature of a contract, and particularly if they are protected under a statute, and if they are to be taken away by any legislation, *that legislation will have to say so specifically by giving it a retrospective effect. This is because prima facie every legislation is prospective.*[30]

It referred another constitution bench judgement in *Garkiapati Veeraya* v. *N. Subbiah Choudhry*[31] where it was observed that "in the absence of anything in the enactment to show that it is to be retrospective, it cannot be so constructed, as to have the effect of altering the law applicable to a claim in litigation at the time when the act was passed."

Third constitutional bench judgement which helped the court was *Amireddi Raja Gopala Rao* v. *Amireddi Sitharamamma,*[32] where the court held[33] that "*a statue has to be interpreted, if possible so as to respect vested rights, and if the*

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28 (2014) 4 SCC 657.The case was unanimously decided on February 11, 2014 by a division bench of Hon'ble Justice H.L. Gokhale and Justice J. Chelameswar. Justice H.L. Gokhale delivered the judgement, *hereinafter* referred as Dr. *Suhas H. Pophale.*

29 AIR 1951 SC 124.

30 *Id.*, para 7-8.

31 AIR 1957 SC 540.

32 AIR 1965 SC 1970. The constitution bench was concerned with the issue as to whether the rights of maintenance of illegitimate sons of a sudra as available under the Mitakshara School of Hindu Law was affected by introduction of Sections 4, 21 and 22 of the Hindu Adoption and Maintenance Act, 1956.

33 *Id.*, para 7.

words are open to another construction, such a construction should never be adopted." A three Judges opinion in the case of *J.P. Jani, Income Tax Officer, Circle IV, Ward G, Ahmedabad* v. *Induprasad Devshanker Bhatt* was also resorted[34] which is as follows:[35]

> *The principle is based on the well-known rule of interpretation that unless the terms of the statute expressly so provide or unless there is a necessary implication, retrospective operation should not be given* to the statute so as to affect, alter or destroy any right already acquired or to revive any remedy already lost by efflux of time. [Emphasis Added][36]

Once presumption part is over the real application of law comes in picture. The first question is how to interpret a word in dispute.

***B.* Liberal *v.* Strict**

The lawyers used to argue in courts and outside courts that, an expression in question should be given which type of meaning, liberal or strict? There is no formula answer of this question.

Fundamental rights cases should be interpreted liberally so as to give maximum benefit to the petitioner whose fundamental right is violated. In the landmark case of *National Legal Services Authority* v. *Union of India*[37] the petitioners sought the legal declaration of Transgender (TG) gender identity than the one assigned to them, male or female, at the time of birth. Their prayer was that non-recognition of their gender identity violates articles 14 and 21 of the Constitution of India. Hijras/Eunuchs, who also fall in that group, claim legal status as a third gender with all legal and constitutional protection.[38]

The judgement took support from Yogyakarta Principles. [39] International precedents like *Van Kuck* v. *Germany*[40] was also used by the court where the

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34 AIR 1969 SC 778.

35 *Id.*, para 5.

36 In that matter the Court was concerned with the issue as to whether the Income Tax Officer could re-open the assessment under Section 297(2) (d) (ii) and 148 of the Income Tax Act, 1961, although the right to re-open was barred by that time under the earlier Income Tax Act, 1922.

37 (2014) 5 SCC 438. This case was unanimously decided on April 15, 2014 by a division bench of Hon'ble Justice K.S.Radhakrishnan and Justice A.K. Sikri. Justice K.S. Radhakrishnan delivered the judgement, *hereinafter* referred as *Transgender* judgement.

38 *Transgender* judgement, para 2.

39 A distinguished group of human rights experts has drafted, developed, discussed and reformed the principles in a meeting held at Gadjah Mada University in Yogyakarta, Indonesia from 6 to 9 November, 2006, which is unanimously adopted the Yogyakarta Principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

40 Application No.35968/97 – Judgment dated 12.9.2003.

European Court of Human Rights placed reliance on Articles 6, 8, 13 and 14 of the Convention for Protection of Human Rights and Fundamental Freedoms, 1950. "The Court also held that the notion of personal identity is an important principle underlying the *interpretation* of various guaranteed rights and the very essence of the Convention being respect for human dignity and human freedom, protection is given to the right of transsexuals to personal development and to physical and moral security." It noticed that the issue can be addressed through international conventions which is as under: [41]

> International Conventions and norms are significant for the purpose of *interpretation* of gender equality. While application of international law in USA is regulated by Article VI, Cl. (2) of the U.S. Constitution[42] known as 'supremacy clause', the courts in India would apply the principles of comity of Nations,[43] unless they are overridden by clear rules of domestic law.[44]

Admitting the difference of comparative approach in India and the USA the court observed :[45]

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41 *Transgender* judgement, para 51.

42 "…all treaties made, or which shall be made, under the authority of the united States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

43 The principle that one sovereign nation voluntarily adopts or enforces the laws of another sovereign nation out of deference, mutuality, and respect.

Unlike enforcement of judgments between states in the United States (which is governed by the Comity Clause of the Constitution), there is no Constitutional obligation on a U.S. court to recognize or enforce a foreign judgment. Neither is comity of nations embodied in international law. However, sovereign nations still use comity of nations for public policy reasons.

Under comity, a reviewing court does not reopen cases that have already been heard in other courts; instead, it examines the foreign judicial system. After considering factors (such as fairness and impartiality of that foreign system, the foreign court's personal jurisdiction over the defendant, the existence of subject matter jurisdiction, and the presence of fraud), the reviewing court might choose to respect and enforce that foreign court's judgments.

Comity of nations is considered in forum non conveniens, anti suit injunctions, antitrust claims, conflict of laws, extraterritorial discovery, and the recognition of foreign judgments.

https://www.law.cornell.edu/wex/comity_of_nations.

44 *Gramophone Company of India Ltd.* v. *Birendra Bahadur Pandey* (1984) 2 SCC 534 and *Tractor Export* v. *Tarapore & Co.* (1969) 3 SCC 562, *Mirza Ali Akbar Kashani* v. *United Arab Republic* (1966) 1 SCR 319.

45 *Transgender* judgement, para 55.

> In the United States, however, it is open to the courts to supersede or modify international law in its application or it may be controlled by the treaties entered into by the United States. But, till an Act of Congress is passed, the Court is bound by the law of nations, which is part of the law of the land. Such a 'supremacy clause' is absent in our Constitution. Courts in India would apply the rules of International law according to the principles of comity of Nations, unless they are overridden by clear rules of domestic law.[46]

Acknowledging *Jolly George Varghese* v. *Bank of Cochin*[47] the court examined the implications if India has ratified a covenant. It observed : [48]

> ...those covenants can be used by the municipal courts as an *aid to the Interpretation of Statutes* by applying the Doctrine of Harmonization. But, certainly, if the Indian law is not in conflict with the International covenants, particularly pertaining to human rights, to which India is a party, the domestic court can apply those principles in the Indian conditions. The Interpretation of International Conventions is governed by Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969.

Interpretation as per international documents: whether discretionary or obligatory?

Whether court is duty bound to interpret in the light of international documents or it is personal privilege of judges? The *Transgender* judgement addresses this in following words:

> In His Holiness *Kesavananda Bharati Sripadavalvaru* v. *State of Kerala*,[49] it was stated that in view of Article 51 of the Constitution, the Court *must interpret* language of the Constitution, *if not intractable*, *in the light of United Nations Charter* and the solemn declaration subscribed to it by India. *In Apparel Export Promotion Council* v. *A. K. Chopra* [50], it was pointed out that *domestic courts are under an obligation to give due regard to the international conventions* and norms for construing the domestic laws, more so, when there is *no inconsistency* between them and there is a void in domestic law. Reference may also be made to the Judgments of this Court in *Githa Hariharan (Ms)* v. *Reserve Bank of India*[51], *R.D.*

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46 See: *Gramophone Company of India Ltd.* v. *Birendra Bahadur Pandey* (1984) 2 SCC 534; *Tractor Export* v. *Tarapore & Co.* (1969) 3 SCC 562; *Mirza Ali Akbar Kashani* v. *United Arab Republic* (1966) 1 SCR 319.

47 (1980) 2 SCC 360.

48 *Ibid.*

49 (1973) 4 SCC 225.

50 (1999) 1 SCC 759.

51 (1999) 2 SCC 228.

> *Upadhyay* v. *State of Andhra Pradesh*[52] and *People's Union for Civil Liberties* v. *Union of India*[53]. In *Vishaka* v. *State of Rajasthan*[54], this court under article 141 laid down various guidelines to prevent sexual harassment of women in working places, and to enable gender equality relying on articles 11, 24 and general recommendations 22, 23 and 24 of the Convention on the Elimination of All Forms of Discrimination against Women. Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions, e.g., articles 14, 15, 19 and 21 of the constitution to enlarge the meaning and content thereof and to promote the object of constitutional guarantee. Principles discussed hereinbefore on TGs and the International Conventions, including Yogyakarta principles, which we have found not inconsistent with the various fundamental rights guaranteed under the Indian Constitution, must be recognized and followed, which has sufficient legal and historical justification in our country.

Kant: Two interpretations

Elaborating Kantian philosophy the court recognised that 'two divergent interpretations of the Kantian criterion of justice prevails.' [55] First is the 'increasing stress on the maximum of individual freedom of action as the end of law, which may not be accepted. Benthem, a leading protagonist of 'hedonist utilitarianism' criticized this approach. "This school of thoughts laid emphasis on the welfare of the society rather than an individual by propounding the principle of maximum of happiness to most of the people. Fortunately, in the instant case, there is no such dichotomy between the individual freedom/liberty we are discussing, as against public good. On the contrary, granting the right to choose gender leads to public good."[56] The second tendency of Kantian criterion of justice was found in re-interpreting "freedom" in terms not merely of absence of restraint but in terms of attainment of individual perfection. Out of the two Kantian criterion of justice the latter trend of re-interpreting "freedom" as attainment of individual perfection is the concern in this case, which holds good even today. The greater "emphasis on the attainment of individual perfection evolved after the Second World War, in the form of U.N.Charter" was a revival of natural law theory of justice. [57]

Tracing this international and jurisprudential back ground for interpretation the court concluded that:[58]

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52 (2007) 15 SCC 337.

53 (2005) 2 SCC 436.

54 (1997) 6 SCC 241.

55 *Transgender* judgement, para 108.

56 *Ibid*.

57 *Ibid*.

58 *Transgender* judgement, para 127.

> ... the provisions of the Constitution are required to be given new and dynamic meaning with the inclusion of rights of TGs as well. In this process, the first and foremost right is to recognize TGs as 'third gender' in law as well. This is recognition of their right of equality enshrined in Art.14 as well as their human right to life with dignity, which is the mandate of the Art.21 of the Constitution.

This interpretation of art 14 and 21 is praiseworthy not because the executive and legislature were reluctant to the cause of TG but the doctrine of equality and dignity mandates that congenial situation should be made and constructive steps should be taken so that a citizen who is a neglected lot may also enjoy the fruits of fundamental rights.

Interpretation of a beneficial provision

In the case of *National Insurance Co. Ltd*. v. *Kirpal Singh*[59] the interpretation of word 'retirement' was one of the points of contention. The respondents who opted for voluntary retirement in terms of the SVRS of 2004 (Special Voluntary Retirement Scheme) appear to have claimed pension as one of the benefits admissible to them. The claim was rejected by the appellants forcing the respondents to agitate the matter before the High Court in separate writ petitions filed by them. The question was whether the provisions of para 6 of the SVRS of 2004 read with para 14 of the Pension Scheme 1995 which stipulates only ten years of qualifying service for an employee who retires from service to entitle him to claim pension would entitle those retiring pursuant to the SVRS of 2004 also to claim pension. The court examined the competitive claims of restricted and liberal interpretation in following words:[60]

> If paras 29 and 30 do not govern the entitlement for those seeking the benefit of SVRS of 2004, the only other provision which can possibly be invoked for such pension is para 14 (*supra*) that prescribes a qualifying service of ten years only as a condition of eligibility. The only impediment in adopting that *interpretation* lies in the use of the word 'retirement' in Para 14 of the Pension Scheme 1995. *A restricted meaning to that expression* may mean that Para 14 provides only for retirements in terms of Para (2)(t) (i) to (iii) which includes voluntary retirement in accordance with the provisions contained in Para 30 of the Pension Scheme. There is, however, *no reason why the expression 'retirement' should receive such a restricted meaning especially when the context in which that expression is being examined by us would justify a more liberal interpretation*. [Emphasis Added]

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59 (2014) 5 SCC 189.The case was unanimously decided on January10 , 2014 by a division bench of Hon'ble Justice T.S. Thakur and Justice Vikramajit Sen. Justice T.S. Thakur delivered the judgement.

60 *Id.*, para 10.

The court provided two reasoning for a liberal construction .[61] First is that "the provision for payment of pension is a *beneficial provision which ought to be interpreted more liberally* to favour grant rather than refusal of the benefit." Second reason is that the "Voluntary Retirement Scheme itself was intended to reduce surplus manpower by encouraging, if not alluring employees to opt for retirement by offering them benefits like ex-gratia payment and pension not otherwise admissible to the employees in the ordinary course."

The court concluded:[62]

We are, therefore, inclined to hold that the expression "Retirement" appearing in Para 14 of the Pension scheme 1995 should not only apply to cases which fall under Para 30 of the said scheme but also to a case falling under a Special Voluntary Retirement Scheme of 2004. So interpreted, those opting for voluntary retirement under the said SVRS of 2004 would also qualify for payment of pension as they had put in the qualifying service of ten years stipulated under Para 14 of the Pension Scheme 1995.

Equity and good conscience: liberal interpretation

Liberal interpretation has to be given in those circumstances where a person suffers injury for no fault of his own. In the case of *R. Unnikrishnan* v. *V.K. Mahanudevan*[63]the respondent applied to Tehsildar, Alathur in the State of Kerala for grant of a schedule caste certificate on the basis that he was a 'Thandan' which was a notified schedule caste. The Tehsildar held an enquiry and found that the appellant did not belong to the schedule caste community and reported the matter to the Director, Schedule Caste Development Department. Aggrieved by the denial of the certificate the respondent filed a suit. The court observed as under:

> That apart the question of ouster of Ezhuvas and Thiyyas known as Thandan on account of the confusion that prevailed for a considerable length of time till the decision of this Court in *Pattika Jathi's* case (*supra*) would be unjustified both in law and on *the principles of equity and good conscience.*

The court followed *State of Maharashtra* v. *Milind*,[64] where an MBBS student secured as Scheduled Tribe candidate. The student claimed that Halba-Koshti were the same as Halba, mentioned in the Constitution (Scheduled Tribes) Order. This Court held that neither the Government nor the Court could add to the list of castes mentioned in the Order and that Halba-Koshtis could not by any process of

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61 *Id*., para 11.

