CHAPTER VIII

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A. INTRODUCTION

The Act also provides for the Adjudication of industrial disputes. The Adjudicatory Bodies contemplated under the Act are: the Labour Courts, Industrial Tribunals and National Tribunals. Before we examine whether these Adjudicatory bodies have succeeded in promoting the primary statutory objective, namely, cheap, speedy and expeditious remedy to the disputants, especially, the labour, it is necessary to address the questions whether Reference of Industrial Disputes by the appropriate Government, that is, either the State Government or the Central Government, in the exercise of its powers under section 10 (1) can be labeled or branded as “Compulsory Adjudication” and, secondly, whether one can entertain the argument that the Government has merely demonstrated its lip sympathy for Collective Bargaining since the enacted provisions providing for Adjudication of industrial disputes have cut at the roots of Collective Bargaining. Before we examine the above questions, it may be appropriate to notice that the Trade Disputes Act, 1929 had not provided for Adjudication of industrial disputes by Tribunals on a reference
made by the Appropriate Government. The 1929 Act, which to a great extent emulated the *British Industrial Courts Act*, 1919, provided for reference of disputes to Courts of Inquiry or Boards of Conciliation but did not provide for the establishment of Adjudicatory bodies for resolving industrial disputes. Again, taking cue from the *British Trade Disputes and Trade Unions Act* of 1927, our 1929 Act forbid lightening strikes in Public Utility Services threatening the violators with fine and imprisonment and sought to prevent general strikes.

Provisions relating to Adjudication of industrial disputes entered the Statute Book during the Second World War through the *Defence of India Rule 81A* which aimed at speedy resolution of industrial disputes “by compulsory reference of such disputes to conciliation or adjudication”. Further, the awards of adjudicators were made legally binding and enforceable.¹ Also, the Rule, *inter alia*, forbid strikes and lockouts during the pendency of Conciliation or Adjudication proceedings and until the specified period expired after the conclusion of the proceedings. The Rule was to lapse on the 1st of October, 1946 but the Government of India kept it alive by having recourse to its Emergency Powers.² When the *Industrial

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¹. Giri, V.V. *Industrial Relations* 9 (First ed. 1955).
Disputes Act was enacted, the substantive provisions in the Defence of India
Rule relating to reference of industrial disputes to Adjudication were
retained. V.V.Giri, therefore, argues that [through] the Industrial Disputes
Act, 1947, compulsory methods of settlement of trade disputes was
inaugurated by way of legislation while in the U.S.A. and the U.K.
Compulsory Arbitration was withdrawn and the voluntary method of
Collective Bargaining and collective agreements and Voluntary
Conciliation were not only retained but encouraged.3 According to Giri,
“Collective Bargaining”, a system where the employer and the
representatives of the trade union would negotiate over the terms and
conditions of employment and endeavour to arrive at an agreement in a
spirit of “give and take”, would be an eminently better method to thrash out
the differences and iron out disputes that may inevitably arise in an
industrial environment. He argues that “[t]he spirit of self-confidence and
self-reliance engendered by healthy bargaining has given place to the habit
of importunity and litigation”.4 While contending that “internal settlement”
should “be preferred to compulsion from outside” and that collective
bargaining and voluntary arbitration be provided the necessary stimulus

3. Ibid.
4. Id., at 11.
instead of compulsory arbitration, V.V. Giri has observed that compulsory arbitration creates a feeling of the “victor” and the “vanquished” and the erstwhile disputants would reenter their industry not in a cheerful, cooperative and accommodative mood but “in a sullen and resentful mood towards each other”. V.V. Giri further posits that the compulsory method for resolving disputes that have arisen “may be inevitable during war or in times of emergency, but is inappropriate in peace as drugging is in health”. Further, the discretionary power which the Act confers upon the Appropriate Government to make a reference to one of the Adjudicatory bodies under section 10 may also prompt the disgruntled that there is scope for abuse or misuse of the said discretionary power and that the Government in power may exercise its referral power at the instance of trade unions that support it and may decline to make a reference of the dispute at the instance of unions which have been or are opposing its polices and programmes. The gist of the foregoing is that there is scope for arbitrariness and discrimination when the Appropriate Government has recourse to its discretionary power under section 10 (1) of the Act.

5. Ibid.
6. Ibid.
Let us now examine the above averments of V.V.Giri and also the opinion prevailing in certain quarters that the discretionary power vested in the Appropriate Government is susceptible to abuse.

First, it may be noted that V.V.Giri uses the phrases "Compulsory Reference" (Adjudication) and "Compulsory Arbitration" alternatively and from his expressions it appears to be obvious that the phrases are to be regarded as synonymous.

It has already been stated that only about 10 to 12% of the Indian Labour force is organised in sectors like Insurance, Banking, Textile, Jute and Transport Industries to mention a few. That is, in so far as the remaining 88 or 90% of the work-force is concerned, "internal settlement" through negotiations can only remain as a pipe dream. That the vast majority of this segment are illiterate or semi-literate, ignorant, suffer from abject poverty, are indebted and most of them belong to the unskilled category cannot be lost sight of. Therefore, to expect this segment to engage in Collective Bargaining and to arrive at collective agreements by adopting the policy of "Give and Take" would reflect inadequate appreciation of the stark realities. As Balraj Mehta has rightly observed: "[T]he vast majority of Indian workers are not organised well enough to
confront the employers in complete and unfettered collective bargaining and protect their rightful claims...".7

Even in organised sectors, inter-union rivalries are rampant. It was reported some years ago that in Heavy Engineering Corporation, a premier Public Sector Undertaking, which employed at one time around 30,000 workers, there were 27 trade unions functioning in the industry.

It has to be noted that in India the Movement for Political Independence and the Trade Union Movement acquired impetus almost simultaneously and the Trade Union Movement was initially led by political leaders like Lokmanya Tilak, Annie Besant, Mahatma Gandhi.8 As V.B. Karnik has observed Indian trade unions were born in politics and “will live and grow in politics”.9 Political domination of trade unions even in many of the organised sectors has been the bane of the Indian Trade Union Movement. The four major Trade Union Federations, namely, All India Trade Union Congress, Indian National Trade Union Congress, Bharatiya Mazdoor Sangh, Centre for Indian Trade Unions have always vied with


8. See Giri V.V., supra note 1 at 3.

each other to establish their bases in the industrial arena through trade unions sponsored by them despite the fact that numerous trade unions in a single industrial unit would render the bargaining process inefficacious. Thus, if a union owing its allegiance to All India Trade Union Congress has already been in existence in an industry, Indian Trade Union Congress would float a union there and the other major Federations, not to speak of mini-federations or the federations floated by the newly evolving regional parties, would not lag behind. Further, the provisions contained in "the archaic and moth-eaten" Trade Unions Act, 1926 which permit any seven or more persons employed in trade, business or industry to form trade unions is also a major cause for multiplicity of trade unions. Thus, inter-union and intra-union rivalries have been not only enervated the Trade Union Movement even in the organised sectors in India but also have severely affected the Collective Bargaining Process even in the organised sectors supposedly or apparently fit to engage in the negotiation process to hammer out collective agreements through "internal settlement".

Domination of trade unions by outside politicians masquerading as trade union Leaders has been criticized by scholars and veteran trade union leaders. Thus, for example, K.N.Subramanian has argued that it is these outside ((politician) elements that have been solely responsible for the "poor finances" of the Indian trade unions. He had observed way back in
1960s that outsiders should be absolutely banned from Trade Union Executive Committees so that internal leadership flourish. He had also argued that the question is not how many outsiders can be appointed on the Trade Union Executive, rather, whether there should be any outsiders at all.\textsuperscript{10}

G.Ramanujam, a well-known trade union leader, has lamented that “the Indian trade unions are leader-based and the leaders are based elsewhere”\textsuperscript{11}.

Further, a historical fact that prompted the Government to retain the substantive provisions relating to reference of industrial disputes to Adjudication, enforceability of the awards of adjudicators, prohibition of strikes and lockouts during the pendency of Conciliation and Adjudication proceedings embodied in Defence India Rule 81A, referred to above, should not be lost sight of. After the achievement of political independence, the Communists who were in control of a large number of trade unions had declared that mere political independence unaccompanied by economic independence and social justice would not mean anything to the toiling

\textsuperscript{10} Subramanian, K.N., \textit{Labour Management Relations in India} 187 (1967).

\textsuperscript{11} Ramanujam, G., \textit{The Honey Bee Towards A New Culture In Industrial Relations} 34 (3rd ed., 1985).
masses and that their struggle against the bourgeoisie should continue. The communists’ argument was that the white bourgeoisie had been, after Independence, replaced by the brown bourgeoisie and the struggle of the proletariat to establish an egalitarian order should not slacken.

Naturally, the Congress Party that came to power, later, was wary of the outbursts of the Communists. The country was to witness rapid industrialisation. The targets envisioned in the Five Year Plans to be launched had to be reached. Economic prosperity through industrialisation could not be achieved if the numerous industries to come up in the Public Sector and Private Sectors were to be plagued by internecine disputes culminating in strikes and lockouts. Industrial progress could be achieved through measures for averting strikes and lockouts, for reducing the incidence of industrial disputes and for their speedy resolution whenever they occurred. The Government’s inclination to retain provisions relating to Adjudication in the 1947 Act is also discernible in the following passage published way back in 1972 in the daily *The Indian Express*.

The Government’s legitimate reluctance to pave the way for the phenomenon of ‘high-wage islands’ in the midst of an ocean of sweated labour, the feeling that the trade union movement in India, because of the political affiliations of trade union leaders
has been noted for anything except working class unity and the fact that nothing has done more harm to the cause of workers in many enterprises than inter-union rivalries.\textsuperscript{12}

In order to be fair and objective in our analysis, we should acknowledge that V.V.Giri has, indeed, asserted that for developing “a sufficiently comprehensive and efficient system of industrial relations” the \textit{sine qua non} is “the existence of associations of employers and workers, strong and free from undue interference and \textit{capable of concluding collective agreements} for the regulation of wages and conditions of work”\textsuperscript{13}.

As already stated, Indian trade unions suffer from various constraints like poor finances, low membership, lack of trade union consciousness and, more importantly, the vast majority of members in trade unions, even in organised sectors, are unaware of the indisputable fact that the basic tenets of trade unionism, to wit, freedom from exploitation, right against discrimination, right to work, right to a living wage, right to social security benefits and just and humane conditions of work, to mention only a few, do synchronise with most of the Directive Principles of State Policy enshrined in Part \textit{IV} of the Indian Constitution. These Directive Principles have been

\textsuperscript{12} “Trade Union Unity”, \textit{Indian Express} (Bangalore edn.), 5\textsuperscript{th} October 1972. \textit{Quoted} in S.S.Visweswaraih, supra note 7 at 68.

\textsuperscript{13} Giri, V.V., \textit{supra} note 1 at 4.
declared as one of the essential or fundamental features of the Indian Constitution in *Keshavananda Bharathi*\(^{14}\) and reiterated and re-enforced by the Indian Supreme Court in *Minerva Mills*.\(^{15}\)

Further, there is no Central Law which mandates that the most representative union in an industrial unit be recognised by the employer for the purposes of collective bargaining. It has to be mentioned here that the Trade Union Federations embracing different ideologies have not arrived at a consensus over the elementary issue, that is, what should be the method to be adopted to determine the representative character of a trade union in an industry where numerous or many trade unions are functioning. While the Leftist Federations, like, All India Trade Union Congress and Centre for Indian Trade Unions demand that "Secret Ballot" should be the method to be employed to determine the representative or majority character of a trade union, Indian National Trade Union Congress has repeatedly maintained that it is the "Verification of Fee Paying Membership" that would serve as a more desirable method for the determination of the representative character.

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\(^{15}\) *Minerva Mills Ltd v. Union of India*, A.I.R. 1980 S.C. 1789, Chandrachud C.J. delivered majority judgment on behalf of himself and Gupta, Untawalia and Kailasam, JJ.
Furthermore, there are no explicit statutory dictates either in the Central Law or in a majority of the State-enacted Trade Union Laws – to the effect that only “Independent” trade unions should be accorded Recognition or that such trade unions should enjoy the ‘Right to Information for the purposes of Collective Bargaining’ or that their members are entitled to “Time-off” when they have to engage in work aimed at promoting harmonious industrial relations.

Reviewing the whole situation prevailing in the area of Labour-Management Relations, the National Commission on Labour has cautioned that the dismantling of the Adjudicatory system under the Act would be an unwise step. The Commission, while advocating that there should be a gradual shift from Adjudication to Collective Bargaining, has underlined that in a developing economy, especially, when a huge section of labour remains unorganized, “the State has a special interest in the methods chosen by the parties for regulation of their mutual relations”. As is well known, Collective Bargaining would not be meaningful and efficacious unless a strong, representative union recognised by the employer takes part in the negotiation process and enjoys the right to resort to industrial action, that is strike, to prevail upon an intransigent employer to come to the Bargaining

Table or to induce him to accept its fair and justifiable demands. The plausible work-stoppages and the grave economic consequences cannot be ignored or brushed away. As the National Commission has rightly pointed out, “the State’s anxiety” as regards the possible work-stoppages are attributable to the hardships and the inconveniences the members of the community would be exposed to on account of the interruption in the production and supply of essential goods or the unavailability of essential services and “the social costs” the disputants would have to bear owing to loss of wages, profits, etc.¹⁷

It can be argued that under the Act the disputants have the necessary opportunity to arrive at a settlement either through mutual negotiations or with the aided assistance of the Conciliation Machinery or to have recourse to Voluntary Arbitration before the Appropriate Government concerned about work-stoppages determines in its discretion to make a reference of the dispute to one of the Adjudicatory authorities under the Act. Therefore, provision for Adjudication cannot be regarded as excluding either mutual negotiations leading to settlement or Voluntary Arbitration at the instance of the disputants.¹⁸ The National Commission on Labour while

¹⁷ Ibid.
¹⁸ See, supra note 16 at 325. (The system of Adjudication under the Industrial Disputes Act, 1947 “does not exclude bipartite agreements”.)
acknowledging, *inter alia*, that there are procedural deficiencies in the adjudicatory system and recommending that the same be remedied has observed:

The adjudication machinery has exercised considerable influence on several aspects of conditions of work and labour management relations. Adjudication has been one of the instruments for improvement of wages and working conditions and for securing allowances for maintaining real wages, for standardisation of wages, bonus and introducing in benefits and amenities. It has also helped to avert many work stoppages by providing an acceptable alternative to direct action and to protect and promote the interests of the weaker sections of the working class, who were not well-organised or were unable to bargain on an equal footing with the employer....

The Five Year Plans being pursued by the Government and the desire to reach the targets envisaged therein, the preambular precepts of Social Justice and the dictates of many of the Directive Principles of State Policy enshrined in the Constitution do make it imperative for the Government to regulate labour-management relations. Therefore, State regulation and collective bargaining “have to co-exist”. While cautioning that the dismantling of the adjudicatory machinery with a view to provide the

19. *Supra* note 16 at p.325.
necessary fillip for collective bargaining would be imprudent, the Commission has observed: "There is a case for shift in emphasis and the shift will have to be in the direction of an increasingly greater scope for, and reliance on, collective bargaining. But, any sudden change replacing adjudication by a system of collective bargaining would neither be called for nor practicable". 20

The foregoing arguments no doubt plead for the retention of the adjudicatory system envisaged in the Act for the resolution of industrial disputes which remain unresolved either as a consequence of "no negotiations", dead-lock in the bargaining process or failure report submitted by the Conciliation machineries or the disputants' unwillingness to have recourse to the system of Voluntary Arbitration. It is however submitted that the Collective Bargaining Process which promotes industrial democracy can never be denounced and until conditions conducive to promote Collective Bargaining like, for example, encouraging the development of trade unions independent of employers and political parties ("Independent Trade Unions"), Right to Information for the purposes of Collective Bargaining, Right to Recognition are established, the Adjudicatory Machinery erected under the Act should not be dismantled.

20. Supra note 16 at 327.
At the same time, measures to infuse confidence in the disputants in the Adjudicatory Machinery and to make it more efficient and effective need be incorporated in the Act.

We may now turn to the Adjudicatory mechanisms which the Act contemplates.

B. ADJUDICATORY AUTHORITIES UNDER THE ACT

For the purposes of Adjudication of industrial disputes the Act provides for the constitution of Labour Courts, Industrial Tribunals and National Tribunals. The Labour Courts and the Industrial Tribunals can be constituted by either the State Governments or the Central Government. However, the power to constitute a National Tribunal is vested in the Central Government only. The Central Government is empowered to constitute a National Tribunal when in its opinion the dispute to be adjudicated upon involves a question of national importance or the dispute is of such a nature that "industrial establishments that are situated in more than one State are likely to be interested in or affected by such disputes". Each of these Adjudicatory bodies shall be manned by one person only who

21. Ss.7, 7A.
22. Ss.7B, 10 (1-A).
is designated as the Presiding Officer. These Presiding Officers can avail of the technical expertise or special knowledge of assessors appointed by the Appropriate Government while adjudicating over the controversies referred to them.

The Act has prescribed the qualifications for appointment of Presiding Officers for Labour Courts, Industrial Tribunals and National Tribunals and also has notified the circumstances under which a person would stand disqualified for appointment. Thus, the Act injuncts that the Appropriate Government shall not appoint a person as the Presiding Officer of the Adjudicatory body who is not “an independent person” or who has already attained the age of 65 years.

A scrutiny of sections 7, 7A and 7B indicates that the Appropriate Government has greater choice when it has to appoint a Presiding Officer for a Labour Court and the choice gets narrowed down when the appointment of a Presiding Officer for an Industrial Tribunal has to be made and the choice is most restricted in the realm of the Act when the Central Government has to appoint a Presiding Officer for a National

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23. Ss.7 (2), 7A (2), 7B ((2).


25. S.7C.
Tribunal since only a person who is or who has been a Judge of a High Court can alone be appointed as the Presiding Officer of a National Tribunal. As regards appointments of Presiding Officers of Industrial Tribunals, the Appropriate Government can choose between a High Court Judge or District Judge or Additional District Judge of at least three years standing. In the case of appointments of Presiding Officers for Labour Courts the Appropriate Government can make its choice from among the following:

- High Court Judge (in office or retired);
- District Judge or Additional District Judge of at least three years standing;
- A person who has held judicial office for not less than seven years;
- A Presiding Officer of a Labour Court constituted under any Provincial Act or State Act with not less than five years of experience. 26

At this juncture, we may refer briefly to the disqualifications the Act specifies under section 7-C. As already stated, the person to be appointed as a Presiding Officer of any Adjudicatory authority must be an "independent person" and must not be more than 65 years of age. As

26. S.7 (3) (a), (b), (c), (d).
regards the second inhibition under the Act relating to the age requirement, there cannot be any scope for controversy since a person to be appointed as a Presiding Officer, despite his possessing the qualifications prescribed under Sections 7, 7A or 7B would still be ineligible for appointment in case he has already attained the age of 65 years or would become ineligible if, at the time of appointment, he has not reached the age of 65 years but attains the age while still in office. That is, if a person with the necessary qualifications is appointed as a Presiding Officer before the age of 65 attains that age while still in office then he forfeits the right to continue as a Presiding Officer and, consequently, cannot discharge Adjudicatory functions. Such a person who reaches the age of 65 after being appointed as a Presiding Officer should lay down his office as per the statutory injunction or the Appropriate Government which has appointed him should dispense with his services and debar him from acting as a Presiding Officer consequent upon his reaching the age of 65. Otherwise, a writ of quo warranto does lie to oust the Presiding Officer who has attained the age of 65 out of his Office.

The other disqualification, a more important one, is that a person who is not “an independent person” cannot be appointed as a Presiding Officer of any of the Adjudicatory body although he has not attained the age of 65 years and in spite of the fact that he possesses the qualifications prescribed
under sections 7, 7A or 7B. The requirement that a person to be appointed as a Presiding Officer should be "an independent person" brooks no argument since only an impartial, unprejudiced, unbiased Tribunal alone can alone inspire confidence in the disputants. Impartiality may be discernible when the Adjudicatory authority does not suffer from Personal or Pecuniary bias and when the parties appearing before it are both accorded a fair opportunity to place their points of view relating to the controversy and when the same procedural norms are applied to parties to the dispute. It is in this light, one may appreciate the statutory requirement that only "an independent person" can be assigned the Adjudicatory role to decide the controversy referred to it.

Now, who is an "independent person"? Does the Act provide the definition for "independent person"? Or, should one construe "independent person" according to the ordinary grammatical meaning or accepted connotations? Of course, one who is biased, prejudiced, who is inclined towards either of the disputants, who has interest in the "award" or outcome of the dispute or who has an axe to grind or who is interested or involved in the subject-matter of the dispute he is called upon to decide cannot be regarded as "independent". Fortunately, the Act under section 2(i) seeks to provide the definition for "independent person". However, the definition is not a wholesome one as is going to be pointed out presently.
According to section 2(i)-

A person shall be deemed to be 'independent' for the purpose of his appointment as the Chairman ... of ... Tribunal, if he is unconnected with the industrial dispute referred to such ... Tribunal or with any industry directly affected by such dispute;

Provided that no person shall cease to be independent by reason only of the fact that he is a share-holder of an incorporated company which is connected with, or likely to be affected by, such industrial dispute; but in such a case, he shall disclose to the appropriate Government the nature and extent of the shares held by him in such company. [Emphasis mine].