62 *Ibid*.

63 (2014) 4 SCC 434. The case was unanimously decided on January 10, 2014 by a division bench of Hon'ble Justice T.S. Thakur and Justice Vikramajit. Justice T.S. Thakur delivered the judgement.

64 (2001) 1 SCC 4.

reasoning or *interpretation* treated to be Halbas. The point was what would be the consequence of the declaration that the student does not belong to ST category. The question that fell for consideration was whether the benefit of the reservation could be withdrawn and the candidate deprived of the labour that he had put in obtaining a medical degree. This court protected any such loss of qualification acquired by him and held:[65]

> In these circumstances, this judgment shall not affect the degree obtained by him and his practising as a doctor. But we make it clear that he cannot claim to belong to the Scheduled Tribe covered by the Scheduled Tribes Order. In other words, he cannot take advantage of the Scheduled Tribes Order any further or for any other constitutional purpose.

Similarly the declaration on point of law should not be prejudicial to the respondent. Justice equity and good conscious allows beneficial interpretation especially when the appellant is not at fault.

Tax exemption: strict as well as liberal interpretation

Can the same text be subject matter of strict and liberal interpretation? The case of *State of Jharkhand* v. *M/s. la Opala R.G. Ltd*[66] is an illustration of it where it was argued that a notification exempting tax liability should be given liberal interpretation as a matter of rule and practice. The court declined. In this case the respondent-dealer was a Public Limited Company engaged in the manufacture of glass and glassware made of Opal glass. The issue was whether "glassware" should be constructed to be covered under notification which provided tax exemption to "types of glass and glass-sheets".

The tax authority argued that "glassware" is not a type of glass but another form of glass. Respondent submitted that the "glassware" in question is a product in which different components are fused together to give glass its final form in accordance with the moulds in which they are manufactured, such as crockery, vases, etc. and therefore, would fall in the category of "types of glass". A notification in the nature of granting tax incentives for the promotion of economic growth and development ought to be *liberally construed and given a purposive interpretation*. The court held that in tax statutes an exemption has to follow both construction, strict as well as liberal. Initially court has to follow strict rule of interpretation to find if exemption at all could be granted or not. If the answer is yes then a liberal interpretation has to be made to give benefit of exemption. "It is settled rule of construction of a notification that at the outset a *strict approach ought to be adopted* in administering whether a dealer/ manufacturer is covered by it at all and if the

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65 *Id.*, para 38.

66 (2014) 15 SCC 136.The case was unanimously decided on March 27, 2014 by a division bench of Hon'ble Justice H.L. Dattu and *hereinafter* referred as Justice S.A. Bobde. Justice H.L Dattu delivered the judgement, *la Opala R.G. Ltd.*

dealer/manufacturer falls within the notification, then the provisions of the notification be liberally construed.[67]

The court was benefitted by a constitution bench judgement in *Hansraj Gordhandas* v. *CCE and Customs*[68] which says that "*...a notification has to be interpreted in the light of the words employed by it* and not on any other basis. This was so held in the context of the principle that in a taxing statute, there is no room for any intendment, that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification i.e. by the plain terms of the exemption."[69] The court also extracted from *Gammon (I) Ltd.* v. *Commr. of Customs*, [70] and three-Judge Bench opinion in *Novopan India Ltd* which is as under:[71]

> . …The principle that *in case of ambiguity, a taxing statute should be construed in favour of the assessee*—assuming that the said principle is good and sound—*does not apply to the construction of an exception or an exempting provision*; *they have to be construed strictly.* A person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision. *In case of doubt or ambiguity, benefit of it must go to the State*. This is for the reason explained in *Mangalore Chemicals* and other decisions viz. each such *exception/ exemption increases the tax burden on other members* of the community correspondingly. Once, of course, the provision is found applicable to him, full effect the court must be given to it.

The court through dictionary meaning discussed whether the two terms, "types of glass" and "forms of glass" would be identical in their connotation and import"[72] and concluded that:[73]

> In our considered view, the glassware so manufactured by the respondent-dealer though made of glass cannot be considered or called as a "type of glass" in light of the aforesaid discussion and since the notification only provides for the reduction in the rate of tax of types of glass and not for "forms of glass" which is manufactured by the respondent as glassware, the respondent would not be covered by the notification.

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67 *la Opala R.G. Ltd*, para 15.

68 AIR 1970 SC755.

69 *la Opala R.G. Ltd*, para 17.

70 (2011) 12 SCC 499.

71 *la Opala R.G. Ltd*, para 17.

72 *la Opala R.G. Ltd*, para 22.

73 *la Opala R.G. Ltd*, para 24.

The manufacturer of articles of glass, therefore, has not been granted the benefit of the tax exemption.

In the case of *Mamta Surgical Cotton* v *Asstt. Commnr. (Anti-Evasion)*[74] the meaning of the words 'manufacture' and 'includes' was discussed. [75] The question which was considered by the court was "whether the manufacturing process is involved in the production of surgical cotton from cotton in terms of definition mentioned in section 2(27) of the Central Sales Tax Act, 1956. The dictionary clause of the Central Sales Tax Act, 1956 under section 2(27) of the Act defines the expression 'manufacture' as under:

> Section 27. "Manufacture" includes every processing of goods which bring into existence a commercially different and distinct commodity but shall not include such processing as may be notified by the State Government."

The court observed that "the essential test for determining whether a process is manufacture or not has been the *analysis of the end product of such process in contradistinction with the original raw material*." The Supreme Court quoted from *McNichol* v. *Pinch*,[76] where Darling, J. had subtly explained the quintessence of the expression manufacture as "the essence of making or of manufacturing is that what is made shall be a different thing from that out of which it is made." It also took support from *Empire Industries Limited* v. *Union of India*,[77] wherein this court after exhaustively noticing the views of the Indian Courts, Privy Council and this court had stated as under:[78]

> 'Manufacture' implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character or use.

The division bench referred two constitution bench judgements. The constitution bench in *Union of India* v. *Delhi Cloth & General Mills Co. Ltd.*,[79]where the change in the character of raw oil after being refined fell for consideration are also quite apposite:[80]

> The word manufacture used as a verb is generally understood to mean as bringing into existence a new substance and does not mean merely to produce some change in a substance.

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74 (2014) 4 SCC 87, *hereinafter* referred as *Mamta Surgical*.

75 *Mamta Surgical Cotton,* para 13.

76 [1906] 2 KB 352.

77 (1985) 3 SCC 314.

78 *Mamta Surgical Cotton,* para 15.

79 1963 Supp (1) SCR 586.

80 *Id.*, para 14.

Another constitution bench judgement is *Devi Das Gopal Krishnan* v. *State of Punjab*, [81] where the court observed that if by a process a different identity comes into existence then it can be said to be manufacture and therefore, when oil is produced out of the seeds the process certainly transforms raw material into different article for use. After these discussion the court on the point of manufacture concluded:[82]

> Having carefully observed the process of transformation of raw cotton into surgical cotton and having noticed that there is distinctive name, character and use of the new commodity, i.e., surgical cotton, we are of the considered opinion that surgical cotton is a separately identifiable and distinct commercial commodity manufactured out of raw cotton ….[83]

The word manufacture used in section 2(27) of the Central Sales Tax Act, 1956 is followed by include which was also discussed by the court.

Inclusive definition

Mamta Surgical Cotton [84] analyses the import of the expression 'including'. Normally the word 'include' is used as a word of extension and expansion to the meaning and import of the precceding words or expressions. However the observation of Lord Watson in *Dilworth* v. *Commr. of Stamps*,[85] provides another meaning:

> But the word *include is susceptible of another construction*, which *may become imperative*, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to mean and include, and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions. [Emphasis Added]

The meaning of the said expression has been considered by a three Judge bench of this court in the case of the *South Gujarat Roofing Tiles Manufacturers Association* v. *State of Gujarat*,[86] wherein this court has observed that *'includes'* is generally used as a word extension, *but the meaning of a word or phrase is extended when it is said to include things that would not properly fall within its ordinary connotation*.[87]

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81 (1967) 3 SCR 557.

82 *Mamta Surgical Cotton*., para 35.

83 *Id*., para 27.

84 *M/S.Mamta Surgical Cotton* v. *Asstt. Commnr.(Anti-Evasion)* 2014 (4) SCC 87.

85 (1899) AC 99.

86 (1976) 4 SCC 601.

87 *Mamta Surgical Cotton* para 50.

The court found a more structured meaning in *RBI* v. *Peerless General Finance & Investment Co. Ltd.*, [88] as under:[89]

> …legislatures resort to inclusive definitions (1) to enlarge the meaning of words or phrases so as to take in the ordinary, popular and natural sense of the words and also the sense which the statute wishes to attribute to it; (2) to include meanings about which there might be some dispute; or (3) to bring under one nomenclature all transactions possessing certain similar features but going under different names. Depending on the context, in the process of enlarging, the definition may even become exhaustive.

Include may some time be exhaustive is further supported by *Karnataka Power Transmission Corpn*. v. *Ashok Iron Works (P) Ltd*.,[90] where this Court after analyzing the afore-cited decisions has observed as follows:[91]

> It goes without saying that interpretation of a word or expression must depend on the text and the context. The resort to the word includes by the legislature often shows the intention of the legislature that it wanted to give extensive and enlarged meaning to such expression. *Sometimes, however, the context may suggest that word includes may have been designed to mean means*. The setting, context and object of an enactment may provide sufficient guidance for interpretation of the word includes for the purposes of such enactment.

The court further added: [92]

> The word "include" is generally used to enlarge the meaning of the words or phrases occurring in the body of the statute; and when it is so used those words or phrases must be construed as comprehending, not only such things, as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. That is to say that when the word includes is used in the definition, the legislature does not intend to restrict the definition: it makes the definition enumerative but not exhaustive. That is to say, the term defined will retain its ordinary meaning but its scope would be extended to bring within it matters, which in its ordinary meaning may or may not comprise.

The court held that: [93]

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88 (1987) 1 SCC 424.

89 *Id.*, para 32.

90 (2009) 3 SCC 240.

91 *Id.*, para 17.

92 *Mamta Surgical Cotton* para 54.

93 *Id.*, para 55.

> By introducing the word including immediately after detailing the definition of cotton, the legislature has expanded the meaning of the expression cotton for the purposes of the Act. While the natural import suggests and prescribes only unmanufactured cotton in all forms, the commodities absorbent cotton wool I.P. and cotton waste manufactured out of cotton are intentionally and purposefully included in the relevant entries alongwith cotton in its ordinary meaning.

Hardeep Singh v. *State of Punjab*[94] also discusses the same as under: [95]

> Wherever the words "means and include" are used, it is an indication of the fact that the definition 'is a hard and fast definition', and no other meaning can be assigned to the expression that is put down in the definition. It indicates an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expression.

Means: exception to exhaustive meaning-contextual interpretation

In the case of *National Insurance Co. Ltd*. v. *Kirpal Singh*[96] the retirement benefits has been deliberated. Para 2 (t) of the General Insurance (Employees) Pension Scheme 1995 used the term "means" to define "retirement." The issue was whether the word "retirement" can be given liberal meaning especially when para 2(t) uses as under:

> "2 Definition:- In this Scheme, unless the context otherwise requires:-
>
> xxx xxx xxx
>
> 2(t) "retirement" means –
>
> The court was conscious that
>
> > the word 'means' used in statutory definitions generally implies that the definition is exhaustive. But that general rule of *interpretation* is not without an exception. An equally well-settled principle of *interpretation* is that the use of the word 'means' in a statutory definition notwithstanding the context in which the expression is defined cannot be ignored in any forensic exercise meant to discover the real purport of an expression.

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94 *Supra* note 25.

95 *Hardeep Singh,* para 57.

96 2014 (5) SCC 189. The case was unanimously decided on January10 , 2014 by a division bench of Hon'ble Justice T.S. Thakur and Justice Vikramajit Sen. Justice T.S. Thakur delivered the judgement, *hereinafter* referred as *Kirpal Singh.*

While quoting from Lord Denning's observations in *Hotel and Catering Industry Training Board* v. *Automobile Proprietary Ltd*,[97] and the Supreme Court of India opinion in *Paul Enterprises* v. *Rajib Chatterjee and Co*,[98] *State of Maharashtra* v. *B.E. Billimoria*,[99] *K.V. Muthu* v. *Angamuthu Ammal*,[100] *Reserve Bank of India* v. *Peerless General Finance*[101] the court concluded that an interpretation should be contextual in nature. It is one reason the words like "in this Act, unless the context otherwise requires" is used. In other words though a provision may use the word "means" but in context it may not be limited to exhaustive meaning. In this light the court interpreted as follows:[102]

> the Pension Scheme 1995 (extracted earlier) defines the expressions appearing in the scheme. But what is important is that such definitions are good only if the context also supports the meaning assigned to the expressions defined by the definition clause**.** The context in which the question whether pension is admissible to an employee who has opted for voluntary retirement under the 2004 scheme assumes importance as Para 2 of the scheme starts with the words "In this scheme, unless the context otherwise requires". There is nothing in the context of 1995 Scheme which would exclude its beneficial provisions from application to employees who have opted for voluntary retirement under the Special Scheme 2004 or vice versa. The term retirement must in the context of the two schemes, and the admissibility of pension to those retiring under the SVRS of 2004, include retirement not only under Para 30 of the Pension Scheme 1995 but also those retiring under the Special Scheme of 2004. *That apart any provision for payment of pension is beneficial in nature which ought to receive a liberal interpretation* so as to serve the object underlying not only of the Pension Scheme 1995 but also any special scheme under which employees have been given the option to seek voluntary retirement upon completion of the prescribed number of years of service and age. [Emphasis Added]

It is appreciable that the court was conscious of the fact that in exceptional cases "means" may be given liberal interpretation through context. This case highlights that though "means" is used for a restricted or strict interpretation the courts should be open to give benefits of provision if the enactment is to further the interest of retired employees, who are protected by such provisions. However, the same liberal interpretation can not be made for protected group in penal statute.

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97 (1968) 1 W.L.R. 1526.

98 (2009) 3 SCC 709.

99 (2003) 7 SCC 336.

100 (1997) 2 SCC 53.

101 (1987) 1 SCC 424.

102 *Kirpal Singh*, para 17.