The main clause of the definition, it is submitted, is unobjectionable despite the "deeming clause" that is roped in. However, it is the proviso that nullifies substantially the import of the main clause intended to infuse impartiality into the Adjudicatory process. It is well established that pecuniary bias, however, minimal or small would disqualify or bar a person from acting as an adjudicator.27 Therefore, the statutory declaration in the proviso that a person would not lose his "independence" or "independent character" just because he happens to be a shareholder in an incorporated company – an industry involved in or affected by an industrial dispute-once

27. Jain and Jain, *Principles of Administrative Law* 221 (4th edn., Reprint, 1993). *See also supra* Chapter IV, pp 82-84 for the criticism of the definition of 'independent' person.
he discloses to the Appropriate Government the nature and extent of shares held by him in such an industry is objectionable. Now, should this proviso be interpreted as laying down that a shareholder shall not cease to be independent even if he owns 50% or 60% of the shares in an industry- an incorporated company? When Courts have ruled that Pecuniary Bias, however small, shall be a serious disqualification, how can this proviso be allowed to remain on the Statute book? No doubt, the Statute obliges the shareholder to disclose to the Appropriate Government the extent of shares held by him and once the Appropriate Government comes to realise or learn that on account of the extent of shares held by a particular person it might not be prudent or fair to appoint him as a Presiding Officer of an Adjudicatory body. But the inherent potential the proviso has to sow the seeds of pecuniary bias cannot and should not be lost sight of. Such a provision would definitely not make any machinery, including the Adjudicatory machinery, an attractive one. It would not infuse or instill confidence in the parties. They would not ultimately feel that justice has been done. It is submitted that the proviso to the definition of 'independent person' under section 2(i) should be deleted at the earliest so that the disputants would be assured that there is not the probability, nay, even the possibility, of any person with any degree of pecuniary bias being appointed as an Adjudicator.
An other aspect that becomes predominant when one scrutinizes the qualifications prescribed for appointment as the Presiding Officer of an adjudicatory body is that the person being appointed must have been engaged in the discharge of judicial functions or must have held judicial office for the statutorily prescribed period. The legislative intent appears to be manifest. Thus, for example, a person who has not held the office of a District Judge or Additional District Judge or who has not functioned as a Presiding Officer of a Labour Court or who has not held any Judicial Office is ineligible for appointment. So, a person whose previous duties or functions cannot be brought within the realm of "Judicial functions" or which are not "even in the shadow of any judicial office" cannot be appointed as the Presiding Officer of a Labour Court or a Tribunal. Thus, in *State of Haryana v. Haryana Co-operative Transport Ltd.*, one Hansraj Gupta who had worked as a Head Clerk and then as a Registrar to the Pensions Appeal Tribunal was appointed as the Presiding Officer of a

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28. *Statesman (P) Ltd v. Deb*, A.I.R. 1968 S.C. 1495. Person to be appointed as the Presiding Officer of a Labour Court must have performed functions which are primarily of a judicial character; "Judicial Office" under section 7 (3) (d) means an office which is "primarily judicial". A person who has held the office of a magistrate for seven years is eligible for appointment as a Presiding Officer of a Labour Court.


Labour Court. The award delivered by the Labour Court ordering reinstatement of some dismissed transport workers with 50% of back wages was challenged on the ground that it was invalid and therefore unenforceable since rendered by a Tribunal which was improperly constituted and, consequently, was devoid of jurisdiction. The Apex Court, while affirming the judgement of the Punjab and Haryana High Court declared that Hansraj Gupta, as Registrar, had admittedly been discharging administrative functions and was “no where in the shadow of any judicial office at any time”. The Court made the significant pronouncement that “administrative proximity with judicial work cannot be regarded as an excuse good enough to elevate the administrator into a holder of judicial office”.

It should also be noted that in the above Case the Court’s attention was drawn to section 9(1) of the Act which declares, *inter alia*, that the “order of the Appropriate Government ... appointing any person ... as the presiding officer of a Labour Court, [or] Tribunal... shall [not] be called in question in any manner....” The Supreme Court, while conceding that

32. *Supra* note 29 at 239.
section 9(1) has been "drafted in wide and general terms" ruled that section 9(1) cannot be interpreted as ousting the jurisdiction of the High Courts under Articles 226 and 227 of the Constitution and that the "rights [under] Articles 226 or 227 can be abridged or taken away only by [a] Constitutional amendment and they cannot be whittled down by a statutory provision like the one contained in section 9(1).\footnote{Ibid.}

In the light of the foregoing, the legislative declaration under subsection 2 of section 17 that the award of the Labour Court or Tribunal, when published, "shall be final and shall not be called in question by any Court in any manner...." stands denuded and such an award, if it has been rendered by a Tribunal which is improperly constituted or by a properly constituted Tribunal which has acted in excess of its jurisdiction or which has not observed the Principles of Natural Justice, is amenable to judicial review under Article 226 of the Constitution.

The matters over which the Labour Courts and Tribunals can exercise their jurisdiction are also discernible from the relevant statutory provisions and the items enumerated in Schedules II and III appended to the Act.\footnote{See Provisos to cl (d) of 10 (1).}
Incidentally, it may be noted that the Industrial Tribunals under the Act seem to enjoy a wider jurisdiction than the Labour Courts. This conclusion can be drawn by referring to sections 7 and 7A. While Section 7A declares that Labour Courts can adjudicate upon industrial disputes which relate to any matter specified in the Second Schedule and perform such other functions that may be assigned to them, the Industrial Tribunals are empowered to adjudicate over matters listed out in the Second and Third Schedules.\textsuperscript{37} It must, however, be noted that it is competent for the Appropriate Government to refer an industrial dispute relating to a matter specified in the Third Schedule to a Labour Court when such a dispute does not affect more than one hundred workmen.\textsuperscript{38}

The other functions which the Labour Courts and Industrial Tribunals may be required to perform are, by way of examples, the following:

i) An industrial dispute referred, voluntarily, by the parties.\textsuperscript{39}

ii) An industrial dispute referred by the disputants, voluntarily, to Arbitration.\textsuperscript{40}

\textsuperscript{37} S.7A (1).

\textsuperscript{38} Proviso to cl (d) of sub-section (1) of S.10.

\textsuperscript{39} S.10 (2).

\textsuperscript{40} S.10 A.
Under the Act, the parties can appoint the Presiding Officer of a Labour Court, Industrial Tribunal or National Tribunal as an Arbitrator provided his consent has been obtained.\(^\text{41}\)

iii) Reference by the Appropriate Government to a Labour Court or Industrial Tribunal over the question whether the period of operation of an award should be shortened because of a material change in the circumstances on which the award was based.\(^\text{42}\)

iv) The Appropriate Government’s permission or denial to lay-off workmen can be the subject-matter of adjudication by the Industrial Tribunal either at the instance of the employer or workmen or on a \textit{suo moto} reference by the Appropriate Government itself.\(^\text{43}\)

v) Review of the Appropriate Government’s Order granting permission or denial to retrench workmen.\(^\text{44}\)

vi) Question as to the amount of money due to a workman or as to the amount at which the benefit a workmen is entitled to has to be computed can be referred to the Labour Court. \(^\text{45}\)

\(^{41}\) S.10 A(1).

\(^{42}\) S.19 (4).

\(^{43}\) S.25 M (7).

\(^{44}\) S.25 N (6).

\(^{45}\) S.33 C.
vii) Question as to how particular award or settlement has to be interpreted can be referred to a Labour Court, Industrial Tribunal or National Tribunal.46

Before we examine the provisions relating to the Appropriate Government’s power to refer disputes to Adjudication and also the more important questions whether these Adjudicatory bodies have to be revamped, whether the procedural format need be changed to meet the expectations and the aspirations of the disputants, whether there is warrant for introducing some amendments to make the Adjudicatory machinery more purposive and effective, we may note, briefly, the powers, functions of and the procedures to be followed by these Adjudicatory bodies.

These Adjudicatory bodies are manned by a single person, as already pointed out, known as the Presiding Officer.

The Presiding Officers are deemed to be “Public Servants” within the meaning of section 21 of the Indian Penal Code.47

The Adjudicatory bodies can, inter alia, enforce the attendance of any person and examine him on oath, compel production of documents and material objects and issue commissio for the examination of witnesses and

46. S.36 A.
47. S.11 (6).
every inquiry or investigation by these Adjudicatory bodies shall be deemed to be judicial proceedings under the relevant provisions of the Indian Penal Code.\textsuperscript{48}

The facts, that these bodies have to adjudicate over industrial disputes ("lis inter-parties"), in the light of the arguments advanced before them, evidence adduced, their determinations ("awards") create rights and impose obligations and any breach of their awards entail penalties under the Act, establish that the functions they perform simulate Judicial functions. They are, therefore, quasi-judicial bodies. They are, however, not courts \textit{stricto sensu} despite the fact that they have all the trappings of the ordinary courts of law.\textsuperscript{49}

In \textit{Bharat Bank Ltd.},\textsuperscript{50} the Government of India and the employees' union contended that the appellate jurisdiction of the Supreme Court would not be invocable against the award of the Industrial Tribunal since the Tribunal could not be said to be exercising judicial functions, its determination, that is, "award", was not in the nature of a judgement, decree, sentence or order of a court and also because its award unless

\begin{itemize}
\item \textsuperscript{48} S.11 (3).
\item \textsuperscript{49} \textit{Bharat Bank Ltd., v. Bharat Bank Employees Union}, A.I.R. 1950 S.C. 188, 189. (\textit{per} Kania, C.J.), \textit{id.}, at 190 (\textit{per} Fazl Ali, J.)
\item \textsuperscript{50} \textit{Id.}, at 188, 191, 192.
\end{itemize}
approved and published by the Appropriate Government would be inchoate, that is, dead and ineffective.

The Supreme Court rejected the above contention and ruled that the award of the Tribunal is appealable under Article 136 of the Constitution. The reasons given by the Apex Court are:

i) The functions and duties of an Industrial Tribunal are very much like a body discharging judicial functions although it is not a court in the technical sense of the word.\(^{51}\)

ii) The award of the Tribunal can confer rights and privileges or impose obligations on either parties.\(^{52}\)

iii) The fact that the award of the Tribunal can be rejected or modified by the appropriate Government or that it would become enforceable only after the appropriate Government publishes the same, will not alter the Tribunal’s nature and character.\(^{53}\)

iv) The Industrial Tribunal has all the trappings of the Court and performs functions which cannot but be regarded as judicial.\(^{54}\)

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\(^{51}\) \textit{Id.}, at 189.

\(^{52}\) \textit{Id.}, at 197.

\(^{53}\) \textit{Id.}, at 198.

\(^{54}\) \textit{Id.}, at 190.
v) An appeal does lie in appropriate circumstances to the Supreme Court under article 136 of the Constitution against the award of the tribunal.55

The Labour Courts, Industrial Tribunals, National Tribunals are the creatures of the statute and can exercise only such powers as are conferred upon them under the law.

These Adjudicatory bodies shall conduct their proceedings expeditiously and shall submit their awards within the period stipulated in the order of reference.56

These bodies have procedural laxity. While they are not bound by the rigid rules of the Civil Procedure Code or the Evidence Act, they should, no doubt Act fairly and reasonably.

They should adjudicate on points referred to them in the order of reference and matters which are incidental to such matters.57 Thus, when the reference relates to a demand for a rise in wages, the questions, whether the activity is an 'industry' as defined under section 2(j), or the dispute an 'industrial dispute' under section 2(k), or the persons raising the dispute are

55. Id., at 191.
56. S.10 (2-A).
57. S.20 (4).
workmen under section 2(s), to cite a few illustrations, are "incidental" to the main question in the reference and, are also, incidentally, jurisdictional or collateral questions.

Further, when a dispute relating to a payment of Gratuity or Overtime Allowance is referred to Adjudication, the Gratuity or Overtime Allowance Schemes which the adjudicatory body lays out in its award are also to be regarded as matters incidental to the main question contained in the order of reference.

The Act, under section 36(4), permits parties to the dispute to enlist the services of lawyers in proceedings before the Labour Court, Industrial Tribunal or National Tribunal. It has to be, however, noted the Right to Counsel which can, in appropriate situation, be regarded as a component of Natural Justice is not the sort of right which section 36(4) speaks of. Under this section, a disputant can be allowed legal representation provided the other party consents and the adjudicatory authority permits. In practice, legal representation has been freely allowed. Because of the complexity of Labour Laws and the fact that a vast majority of the Indian working class are illiterate and ignorant, the restrictive conditions under section 36(4), referred to above, should be removed and Right to Counsel should be statutorily guaranteed in express terms so that conscientious Lawyers, well-
versed in Labour Laws, can protect the legitimate interests of the working
class.

C. APPROPRIATE GOVERNMENT'S POWER TO REFER
DISPUTES TO ADJUDICATION

In the realm of the *Industrial Disputes Act*, 1947, section 10 is also of
paramount significance. If the disputants are not able to arrive at a
"Settlement" or if they are disinclined to refer their dispute to an Arbitrator,
then, the "ultimate legal remedy for the ... unresolved dispute is its
reference to adjudication by the appropriate Government".58

Section 10 confers upon the Appropriate Government the
discretionary power to refer an existing or an apprehended industrial
dispute to, *inter alia*, one of the adjudicatory bodies. It has been argued
that the discretionary power conferred upon the Appropriate Government
may be exercised in a discriminatory fashion,59 that the Government may
succumb to political pressure while deciding whether a dispute should or
should not be referred to Adjudication. Here, the observations of the
*National Commission on Labour* appear to be appropriate and need be
quoted: "Discretion, though used by the appropriate Government in a fair

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59. *Id.*, at p.325, para 23-29.
manner may appear to the workers/employers affected to have been unfairly used; [A]llegations of political pressure, *though often without foundation*, have been there".60

Further, in the light of Ramanujam’s observation that “Indian Trade Unions are leader-based and leaders are based elsewhere”,61 it has to be noted that “professional labour leaders, politicians and political parties rarely let go an opportunity to initiate a quarrel or exploit a grievance for reasons which do not always stem from a genuine concern for the welfare of the workers” 62

Apart from the foregoing, it is now well established through the judicially evolved principles that the discretionary authority cannot exercise the discretion conferred for any illegitimate purpose, that the discretionary power should be exercised to promote the statutory objects and that a discretionary decision founded upon irrelevant factors or grounds would be judicially reviewable and quashable.63 Further, some of the post-1980 decisions rendered by the Apex Court do establish that the Appropriate

60. *Id.*, at p.327, para 23-36. [Emphasis supplied].

61. *Supra* note 11.


63. *Infra* foot notes 80 at p.348; 95 at p.356 for case law.
Government’s statutory discretionary power shall remain only on the statute book for the Court has not merely directed the Appropriate Government to reconsider its discretionary decision but has ordered it to make a reference to the adjudicatory authority.\textsuperscript{64}

We may now refer to section 10 to find out whether the Discretionary Power vested in the Appropriate Government is “constant” in the sense that it is always available to it or whether the Appropriate Government may stand deprived of it in certain situations and, also, whether, in the light of the post 1980 Decisions of the Supreme Court, the Appropriate Government stands deprived of the statutorily conferred Discretionary Power to refer or not to refer an industrial dispute to Adjudication.

Section 10 (1) reads as follows:

Where the appropriate Government is of opinion that any industrial dispute exists or is apprehended, it may at any time, by order in writing,

a) refer the dispute to a Board for promoting a settlement thereof; or

b) refer any matter appearing to be connected with, or relevant to the dispute, to a Court of inquiry; or

c) refer the dispute or any matter appearing to be connected with, or relevant to the dispute, if it relates to any matter specified in the Second Schedule, to a Labour Court for adjudication; or
d) refer the dispute or any matter appearing to be connected with or relevant to the dispute, whether it relates to any matter specified in the Second Schedule or the Third Schedule, to a Tribunal for adjudication:....

A close scrutiny of the above provisions indicates that the words of much import found in section 10 (1) are, “may” and “at any time”. We may examine the amplitude of the discretionary power the Appropriate Government enjoys, later. Also, the question whether the Appropriate Government can refer a dispute to adjudication after it has declined to make a reference earlier and whether the Appropriate Government can after declining to make a reference at the instance of either or both of the disputants refer the dispute after a long lapse of time. Initially, we may note that the Appropriate Government is competent to exercise its discretionary power to make a reference not only in situations where the difference between the parties over, say, Wages, Allowances, Bonus or Conditions of work has got concretised establishing an industrial dispute but also in situations where the industrial dispute has not manifested itself or surfaced but is imminent in the opinion of the Appropriate Government. That is why, probably, the legislature has empowered the Appropriate
Government to refer even the “apprehended disputes” to a Board of Conciliation, to a Court of Inquiry or to Adjudication. Since the above authorities have been mentioned in clauses (a) (b) and (c and d) of section 10(1) respectively, one after another, can it be argued that in the scheme of section 10 under the Act, the Appropriate Government is devoid of the power to make a reference to a Labour Court or Industrial Tribunal straight away and that it has to first make a reference to a Board for promoting a settlement, later to a Court of Inquiry to have the facts leading to the dispute unearthed and only then would it be able to exercise its referral power to have the dispute adjudicated upon. Or, can it be argued that the Appropriate Government in the exercise of its discretion can choose any one of the authorities referred to above? The proponents of the argument that the Appropriate Government can, under the Act, make a reference to adjudication only after it has, at least, referred the dispute to the Board of Conciliation may rely upon the following statutory provisions. Under section 12(5), the Appropriate Government after receiving the Failure Report from the Conciliation Officer on being satisfied that there is a case for reference may refer the dispute to a Board of Conciliation or to one of the adjudicatory bodies. However, if the Appropriate Government decides not to make a reference to any of the above mentioned authorities it has to record and furnish the reasons therefor to the disputants. Under section
13(4), the Appropriate Government, on receipt of the Failure Report from the Board of Conciliation in respect of a dispute relating to a Public Utility Service, decides not to make a reference to adjudication then it has to record and apprise the parties the reasons for not making a reference.

The foregoing provisions may apparently buttress the claim that the Appropriate Government cannot decide to refer a dispute to an adjudicatory body straight away. But, if the elementary cannon of statutory interpretation that a Statute has to be read as a whole is heeded then clause (c) of sub-section (2) of section 20 of the Act would knock the bottom out of the argument that reference to the adjudicatory machinery in the scheme of section 10 should be the last resort. Because, the clause just cited declares that a conciliation proceeding under the Act shall be deemed to have concluded when the Appropriate Government makes a reference to, inter alia, an adjudicatory body. Here, it has to be noted that the pendency of conciliation proceeding even before the Board of Conciliation after the Appropriate Government has made a reference to the same under section 10 is no bar against the Appropriate Government’s discretionary decision to refer the same dispute to adjudication. More importantly, the decision in
Niemla Textile Finishing Mills,\textsuperscript{65} unmistakeably establishes that the Appropriate Government, in its discretion, can decide about the authority to which it has to make a reference under section 10(1) to achieve the desired statutory ends, that is, avoidance of strife or industrial unrest interrupting industrial production, jeopardizing public peace or order. The Niemla Court has observed:

[D]ifferent authorities... are constituted under the Act ... with different ends in view ... The appropriate Government [can, in its discretion] to choose one or the other ... for the purpose of investigation and settlement of industrial disputes and whether it sets up one authority or the other for the achievement of the desired ends depends upon its appraisement of the situation as it obtains in a particular industry or establishment\textsuperscript{66}.

Referring to the authorities mentioned in clauses (a), (b) and (c) under section 10 (1) and answering the query whether all the steps contemplated in the manner indicated should be taken seriatim, the Supreme Court declared: "It is not necessary that these steps should be taken seriatim one after the other. Whether one or the other of the steps should be taken by


\textsuperscript{66}. Id., at 334, 335.
the Appropriate Government must depend upon the exigencies of the situation, the imminence of industrial strife [etc]." 67

In *Allen Berry and Company Ltd v. A. Das Gupta and others*, 68 the question before the Calcutta High Court was whether the proceedings before the Court of Inquiry would conclude on a reference being made by the Appropriate Government in respect of the same dispute to an Industrial Tribunal. In this case, the Appropriate Government had, by having recourse to its 10(1) discretionary power, made references to an adjudicatory body and also to the Court of Inquiry. The Calcutta High Court ruled that "reference to a Court of Inquiry is not a subsidiary proceedings" and would not depend upon proceedings pending before an Industrial Tribunal. 69 The Court added that the proceedings before the Court of Inquiry are "independent proceedings" and "can be pursued to its conclusion". 70

Again, in *Ushodaya Publications (P) Ltd v. Government of Andhra Pradesh and others*, 71 the High Court of Andhra Pradesh has ruled that the argument that once the Appropriate Government has made a reference of an

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67. *Id.*, at 335, 336.
69. *Id.*, at 852.
70. *Ibid*.
71. 1983 Lab I.C. 580, 595 A.P.
Industrial dispute to an Industrial Tribunal, it is debarred from making a reference of the same dispute to a Court of Inquiry is untenable.

Incidentally, it should be pointed out that in *M/s. Hindustan General Electrical Company Ltd v. State of Bihar*, the Patna High Court, while answering the question whether the 10(1) proceedings are alternative or cumulative in character, has ruled that “the Appropriate Government cannot refer an industrial dispute for adjudication and at the same time refer any matter connected with or relevant to the identical industrial dispute to a Court of Inquiry under section 10 (1) (b)”.

It is submitted that the decision of the Patna High Court does not adequately appreciate the legislative wisdom in providing for the constitution of the various authorities. In a particular situation, with a view to prevent potential industrial strife which may disrupt the productive activity in the industry and cause much inconvenience to the public and to avert strike and lockout, the Appropriate Government may be impelled to have the dispute resolved through the adjudicatory process contemplated under the Act. At the same time, if the Appropriate Government prompted by the statutory dictates, concludes that the reasons and causes for the

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72. A.I.R. 1964 Pat 381.

73. Id., at 382.
frequent recurrence of disputes in the particular industry should be got investigated so that remedial measures can be initiated to, at least, reduce the incidence of disputes in that industry, it may make a reference to a Court of Inquiry. Therefore, the opinion expressed by the Patna High Court that the proceedings under section 10 (1) of the Act are in the alternative and not cumulative in character, it is respectfully submitted, cannot be acclaimed.

We may now address the question whether the discretionary power vested in the Appropriate Government under section 10 (1) is “constant” or whether it undergoes situational modifications or is rendered non est in some situations and whether the Appropriate Government’s direction to refer an industrial dispute to the Board of Conciliation or to an Adjudicatory authority, especially, “at any time” would promote a fundamental objective of the Act, that is, the promotion of industrial peace and avoidance of industrial strife or unrest.

A casual reading of the numerous statutes enacted by the legislature creates an unmistakable impression that it is virtually impossible to avoid the conferment of discretionary powers upon the Executive Authorities. The statutes may use expression like “if the authority deems fit”, “if the authority has reasonable ground to believe”, “if in the opinion of the
authority it is necessary", etc to herald the conferment of discretionary power. If "discretion" means choice to choose from amongst the various alternatives, can it be argued that "discretion" breeds "arbitrariness" and, therefore, should not be conferred upon the administrative authority? It is submitted that no legislature can be Omniscient and can be regarded as an entity endowed with the foresight to provide for all contingencies the administrative authorities may have to face while enforcing the law. That is the primary reason for the grant of discretionary power. But, the grant of discretionary power should not enable the grantee of discretion to become a despot if Rule of Law has to prevail. Therefore, the Courts "have woven a network of restrictive principles which require statutory powers to be exercised reasonably and in good faith, for proper purposes only, and in accordance with the spirit as well as the letter of the empowering [statute]".\(^\text{74}\) As Prof. Wade has pointed out, "arbitrary and unfettered discretion are what the courts refuse to countenance".\(^\text{75}\) The Indian Supreme Court has declared in *Barium Chemicals Ltd v. Company Law Board*\(^\text{76}\) that any discretionary power statutorily granted cannot be construed "in the abstract but [should] be read within the four corners of the


\(^{75}\) Ibid.