C. Penal *v.* Remedial Statutes

Criminal statute: strict interpretation

Criminal codes are given strict interpretation. In the case of *State of Punjab* v *Gurmit Singh*[103] the words in section 304B Indian Penal Code which uses the words *'relative of husband'* was in dispute. Does it include husband's Aunt's brother (Chachi's brother). The court observed that "IPC is a penal provision which is to be construed strictly. A word for which the definition is not mentioned should be construed in natural, ordinary and popular sense. For this reliance was placed on dictionaries as to what a word would mean in common parlance should do the needful."[104] Relative means relations coming out of marriage, adoption and blood. The court did not find any reason to go beyond this meaning. It observed: [105]

> It is well known rule of construction that when the Legislature uses same words in different part of the statute, the presumption is that those words have been used in the same sense, unless displaced by the context. We do not find anything in context to deviate from the general rule of interpretation. Hence, we have no manner of doubt that the word "relative of the husband" in Section 304 B of the IPC would mean such persons, who are related by blood, marriage or adoption.

Hence, in this case the respondent was not covered in the ambit of 'relative' but court went on to add that this shall not preclude the court from fastening liability under some other section of the IPC. This interpretation does not serve the purpose of incorporating 304B. Purpose was to protect wife from dowry demand and harassment. If this strict interpretation is continued it shall leave chances where in the other relatives who could enjoy the shield (of not being relative because of blood, marriage or adoption) under this section (due to narrow understanding, though they would be liable in other sections) would perpetuate such crimes knowing they would be safe while they are equally playing with the plan of the husband and others. Also, for people who are aware of the nuances of law shall always have their exits before they undertake to indulge in such crimes by engaging their relatives and refraining themselves. Moreover women being vulnerable class a liberal interpretation may be considered so that she feels protected. Flipside in that where to stop if relative is not limited by blood, marriage and adoption. The solution seem to be generally limiting to the there categories blood, marriage and adoption but exceptionally others also. An explanation in 304 B may be added by amendment, if more such cases are in notice.

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103 (2014) 9 SCC 632

104 *Id.*, para 9.

105 *Id.*, para 12.

Interpretation of section 292 IPC: Liberal approach

A penal statute should be generally given strict interpretation but a liberal interpretation may not be overruled. The word 'Obscenity' has attracted various interpretations as conservatives and modernists have inconsistent views on this. Whether *Hicklin test*[106] is a guiding principle for court to examine something obscene was one of the issue in *Aveek Sarkar* v. *State of West Bengal*.[107] It has to interpret the meaning of word obscene used under section 292 of IPC. There are certain test to measure whether a thing is obscene or not. Contemporary community standards is one such test. The court observed:[108]

> The test must obviously be of a general character but it must admit of a just application from case to case by indicating a line of demarcation not necessarily sharp but sufficiently distinct to distinguish between that which is obscene and that which is not. None has so far attempted a definition of obscenity because the meaning can be laid bare without attempting a definition by describing what must be looked for.

The court added:[109]

> It may, however, be said at once that treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more. The test of obscenity must square with the freedom of speech and expression guaranteed under our Constitution.

The court admitted that the meaning and scope of the word obscene changes with time: [110]

> We are, in this case, concerned with a situation of the year 1994, but we are in 2014 and while judging as to whether a particular photograph, an article or book is obscene, regard must be had to the contemporary mores and national standards and not the standard of a group of susceptible or sensitive persons.

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106 *Regina* v. *Hicklin* (1868 L.R. 2 Q.B. 360):

"The test of obscenity is whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall."

Hicklin test postulated that a publication has to be judged for obscenity based on isolated passages of a work, considered out of context and judged by their apparent influence on most susceptible readers, such as children or weak-minded adults.

107 (2014) 4 SCC 257. The case was unanimously decided by Justice K.S. Radhakrishnan, and Justice A.K. Sikri, *hereinafter* referred as *Aveek Sarkar.*

108 *Id.,* para 15.

109 *Ibid.*

110 *Id.,* para 18.

The court concluded that the Hicklin test is not the correct test to be applied to determine "what is obscenity".[111] On the interpretation of various expressions in section 292 of the Indian Penal Code, of course, the court admits that the section: [112]

> uses the expression 'lascivious and prurient interests' or its effect. Later, it has also been indicated in the said Section of the applicability of the effect and the necessity of taking the items as a whole and on that foundation where such items would tend to deprave and corrupt persons who are likely, having regard to all the relevant circumstances, to read, see or hear the matter contained or embodied in it. We have, therefore, to apply the "community standard test" rather than "Hicklin test" to determine what "obscenity" is.

Elaborating on the nudity and obscenity the court observed:[113]

> *A picture of a nude/semi-nude woman, as such, cannot per se be called obscene unless it has the tendency to arouse feeling or revealing an overt sexual desire.* The *picture should be suggestive of deprave mind and designed to excite sexual passion in persons who are likely to see it*, which will depend on the particular posture and the background in which the nude/semi-nude woman is depicted. Only those sex-related materials which have a *tendency of "exciting lustful thoughts" can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards.* [Emphasis Added]

Without referring to 'contextual interpretation' the court acknowledges that a factual situation has to be appreciated in its context and not in isolation. While quoting from *Bandit Queen Case* (1996) [114] and *Ajay Goswami* v. *Union of India*[115] it observed that "We have to examine the question of obscenity in the context in which the photograph appears and the message it wants to convey." [116]

Interpretation of fact or law

Whether courts interpret only legal provisions in dispute or also interprets a factual situation, especially when it is apex court. In some cases the Supreme Court has to interpret available facts and then to apply legal provisions. *Aveek sarkar* is an illustration of this. After discussing what is obscene as per present norms the court narrated the fact as under: [117]

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111 *Id.*, para 23.

112 *Ibid.*

113 *Ibid.*

114 *Bobby Art International* v. *Om Pal Singh Hoon* (1996) 4 SCC 1.

115 (2007) 1 SCC 143.

116 *Aveek Sarkar,* para 24.

117 *Id.*, para 26.

> We have to examine whether the photograph of Boris Becker with his fiancée Barbara Fultus, a dark-skinned lady standing close to each other bare bodied but covering the breast of his fiancée with his hands can be stated to be objectionable in the sense it violates Section 292 IPC.

Applying the community tolerance test to the fact situation it concluded through following construction: [118]

> we are not prepared to say such a photograph is suggestive of deprave minds and designed to excite sexual passion in persons who are likely to look at them and see them, which would depend upon the particular posture and background in which the woman is depicted or shown. Breast of Barbara Fultus has been fully covered with the arm of Boris Becker, a photograph, of course, semi-nude, but taken by none other than the father of Barbara. Further, the photograph, in our view, has no tendency to deprave or corrupt the minds of people in whose hands the magazine Sports World or Anandabazar Patrika would fall.

It also considered motive of the material in question: [119]

> The message, the photograph wants to convey is that the colour of skin matters little and love champions over colour. Picture promotes love affair, leading to a marriage, between a white-skinned man and a black skinned woman.

Interpretation of adequate and special reasons

Punishment has always been an area of the discretion of judges. In India unlike other countries[120] there is no sentencing guideline. To check this discretion of judges one of the tools used are the provision for minimum punishment. The legislature, however, provides for the "adequate and special reasons" clause so that in exceptional cases the judges could exercise their wisdom.[121] The interpretation of 'adequate and special reasons' is a difficult question. The same was present in the proviso to section 376 (1) of IPC.[122] *Parminder Alias Ladka Pola* v. *State of Delhi*[123] discusses the same. It restated the position from *State of Rajasthan* v. *Vinod Kumar* that "the power under the proviso is not to be used

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118 *Ibid.*

119 *Id.*, para 28.

120 The sentencing guideline in the UK can be accessed at http://www.cps.gov.uk/legal/s_to_u/sentencing_ manual/ while that of USA could be found in http://www.ussc.gov/guidelines-manual/guidelines-manual.

121 For ex-S. 7 of Essential Commodities Act 1955, s 376 of IPC prior to 2013 etc.

122 Criminal Law Amendment Act 2013 deleted this provision from the section.

123 (2014) SCC 592. The case was unanimously decided by a division bench of Hon'ble Justice A. K. Patnaik and Justice Gyan Sudha Misra. Justice A. K. Patnaik delivered the judgement.

indiscriminately in a routine, casual and cavalier manner for the reason that an exception clause requires strict *interpretation*." While making this strict interpretation the age of the prosecutrix, the consequences of the rape and conduct of offender will be relevant consideration. On the other hand the facts that the prisoner successfully passed class ten or twelve examination during jail custody, or he got married during bail period, or is father of two small daughters, person to earn bread, sufferings of families because of loss of job etc are not relevant considerations for interpreting 'adequate and special reasons.' because victim was minor and she lost her regular schooling.

Rarest of rare: crime test or criminal test

Mofil Khan v. *State of Jharkhand* [124] case is important for two reasons. It removes a popular confusion as to what is not the correct meaning of "rarest of rare." It observes:[125]

> We remind ourselves that the doctrine of "rarest of rare" does not classify murders into categories of heinous or less heinous. The difference between two is not in the identity of the principles, but lies in the realm of application thereof to individual fact situations.

Secondly, the case is a good survey of how to interpret the phrase "rarest of rare" in family killings cases. *Mofil Khan* seems to resolve the dispute regarding various tests for capital punishment in following words:[126]

> The Crime Test, Criminal Test and the "Rarest of the Rare" Test are certain tests evolved by this Court. The Tests basically examine whether the society abhors such crimes and whether such crimes shock the conscience of the society and attract intense and extreme indignation of the community."

The judgement will add fuel to abolitionist and retentionist debate. But this judgement has only followed the precedents where in similar mass killings of family there is hardly any Supreme Court judgement where capital punishment has not been awarded. The reference of *Mofil Khan* case deserves special mention here because it addresses Crime Test and Criminal Test in death punishment cases. Doubts were raised by Justice Madan B Lokure regarding Crime Test and Criminal Test in *Sangeet* v *State of Haryana* (decided on 20 November, 2012). *Mofil Khan* seems to resolve the dispute regarding various tests for capital punishment viz The Crime Test, Criminal Test and the "Rarest of the Rare" Test. *Mofil Khan*, is the full bench order. *It seems Mofil Khan, is suggesting that there is and cannot*

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124 (2015) (1) SCC 67.The case was unanimously decided on 9 October 2014 by a full bench of Hon'ble Chief Justice H.L. Dattu, Justice R.K. Agrawal, Justice Arun Mishra. Chief Justice H.L. Dattu delivered the judgement, hereinafter referred as Mofil Khan.

125 *Id.*, para 20.

126 *Id.*, para 46.

be one test to clearly find the 'rarest of the rare' cases. It also suggests that the complex decision making process in rarest of rare cases cannot be limited to only one test and all these tests which may be inconsistent in nature are now accepted indicators for the exercise of judicial discretion in capital punishment cases. In other words the concern raised by *Sangeet* case (which was a division bench judgement) seems to be diluting(or has already been diluted).

Corruption

Under Prevention of Corruption Act, 1988 not only public servant but one who is not a public servant can also be tried. What will happen to trial of non-public servants when an accused public servant dies. This and other questions were interpreted by different high courts differently. The Supreme Court has settled the issue in the case of *State through CBI New Delhi* v. *Jitender Kumar Singh*,[127] where interpretation of various sections of Prevention of Corruption Act, 1988 [Chapter II read with Chapter III] especially Sections 3, 4, 5 were in question. The question before the court was "whether, on the death of the sole public servant, the Special Judge will cease to have jurisdiction to continue with the trial against the private persons for non-PC offences". Should the trial court modify and/or alter and/or amend the charges?

The court observed that "trying any case" under Section 3(1) is, a jurisdictional fact for the Special Judge to exercise powers to try any offence other than an offence specified in Section 3. It observed:

> Trying of a IPC offence is a jurisdictional fact to exercise the powers under Sub-section (3) of Section 4. Jurisdiction of the Special Judge, as such, has not been divested, but the exercise of jurisdiction, depends upon the jurisdictional fact of trying a PC offence. We are, therefore, concerned with the exercise of jurisdiction and not the existence of jurisdiction of the Special Judge.

Elaborating the meaning and content of the expression "jurisdictional fact" the court referred to *Carona Ltd.* v. *Parvathy Swaminathan & Sons*,[128] as under :

> ...where the jurisdiction of a Court or a Tribunal is dependent on the existence of a particular state of affairs that state of affairs may be described as preliminary to, or collective to the merits of the issue. Existence of a jurisdictional fact is thus a sine qua non or condition precedent to the assumption of jurisdiction by a Court.

Regular bail

In *Sundeep Kumar Bafna* v. *State of Mahatrastra*,[129] the Supreme Court observed that the words "brought before a Court" used in section 497 of CrPC

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127 AIR 2014 SC 1169. The case was unanimously decided on February 05, 2014 by a division bench of Hon'ble Justice K. S. Radhakrishnan and Justice A.K. Sikri. Justice K. S. Radhakrishnan delivered the judgement.

128 (2007) 8 SCC 559.

129 AIR 2014 SC 1745.

1898, which was substituted by "brought before a Court other than the High Court or a Court of Session" under section 437 (1) did not dilute the power of superior courts. The court held:[130]

> The CrPC severely curtails the powers of the Magistrate while leaving that of the Court of Session and the High Court untouched and unfettered. It appears to us that this is the only logical conclusion that can be arrived at on a conjoint consideration of Sections 437 and 439 of the CrPC.

To support its finding the court considered section 439 also as under:[131]

> Obviously, in order to complete the picture so far as concerns the powers and limitations thereto of the Court of Session and the High Court, Section 439 would have to be carefully considered. And when this is done, it will at once be evident that the CrPC has placed an embargo against granting relief to an accused, (couched by us in the negative), if he is not in custody. It seems to us that any persisting ambivalence or doubt stands dispelled by the proviso to this Section, which mandates only that the Public Prosecutor should be put on notice. We have not found any provision in the CrPC or elsewhere, nor have any been brought to our ken, curtailing the power of either of the superior Courts to entertain and decide pleas for bail.

In difficult situations the statute should be interpreted in the light of constitution. The court observes:[132]

> The Constitution therefore requires that a pragmatic, positive and facilitative interpretation be given to the Cr PC especially with regard to the exercise of its original jurisdiction by the Sessions Court. We are unable to locate any provision in the Cr PC which prohibits an accused from moving the Court of Session for such a relief except, theoretically, Section 193 which also only prohibits it from taking cognizance of an offence as a Court of original jurisdiction. This embargo does not prohibit the Court of Session from adjudicating upon a plea for bail. It appears to us that till the committal of case to the Court of Session, Section 439 can be invoked for the purpose of pleading for bail.