\(^{76}\) A.I.R. 1967 S.C. 296.
In the light of the foregoing, let us examine the nature and scope of the discretionary power the Appropriate Government enjoys under section 10 (1) of the Act, the statutory restrictions imposed upon the Appropriate Government's discretionary power, the circumstances under which the Appropriate Government stands deprived of its discretionary power or when the Appropriate Government's discretionary action loses its force.

Apparently, the words "may" and "at any time" appearing in section 10 (1) of the Act seem to establish that the Appropriate Government's discretionary power to make a reference is unbridled. But any discretionary power cannot, nay, ought not to be regarded as absolute because absolute discretion is a fertile ground to breed arbitrariness or for arbitrary actions and strikes at the roots of Article 14 of our Constitution which forbids

77. *Id.*, at 322.


79. Art.14. " *Equality before law-* The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India". *Quoted in Seervai, H.M., Constitutional Law of India A-6* (vol.1, Fourth (Silver Jubilee) edn., 1991).
discriminatory actions. The discretionary authority, therefore, is obliged to act fairly, justly and in good faith.  

In so far as the Appropriate Government’s discretionary power is concerned, the other statutory provisions under section 10 do structure and control the said discretionary power. Thus, the Second Proviso after clause (d) under section 10 (1) requires the Appropriate Government to make a reference when a dispute has arisen in a Public Utility Service and a strike or lockout notice has been served. But even in the situation just mentioned, the Appropriate Government is not divested of its discretionary power totally since the Proviso also adds that the Appropriate Government is not bound to make a reference in respect of a dispute in Public Utility Service even when a strike or lockout notice has been served if it regards such a notice as “frivolous or vexatious” or it concludes, of course, on the basis of relevant material at its disposal, that, it is “inexpedient” to make a reference. Therefore, the Proviso, referred to, while apparently seeking to control the Appropriate Government’s discretion, does not completely

divest the Appropriate Government of the discretionary power granted under section 10 (1).

Under section 10 (1-A), when the Central Government concludes that a dispute involves a question of "national importance" or "is of such nature that industrial establishments situated in more than one State are likely to be interested in, or affected by such dispute and that the dispute should be adjudicated by a National Tribunal", and makes a reference to a National Tribunal, then, the particular State Government would stand deprived of its discretionary power to make a reference under section 10 (1).

Section 10 (2) ordains that the Appropriate Government shall make a reference to adjudication when the disputants, either separately or jointly, make a request and the Appropriate Government is convinced that the parties requesting for reference represent the "majority" in their respective constituencies.

Under section 10 A, if the disputants agree to refer their dispute to Arbitration before the Appropriate Government has exercised its referral power under section 10 (1) or 10 (1-A), then, the discretionary power of both the State and the Central Government would "go into a state of suspended animation". In the light of a statutorily acknowledged

81. Ss.10 (1-A); 10 (6).
Arbitration Agreement, the Appropriate Government would stand deprived of its discretionary power to make a reference.

Incidentally it may be noted that the pendency of conciliation proceedings would not divest the Appropriate Government of its discretionary power to make a reference to Adjudication.\textsuperscript{82}

The preceding discussion establishes that the Appropriate Government's discretionary power under section 10 (1) undergoes situational modification and, at times, may even evaporate and would be \textit{non-est}. Further, since the disputants can seek reference voluntarily or can opt for Voluntary Arbitration, the argument that the section 10(1) discretionary power paves the way for discriminatory exercise by the Appropriate Government gets weakened considerably.

It has been pointed out earlier that any discretionary power statutorily granted "cannot be read in the abstract" and should be construed within the four corners of the statute and that it should be exercised fairly and justly.\textsuperscript{83} Therefore, the discretionary authority should be guided by relevant facts and the objects the statute seeks to promote. It has to be noted that the

\textsuperscript{82} See, \textit{Western India Match Co. Ltd v. Western India Match Company Union}, (1970) 2 L.L.J. 256 (S.C.)
\textsuperscript{83} \textit{Supra} note 80.
Appropriate Government's discretionary power to refer a dispute is exercisable only when an *industrial dispute* exists or is apprehended. That is, it is not in respect of any other kind of dispute the Appropriate Government can exercise its discretion. If it turns out when the reference order is challenged that the dispute referred is not an industrial dispute, then, the reviewing court would be constrained to quash such an order. Further, if the disputants, plead before the adjudicator that the dispute mentioned in the Reference does not exist or that there is no basis for Government's apprehension, the Government would be obliged to place the facts before the Court to ensure that its order of reference is sustained.

We may now refer to judicial decisions relating to the reviewability of discretionary references the Appropriate Government can make under section 10 (1) of the Act and examine whether in the light of some of the post 1980 decisions of our Supreme Court the said discretionary power of the Appropriate Government has disappeared.

In *State of Madras v. C.P. Sarathy*, an industrial dispute between the workers and the managements of Cinema Houses in Madras was referred to Adjudication. The award rendered by the Industrial Tribunal was not implemented by the Management of a Cinema House, namely,
Prabhat Talkies. Consequently, the manager of the Cinema House was prosecuted. Sarathy’s contention, inter alia, while challenging the award was that there had been no dispute between the workers and management of Prabhat Talkies and, therefore, the Reference by the Appropriate Government was invalid and without jurisdiction. The Court ruled that mere “apprehension” was enough and the Government’s reference could not be assailed.

It may be noted that sub-section (5) of section 10 empowers the Appropriate Government to include in its Order of Reference at any time any other establishment, group or class of establishments of similar nature which are likely to be interested in or affected by the dispute which is the subject matter of reference “whether or not at the time of such inclusion any dispute exists or is apprehended in that establishment, group or class of establishment”.

To illustrate, if an industrial dispute, over Payment of Bonus, has arisen between the workers and management of a Cinema House “X”, the appropriate government, under section 10(5), is statutorily authorised to

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85. S.29 “Penalty for breach of settlement or award”.
86. Supra note 84 at 56: School Glass India (Pvt) Ltd., v. Assistant Commissioner of Labour and Conciliation Officer, 2000 11 L.L.J. 1498 (Guj.) (per Rathod, J.)
include, at the time of making the reference or thereafter but before the submission of the award, either *suo moto* or on application made to it, Cinema Houses "Y" and "Z", although at the time of such inclusion, no dispute exists or is apprehended in Cinema Houses "Y" and "Z". The appropriate government’s order of Inclusion would however, be unsustainable when the original order of reference cites a bonus dispute that has arisen in a Cinema Houses and the government seeks to refer a bonus dispute that has arisen in a Transport or Aviation industry.

It is more important for us to focus upon the Supreme Court’s observations about the Appropriate Government’s discretionary power and its exercise in the light of its decision in *Sarathy*.

According to the *Sarathy Court*:

i) The Appropriate Government, while making an order of reference under section 10(1), performs an administrative act and not a judicial or a quasi judicial act.87

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ii) The High Court, in the exercise of its Review Jurisdiction under Article 226 of the Constitution, cannot examine the Appropriate Government's order of reference to ensure that there was material before the Government to support its opinion that an industrial dispute existed or was apprehended.88

iii) The factual existence of an industrial dispute or its apprehension and the expediency of making a reference are matters entirely for the Appropriate Government to decide.89

Was the Sarathy Court seeking to lay down that the Appropriate Government’s discretionary act appertaining to an order of reference would be virtually unreviewable even when it could be established that there was non-application of mind on the part of the Appropriate Government or that the Government, while making the reference, had ignored relevant facts or had acted malafide? Should not the repository of discretion be insisted upon to exercise its power to promote the avowed statutory objects and purposes? The Government may opine that it is expedient or inexpedient to make a reference. But when the order of reference is assailed, should not there be relevant material to determine why the Government has concluded

88 . State of Madras v. C.P. Sarathy, ... supra note 84 at 56.
89 . Ibid.
that a reference would be expedient or otherwise? The reviewing Court has the inherent authority to determine whether the discretionary power has been properly exercised or not. As we see, the subsequent decisions of the Supreme Court have substantially affected the vitality of the opinion in Sarathy. Thus, in Rohtas' Industries v. Agarwal, Justice K.S.Hegde has said that Sarathy's Decision cannot be regarded as an authority. According to the Learned Judge, when an administrative authority is statutorily enabled to form an opinion in its discretion, the Jurisdiction of the Reviewing Court "cannot be precluded to examine whether the relevant facts existed [to support the opinion]" and it can determine whether in fact there was any material before the Government.

It is now well established that the discretionary power of the Appropriate Government under section 10 (1) is neither unbridled, unfettered or uncanalised. The government's referral order would be challengeable when on the basis of the material available it can be

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91. Id., at 715.
92. Id., at 715, 719.
93. Id., at 719.
concluded that the Government's opinion is not an "honest one" or that there is non-application of mind by the Government to relevant facts placed before it.

The Government must provide reasons, though not exhaustively, for its opinion. The Government cannot avoid Judicial review by failing to give reasons. Further, if the Government does not give germane reasons, the Reviewing Court "can direct [the Government] to reconsider the matter in the light of relevant [facts]". Even if the Government opines that "it is inexpedient to exercise its power" under section 10 (1), it must spell out the

94. See Barium Chemicals Ltd., v. Company Law Board, supra note 76. See Nedungadi Bank Ltd. v. K.P. Madhanakutty and Others, supra note 80. "Reference order under section 10 of the Act is an administrative order subject to Judicial Review if it omits to consider statutory requirements or travels outside [its] scope of power", id., at 564.

95. See M/s Hochtief Gammon v. State of Orissa, (1975) 11 L.L.J. 418 S.C. Government making a reference of a Bonus Dispute without including in its Reference Order the vital question, who is liable to pay the same, despite a plea from Hochtief which had entered into a contract with Hindustan Steel Ltd for executing certain works under which Hindustan Steel was to pay for labour and material. The "Government has not applied its mind to any of the considerations set out in the applicant's application". id., at 424. The Government "has failed to realise the fact that the workmen wanted Bonus either from the applicant or the company", id., at 429. Government has not cared to consider relevant facts, id., at 429. See also, Sindhu Resettlement Corporation Ltd., v. Industrial Tribunal, (1968) 1 L.L.J. 834 S.C.; Orient Paper Mills Shramik Congress v. Orissa, (1988) 11 L.L.J. 75, 81 Orissa (D.B.)

96. Id., at 428.

97. Ibid.
reasons and must establish that it has taken into account all the relevant facts".98

Corrupt motives or mala fides would dissuade the Reviewing Court to sustain Government’s order of reference.99

The existence or apprehension of an industrial dispute, not any other kind of dispute, is a sine quo non before the Appropriate Government makes its referral order.100

As pointed out earlier, the Appropriate Government enjoys the discretionary power under section 10 of the Act to make a reference “at any time”. Now, what is the import of the phrase “at any time”? Would the discretionary power of the Government disappear once it declines to make a reference? Can the government, after initial refusal to make a reference, revise its earlier opinion not to refer and then make a Reference? What are the circumstances under which the Government which has initially refused

98. Ibid.


to make a reference can decide to make a reference? After refusing to make a reference, should the Government decide to refer the dispute to, say, adjudication, would there be an obligation upon the Government to observe the Principles of Natural Justice? To illustrate, a trade union may raise a dispute over the dismissal of a few of its members. The Government may refuse to make a reference. The employer may later fill up the vacancies. If the Government subsequently, at the instance of the trade union, revises its earlier opinion and decides to make a reference, should the Government extend an opportunity of being heard to the employer? Can the Government after initial or subsequent declination make a reference after a long lapse of time, that is several years? In other words, is there any period of limitation for making an order of reference? Let us turn to relevant case law to find out the answers.

It may be recalled that under the Act, the Conciliation Officer is obliged to commence the Conciliation proceedings soon after the receipt of a strike or lockout notice in respect of an industrial dispute in a Public Utility Service.101 As regards a dispute that has arisen in a non-public utility service, he has the discretion to decide when he should start the

101. S.12 (1).
proceedings to promote a fair and an amicable settlement. Now, the question is, would the Government's discretionary power to make a reference to Adjudication stand affected during the pendency of such conciliation proceedings, especially, when section 10 (1) enables to make a reference "at any time"? Can it be argued that the Government's discretion to make a reference to adjudication springs up only after it is in receipt of the Failure Report from the Conciliation Officer?

In *Western India Match Co., Ltd., v. Western India Match Co., Workers' Union*, the Supreme Court has ruled that the Government need not wait until the Conciliation Officer submits Failure Report and that the phrase "at any time" enables the Government to make a reference to Adjudication "without waiting for Conciliation proceedings to begin or to be completed".

In *Western India Case*, the employer, after periodically extending the period of probation of a foreman, dispensed with his services. A request for reference was declined by the Appropriate Government. Later, after a lapse

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103. *Supra* note 82.

104. *Id.*, at 257-58. In this Case the Court had to interpret "at any time" in S.4-k of the U.P. *Industrial Disputes Act*, 1947, which is in *pari materia* with section 10 (1) of the *Industrial Disputes Act*, 1947. *See Avon Service (Production Agencies) Pvt Ltd., v. Industrial Tribunal, Haryana*, (1979) 1 L.L.J. 1, 4 S.C.
of six years, the Government, at the instance of the trade union, made a reference.

The three questions\textsuperscript{105} presented to the Supreme Court were:

i) Was it possible for the union to validly espouse the cause of a workman when he was not a member at the date when his service was terminated? Even if it was, was there in fact an espousal so as to convert his individual dispute into an industrial disputes?

ii) Do the words 'at any time'... have any limitations, or can the Government refer a dispute for adjudication after the lapse of about six years, and in this case, after the accrual of the cause of the dispute?

iii) In what circumstances can the Government refer such a dispute for adjudication after it has once refused to do so?

Incidentally, it has to be pointed out that the employer contended, \textit{inter alia}, that the Government's decision to refer the stale dispute at the instance of a trade union, several years after initial refusal or refusal or refusals would, among other things, cause "dislocation in industry".\textsuperscript{106}

\begin{footnotes}
\item [105] Supra note 82 at 259.
\item [106] Id., at 261.
\end{footnotes}
The Company's contentions were not accepted by the Supreme Court. The reasons\textsuperscript{107} for dismissing the contentions are: The Doctrine of Res judicata is not invocable in respect of an administrative act performed by the Appropriate Government under section 10 (1); Government's earlier declination does not debar it from making a reference on a later date; The employer's conduct or acts after the government's refusal would not affect its discretionary powers to make a reference; Government can reconsider its earlier opinion and make a reference when it has misapprehended the fact or ignored relevant facts in the first instance or when new facts have surfaced.

A silver lining which industrial employers may, \textit{prima facie}, discern from the ruling of the Supreme Court in \textit{Western India Match Company's} Case is that the Appropriate Government may have to take into account the inconvenience that may be caused to an employer when the Government decides to make a reference after first refusing to do so. However, the silver lining disappears when the Court's following observation is carefully scrutinized:

\begin{quote}
[The Government's] decision to refer, [after initial refusal] might cause inconvenience to the employer because the employer in the mean time might have acted on the belief that
\end{quote}

\textsuperscript{107} \textit{Id.}, at 262.
there would be no proceedings by way of adjudication... [in future]. Such a consideration would, we should think, be taken into account by the Government whenever, in exercise of its discretion, it decides to reopen its earlier decision... These are matters which the Government would have to take into account while deciding whether it should reopen its former decision in the interest of justice and industrial peace but have nothing to do with its jurisdiction under section 4-K [of the *U.P. Industrial Dispute Act, 1947* which is in *pari materia* with section 10 (1) of the *Industrial Disputes Act, of 1947*]....

So, in the ultimate analysis, according to the Court, there may not be any period of limitation in so far as the Government's exercise of referral power under section 10 (1) of the Act is concerned.

In *Binny Ltd*, the award of the adjudicator was under challenge on the ground that the government had on two earlier occasions declined to make a reference and the record contained no material to indicate what prompted the Government to make a reference.

Again, the Supreme Court refused to quash the Reference Order. In the Opinion of the Court, an earlier refusal would not entitle the Court to conclude that there could be no cause for reference subsequently.

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108. *Id.*, at 264.


110. *Id.*, at 484.
Further, since section 10 (1) authorises the Appropriate Government to make a reference “at any time”, Government, after initial refusal, may change its mind and make a reference on the basis of “fresh material available”.111

In *Avon Services*,112 the dispute arose on account of the termination of two workmen whose reinstatement with full back wages the trade union had demanded. Government refused to make a reference. Later, after a lapse of nine months, the Government obliged. The Industrial Tribunal ordered reinstatement with full back wages. The employer challenged the Tribunal’s award in a writ petition which was dismissed by the High Court in *limine*.

On appeal to the Apex Court, the employer contended that the Government lacked the authority to make a reference in respect of the same dispute unless it was in possession of “some fresh or additional material” which the Government should disclose or which must appear on the face of the reference itself.113 Such disclosure, the appellant argued, would enable

111 *Ibid*. The Court could not examine this question since the Government was not a party to the proceedings.

112 *Avon Services*... *supra* note 104.

113 *Id.*, at 3.
the adjudicator to determine whether Government’s reference order would not smack of arbitrariness or unfairness.\textsuperscript{114}

The \textit{Avon} Court rejected the Company’s contention and ruled that the Government’s initial declination would neither dry up nor exhaust “the source of power” but would only indicate that “the Government for the time being [has] refused to exercise the power and the Government, consequent upon its initial refusal would not be denuded of its power”.\textsuperscript{115}

The \textit{Avon’s} Court, while holding that the Government’s refusal in the first instance to make a reference would not deprive it of the power to refer subsequently when new facts surface or “for any other relevant consideration”, like, “threat to industrial peace”, declared that the expression “at any time” confers “a vital power” on the Appropriate Government and the amplitude of the expression “need not be whittled

\textsuperscript{114} Ibid.

\textsuperscript{115} Id., at 5: See Amrutlal Mafatlal Parekh \textit{v.} State of Gujarat, 1999 Lab I.C. 1775 (Guj.) (\textit{per} Pandit, J.) Relying on \textit{Binny Ltd}, supra note 109 and \textit{Avon Services}, supra note 104 at 5, the Gujarat High Court has ruled that the appropriate Government, despite its initial refusal to make a reference, can make it on a subsequent date without there being any fresh material, \textit{id.}, at 1775. But, for a critique of \textit{Avon’s Decision}, See O.P. Malhotra, \textit{The Law of Industrial Disputes} 694-697, 698 (vol.1) (Fifth Edn., 1998). Malhotra argues that some of the Court’s observations in \textit{Avon}, “are not only self-contradictory but are also irreconcilable with the ratio of Western India Match Co.,” \textit{Ibid.}
down by interpretative process". Well, should not the Government which is statutorily assigned the task of promoting industrial peace and averting industrial strife be more careful while deciding whether a reference is warranted? Should the Government's misapprehension, misunderstanding of the existing facts be condoned through judicial condescension? The Government's reconsideration of its earlier decision not to refer may not invite criticism when on the basis of new facts that have come to light or its bonafide perception that the dispute may jeopardise industrial peace and the nation's economy, may prompt it to concede the demand for reference. At the same time, the Court opines that because of the use of "at any time", the Appropriate Government is empowered to make a reference after a lapse of many years. This provides a potential ground for arbitrary actions. As O.P. Malhotra has pointed out, change of Government, the disputant trade union's proximity to the Government that has come to power may, inter alia, lead to a reference, after many years, despite the previous Government's refusal to make a reference. Further, the argument that "at any time" proscribes period of limitation would encourage, at least, one of the partners in production, that is, workers, to remain dour and sullen and

116. Avons service (Production Agencies) Pvt Ltd., v. Industrial Tribunal, Haryana, supra note 104 at 5.
the maximum cooperative spirit may get weakened. Reference at the behest of politicians would encourage these tendencies.\textsuperscript{117}

The Government, no doubt, in its discretion, is entitled to examine the question whether reference of an industrial dispute that exists or is

\footnotesize\textsuperscript{117}See Srikrishna Jute Mills v. Government of A.P., 1977 Lab I.C. 988 (A.P) (D.B.) Reference because of pressure exerted by an M.L.A. Quashed: Shanti Theatres, Madras v. State of Tamil Nadu (1979) 55 F.J.R. 389. Reference made after 10 years. Government had earlier on three occasions declined to make a reference. Quashed since earlier declination was not on account of misapprehension and no new facts had become available warranting a reference: Ganeshan v. Union of India, (1993) Lab I.C. 802 (Bom.) Inordinate and unexplained delay would be a just and proper ground for the Government’s refusal to make a reference, id., at 806: Manager, Air Control Engineering Co.Ltd v. Kanaiyalal Ghusabhai Kanvaria, 2000 11 L.L.J. 797 (Guj.) (per Rathod, J) “Refusal to refer dispute for adjudication on ground of unexplained delay of ten years held, justified”, id., at 800: Saurashtra Employees’ Union v. Sub-Divisional Officer, 2000 (86) FLR 849 (Guj.) (per Bhatt, J.) Inordinate delay of 10 years. No justification for such delay given. Held, “concerned authority had power to refuse to make reference”, id., at 851: Digambar Rambhau Kalaskar v. The Chief Manager, Staff Administration, Bank of Maharashtra, 2000 (86) FLR 855 (Bom.-Aurangabad B.) (per Kochar, J) Workman was dismissed in 1973 and the dispute was raised in 1991. The Court held such a state dispute need not be referred to adjudication, id., at 858: Nedungadi Bank Ltd. v. K.P.Madhavan Kutty and Others, supra note 80. Lapse of seven years and there being no industrial dispute, Government’s refusal to refer justifiable, id., at 563-64: Satpal v. P.O. Labour Court, 2001 (91) FLR 290 (P & H) (D.B.) (per Sudhalkar, J.) No reasons being given for raising the dispute after 8 years. Appropriate Government need not make reference, ibid : Contra, Ajaib Singh v. Sirhind Co-operative Marketing-cum-Processing Service Society Ltd., AIR 1999 SC 1351 (D.B.) (per Sethi,J.) “... No reference to the Labour Court can be generally questioned on the ground of delay alone. Even ... where the delay is shown to be existing ... the Labour Court ... dealing with the case can appropriately mould the relief by declining to grant back wages to the workman till the date he raised the demand...”, id., at 1355: Mahavir Singh v. U.P. State Electricity Board, 1999 11 L.L.J. 482 (S.C.) (D.B.): Workmen of K.G.I.D. Employees’ Union v. P.O., Principal Industrial Tribunal, 1999 Lab 1.C. 2553, 2556 (Kant.) (per Gopala Gowda, J.)
apprehended is expedient or not at a given point of time. But, when a dispute exists and the Government declines to make a reference, the employer in situations involving discharge, dismissal or retrenchment may be impelled to infer that in the opinion of the Government the dispute raised by the trade union does not merit or warrant reference. Now, with the advent of the Doctrine of Legitimate Expectation developed by the Courts,\(^{118}\) can the employer expect that before the Government makes a reference, after initial refusal, he should be heard or furnished reasons as to why the Government has decided to make a reference? The point is, if in a situation involving discharge or dismissal or retrenchment of workmen, the Government, on a dispute being raised declines to make a reference, should the employer wait for a month, a year or several years before he can decide to fill up the vacancies? If the expression “at any time” is given a literal interpretation and if such literal interpretation is buttressed by judicial pronouncements that the Government, under section 10 (1), while making a