Custody and arrest

The meaning of word custody and its difference from arrest has time and again came for discussion in courts. This time it came to differentiate between power to grant bail by lower courts and higher courts. Can a person (who is neither

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130 *Id.*, para 8, 10, 16.

131 *Id.*, para 7, 8, 10, 16.

132 *Id.*, para 25.

arrested or detained) accused of an offence punishable by life imprisonment directly approach the high court for regular bail under section 439 of CrPC 1973 or is he required to approach magistrate court for this purpose? The Bombay High Court (single bench) was of the following opinion:

> …the Appellant "is required to be arrested or otherwise he has to surrender before the Court which can send him to remand either to the police custody or to the Magisterial custody and this can only be done under Section 167 of CrPC by the Magistrate and that order cannot be passed at the High Court level."

When such accused is present before the high court and willing to surrender, is he in custody of high courts or not. This question was answered by Supreme Court as under:[133]

> Some salient features of these provisions are that whilst Section 437 contemplates that a person has to be accused or suspect of a non-bailable offence and consequently arrested or detained without warrant, Section 439 empowers the Session Court or High Court to grant bail if such a person is in custody. The difference of language manifests the sublime differentiation in the two provisions, and, therefore, there is no justification in giving the word 'custody' the same or closely similar meaning and content as arrest or detention.

The court also noticed that in the present case the person is accused of offence which are punished with life imprisonment also. Section 437 prohibits magistrate to grant bail. The court acknowledges this difficulty as under:[134]

> Furthermore, it is incongruent that in the face of the Magistrate being virtually disempowered to grant bail in the event of detention or arrest without warrant of any person accused of or suspected of the commission of any non-bailable offence punishable by death or imprisonment for life, no Court is enabled to extend him succour. Like the science of physics, law also abhors the existence of a vacuum, as is adequately adumbrated by the common law maxim, viz. 'where there is a right there is a remedy'.

In the impugned judgment, the learned single judge of the high court had opined that "when the Appellant's plea to surrender before the court is accepted and he is assumed to be in its custody, the police would be deprived of getting his custody, which is not contemplated by law." Addressing this argument the court observed :[135] 7

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133 *Id*., para 7, 8, 10, 16.

134 *Ibid.*

135 *Ibid*.

> The universal right of personal liberty emblazened by Article 21 of our Constitution, being fundamental to the very existence of not only to a citizen of India but to every person, cannot be trifled with merely on a presumptive plane. We should also keep in perspective the fact that Parliament has carried out amendments to this pandect comprising Sections 437 to 439, and, therefore, predicates *on the well established principles of interpretation of statutes that what is not plainly evident from their reading, was never intended to be incorporated into law.* Some salient features of these provisions are that whilst Section 437 contemplates that a person has to be accused or suspect of a non-bailable offence and consequently arrested or detained without warrant, Section 439 empowers the Session Court or High Court to grant bail if such a person is in custody. [Emphasis Added]

This interpretation will help a suspect to approach directly to a high court if s/he is accused of serious cases.

D. Cannons of interpretation

i. Literal meaning: The first principle

In this context Dias says that "Judges frequently use the phrase 'the true meaning' of words in the pursuit of their task." Literal or True Meaning Rule, the most widely used cannons of interpretation is that "if the precise words used are plain and unambiguous, in our judgement, we are bound to construe them in their ordinary sense, even though it do lead, in our view of the case, to an absurdity or manifest injustice."[136] In the case of *Union of India Through Director of Income Tax* v. *M/s Tata Chemicals Ltd.*[137] it was observed:[138]

> It is cardinal principle of *interpretation* of Statutes that the words of a Statute must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning unless such construction leads to some absurdity or unless there is something in the context or in the object of the Statute to the contrary. The golden rule is that the words of a Statute must prima facie be given their ordinary meaning. It is yet another rule of construction that when the words of a Statute are clear, plain and unambiguous, then the Courts are bound to give effect to that meaning irrespective of the consequences. It is said that the words themselves best declare the intention of the law giver. The Courts have adhered to the

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136 *Abley* v *Dale*, (1851) 11 CB 378 at 391, as quoted in *Dias*, 171.

137 2014 (6) SCC 335. The case was unanimously decided on February 26, 2014 by a division bench of Hon'ble Justice H.L. Dattu And Justice S.A. Bobde. Justice H.L. Dattu delivered the judgement.

138 *Ibid*.

> principle that efforts should be made to give meaning to each and every word used by the legislature and it is not a sound principle of construction to brush aside words in a Statute as being inapposite surpluses, if they can have proper application in circumstances conceivable within the contemplation of the Statute.[139]

ii. Golden Rule

An application of some of the difficulties inherent in the '*Literal Rule*' led to a cautious departure, styled the '*Golden Rule'*: the literal sense of words should be adhered to unless this would lead to absurdity, in which case the literal meaning may be modified.[140] It contradicts the literal rule according to which, as explained, the plain meaning has to be adhered to even to the point of absurdity.[141] Like previous years this golden rule finds a place in the opinion of CJI HL Dattu in a unanimous a full bench judgement in the case of *M/S. Hyder Consulting (UK) Ltd* v. *Governor, State of Orissa Through Chief Engineer.* [142]

The only question that arises for determination in the instant lis was, "whether grant of interest by the Arbitral Tribunal under Section 31(7) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act") amounts to granting "interest on interest"? CJI Justice Dattu observed:[143]

> My aforesaid interpretation of Section 31 (7) of the Act is based on three golden rules of interpretation as explained by Justice G.P. Singh - Interpretation of Statute (13th Edition- 2012) where the learned author has said that:
>
> 1. while interpreting any Statue, language of the provision should be read as it is and the intention of the legislature should be gathered primarily from the language used in the provision meaning thereby that attention should be paid to what has been said as also to what has not been said;
>
> 2. second, in selecting out of different interpretations "the Court will adopt that which is just, reasonable, and sensible rather than that which is none of those things" ; and
>
> 3. third, when the words of the Statute are clear, plain or unambiguous, i.e., they are reasonably susceptible to only one

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139 See *Gurudevdatta VKSSS Maryadit* v. *State of Maharashtra* (2001) 4 SCC 534.

140 *Becke* v. *Smith* (1836) 2 M & W 191 at 195. *Grey* v. *Pearson* (1857) 6 HL C 61 at 106.

141 *Dias*, at 173.

142 2015 (2) SCC 189. Date of judgement-November 25, 2014. It is a full bench unanimous judgement where all three judges(H.L. Dattu, CJI. Abhay Manohar Sapre and S. A. Bobde J) delivered individual opinion.

143 *Id.*, para 33.

> meaning , the Courts are bound to give effect to that meaning irrespective of the consequence (see pages 50, 64, and 132).

Similar approach was adopted by Abhay Manohar Sapre J as under:[144]

> The aforesaid question can be answered by a *plain and simple reading* of Section 31(7) of the Act which reads as under: "31(7)(a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

Similarly in the case of *Union of India Tr. Dir.of I.T* v. *M/S Tata Chemicals Ltd*[145] the issue was whether revenue is legally responsible under section 244a of the Income Tax Act, 1961 (for short, "the Act") for payment of interest on the refund of tax made to the resident/deductor under section 240 of the Act. The Court absorved:

> It is cardinal principle of interpretation of Statutes that the words of a Statute must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning unless such construction leads to some absurdity or unless there is something in the context or in the object of the Statute to the contrary. *The golden rule is that the words of a Statute must prima facie be given their ordinary meaning*. It is yet another rule of construction that when the words of a Statute are clear, plain and unambiguous, then the Courts are bound to give effect to that meaning irrespective of the consequences. It is said that the words themselves best declare the intention of the law giver. The Courts have adhered to the principle that efforts should be made to give meaning to each and every word used by the legislature and it is not a sound principle of construction to brush aside words in a Statute as being inapposite surpluses, if they can have proper application in circumstances conceivable within the contemplation of the Statute (See *Gurudevdatta VKSSS Maryadit* v. *State of Maharashtra*[146] [2001] 4 SCC 534).
>
> It is also well settled principle that the *courts must interpret the provisions of the Statute upon ascertaining the object of the legislation* through the medium or authoritative forms in which it is

144 *Id.*, para 25.

145 (2014) 6 SCC 335

146 (2001) 4 SCC 534.

> expressed. It is well settled that the Court should, while interpreting the provisions of the Statute, assign its ordinary meaning.

iii. Purposive interpretation

The significance of purposive interpretation has been explained in constitutional bench judgement in *Hardeep Singh* which is as under:[147]

> ...a *constructive and purposive interpretation should be adopted that advances the cause of justice and does not dilute the intention of the statute* conferring powers on the court to carry out the above mentioned avowed object and purpose to try the person to the satisfaction of the court as an accomplice in the commission of the offence that is subject matter of trial.

In the case of *Transgender judgement* it was held that recognition of TG as third gender is mandated by purposive *interpretation*: [148]

> This *interpretation* is in consonance with new social needs. By doing so, this Court is only bridging the gap between the law and life and that is the primary role of the Court in a democracy. *It only amounts to giving purposive interpretation to the aforesaid provisions of the Constitution so that it can adapt to the changes in realty*. Law without purpose has no raison d'etre. The purpose of law is the evolution of a happy society. [Emphasis Added]

This purposive interpretation protects constitution and democracy: [149]

> 122. It is now very well recognized that the *Constitution is a living character*; *its interpretation must be dynamic*. It must be understood in a way that intricate and advances modern realty. The judiciary is the guardian of the Constitution and by ensuring to grant legitimate right that is due to TGs, we are simply protecting the Constitution and the democracy inasmuch as judicial protection and democracy in general and of human rights in particular is a characteristic of our vibrant democracy.

One of the issues *Shatrughan Chauhan*[150] deals with is solitary confinement of death row prisoners. Regarding death convict the Prisons Act 1894, Section 30 (2) says that "Every such prisoner, shall be confined in a cell apart from all other prisoners, and shall be placed by day and by night under charge of a guard." The State submitted that they were kept separately from the other prisoners for safety purposes. In other words, they were kept in statutory segregation and not *per se* in solitary confinement. The court examined the *ratio decidendi* of *Sunil Batra* (1978)

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147 *Hardeep Singh*, *Supra* note 25 para 9. The constitutional bench has interpreted the scope and limitation of s 319 of CrPC 1973.

148 *Transgender* judgement, para 121.

149 *Id.*, para 122.

150 (2014) 3 SCC 1

4 SCC 494 and held that solitary or single cell confinement prior to rejection of the mercy petition by the President is unconstitutional. Almost all the prison Manuals of the States provide necessary rules governing the confinement of death convicts. *The rules should not be interpreted to run counter to the above ruling and violate Article 21 of the Constitution*.[151]

Almost similar issue of interpretation came in *Ajay Kumar Pal* v *Union of India*[152] where the expression "under sentence of death" used in section 30 of Prisons Act, 1894 was debated. The same has been decided 36 years ago in *Sunil Batra* (1978) but remained inapplicable in various cases. The question was whether the prisoner is "under sentence of death" as soon as a trial court awards capital punishment or does it apply only after mandatory confirmation by the high court or until the judicial process at the Supreme Court is over or after rejection of the mercy petition?

There are two significant statutory consequences of death sentence awarded by a trial court. First, section 30 (1) and (2), Prisons Act, 1894 says that "every prisoner under sentence of death" "shall be confined in a cell apart from all other prisoners." Second, as per section 366(1) of CrPC 1973 this sentence has to be confirmed by the high court. In the present case also Ajay Kumar Pal was awarded death sentence by a trial court of Ranchi on 09.04.2007. The prisoner was shifted into solitary confinement on that very day to observe the command of 30 (2), Prisons Act, 1894. The mandatory statutory requirement of section 366(1) of CrPC 1973 led to confirmation of the death sentence by the high court, Jharkhand. The Supreme Court also found it a special case of rarest of the rare category and death 'sentence was finally confirmed by the judicial process' on 16.03.2010. The prisoner applied for executive clemency through mercy petition to the President. The President rejected the mercy request which was communicated to him on 27.01.2014, nearly after 3 years and 10 months. The petitioner again came to the Supreme Court for judicial review of executive decision of the President on two grounds. One, there was an inordinate and unexplained delay of three years and ten months in disposal of his Mercy Petition. Two, the shifting of prisoner from normal confinement to solitary confinement after trial court verdict was unconstitutional as the verdict was not final.

Supreme Court has to interpret whether delay of 3 years and 10 months is inordinate or not. To answer the first issue, the court referred the law restated in *Shatrughan Chauhan* that:

> if there is undue, unexplained and inordinate delay in execution due to pendency of mercy petitions or the executive as well as the Constitutional authorities have failed to take note of/consider the relevant aspects, this Court is well within its powers u/art. 32 to hear the grievance of the convict and commute the death sentence into life imprisonment on this ground alone however, only after

151 *Shatrughan Chauhan*, para 241.1.

152 (2015) 2 SCC 478. See also case comment part of *ILI News Letter*, Sept-Dec, 2014, by the same author.

satisfying that the delay was not caused at the instance of the accused himself.

The court applied this legal position on present case and found that there was no delay on part of the prisoner. Indeed the prisoner did not apply for any proceedings in the form of review petition *etc* after Supreme Court verdict. All necessary documents were forwarded to the concerned government authorities within one month of confirmation of death sentence by the Supreme Court. Yet the office of the president took 3 years and 10 months. The court therefore decided that "though no time limit can be fixed within which the Mercy Petition ought to be disposed of, in our considered view the period of 3 years and 10 months to deal with such mercy petition in the present case comes within the expression "inordinate delay"."

Answering the second issue of the interpretation of words 'under sentence of death' the court quoted from *Sunil Batra* v. *Delhi Administration*, (1978) 4 SCC 494 where Justice Krishna Iyer speaking for the majority held that trial court sentence of death and mandatory confirmation by High Court is not right time for the application of section 30. "Even if [the Supreme] Court has awarded capital sentence, S. 30[Prison Act 1894] does not cover him so long as his petition for mercy to the Governor and/or to the President permitted by the Constitution, Code and Prison Rules, has not been disposed". In other words as per section 30(2) of Prison Act the prisoner can be "confined in a cell apart from all other prisoners" only "once mercy petition is rejected by the Governor and the President, and on further application there is no stay of execution by the authorities, he is 'under sentence of death', even if he goes on making further mercy petitions." On these two basis of 'delay' and 'solitary confinement' the Supreme Court commuted the death sentence to life imprisonment. There is nothing special on the part of Supreme Court in this judgement as it only applied the law laid down in two constitution bench judgement of *Sunil Batra* (*supra*) and *Triveniben (*1989) 1 SCC 678) and followed the capital punishment jurisprudence in India. The judgement, however, could have served the humanity better by its follow up orders. It should have directed the registrar of the Supreme Court to communicate this judgement to all jail superintendent dealing with death sentence prisoners. It should have ensured the compliance of *Sunil Batra* order on section 30 (2) of the Prisons Act, 1894. They should have also directed that the compliance report be submitted within one month of this judgement. The error is continuing and it should be rectified as soon as possible because any death row convict in solitary confinement before final disposal of mercy petition (if any) is violation of article 21 everyday. It is a continuing violation of fundamental right.