reference, performs an administrative function and that the administrative power statutorily granted cannot whither away or dry up when, in the first stance, the Government refuses to make a reference, then, the employer would never be able to fill up the vacancies and, consequently, may be forced in a competitive market to pull down his shutters, rendering all others in his employ jobless. Would not the ensuing industrial unrest create more problems for the Government which is Constitutionally ordained to effectuate Directive Principles like right to adequate means of livelihood, right to work, to mention a few? At the same time, one should bear in mind that a dispute relating to, say, Discharge, of some workmen may not initially ignite industrial unrest but may do so when the majority of the workers after a while agitate against the discharge on the ground that the employer has targeted trade union activists, has indulged in an Unfair Labour Practice and demand reinstatement of the unionists. If, later, a strike notice is served and unions in other similar industries exhort their members to resort to a day's sympathetic strike to express their solidarity, then, the Government which might have refused to make a reference earlier may change its mind and make a reference to avert industrial strife and loss in production. Cannot, in such a situation, the Government justify its stand by explaining what prompted it revise its earlier decision? Reasonable explanations or germane reasons would be appreciated by the employers
and their associations and foil attempts to level charges of arbitrary or discriminatory actions against the Government in the exercise of its discretionary power. However, if discharges have taken place, say, in 1970 and reference is made in 1990, such a reference should be quashed when challenged, and the challenge, it is submitted, cannot be dismissed by construing “at any time” literally.119

Recently, in *Sapan Kumar Pandit*,119 the Supreme Court was called upon to construe the words “at any time” occurring under section 2-k of the *U.P. Industrial Disputes Act* which is in *pari materia* with section 10(1), *Industrial Disputes Act*. The Apex Court ruled that –

The word[s] ‘at any time’... *prima facie* indicat[e] to a period without boundary. But such an interpretation making the power unending would the pedantic. There is inherent evidence in this Section itself to indicate that the time has some circumscription. The word[s] ‘where the Government is of the opinion that any industrial dispute exists or is apprehended’ have to be read in conjunction with the words ‘at any time’. They are, in a way, complimentary to each other. The Government’s power to refer ... has thus one limitation of time and that is, it can be done only so long as

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the dispute exists. In other words, the period envisaged by
the enduring expression 'at any time' terminates with the
eclipse of the industrial dispute. It, therefore, means that if
the dispute existed on the day when the reference was made
by the Government it is idle to ascertain the number of years
which elapsed since the commencement of the dispute to
determine whether the delay would have extinguished the
power of the government to make the reference...\textsuperscript{119B}

Further, the contention that in making a reference the Government is
performing an administrative function and not a judicial or a quasi judicial
function and, therefore, the \textit{audi alteram partem} ("hear the other side") is
not invokeable has become untenable in the light of the path-breaking
decisions of the Supreme Court in \textit{State of Orissa v. Binapani Dei,}\textsuperscript{120}
\textit{Kraipak v Union of India}\textsuperscript{121} and \textit{Mohinder Singh Gill v. Chief Election
Commissioner,}\textsuperscript{122} to cite a few. In \textit{Mohinder Singh}, the Supreme Court has
observed, it is submitted, rightly, that "the dichotomy between
administrative and quasi-judicial functions \textit{vis-a-vis} the doctrine of natural
justice is presumably obsolescent after \textit{Kraipak} in India \textit{Schmidt} in

\textsuperscript{119B} \textit{Id.}, at 2816 – 17.
\textsuperscript{120} A.I.R. 1967 S.C. 1269, 1272 \textit{per} Show, J.
\textsuperscript{121} A.I.R. 1970 S.C. 150, 156, \textit{per} Hegde, J.
\textsuperscript{122} (1978) 1 S. C. C. 405, 433, \textit{per} Krishna Iyer, J.
England”\. In Binapani, the Supreme Court has held that even an administrative order which involves civil consequences must be made consistently with the Principles of Natural Justice\. When the employer acts in pursuance of the Government's initial refusal to refer the dispute and takes appropriate measures to ensure that production in his Establishment does not suffer, he would be in a dilemma if the Government after a considerable lapse of time decides to make a reference of a stale dispute. He may not be able to terminate the services of workmen employed in the places of the discharged, dismissed or retrenched workmen. He would be forced, in case of an order of reinstatement, to carry on his back the dead weight of uneconomic surplusage and, in the meanwhile, would have to spend his time and money to defend himself in the proceedings the consequence of Government’s reference to adjudication which, definitely, entails civil consequences.

In the light of the foregoing discussion, it is submitted that it should be made obligatory that the Government should explain why it is making a reference after initial or prior refusals. Further, reviewing courts should

\[123\] Ibid. Schmidt v. Secretary of State for Home Affairs, (1969) All E.R. 904, 909, per Lord Denning M.R.

transmit clear signals to the Appropriate Government that reference of stale disputes would be quashed at the instance of the aggrieved employer. The expression "at any time" cannot be construed as granting a licence to the Government to make references after a long lapse of time.

An other important question that has to be examined in this segment is whether the Appropriate Government is bound to make a reference of every industrial dispute that comes into existence or that is apprehended or whether it is entitled under section 10 (1), because of the use of the words "may" and "at any time" therein, to examine the question of "expediency" before deciding to make a reference. Section 10 (1) authorises the Government to form an opinion as to whether an industrial dispute exists or can be apprehended and after the formation of an honest opinion, it may, in its discretion decide to make or not to make a reference. If "discretion" implies a choice among alternative "courses of action or inaction", then, "a choice to do nothing or to do nothing [at a given point of time] is definitely included". The contention that whenever an industrial dispute surfaces or is apprehended the Government is statutorily obliged to refer the same to adjudication would, it is submitted, render the words "may" and "at any

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time” in section 10 (1) redundant.\textsuperscript{126} It has been pointed out that in construing the expression “at any time” the Supreme Court has often declared that the Government’s decision to refer a dispute, after earlier refusal, is not impugnable because of the use of the above expression by the Legislature in section 10 (1). Such a construction placed by the Apex Court on the expression being referred to clearly establishes that the Government’s initial inaction by not making a reference is statutorily permissible. Further, the Apex Court has also recognised that the Government is entitled to examine the question of “expediency” before making a reference.\textsuperscript{127}

That the appropriate Government is entitled to consider the question whether it is expedient to make a reference soon after an industrial dispute comes into existence or is apprehended is also discernible by a careful scrutiny of some of the provisions in the Act. Thus, under the Second Proviso to clause (d) of section 10 (1), when a strike or lockout notice has been received in respect of an industrial dispute in a Public Utility Service,

\textsuperscript{126} See S.S.Visweswariah \textit{... supra} note 78 at 19.

\textsuperscript{127} See e.g. \textit{State of Bombay v. Krishnan}, (1960) 2 L.L.J. 592 S.C.; \textit{Bombay Union of Working Journalists v. State of Bombay}, (1964) 1 L.L.J. 351 (S.C.); \textit{Western India Match Company... supra} note 82; \textit{Avon Service... supra} note 104; \textit{Binny Ltd... supra} 109.
the Government need not make a reference if it concludes that such a notice “has been frivolously, vexatiously given” and, more importantly, “it would be inexpedient to do so.” Under section 12 (5), the Government even after receiving the Failure Report from the Conciliation Officer, is not required to make a reference. As per this section, on receipt of Failure Report, the Government “may” make a reference and if it decides, in its discretion, not to make a reference, it has only to furnish germane reasons for not making the reference.128

The Case Law and the Statutory Provisions cited do establish the Appropriate Government’s authority to examine the question of “expediency” before making a reference. Examination of the element of “expediency” is, it is submitted, a component of the discretionary power which the legislature has, in its wisdom, conferred upon the Appropriate Government. It is submitted, again, that this component of discretionary power cannot be usurped by the judiciary. If, in the opinion of the reviewing court, the discretionary power has been abused or misused, the Court can undoubtedly mandamus the discretionary authority to exercise its

128. See S.13 (4). “If, on the receipt of a [Failure] [R]eport ... in respect of a dispute relating to public utility service, the appropriate Government does not make a reference ... it shall record and communicate to the parties concerned its reasons therefor”.
power according to law. But it cannot, be directed to exercise its discretionary power in a particular way. When that happens, the discretion of the Appropriate Government conferred by the Legislature evaporates test and becomes non-est.

In the light of the foregoing, let us advert to some of the opinions of our Apex Court rendered in 1980 and thereafter. In *M.P.Karmachari Sangh v. M.P.*, the Supreme Court ruled:

> We set aside the judgment of the High Court, allow this appeal and direct the State Government to refer all the questions raised by the appellant Tribunal.

Again, the same Court in *Ram Avtar Sharma v. Haryana*, has held:

> Let a writ of mandamus be issued directing the appropriate Government... to consider its decision and to exercise power under S.10 on relevant consideration germane to this decision. *In other words, a clear case of reference under S.10 (1) ... is made out. We order accordingly.*

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129. *M.P.Karmachari Sangh... supra* note 64. Demand for D.A. at higher rates, not referred. Government giving cogent reasons as to why reference was not warranted. M.P. High Court refused to intervene since in its opinion reasons given by appropriate Government were germane and the question of expediency had been properly considered by the appropriate Government.

130. *Id.*, at 523.

131. *Ram Avtar Sharma ..., supra* note 64.

132. *Id.*, at 192. (Emphasis added).
Later, in *Veerarajan v. Tamil Nadu*, the Apex Court concluded:

We are of the opinion that the respondent – State Government should have a direction to refer the dispute for adjudication by the Labour Court. The State Government’s order should be made within one month from today.  

It is submitted that the decisions in Cases, cited above, are not in tune with the earlier Precedents. As pointed out by Visweswaraiah in his Article “Discretionary Referrals: Compulsory Adjudication And The Industrial Disputes Act 1947”, the decisions in *Nirmal Singh*, *M.P.Karmachari Sangh*, *Ram Avtar Sharma*, *Veerarajan*, “if left undisturbed, would not only mock at the more pragmatic and authoritative assertions of the [Supreme Court], made earlier, but also might thrive to throttle the discretion [conferred upon and to be] enjoyed by the appropriate Government”. 