There would be around 250 convicts of death sentence whose petition would be pending either in the judicial process or in the executive clemency proceedings.[153]

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153 News papers in 2012 reported Ajmal Kasab as "the 309th prisoner on death row in India" while Asian Centre for Human Right, 22 October 2013 reports "414 death row convicts await the gallows in India" and Death penalty project of NLU Delhi identifies around 250 convicts as on 2014 December.

It is difficult to state whether section 30 (2) the Prisons Act, 1894 is followed with the cavet of *Sunil Batra* or not. There are greater chances that most of these 250 prisoners are kept in solitary confinement even before prisoner's "sentence of death has become final, conclusive and indefeasible which cannot be annulled or voided by any judicial or Constitutional procedure". Recently *Surender Singh Koli* (*Nithari* case) also complained that he was in solitary confinement even after this judgement of *Ajay Kumar Pal*. As a matter of fact and law *Shatrughan Chauhan* has issued 12 guidelines where the very 1st guideline is the *ratio* of *Sunil Batra* which distinguished solitary confinement from 'confined in a cell apart from all other prisoners' as used in section 30(2) of Prison Act 1894. Wrong application of section 30, violation of *Sunil Batra* and inordinate delay in mercy petition changes the status of prisoner from offender to victim. For judiciary "it becomes a fresh case of violation of fundamental right under art 21" independent of the legal finding that the prisoner has committed a rarest of the rare crime. Initially prisoner was violator of law and State was victim but now prisoner becomes victim of State inaction as well as gross negligence and State become violator of article 21.

The lesson for executive is that they must read the guidelines of judiciary carefully. This case should be a part of the training programmes for prison officials. The lesson for legislature (parliament in this case) is that they should bring an amendment in section 30 of Prison Act 1894(if they agree with the judgement) adding an explanation that "the section will be applicable only after mercy petition, if any, is rejected and there is no stay of execution by the authorities". Had they amended suitably in 80s, various cases would not have lead to fundamental right and human rights violations. Lesson for judiciary has already been discussed. Another point for discussion is that the jurisdiction of "writ compensation" has not been exercised by the Supreme Court. Once fundamental right is violated, especially where State is the clear violator, a constitutional tort is constituted. Why the court has not granted some compensation in this case? The legal question could be whether right to claim compensation for violation of fundamental right is another right under article 32? This is a matter of further study and research.

Freedom of expression and right to choose medium instruction in education

Whether the right to freedom of speech and expression be interpreted so as to include the right to choose the medium of instruction, was one of the core issue before the constitutional bench in the case of *State of Karnataka* v. *Associated Management of Primary & Secondary Schools.*[154] Background of the case is that a three-judge bench of the Karnataka high court unanimously struck down a 1994 government order mandating Kannada or mother tongue as the medium of instruction in primary school as unconstitutional. The full bench quashed clauses (2), (3), (6) and (8) of the government order prohibiting all unaided primary schools

154 (2014) 9 SCC 485. The case was unanimously decided on May 06, 2014 by a constitutional bench of Hon'ble Justice CJI. R.M. Lodha , Justice A. K. Patnaik , Justice Sudhansu Jyoti Mukhopadhaya , Justice Dipak Misra, Justice Fakkir Mohamed Ibrahim Kalifulla. Justice A. K. Patnaik delivered the judgement, *hereinafter* referred as *Karnataka Mother Tongue judgement*

established after 1994 from teaching in the English medium, ruling that every citizen has a right to establish, administer and maintain educational institutions of her choice. The high court ruled that the right to choose the medium of instruction is implicit in the right to education.

The issue before the Supreme Court was-

i. Whether right to choose the medium of instruction in classes I to IV of a school is a fundamental right under Articles 19(1)(a), 19(1)(g), 26, 29 and 30(1) of the Constitution?

ii. Whether clauses of the order dated 29.04.1994 of the Government of Karnataka are *ultra vires* the Constitution?

iii. Can article 350A be interpreted in such a manner to infringe fundamental rights under art 19(1) and Art 30(1)?

It was argued that if the right to freedom of speech and expression is interpreted so as to include the right to choose the medium of instruction, the State will have no power to impose any reasonable restrictions in the larger interests of the State or the nation on this right to choose the medium of instruction and such an *interpretation* should be avoided by the Court.[155]

The court addressed various questions for example "What does Mother tongue mean? The court explored that it needs:[156] interpreting the expression 'mother tongue' as used in the Constitution. We must not forget that the Constitution is not just an ordinary Act which the court has to interpret for the purpose of declaring the law, but is a mechanism under which the laws are to be made.

Delineating on the significance of interpretation of constitutional provision the court was conscious of what Kania J observed in *AK Gopalan* v *State of Madras*:[157]

Although *we are to interpret words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting – to remember that it is a Constitution, a mechanism under which laws are to be made and not a mere Act which declares what the law is to be*.[158] [Emphasis Added]

Mother tongue

The court took support from Provincial Education Ministers' Conference held in August, 1949, *A.K. Gopalan* v. *State of Madras* (AIR 1950 SC 27), the State Reorganization Commission, 1955, Article 350A, etc and developed the meaning of mother tongue as under:[159]

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155 *Id.*, para 20.

156 *Id.*, para 27.

157 AIR 1950 SC 27 at 42, para 26.

158 *Karnataka Mother Tongue judgement*, para 27.

159 *Id.*, para 33.

> Mother tongue in the context of the Constitution would, therefore, mean the language of the linguistic minority in a State and it is the parent or the guardian of the child who will decide what the mother tongue of child is. The Constitution nowhere provides that mother tongue is the language which the child is comfortable with, and while this meaning of "mother tongue" may be a possible meaning of the 'expression', this is not the meaning of mother tongue in Article 350Aof the Constitution or in any other provision of the Constitution and hence we cannot either expand the power of the State or restrict a fundamental right by saying that mother tongue is the language which the child is comfortable with.

Looking back to various precedents like *Romesh Thappar* v. *The State of Madras,*[160] *Sakal Papers (P) Ltd.* v. *Union of India,*[161] *Romesh Thappar* v. *The State of Madras*[162] *Odyssey Communications (P) Ltd.* v. *Lokvidayan Sanghatana,* [163]the court found that article 19 has to be liberally construed: This Court has from time to time expanded the scope of the right to freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution by consistently adopting a very liberal *interpretation*.[164]

The court examined whether an unaided nonminority school has a right to choose a medium of instruction under Article 19(1)(g) of the Constitution at the primary school stage.[165]

Occupation

The court observed that in *T.M.A. Pai Foundation* v. *State of Karnataka*[166] (*supra*), Kirpal C.J. writing the *majority judgment interpreted this right under Article 19(1)(g) of the Constitution to include the right to establish and run educational institutions*. In *T.M.A. Pai Foundation.* v. *State of Karnataka* (*supra*), the majority judgment held:[167]

> The establishment and running of an educational institution where a large number of persons are employed as teachers or administrative staff, and an activity is carried on that results in the imparting of knowledge to the students, must necessarily be regarded as an occupation, even if there is no element of profit generation. It is difficult to comprehend that education, per se, will not fall under

160 AIR 1950 SC 124.

161 AIR 1962 SC 305.

162 AIR 1950 SC 124.

163 (1988) 3 SCC 410.

164 *Karnataka Mother Tongue judgement,* para 38.

165 *Id.*, para 50.

166 2002 (8) SCC 481.

167 *Id.*, para 25.

> any of the four expressions in Article 19(1)(g). "Occupation" would be an activity of a person undertaken as a means of livelihood or a mission in life.

The meaning of the word "occupation" in Article 19(1)(g) as held in *T.M.A. Pai Foundation* was quoted as under:[168]

> Thus, the word *"occupation"* in Article 19(1)(g) of the Constitution *was interpreted by the majority* judgment of this Court ... *to include the activity which results in imparting of knowledge to the students even if there is no element of profit generation in such activity*.

19(1) *vis a vis* 30(1)

Following the difference between art 19(1) and 30(1) the court added from the same judgement:[169]

> However, unlike Article 30(1) of the Constitution, Article 19(1)(g) does not have the word "choice". The absence of the word "choice", in our considered opinion, does not make a material difference because we find that Article 19 of the Constitution is titled "Right to Freedom" and the word "freedom" along with the word "any" before the word "occupation" in Article 19(1)(g) of the Constitution would mean that the right to establish and administer an educational institution will include the right of a citizen to establish a school for imparting education in a medium of instruction of his choice.

If a citizen thinks that he should establish a school and in such a school, the medium of instruction should be a particular language then he can exercise such right subject to the reasonable regulations made by the State under article 19(6) of the Constitution. The constitutional bench in *Karnataka Mother Tounge judgement*, concluded : [170]

> We are thus of the considered opinion that a private unaided school which is not a minority school and which does not enjoy the protection of Articles 29(1) and 30(1) of the Constitution *can choose a medium of instruction for imparting education to the children in the school*. [Emphasis Added]

Another question was whether Article 350A can be interpreted to empower the State to compel a linguistic minority to choose its mother tongue only as a medium of instruction in a primary school established by it. It was answered that Article 350A cannot be interpreted in violation of fundamental right under Article 30(1). [171]

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168 *Ibid.*

169 *Ibid.*

170 *Karnataka Mother Tounge judgement*, para 51.

171 *Id.*, para 63.

iv. Harmonious Construction

The Supreme Court in *Venkataramana Devaru* v. *State of Mysore* [172] elucidated the principle of harmonious construction as under:

> The rule of construction is well settled that when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect could be given to both. This is what is known as the rule of harmonious construction.

This was made applicable by a constitutional bench in the case of *Pramati Educational & Cultural Trust ®* v *Union Of India*[173] where one of the issue was whether there is any conflict between art Article 19(1)(g), Article 30(1) *vis a vis* 21A. Declining any conflict the court observed:

> Article 21A of the Constitution, as we have noticed, states that the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine. The word 'State' in Article 21A can only mean the 'State' which can make the law. Hence, Mr. Rohatgi and Mr. Nariman are right in their submission that the constitutional obligation under Article 21A of the Constitution is on the State to provide free and compulsory education to all children of the age of 6 to 14 years and not on private unaided educational institutions. Article 21A, however, states that the State shall by law determine the "manner" in which it will discharge its constitutional obligation under Article 21A. *Thus, a new power was vested in the State to enable the State to discharge this constitutional obligation by making a law. However, Article 21A has to be harmoniously construed with Article 19(1)(g) andArticle 30(1) of the Constitution.* [Emphasis Added]

The court concluded on the issue that :

> *We do not find anything in Article 21A which conflicts with either the right of private unaided schools under Article 19(1)(g) or the right of minority schools under Article 30(1) of the Constitution,* but the law made under Article 21A may affect these rights under Articles 19(1)(g) and 30(1). The law made by the State to provide free and compulsory education to the children of the age of 6 to 14 years should not, therefore, be such as to abrogate the right of unaided private educational schools under Article 19(1)(g) of the Constitution

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172 AIR 1958 SC 255 para 29.

173 (2014) 8 SCC 1. The bench consisted of Hon'ble Justice .M. Lodha, A.K. Patnaik, Sudhansu Jyoti Mukhopadhaya, Dipak Misra, Fakkir Mohamed Kalifulla.

> or the right of the minority schools, aided or unaided, under Article 30(1) of the Constitution.

The constitutional bench, therefore, held as under:[174]

> In the result, we hold that the Constitution (Ninety-third Amendment) Act, 2005 inserting clause (5) of Article 15 of the Constitution and the Constitution (Eighty-Sixth Amendment) Act, 2002 inserting Article 21A of the Constitution do not alter the basic structure or framework of the Constitution and are constitutionally valid. We also hold that the 2009 Act is not ultra viresArticle 19(1)(g) of the Constitution. We, however, hold that the 2009 Act insofar as it applies to minority schools, aided or unaided, covered under clause (1) of Article 30 of the Constitution is ultra vires the Constitution.

Shivshankar Gurgar v. *Dilip*[175] was a case on Madhya Pradesh Accommodation Control Act, 1961 for eviction of the respondent and recovery of arrears of rent. A compromise memo signed by both the parties. On 21.7.2005 the Appellant filed an application for the execution of the compromise decree alleging that the Respondent failed to fulfil his obligations arising out of the compromise decree and, therefore, the Appellant is entitled to recover possession of the premises. It was alleged that signatures were obtained by the Petitioner on the said compromise under undue influence and no receipt was issued by the Petitioner for a sum of Rs. 10,000/-, which was paid by the Respondent. Meaning of Section 13 was in question. Section 13(1)[2] of the Act stipulates that the tenant shall either deposit in the court or pay to the landlord an amount calculated at the rate of rent at which it was prayed for by the landlord for various periods specified therein (the details of which are not necessary for the present). The court held: [176]

> The language of Section 13(1)[177] is very clear and explicit in this regard. We fail to understand as to how the Court [MP high

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174 *Id.*, para 56.

175 AIR 2014 SC 1182. The case was unanimously decided on January 3, 2014 by a division bench of Hon'ble Justice Ranjana Prakash Desai and Justice J. Chelameswar. Justice J. Chelameswar delivered the judgement.

176 *Id.*, para 23.

177 When tenant can get benefit of protection against eviction.— (1) On a suit or any other proceeding being instituted by a landlord in any of the grounds referred to in section 12 or in any appeal or any of other proceeding by a tenant against any decree or order for his eviction, the tenant shall, within one month of the service of writ of summons or notice of appeal or of any other proceeding, or within one month of institution of appeal or any other proceeding by the tenant as the case may be, or within such further time as the court may on an application made to it allow in this behalf, deposit in the court or pay to the landlord, an amount calculated at the rate of rent at which it was prayed, for the period for which the tenant may

> court]could *read into* Section 13, a possibility of enabling the judgment debtor (tenant) to protect his possession by making the payment during the execution proceedings in spite of the fact that he had already been adjudged to be in default of payment of the rent to the landlord. *Such an interpretation of Section 13 would be wholly destructive of Section 12(1)(a).*[178] Therefore, not only the language of Section 13(1), but also an irreconcilable inconsistency that would arise between Section 12(1)(a) and Section 13(1) if the *interpretation* placed by the executing court is accepted - in our view is sufficient to hold that the executing court's *interpretation* of Section 13(1) is unsustainable.

In the case of *Union of India* v. *Vasavi Co-op. Housing Society Ltd*,[179] *following the precedents observed that the revenue record does not confer title. In Corporation of the City of Bangalore* v. *M. Papaiah* [180] held that "it is firmly established that revenue records are not documents of title, and *the question of interpretation of document not being a document of title is not a question of law*."

Conflict of legislations

The conflict between central legislation and state legislation is not new. In the case of *Dr. Suhas H. Pophale* v. *Oriental Insurance Co. Ltd.*[181]the issue before the court was "whether the rights of an occupant/licensee/ tenant protected under a State Rent Control Act (Bombay Rent Act, 1947 and its successor the Maharashtra Rent Control Act, 1999, in the instant case), could be adversely affected by application of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 ('Public Premises Act' for short)?"

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have made default including the period subsequent thereto up to the end of the month previous to that in which the deposit or payment is made and shall thereafter continue to deposit or pay, month by the 15th of each succeeding month a sum equivalent to the rent at that rate till the decision of the suit, appeal or proceeding as the case may be.

178 The tenant has neither paid nor tendered the whole of the arrears of the rent legally recoverable from him within two months of the date on which a notice of demand for the arrears of rent has been served on him by the landlord in the prescribed manner.

179 AIR 2014 SC 937 para 17. The case was unanimously decided on January 7, 2014 by a division bench of Hon'ble Justice K.S. Radhakrishnan and Justice A.K. Sikri. Justice K.S. Radhakrishnan delivered the judgement.

180 (1989) 3 SCC 612 para 5.

181 (2014) 4 SCC 657 para 2. A division bench of Hon'ble Justice H.L. Gokhale and Hon'ble Justice J. Chelameswar. Hon'ble Justice H.L. Gokhale delivered the judgement. *Hereinafter* referred as *Dr. Suhas H. Pophale.*

speedier remedy vis a vis welfare provision

In this conflict situation two principles are applicable (i) later laws abrogate earlier contrary laws, and (ii) a general provision does not derogate from special one. The court referred that a similar conflict has been raised in the case of *Ashoka Marketing Ltd*. v. *Punjab National Bank* [182] where the constitutional bench observed that Public Premises Act is a later enactment having been enacted on 23.8.1971, whereas the Delhi Rent Control Act, was enacted on 31.12.1958.[183] It was however, found by *Ashoka Marketing Ltd*. that both "the Rent Control Act and the Public Premises Act, are special ... Since, the Public Premises Act is a special statute and not a general enactment the exception contained in the principle that a subsequent general law cannot derogate from an earlier special law cannot be invoked and in accordance with the principle that the later laws abrogate earlier contrary laws, the Public Premises Act must prevail over the Rent Control Act. Applying principle and precedent of the constitutional bench in *Ashoka Marketing Ltd* the court held: [184]

> 30. ...The Public Premises Act, undoubtedly provides a speedy remedy to recover the premises from the unauthorised occupants. At the same time, we have also to note that in the instant case the occupant is claiming a substantive right under a *welfare provision of the State Rent Control Ac*t, which gave him a protected status in view of the amendment to that Act. ... Considering that the *Rent Control Act is a welfare enactment,* and a further protective provision has been made therein, can it be permitted to be rendered otiose and made inapplicable to premises specifically sought to be covered thereunder, and defeated by resorting to the provisions of the Public Premises Act? In the present case, it must also be noted that the appellant is seeking a protection under Section 15A of the Bombay Rent Act, which has a non-obstante clause. .... *However by enforcing a speedier remedy, a welfare provision cannot be rendered nugatory*. *The provisions of the two enactments will have to be read harmoniously* to permit the operation and co-existence of both of them to the extent it can be done. Therefore, the term 'belonging to' as occurring in the definition of Public Premises in Section 2(e) will have to *be interpreted meaningfully to imply only the premises* owned by or taken on lease by the Government Company at the relevant time. ... If at all he had to be evicted, it was necessary to follow the due process of law which would mean the process as available under the Bombay Rent Act or its successor Maharashtra Rent Control Act, 1999, and not the one which is provided under the provisions of the Public Premises Act. [Emphasis Added]

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182 1990 (4) SCC 406

183 *Id.,* para 53.

184 *Dr. Suhas H. Pophale*, para 30.

III. LEGISLATIVE INTENTION

Dias in his *Jurisprudence* observes that[185]

> When confronted with the task of interpreting a statute judges say that their task is to ascertain the 'intention of Parliament' as can be gathered from the meaning of the words used. This quest is no less elusive than the search for the *ratio decidendi* of a case. For instance, where Parliament enacts a provision on a mistaken view of the law, the courts will give effect to it according to what the law really was in their view. This may be by product of the rule that express words, or necessary implication, are required to change the law. Such being the case, the point is : if Parliament did take a mistaken view of the law, in what sense are courts giving effect to the intention behind the enactment? Reference to intention seems to be superfluous.

Intention gathering, therefore, has remained a formidable task. Parliamentary debates are chief source but the Indian courts have explored the intention generally without resorting to the debates of legislature. It may be because the debates were not quoted or produced by the counsel of parties and the court did not took pain to summon it themselves to be sure what was the intention. They gathered the intention some time by presumption or sometime by means of interpretation. The constitution bench in the case of *Hardeep Singh*[186] tried to find out the intention of legislature with rules of interpretation. For example 'every word used in statute is deliberate.' Followings passage deserve mention:[187]

> To say that powers under Section 319 Cr.P.C. can be exercised only during trial would be reducing the impact of the word 'inquiry' by the court. *It is a settled principle of law that an interpretation which leads to the conclusion that a word used by the legislature is redundant, should be avoided* as the presumption is that the *legislature has deliberately and consciously used the words for carrying out the purpose of the Act*. The legal maxim "A Verbis Legis Non Est Recedendum" which means, "from the words of law, there must be no departure" has to be kept in mind.

A statute requires to be interpreted without doing any violence to the language used therein. The court further observed:[188]

> No word in a statute has to be construed as surplusage. No word can be rendered ineffective or purposeless. *Courts are required to carry out the legislative intent fully and completely. While construing a*

185 *Dias*, 166.

186 (2014) 3 SCC 92

187 *Hardeep Singh*, para 39.

188 *Id.*, para 41.

> *provision, full effect is to be given to the language used therein,* giving reference to the context and other provisions of the Statute. By construction, a provision should not be reduced to a "dead letter" or "useless lumber". An interpretation which renders a provision an otiose should be avoided otherwise it would mean that in enacting such a provision, the legislature was involved in "an exercise in futility" and the product came as a "purposeless piece" of legislation and that the provision had been enacted without any purpose and the entire exercise to enact such a provision was "most unwarranted besides being uncharitable." [Emphasis Added]

In the case of *Sundeep Kumar Bafna*[189] the Supreme Court interpreted the meaning of the expression "brought before a Court other than the High Court or a Court of Session" used in s. 437(1) of CrPC 1973.[190] The point was whether this expression dilutes the power of higher courts? Taking assistance from the previous law (CrPC 1898) the court observed that:[191]

> whilst Section 497(1) of the old Code alluded to an accused being "brought before a Court", the present provision postulates the accused being "brought before a Court other than the High Court or a Court of Session" in respect of the commission of any non-bailable offence.

The court was conscious that precedent like *Gurcharan Singh* v. *State*,[192] says that 'there is no provision in the CrPC dealing with the production of an accused before the Court of Session or the High Court.' The court, however, went into the intention of legislature as under:[193]

> But it must also be immediately noted that no provision categorically prohibits the production of an accused before either of these Courts. The Legislature could have easily enunciated, by use of exclusionary or exclusive terminology, that the superior Courts of Sessions and

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189 AIR 2014 SC 1745.

190 Cr PC 1973, s 437-When bail may be taken in case of non- bailable offence.

(1) When any person accused of, or suspected of, the commission of any non- bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court *other than the High Court or Court of Session*, he may be released on bail, but-

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

191 *Sundeep Kumar Bafna*, Supra note 129, para 8.

192 (1978) 1 SCC 118 para 13.

193 *Supra* note 191.

> High Court are bereft of this jurisdiction or if they were so empowered under the Old Code now stood denuded thereof. ... [Emphasis Added]

Constituent Assembly Debate has been used to gather the intention of our fore fathers and to interpret the silence of the constitution. In the case of *Manoj Narula* it was argued that politicians with criminal antecedents should not be made minister. As the provisions of our constitution is silent the court may read into art 75(1) this limitation. Declining this argument the constitution bench quoted Dr Ambedkar as under:

> His [Hon'ble K.T. Shah] last proposition is that no person who is convicted may be appointed a Minister of the State. Well, so far as his intention is concerned, it is no doubt very laudable and I do not think any Member of this House would like to differ from him on that proposition. But the whole question is this whether we should introduce all these qualifications and disqualifications in the Constitution itself. Is it not desirable, is it not sufficient that we should trust the Prime Minister, the Legislature and the public at large watching the actions of the Ministers and the actions of the legislature to see that no such infamous thing is done by either of them? I think this is a case which may eminently be left to the good-sense of the Prime Minister and to the good sense of the Legislature with the general public holding a watching brief upon them. I therefore say that these amendments are unnecessary.

IV JUDICIAL LEGISLATION

A constitution bench opinion through BS Chauhan J in the case of *Hardeep Singh* reiterates restraint as under:[194]

> ...The court has to proceed on the footing that the legislature intended what it has said and even if there is some defect in the phraseology etc., it is for others than the court to remedy that defect. The statute requires to be interpreted without doing any violence to the language used therein. *The court cannot re-write, recast or reframe the legislation for the reason that it has no power to legislate.*

In *Mohd. Arif @ Ashfaq* v *Registrar, Supreme Court of India* [195] the majority observed :

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194 *Hardeep Singh, Supra* note 25, para 40.

195 (2014) 9 SCC 737. The constitution bench consisted of R. M. Lodha, Arjan Kumar Sikri, R. F. Nariman, J. S. Kehar and J. Chelameswar. Majority judgement has been delivered by Justice R. F. Nariman on behalf of four and dissenting view was of Chelameswar, J.

> ...when on the same set of facts, one judicial mind can come to the conclusion that the circumstances do not warrant the death penalty, whereas another may feel it to be a fit case fully justifying the death penalty, we feel that when a convict who has suffered the sentence of death and files a review petition, the necessity of oral hearing in such a review petition becomes an integral part of "reasonable procedure".

The judgement further says:[196]

> If a pyramidical structure is to be imagined, with life on top, personal liberty (and all the rights it encompasses under the new doctrine) immediately below it and other fundamental rights below personal liberty it is obvious that this judgment will apply only to death sentence cases. we feel that the review petition that is pending since the year 2010 should be disposed of as soon as possible by a bench of three Hon'ble Judges after giving counsel a maximum of 30 minutes for oral argument.

The court summarised following four points as law laid down in this judgment, *viz*.,

i. the right of a limited oral hearing in review petitions where death sentence is given, shall be applicable only in pending review petitions and such petitions filed in future.

ii. It will also apply where a review petition is already dismissed but the death sentence is not executed so far.

iii. In such cases, the petitioners can apply for the reopening of their review petition within one month from the date of this judgment.

iv. However, in those cases where even a curative petition is dismissed, it would not be proper to reopen such matters.

Adoption

Adoption laws in India had remained a matter of continuous debate as the process is too slow to facilitate adoption. Apprehensions of misuse and reservations of Muslim law may have deterred the political class to shape the law in better fashion. *Lakshmi Kant Pandey*[197] was a high watermark in the development of the law relating to adoption as elaborate guidelines had been laid by the Supreme Court to protect the interest of the child in case of inter-country adoptions. In *Shabnam Hashmi* v. *Union of India*,[198] somewhat similar issue was agitated where

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196 *Id.*, para 64.

197 (1984) 2 SCC 244.

198 (2014) 4 SCC 1. The case was unanimously decided on February 19, 2014 by a full bench of Hon'ble Chief Justice P. Sathasivam, Justice Ranjan Gogoi and Justice Shiva Kirti Singh. Justice Ranjan Gogoi delivered the judgement.

the petitioner wanted the Supreme Court to add another dimension of fundamental rights using its power of interpretation. It desired that

i. "the right to adopt and to be adopted be" declared as fundamental right under art 21

ii. the Court should lay down optional guidelines enabling adoption of children by persons irrespective of religion, caste, creed etc.

iii. a direction to the respondent Union of India to enact an optional law the prime focus of which is the child with considerations like religion etc. taking a hind seat.

The court found that there is no urgency to address the issue of optional guideline and law in form of a judicial legislation because after *Lakshmi Kant Pandey* the law is developing and JJ Act has been subjected to amendments in 2000 and 2006. Rules have been framed. This shows the legislature is conscious. Secondly Rules 33(3) and 33(4) of the JJ Rules, 2007 contain elaborate provisions regulating pre-adoption procedure i.e. for declaring a child legally free for adoption.

The court also made following *obiter* remarks:

> To us, the Act is a small step in reaching the goal enshrined by Article 44 of the Constitution. Personal beliefs and faiths, though must be honoured, cannot dictate the operation of the provisions of an enabling statute. At the cost of repetition we would like to say that an optional legislation that does not contain an unavoidable imperative cannot be stultified by principles of personal law which, however, would always continue to govern any person who chooses to so submit himself until such time that the vision of a uniform Civil Code is achieved. The same can only happen by the collective decision of the generation(s) to come to sink conflicting faiths and beliefs that are still active as on date.

It further added:

Conflicting view points prevailing between different communities, as on date, on the subject makes the vision contemplated by Article 44 of the Constitution i.e. a Uniform Civil Code a goal yet to be fully reached and the Court is reminded of the anxiety expressed by it earlier with regard to the necessity to maintain restraint.

Police power- Power of police has attracted various judicial rulings leading to judicial legislation, for example - *DK Basu* case. CrPC 1973 has been amended in 2005. It was again amended in 2008 when S 41 has been modified and 41A etc have been inserted. *Arnesh Kumar* v *State of Bihar*[199] is mandatory guidelined on 2008 amendments. It observed that the objective of "this judgment is to ensure

199 (2014) 8 SCC 273.

that police officers do not arrest accused unnecessarily and Magistrate do not authorise detention casually and mechanically."