135. *Supra* note 78.
137. *M.P.Karmachari Sangh ... supra* note 64.
138. *Ram Avtar Sharma ... supra* note 64.
139. *Veerarajan...Supra* note 133.
140. *Supra* note 78 at 2.
D. ADJUDICATORY PROCESS UNDER THE INDUSTRIAL DISPUTES ACT, 1947: AN APPRAISAL

The Critics of Adjudication have argued that the adjudicatory process is "dilatory", "expensive", has come in the way of voluntary settlement of disputes through mutual negotiations and affected the growth of the Collective Bargaining System, has not succeeded in achieving industrial peace, and what not. There may be some justification for some of the critical comments, but the wholesale onslaught on the adjudicatory mechanism provided under the Act, it is submitted, is not acceptable. As has already been pointed out, about 90% of the Indian Labour is unorganized. Moreover, the vast majority of them are indebted, illiterate or semi-literate, and ignorant. Even in the organised sectors, the multiple unions that are operating have inhibited the growth of the Collective Bargaining System. Further, there has been no Central Law promoting the growth of independent trade unions or paving the way for the recognition of the most representative trade unions for the purposes of collective bargaining. The unassailable fact that the major Central Trade Union Federations are not unanimous over any appropriate method for determining the representative character of a trade union may prime facie create an impression that the plea for strengthening the Collective Bargaining Process is not wholly genuine. Even the bitter Critics of the Adjudicatory
mechanism the Act provides for cannot advance the argument that adjudication after reference is the only means for retrieving or maintaining or establishing industrial peace. The Act provides for voluntary settlement of industrial disputes, provides for voluntary arbitration and for reference at the instance of parties enjoying the majority character. Only when these means are not availed of, the Government, in a developing economy in order to keep the wheels of production moving and with a view to avoid or minimise inconvenience to the public who are dependent upon the products or the services of the industries, may be constrained to make a reference. Further, in a planned economy, no Government can be indifferent to the Labour-Management Relations existing in the industries which may pave the way for internecine disputes. It has to, at times, step in to ensure the industrial strife emanating in an establishment does not affect the economy. The Government has a vital interest in promoting industrial peace and avoiding industrial strife so that the planned targets do not become elusive or remain mirages.

The role played by industrial adjudicators since Independence in safeguarding and promoting the interests of the workers cannot be ignored. Before the provisions relating to retrenchment, layoff compensation were inserted in the Act, the Tribunals had been awarding such compensation in appropriate cases. The legislative objectives underlying the Amendments
aimed at providing for Social Security benefits like retrenchment, lay-off compensation do acknowledge and establish that Industrial Tribunals were ordering the employers to make these Social Security payments and as there was no uniformity as regards the quantum of Social Security benefits, the Legislature stepped in to ensure the required uniformity.

A perceptive student of Labour Law would vouchsafe that most of the provisions enacted in the Payment of Gratuity Act, 1972 reflect the awards relating to gratuity claims rendered by the Tribunals.

In the light of the foregoing, the National Commission on Labour was right in observing that the Adjudication has been an instrument in improving wages and working conditions, for standardisation of wages, bonus and has thwarted many strikes, lockouts and protected and promoted the interests of the working class who were ill-equipped or unorganised to engage in effective Collective Bargaining or Bargaining on an equal footing.

Despite the plea for retention of the adjudicatory machinery under the Act, the poor quality of the adjudicatory machinery that is made available by the appropriate government, at times, or the procedural format for the adjudicatory process the Act provides for which delays justice cannot be winked at.
It is submitted that it is not enough if the Government provides for adjudication of industrial disputes with a view to resolve industrial conflicts. Such a machinery might inspire confidence in the disputants if it adopts a procedure which ensures expeditious resolution. As pointed out earlier, a District Judge or a High Court Judge can be appointed as an adjudicator. Experience of the functioning of the adjudicatory machinery discloses that the persons appointed as Presiding Officers of the adjudicatory bodies are retired District Judges. These persons were throughout their careers, would have been engaged in deciding issues arising in Civil Litigation or determining the guilt or innocence of the accused in criminal proceedings. Further, over the years, while in service, they would have rigidly adhered to the provisions of the Civil Procedure Code, Criminal Procedure Code and the Evidence Act. After retirement, when appointed to adjudicate over industrial disputes, they cannot quickly avail of the procedural laxity which the Act permits. Their lack or inadequate knowledge of the provisions in the Act and judicial interpretations placed upon those provisions would make their task daunting. It cannot be gainsaid that an industrial adjudicator can infuse confidence only when his expertise in the subject-matter is recognised by the disputants. Further, many a time, the government has failed to make appointments promptly for the vacancies caused by the exit of the Presiding
Officers either on account of their reaching the age of sixty-five years or otherwise. This may lead to heavy work-load in so far as the other functioning adjudicatory bodies are concerned. This factor also would not promote adequate confidence in the adjudicatory authority.

The procedure contemplated in the Rules for the Adjudication of industrial disputes leaves much to be desired. Tribunals are established to supplement the Justice System and to provide cheap and expeditious remedies. Lengthy and cumbersome procedural format may not deliver the desired results.

Under the Act, after the appropriate Government makes a reference, the aggrieved workmen or trade union has to file a statement of claim and the Tribunal has to fix a date. Then, a date is fixed for filing the written statement by the management. Inevitably, a few months would elapse before the management files the Written Statement. This would be followed by a reply or a rejoinder by the workmen or his trade union. Then, dates would be fixed for filing documents, framing issues, recording of evidence, etc. In the interregnum, the Tribunal might be called upon to decide challenges by the employer relating to its jurisdiction to adjudicate. For example, the preliminary questions raised by the employer to the effect that the Industrial Tribunal cannot adjudicate over the main issue in the reference because his activity is not 'industry' under section 2(j), or the
dispute raised is not an 'industrial dispute' under section 2(k) of the Act, etc or either the management or trade union may raise the jurisdictional question that the Government that has made the reference is not the 'appropriate Government' under section 2(a) of the Act.

Surely, the procedure as laid down in the Rules can be improved upon and the element of expedition should be introduced. Of course, the cooperation on the part of the disputants can go a long way in eliminating the stigma, as G. Ramanujam has averred, that the adjudicatory process stands condemned as a time-consuming futile exercise at litigation.

If the Conciliation process precedes reference, then the concerned authorities, namely, Conciliation Officers or the Boards of Conciliation should be statutorily required to transmit all the materials relating to the dispute along with the Failure Report to the designated Labour Courts, Industrial Tribunals or National Tribunals.

The Industrial Relations Commissions envisaged under the 1988 Amendments do provide for a much better mechanism for the resolution of industrial conflicts. The 1988 Amendment Bill, which lapsed owing to the collapse of the Government, had contemplated the appointment of persons with expertise in Labour Management Relations, Economics, etc. The Central as well as the State Industrial Relations Commissions, the Bill had provided under section 9-E should consist of a President and an equal
number of Judicial and Technical Members. However, the total strength of each such commission were not exceed seven. More importantly, only a person is of eminence in the field of industry, labour or management could be appointed as a Technical Member under Sec.9F being appointed as a Technical Member. Thus, as in the case of the presently operating Income Tax Tribunals which consist of members well versed in Income Tax Laws ("Accountant Members") and Judicial Members, the 1988 Amendment Bill had incorporated provisions for the appointment of persons well acquainted with Judicial procedures and persons possessing expertise in Labour Management Relations etc. The Second National Commission on Labour which has been entrusted with the task of making Recommendations for improving the Labour Laws, Industrial Relations mechanism, etc., should take note of this important feature of the lapsed 1988 Amendment Bill and incorporate the same in its proposals or Recommendations.141

The 1988 Amendment Bill had also provided for the establishment of "Bargaining Council". It was the duty of the employer under section 9-V(1) of the 1988 Bill, to “establish a bargaining council ... consisting of representatives of all the trade unions having membership among the

workmen employed in the establishment. Each trade union being represented in the “Bargaining Council” was to be called a “Bargaining Agent”. If more than one trade union were to be functioning in an establishment, the representation of unions on the Bargaining Council, as per sub-section (2) (a) of section 9-V, had to be in proportion to the number of their members in that establishment. Under clause (b) of sub-section (2), the trade union with the highest membership i.e., not less than forty percent of the total membership among the workmen, would be the “Principal Bargaining Agent”. If none of the unions enjoyed forty percent of the total membership, then, a union with the highest membership in the establishment would have the right to nominate one of its representatives as the Chairman of the “Bargaining Council”. If only one trade union were to be functioning, such a union would be the “Bargaining Council” for that establishment and it would also act as the “Sole Bargaining Agent” under sub-section (3) of section 9-V. Even in the absence of trade unions in the establishment, as per sub-section (6) of section 9-V, the employer was required to establish a “Bargaining Council”.

If the Government is serious in promoting Collective Bargaining at least in well-organised sectors like Insurance, Banking, to mention a few, then, the provisions relating to the setting up of Bargaining Councils, referred to above, have to be revived. At the same time, the method
proposed in the 1988 Amendment Bill for determining the representative character of a trade union, which, while first providing for the method of verification of fee-paying membership, had also answered the call of the leftist unions for "Secret Ballot" in certain contingencies should also be seriously considered and final decision ought to be taken in this regard at the earliest. The major trade union federations should welcome this measure so that Collective Bargaining Process can become more effective because of the participation of a majority union as a recognised bargaining agent.

Further, the Government should be cautious while making references. Indiscriminate exercise of discretionary referral power would hamper the growth of strong trade unions which would hinder the development of the Collective Bargaining Process. Government should, in case of disputes in organised sectors, at least, determine whether the parties did, in the first instance, engage in bonafide Collective Bargaining. Only then, can it decide to make a reference. That is, the Government should transmit signals that adjudicatory machinery would not be readily made available just because either or both of the disputants request for reference. Of course, there cannot be a hard and fast rule with the help of which any one can determine what kind of disputes warrant reference immediately and what other kinds of disputes should not be referred soon after they arise.
The Government may be guided by the nature of the industrial activity the place of industry in the national economy, for e.g., Insurance, Banking, and the inconvenience the public would be exposed to if the dispute is not immediately resolved, for e.g., Transport Industry, Public Utility Services.

In order to encourage Collective Bargaining in organised sectors, Government may introduce “Pendulum Arbitration”.\textsuperscript{142} The introduction of this system with its peculiar feature may make Adjudication less attractive.

It is true that section 10 (1) by using “may” and “at any time” has paved way for discriminatory referrals. It is also acknowledged judicially that the Government that has refused to make a reference in the first instance is not barred from referring the same dispute to Adjudication, later, even after several years. It is suggested that the Act be amended so that a period of limitation be prescribed for making references.

It is time to find out what factors have prompted the Government over the years to make reference or to decline to do so. It appears that the discretionary power conferred several decades ago has been retained in its pristine form. If the factors referred to above acquire normative character, then, as Prof. K.C.Davis has rightly observed the discretionary power would get structured better.

\textsuperscript{142} See Chapter VII of this Dissertation titled “'Voluntary Arbitration' Under The Industrial Dispute Act: A Critical Assessment” at pp 237-38.