In order to ensure what the court has observed above, the division bench made the following direction to police:

> 1. All police officers be provided with a check list containing specified sub- clauses under Section 41(1)(b)(ii);
>
> 2. The police officer shall forward the check list duly filed and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;
>
> 3. The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;
>
> 4. The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of police of the district for the reasons to be recorded in writing;
>
> 5. Notice of appearance in terms of Section 41A of Cr.PC be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the District for the reasons to be recorded in writing;

Following paragraph provides binding force to the direction:

> Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before High Court having territorial jurisdiction.
>
> Authorising detention without recording reasons as aforesaid by the judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

The court made the direction applicable to all cases where punishment is less than seven years. The operative part is as under:

> We hasten to add that the directions aforesaid shall not only apply to the cases under Section 498-A of the I.P.C. or Section 4 of the Dowry Prohibition Act, the case in hand, but also such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years; whether with or without fine.

> This judgement has invited criticism from a few feminist thinkers. Feminist aggressively argue that the penal laws are based on pre-conceived notions and prejudices and "claim that jargon of abuse of [femal] laws is nothing more than red herring purposely highlighted by certain propagandist to further their regressive patriarchal agendas." On the other hand there are judicial acceptance that female related laws are heavily misused in India be it dowry (*Sushil Kumar Sharma* v. *Union of India* 19 July 2005) or cruelty (*Preeti Gupta* v. *State of Jharkhand* 13 August, 2010) or rape laws (*Radhu* v. *State of Madhya Pradesh* (14 Sept. 2007). *Arnesh Kumar* is latest acknowledgement which has made the police officials more accountable to arrest.

V EXTERNAL AID

a) Legal Maxim

The constitution bench in *Hardeep Singh*[200] referred the purpose of section 319 of CrPC 1973 as under: [201]

> 12. Section 319 Cr.P.C. springs out of the doctrine judex damnatur cum nocens absolvitur (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 Cr.P.C.[202]

Per Incuriam

In the case of *Sundeep Kumar Bafna*[203] the concept of *per incuriam* was thoroughly discussed. The court presented three situations regarding *per incuriam* which may be classified as under:[204]

i. A decision or judgment can be *per incuriam* any provision in a statute, rule or regulation, which was not brought to the notice of the Court.

ii. A decision or judgment can also be *per incuriam* if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a Co-equal or Larger Bench; or

iii. if the decision of a High Court is not in consonance with the views of this Court.

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200 *Supra* note 186.

201 *Hardeep Singh, Supra* note 25, para 12.

202 Cr PC 1973, 319. Power to proceed against other persons appearing to be guilty of offence.

203 *Supra* note 129.

204 *Sundeep Kumar Bafna*, para 15.

The court warned all courts "to be extremely careful and circumspect in concluding a judgment of the Supreme Court to be *per incuriam*."

One of the interpretative value of *Shatrughan Chauhan* lies in the discussion regarding 'Judgments Declared *per incuriam.'* One of the arguments are that "the guidelines issued in *Machhi Singh* are contrary to the law laid down in *Bachan Singh.* Therefore, in three decisions, viz., *Swamy Shraddananda (2)* v. *State of Karnataka* (2008) 13 SCC 767, *Sangeet* v. *State of Haryana* (2013) 2 SCC 452 and *Gurvail Singh* v. *State of Punjab* (2013) 2 SCC 713 the verdict pronounced by *Machhi Singh* is held to be *per incuriam.*" [205] While dealing with this issue the court found that *Machi Singh* in paragraph 38, referred to the guidelines prescribed in *Bachan Singh.* In other words, *Machhi Singh,* did not overlook *Bachan Singh*.

Shatrughan Chauhan then refers three-judge bench decision in *Swamy Shraddananda (2)(supra)* where the court noted that what *Machhi Singh* did was the crystallisation of rarest of rare principle(*Bachchan Singh*) into practical application of five situations of murder. *Swamy Shraddananda (2)* does notice that "the unfortunate reality is that in later decisions neither the rarest of rare cases principle nor the *Machhi Singh* categories were followed uniformly and consistently."[206] Then the court went back to the question "Should *Machhi Singh* be declared unconstitutional and answered as under: [207]

> Except the above observations, the three-judge bench [in *Swamy Shraddananda (2)(supra)*]has nowhere discarded *Machhi Singh (supra)*. In other words, we are of the view that the three-Judge Bench considered and clarified the principles/guidelines in *Machhi Singh (supra)*. It is also relied by the majority in *Triveniben (supra).* [208]

b) Dictionaries etc

Custody- The use of dictionary as a secondary source has been useful to find the meaning of a term in question. In the case of *Sandeep K Bafna*[209]the meaning of 'custody' was discussed with the help of English language dictionaries and legal dictionaries. The English language dictionaries were quoted as under: [210]

> The Oxford Dictionary (online) defines custody as imprisonment, detention, confinement, incarceration, internment, captivity; remand, duress, and durance. The Cambridge Dictionary (online) explains 'custody' as the state of being kept in prison, especially while waiting to go to court for trial. Longman Dictionary (online) defines 'custody' as 'when someone is kept in prison until they go to court,

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205 *Shatrughan Chauhan*, para 86.

206 *Swamy Shraddananda (2),* para 31.

207 *Shatrughan Chauhan*, para 88.

208 *Ibid.*

209 *Supra* note 129.

210 *Sandeep K Bafna*, para 9.

> because the police think they have committed a crime'. Chambers Dictionary (online) clarifies that custody is 'the condition of being held by the police; arrest or imprisonment; to take someone into custody to arrest them'. Chambers' Thesaurus supplies several synonyms, such as detention, confinement, imprisonment, captivity, arrest, formal incarceration. The Collins Cobuild English Dictionary for Advance Learners states in terms of that someone who is in custody or has been taken into custody or has been arrested and is being kept in prison until they get tried in a court or if someone is being held in a particular type of custody, they are being kept in a place that is similar to a prison. The Shorter Oxford English Dictionary postulates the presence of confinement, imprisonment, durance and this feature is totally absent in the factual matrix before us.

After literal meaning from English dictionaries, the legal meaning was traced from "the *Corpus Juris Secundum* which under the topic of 'Escape & Related Offenses; Rescue' adumbrates that 'Custody, within the meaning of statutes defining the crime, consists of the detention or restraint of a person against his or her will, or of the exercise of control over another to confine the other person within certain physical limits or a restriction of ability or freedom of movement.'' *Black's Law Dictionary*, (9th ed. 2009) was also referred:[211]

> "Custody- The care and control of a thing or person. The keeping, guarding, care, watch, inspection, preservation or security of a thing, carrying with it the idea of the thing being within the immediate personal care and control of the person to whose custody it is subjected. Immediate charge and control, and not the final, absolute control of ownership, implying responsibility for the protection and preservation of the thing in custody. Also the detainer of a man's person by virtue of lawful process or authority.

The court concluded: [212]

> A perusal of the dictionaries thus discloses that the concept that is created is the controlling of a person's liberty in the course of a criminal investigation, or curtailing in a substantial or significant manner a person's freedom of action.

Difference Between Type And Form

In the case of *La Opala R.G. Ltd* the expression "types of glass" have been distingushed from "forms of glass." The issue was "whether the two terms would be identical in their connotation and import."[213]

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211 *Ibid*.

212 Id., para 10.

213 *la Opala R.G. Ltd, Supra* note 66, para 25.

> It is a settled law that in taxing statutes the terms and expressions must be seen in their common and popular parlance and not be attributed their scientific or technical meanings. In common parlance, the two words "type" and "form" are not of the same import. According to the Oxford Dictionary, whereas the meaning of the expression "types" is "kind, class, breed, group, family, genus"; the meaning of the word "form" is "visible shape or configuration of something" or the "style, design, and arrangement in an artistic work as distinct from its content". Similarly, Macmillian Dictionary defines "type" as "a group of people or things with similar qualities or features that make them different from other groups" and "form" as "the particular way in which something appears or exists or a shape of someone or something." Therefore, "types" are based on the broad nature of the item intended to be classified and in terms of "forms", the distinguishable feature is the particular way in which the items exist. An example could be the item "wax". The types of wax would include animal, vegetable, petroleum, mineral or synthetic wax whereas the form of wax could be candles, lubricant wax, sealing wax, etc.

After discussing the dictionary meaning of terms in issue the court held: [214]

> glassware is a form of glass and it is contended by the assessee that forms of glass are also covered by the said notification. The term glassware would generally encompass ornaments, objects and articles made from glass. The New Oxford Dictionary, the Merriam-Webster Dictionary and the Macmillian Dictionary refer to the said general meaning while defining it. Glassware would include crockery such as drinking vessels (drinkware) and tableware and general glass items such as vases, pots, etc. Therefore, it cannot be accepted that the expression "types of glass" could have been intended to refer to or include "forms of glass".

Evidence

A constitution bench in the case of *Hardeep Singh* uses law dictionary and the opinion of distinguished authors to interpret the word evidence as used in section 319 of CrPC 1973. In this case the court framed a question that 'whether the word "evidence" used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?' The court extracted as under:[215]

> According to Tomlin's Law Dictionary, Evidence is "the means from which an inference may logically be drawn as to the existence of a

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214 *Id.*, para 27.

215 *Supra* note 25.

> fact. It consists of proof by testimony of witnesses, on oath; or by writing or records." Bentham defines 'evidence' as "any matter of fact, the effect, tendency or design of which presented to mind, is to produce in the mind a persuasion concerning the existence of some other matter of fact- a persuasion either affirmative or disaffirmative of its existence. Of the two facts so connected, the latter may be distinguished as the principal fact, and the former as the evidentiary fact." According to Wigmore on Evidence, evidence represents "any knowable fact or group of facts, not a legal or a logical principle, considered with a view to its being offered before a legal tribunal for the purpose of producing a persuasion, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law, or of logic, on which the determination of the tribunal is to be asked."

After elaborate discussion the court concluded as under:[216]

> It is, therefore, clear that the word "evidence" in Section 319 Cr.P.C. means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents. It is only such evidence that can be taken into account by the Magistrate or the Court to decide whether power under Section 319 Cr.P.C. is to be exercised and not on the basis of material collected during investigation.

The court concluded that 'the word 'evidence' in Section 319 Cr.P.C. has to be broadly understood and not literally i.e. as evidence brought during a trial.'

Advice

In *Manoj Narula* the constitution bench deliberated on the meaning of 'advice' under art 75:[217]

> As per the New Shorter Oxford English Dictionary, one of the meanings of the word "advice" is "the way in which a matter is looked at; opinion; judgment". As per P. Ramanatha Aiyer's Law Lexicon, 2nd Edition, one of the meanings given to the word "advice" is "counsel given or an opinion expressed as to the wisdom of future conduct" (Abbot L. Dict.). In Webster Comprehensive Dictionary, International Edition, one of the meanings given to the word "advice" is "encouragement or dissuasion; counsel; suggestion". Thus, the word "advice" conveys formation of an opinion.

Justice Madan B Lokur observed that the words criminal background is a vague term. Moreover the constituent assembly also wanted to leave this issue out of constitutional purview.

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216 *Id.* para 71.

217 Appointment of ministers.

c) Law Reports : Editorial note

Sundeep Kumar Bafna[218]highlights the risk of believing in secondary sources like editorial note of a judgement reported in a journal which is as under: [219]

> In the present case, in the impugned Order the learned Single Judge appears to have blindly followed the incorrect and certainly misleading editorial note in the Supreme Court Reports without taking the trouble of conscientiously apprising himself of the context in which *Rashmi Rekha* appears to hold *Niranjan Singh per incuriam*, and equally importantly, to which previous judgment.

In the case of *Manoj Narula*[220] it was argued that politicians with criminal antecedents should not be made minister. Justice Kurian Joseph declined the argument. In his obiter remarks he observed:

> Kautilya, one of the great Indian exponents of art of government, has dealt with qualification of king and his councillors at Chapter IX in Arthasastra, said to be compiled between BC 321-296. To quote relevant portion:
>
> CHAPTER IX THE CREATION OF COUNCILLORS AND PRIESTS NATIVE, born of high family, influential, well trained in arts, possessed of foresight, wise, of strong memory, bold, eloquent, skilful, intelligent, possessed of enthusiasm, dignity and endurance, pure in character, affable, firm in loyal devotion, endowed with excellent conduct, strength, health and bravery, free from procrastination and ficklemindedness, affectionate, and free from such qualities as excite hatred and enmity-these are the qualifications of a ministerial officer.

VI MISCELLANEOUS

i. Comparative law

Arrest and custody

The Supreme Court used comparative method to explore the meaning of word arrest. British law was quoted as under: [221]

> Halsbury's Laws of England (4th Edition) which states that – "Arrest consists of the actual seizure or touching of a person's body with a view to his detention. The mere pronouncing of words of arrest is

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218 *Supra* note 129.

219 *Sundeep Kumar Bafna*, para 16.

220 (2014) 9 SCC 1.

221 *Sandeep K Bafna*, *Supra* note 129, para 11.

not an arrest, unless the person sought to be arrested submits to the process and goes with the arresting officer".

USA position was referred as under: [222]

> The US Supreme Court has been called upon to explicate the concept of custody on a number of occasions, where, coincidentally, the plea that was proffered was the failure of the police to administer the Miranda caution, i.e. of apprising the detainee of his Constitutional rights. In *Miranda* v. *Arizona* 384 US 436 (1966), custodial interrogation has been said to mean "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way". In *Minnesota* v. *Murphy* 465 US 420 (1984), it was opined by the U.S. Supreme Court that since "no formal arrest or restraint on freedom of movement of the degree associated with formal arrest" had transpired, the Miranda doctrine had not become operative. In *R.* v. *Whitfield* 1969 CareswellOnt 138, the Supreme Court of Canada was called upon to decide whether the police officer, who directed the accused therein to stop the car and while seizing him by the shirt said "you are under arrest:", could be said to have been "custodially arrested" when the accused managed to sped away. The plurality of the Supreme Court declined to draw any distinction between an arrest amounting to custody and a mere or bare arrest and held that the accused was not arrested and thus could not have been guilty of "escaping from lawful custody".

Canadian judgement was also quoted:[223]

> More recently, the Supreme Court of Canada has clarified in *R*. v. *Suberu* [2009] S.C.J.No.33 that detention transpired only upon the interaction having the consequence of a significant deprivation of liberty. Further, in *Berkemer* v. *McCarty* 468 U.S. 420 (1984), a roadside questioning of a motorist detained pursuant to a routine traffic stop was not seen as analogous to custodial interrogation requiring adherence to Miranda rules.

Similarly the word custody has also been extracted from USA:[224]

> The term is very elastic and may mean actual imprisonment or physical detention or mere power, legal or physical, of imprisoning or of taking manual possession. Term "custody" within statute requiring that petitioner be "in custody" to be entitled to federal

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222 *Ibid.*

223 *Ibid.*

224 *Id.*, para 9 .

> habeas corpus relief does not necessarily mean actual physical detention in jail or prison but rather is synonymous with restraint of liberty. U. S. ex rel. Wirtz v. Sheehan, D.C.Wis, 319 F.Supp. 146.

Criminalisation of politics

In the case of *Manoj Narula*[225] it was argued that politicians with criminal history cannot be made minister as art 75(1) contains implied limitation to the effect. The counter argument was to decline the idea on the basis that in foreign jurisdiction there are express provisions for it. The relevant passage is as under:

> Mr. Andhyarujina has further submitted that Section 44(4)(ii) of the Australian Constitution puts a limitation on the member of the House which travels beyond conviction in a criminal case, for the said provision provides that any person who has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer, would be incapable of being chosen or of sitting as a senator or a member of the House of Representatives. Learned counsel has commended us to Lane's Commentary on the Australian Constitution, 1986 to highlight that this is an exceptional provision in a Constitution which disqualifies a person from being a Member of Parliament even if he is not convicted but likely to be subject to a sentence for the prescribed offence, but in the absence of such a provision in our Constitution or in law made by the Parliament, the Court cannot introduce such an aspect on the bedrock of propriety.

The position in Britain was narrated as under:

> U.K. Representation of Peoples Act, 1981 which provides that a person who is sentenced or ordered to be imprisoned or detained indefinitely or for more than one year is disqualified and his election is rendered void and the seat of such a member is vacated. ...

ii. Meaning of particular words

a) apart

Shatrughan Chauhan interprets the meaning of word 'apart' as under:

> "Apart from all other prisoners" used in Section 30(2)[226] is also a phrase of flexible import. 'Apart' has the sense of 'To one side, aside,... apart from each other, separately in action or function'

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225 *Supra* note 25.

226 Section 30 of the Prisons Act

(2) Every such prisoner, shall be confined in a cell apart from all other prisoners, and shall be placed by day and by night under charge of a guard.

> (Shorter Oxford English Dictionary). All that it connotes is that in a cell where there are a plurality of inmates the death sentences will have to be kept separated from the rest in the same cell but not too close to the others. And this separation can be effectively achieved because the condemned prisoner will be placed under the charge of a guard by day and by night. The guard will thus stand in between the several inmates and the condemned prisoner. Such a meaning preserves the disciplinary purpose and avoids punitive harshness. Viewed functionally, the separation is authorised, not obligated. That is to say, if discipline needs it the authority shall be entitled to and the prisoner shall be liable to separate keeping within the same cell as explained above. "Shall" means, in this disciplinary context, "shall be liable to". If the condemned prisoner is docile and needs the attention of fellow prisoners nothing forbids the jailor from giving him that facility.

b) custody, detention and arrest

In the case of *Sundeep Kumar Bafna* the comparative meaning of custody, detention and arrest were given. The court after detailed discussion observed that "custody, detention and arrest are sequentially cognate concepts." The difference lies in the 'degree of infringement of physical liberty'. It observed:[227]

> On the occurrence of a crime, the police is likely to carry out the investigative interrogation of a person, in the course of which the liberty of that individual is not impaired, suspects are then preferred by the police to undergo **custodial** interrogation during which their liberty is impeded and encroached upon. If grave suspicion against a suspect emerges, he may be **detained** in which event his liberty is seriously impaired. Where the investigative agency is of the opinion that the detainee or person in custody is guilty of the commission of a crime, he is charged of it and thereupon **arrested**.

The court extracted from *Directorate of Enforcement* v *Deepak Mahajan*:[228]

> ...both the words 'custody' and 'arrest' are not synonymous terms. Though 'custody' may amount to an arrest in certain circumstances but not under all circumstances. *If these two terms are interpreted as synonymous, it is nothing but an ultra legalist interpretation which if under all circumstances accepted and adopted, would lead to a startling anomaly resulting in serious consequences.* [Emphasis Added]

This is more important because section 439 does not use the word arrest but custody. When a person is present before a court, he is deemed to be in custody of

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227 *Sundeep Kumar Bafna,* para 12.

228 (1994) 3 SCC 440, para 49.

the court. The court in *Sundeep Kumar Bafna* traced the authority for this proposition in *Deepak Mahajan* which is as under:[229]

> While interpreting the expression 'in custody' within the meaning of Section 439 CrPC, Krishna Iyer, J. speaking for the Bench in *Niranjan Singh* v. *Prabhakar Rajaram Kharote*[230] observed that:
>
> He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the court and submits to its directions.

c) Mother tongue and occupation

The meaning has been interpreted by a constitutional bench in *State of Karnataka* v *Associated Management of Primary & Secondary Schools*, which has been discussed previsnaly. [231]

d) Trial

A constitution bench in the case of *Hardeep Singh*[232] after detailed discussion reiterates following meaning of trial:[233]

> In view of the above, the law can be summarised to the effect that as 'trial' means determination of issues adjudging the guilt or the innocence of a person, the person has to be aware of what is the case against him and it is only at the stage of framing of the charges that the court informs him of the same, the 'trial' commences only on charges being framed. Thus, we do not approve the view taken by the courts that in a criminal case, trial commences on cognizance being taken.

e) Inquiry- The case as discussed above also compared trial and inquiry as under:[234]

> 36. Section 2(g) Cr.P.C. and the case laws referred to above, therefore, clearly envisage inquiry before the actual commencement of the trial, and is an act conducted under Cr.P.C. by the Magistrate or the court. The word 'inquiry' is, therefore, not any inquiry relating to the investigation of the case by the investigating agency but is an inquiry after the case is brought to the notice of the court on the

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229 *Supra* note 227.

230 (1980) 2 SCC 559, para 9.

231 (2014) 9 SCC 485, *supra* note 154. Detailed discussion may be found under head 'monther tonge' under purposive interpretation.

232 *Hardeep Singh*, *supra* note 25.

233 *Id.*, para 35.

234 *Id.*, para 36.

> filing of the charge-sheet. The court can thereafter proceed to make inquiries and it is for this reason that an inquiry has been given to mean something other than the actual trial.

f) Course

The constitution bench in *Hardeep Singh* also deliberated on the word 'course' as under: [235]

> The word "course" ordinarily conveys a meaning of a continuous progress from one point to the next in time and conveys the idea of a period of time; duration and not a fixed point of time.[236] In a somewhat similar manner, it has been attributed to word "course" the meaning of being a gradual and continuous flow advanced by journey or passage from one place to another with reference to period of time when the movement is in progress.[237]

Giving legal meaning to the word 'course' the court observed:[238]

> Even the word "course" occurring in Section 319 Cr.P.C., clearly indicates that the power can be exercised only during the period when the inquiry has been commenced and is going on or the trial which has commenced and is going on. It covers the entire wide range of the process of the pre-trial and the trial stage. The word "course" therefore, allows the court to invoke this power to proceed against any person from the initial stage of inquiry upto the stage of the conclusion of the trial. The court does not become functus officio even if cognizance is taken so far as it is looking into the material qua any other person who is not an accused.

VII CONCLUDING REMARKS

In the year 2014 the constitution bench decided sixteen cases all of them are not significant for the purpose of this survey.[239] The first constitutional bench judgement is *Hardeep Singh*[239A] which deals with competing principle of

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235 *Id.,* para 37-38.

236 *Commissioner of Income-tax, New Delhi (Now Rajasthan) v. M/s. East West Import & Export (P) Ltd. (Now known as Asian Distributors Ltd.) Jaipur,* AIR 1989 SC 836.

237 *State of Travancore-Cochin & Ors*. v. *Shanmugha Vilas Cashewnut Factory, Quilon*, AIR 1953 SC 333.

238 *Hardeep Singh,* para 37.

239 Out of sixteen constitutional bench cases (2014) seven have been analysed and commented upon. Though this survey has gone through all sixteen constitutional bench cases, all have not been considered here either because they do not cover important principles of interpretation or substantial part deals with other topics like taxation, contract etc which is being surveyed by other learned authors in this survey.

239A (2014) 3 SCC 92.

presumption in criminal jurisprudence. It declares that like presumption of innocence, presumption of guilt 'is also a part of fair trial.' It will provide legitimacy and moral force to all stake holders of the criminal justice administration machinery. At the same time it imposes additional burden that the provision regarding presumption of guilt is not misused consciously or even negligently. The judgement interprets section 319 of CrPC 1973. Next important decision is *Dr. Subramanian Swamy* [240] which reiterates the *presumption of constitutionality of an enactment*, and observes that *a clear transgression of constitutional principles must be shown*. The judgement declared section 6A of Delhi Special Police Establishment Act, 1946 (DSPEA) as unconstitutional. Third case of significance is constitutional bench judgement of *Pramati Educational & Cultural Trust* ® [241] where one of the issue was whether there is any conflict between art Article 19(1)(g), Article 30(1) *vis a vis* 21A. The judgement resorted to the rule of harmonious construction to resolve the controversy. Basic structure theory is one most powerful tool of constitutional interpretation which may render a constitutional provision unconstitutional. The court declined to use this tool and held that the Constitution (Ninety-third Amendment) Act, 2005 inserting clause (5) of Article 15 and the Constitution (Eighty-Sixth Amendment) Act, 2002 inserting Article 21A do not alter the basic structure or framework of the Constitution and are constitutionally valid. RTE Act 2009 is held not ultra vires Article 19(1)(g) of the Constitution though 2009 Act insofar as it applies to minority schools, aided or unaided, covered under clause (1) of Article 30 of the constitution is *ultra vires* the Constitution. Another case on education examines whether the right to freedom of speech and expression be interpreted so as to include the right to choose the medium of instruction, the constitutional bench in the case of *State of Karnataka* v *Associated Management of Primary & Secondary Schools*,[242] answered in affirmative. The court held that Article 350A cannot be interpreted in violation of fundamental right under Article 30(1). *Manoj Narula* [242A] was a failed attempt to check the menace of criminalisation of politics where it was argued before the constitutional bench that it should read into the requirement of "ministers with no criminal background" under art 75(1). The court also rejected the argument of *purposive interpretation*, doctrine of implied limitation and principle of constitutional silence. In *Mohd. Arif @ Ashfaq* [243] the majority was consistent in liberally interpreting art 21 and held that necessity of oral hearing in review petition of death sentence cases is an integral part of "procedure established by law." In *Rohhas Bhankher* v. UoI [243A] the constitution bench held *S. Vinod Kumar* (1996) 6 SCC 580 per incurim for not considering article 16 (4) 77th amendment 1995.

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240 (2014) 8 SCC 682.

241 (2014) 8 SCC 1.

242 (2014) 9 SCC 485.

242A (2014) 9 SCC 1.

243 (2014) 9 SCC 737.

243A (2014) 8 SCC 872.

Among other cases (either three judges bench or two judges bench) *National Legal Services Authority* [244] uses Yogyakarta Principles, International precedents, international conventions as strong (and binding tools) of interpretation with 'two divergent interpretations of the Kant" to recognise Trans Genders(TG) as 'third gender' in law. *Charu Khurana* v *Union of India* [245] acknowledges again that interpretative process of this Court has elevated the status of part IV and IVA of the constitution of India. *Shatrughan Chauhan*,[245A] revisits the grounds on which death sentence can be commuted to life imprisonment. It makes a subtle difference between judicial review cases and fundamental rights cases. In judicial review the procedure followed is questioned not the decision reached while in fundamental rights cases both are questioned. *Ajay Kumar Pal* [245B] declares that less than four year delay in mercy petition can be interpreted as inordinate delay and also highlights how a previous interpretation of expression "under sentence of death" made in *Sunil Batra* in 1978 remained overlooked or misinterpreted by jail executives. In death sentence jurisprudence the confusion in the 'crime test', 'criminal test' and 'rarest of the rare test' has been addressed in *Mofil Khan* [246] *Sundeep Kumar Bafna* [246A] adds another dimension of personal liberty by revealing that under section 439 of Cr PC 1973, the higher courts are not barred to grant bail even if the accused is not arrested or detained. His presence is deemed custody as required by section 439. An absconder can ask for regular bail from higher courts without surrendering before concerned magistrate court. There are chances that "in this manner absconding accused in several sensitive cases, affecting the security of the nation or the economy of the country, would take advantage of such an *interpretation* of law and get away from the clutches of the investigating officer." If the government feels this would create serious difficulties in investigation of crimes, it should bring amendments in Cr PC 1973 in the parliament because "any infraction or inroad to the freedom of an individual is possible only by some clear unequivocal and unambiguous procedure known to law." The direction in *Arnesh Kumar* [247] has come as great relief to persons accused of 498A etc. It has reduced the discretionary power of police and magistrate. It has also checked the menace of corrupt practices by police and magistrates. The rush for "arrest stay" in UP, anticipatory bail in other States has been checked. The ambulance chasing lawyers and a few fanatic feminists (those who still believe that abuse of 498A etc is just marginal) may be/are disappointed but the direction is in line of art 21. The survey also indicates in the case of *Kirpal Singh*[248] that in case of a beneficial provision

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244 (2014) 5 SCC 438.

245 2014 Indlaw SC 781, 2014(1) SCALE 701,

245A 2014 (1) SCALE 437.

245B (2015) 2 SCC 478.

246 (2015) 1 SCC 67.

246A AIR 2014 SC 1745.

247 (2014) 8 SCC 273.

248 (2014) 5 SCC 189.

like retirement and pension "means" can be interpreted as not exhaustive or restricted *la Opala R.G. Ltd* [249] is an illustration of possibility of both strict as well as liberal interpretation of same provision. In 2012 survey it was found that a few cases have been referred for bigger bench because of inconsistency of opinion among judges.[250] These cases are still pending. The survey of 2014 shows that during interpretative process most of the rules of thumb have been discussed. It is neither possible nor desirable to stick to one rule of interpretation if the situation so demands, because purpose of judicial adjudication is to provide justice. In the 2012 survey it was suggested that like many countries[251] India should also codify the rules of interpretation. This brings clarity and certainty to a considerable extent. Though India has a General Clauses Act 1897 and various statutes do contain definition (or interpretation) part in themselves, it is desirable that a distinct comprehensive enactment on interpretation be considered. This task can be given to the Law Commission of India or the Commission may take notice of this itself.

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249 (2014) 15 SCC 136.

250 *M/S Delhi Airtech Services Private Ltd* v *State of U.P.* AIR 2012 SC 573 and *Ritesh Sinha* v. *The State of Uttar Pradesh*, AIR 2013 SC 1132, (2013) 2 SCC 357. Both are yet to reach finality.

251 Interpretation Act 1901 of Australia, The Interpretation Act 1978 of the United Kingdom, Interpretation Act 1985 of Canada, 252 Interpretation Act 1987 of New South Wales, 253 Interpretation Act 2005 for Republic of Ireland,