THE INDIAN SUPREME COURT AND CURATIVE ACTIONS

*Muteti Mutisya Mwamisi**

I. Introduction

The decision of the Supreme Court of India in *Rupa Ashok Hurra v. Ashok Hurra and Another*[1] was in more ways than one, a path breaking decision. For one, it got rid of the practice of litigants assailing the Supreme Court's final decisions via Article 32. In the same vein, however, it added a new dimension to its exercise of inherent power. This aspect is brought out by modalities of curative petition that *Rupa Ashok Hurra* so propounded. The propounding of modalities of curative petition went beyond the modest exercise of inherent power of the Court of admitting meritorious petitions under any appropriate procedure but created a new procedure by which such petitions can come before the Supreme Court. The *Rupa Ashok Hurra* decision was an endeavor by the Supreme Court to bring order to a Constitutional issue that could as well have become a hotch potch of highly individualised judicial pronouncements. This could have been so but equally significant is the controversy that the *Rupa Ashok Hurra* decision has bestirred among the litigant public. This article endeavors to bring forth the controversies generated by the *Rupa Ashok Hurra* decision and the impact of this decision on Constitutionalism.

The case commentary is divided into four parts. The first part gives the factual back ground leading to the *Rupa Ashok Hurra* decision. This part provides a justification for propounding the modalities of curative petitions. The second part looks at what distinguishes a curative petition from a 'second review petition', so to speak. As it will be seen, the question whether a curative petition amounts to a 'second review petition' or not, is an open ended question. The third part looks at the *ex debito justitiae*[2] obligation that the Court expounded in order to propound the modalities of curative petitions. The last part is the conclusion and suggests an alternative that the Court could have adopted in place of curative petitions in dealing with the issues raised in *Rupa Ashok Hurra.*

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* Fourth Year, B.A. LL.B. (Hons.), NALSAR University of Law, Hyderabad. I am greatly indebted to Mr. Anil Nauriya, Supreme Court Advocate, who has been my mentor & teacher, with specific reference to to this article. I also wish to thank Prof. Amita Dhanda who patiently corrected the article at various stages & T N. Sansi, Additional Registrar, Supreme Court of India, who allowed me to access the Supreme Court registry.

1 (2002) 4 SCC 388

2 *Ex debito justitiae* has been used in Common law doctrine to mean as a matter of right; in accordance with the requirement of justice. In this case commentary it refers to the Court's obligation.

II. A Factual Background

Many questions have been raised, among academics and lawyers, as to whether it was necessary for the Supreme Court to propound the modalities of curative petitions. This is because as the second paragraph in this part will show, it appears that even without curative petition, persons aggrieved by a final Supreme Court decision, resulting in a miscarriage of justice would still able to approach the Court for assailing a judgment of the Court. In India, the Supreme Court is the 'guardian angel of fundamental rights'; a cause it has furthered with a lot of enthusiasm. This enthusiasm has often been called judicial activism. Perhaps, due to the fact that the matter before the Court in *Rupa Ashok Hurra* had come before it through Article 32 might have prompted the Court to propound the modalities of curative petitions[3]. In the subsequent paragraphs I seek to provide a glimpse of various Supreme Court pronouncements that culminated in the Court setting forth the modalities of curative petitions.

Prior to *Rupa Ashok Hurra*, the Supreme Court in a number of decisions had held that an order of it, which results in a miscarriage of justice, is amenable for correction. Examples of this sort are to be found in *M.S. Ahlawat*[4], *Harbans Singh v. State of Uttar Pradesh*[5] and *Supreme Court Bar Association v. Union of India*[6]. In the above mentioned cases the Court invoked its inherent power under Article 142 to do complete justice[7]. In all these mentioned cases the matter came before the Court via Article 32. These cases had been distinguished in *Rupa Ashoka Hurra* on the ground that no one had joined issue with regard to the maintainability of a writ petition under Article 32.[8] However, this state of affairs was changed in *A. R. Antulay v. Union of India* [9] where the Court ruled that a final Supreme Court judgment cannot be assailed via a writ petition[10].

In both *A. R. Antulay* and *Rupa Ashok Hurra*, the matters were referred to larger benches by smaller ones; in the case of *A. R. Antulay*, a Division Bench and a three judge Bench in the case of *Rupa Ashok Hurra*. For *A. R. Antulay* the Constitutional Bench consisted of seven judges whereas for *Rupa Ashok Hurra* it consisted of five judges.

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3 Article 32 of the Constitution of India allows persons to approach the Supreme Court directly for the enforcement of their fundamental rights.

4 (2000) 1 SCC 270.

5 (1982) 2 SCC 101.

6 (1998) 4 SCC 409.

7 *Rupa Ashok Hurra V. Ashok Hurra and Anr*, (2002) 4 SCC 388 at P. 416, Para 48.

8 Ibid, P. 402, para 13.

9 See an appendix of *A. R. Antulay V. Union of India* (1984) 3 SCR 482, 48 at P. 764 of *A. R. Antulay V. R. S. Nayak* (1988) 2 SCC 602 judgment.

10 Ibid.

I will now start with the factual back ground leading to *A. R. Antulay* and then proceed to the factual background leading to *Rupa Ashok Hurra* in that order. In *A. R. Antulay* the Court was confronted with the following situation: the Supreme Court in an earlier case had ordered that the appellant therein be tried by a High Court Judge as opposed to a Special Judge as laid down by the Act of 1952.[11] This was a clear violation of the statutory provisions of the Criminal Law Amendment Act, 1952. The petitioner first appeared before the High Court judge questioning the Constitutionality of the proceedings before the High Court. However, his objections were rejected by the High Court Judge. The High Court judge ruled that he had been granted powers by the Supreme Court through its earlier order to proceed with the trial of the appellant.

The appellant then sought to challenge this order via writ petition under Article 32, which was dismissed by a two Judge Bench of the Supreme Court who observed that the dismissal would not prejudice the right of the appellant therein referred to as the petitioner to approach the Supreme Court with an appropriate review petition or to file any other application, which he may be entitled in law to file.[12] Subsequently, the petitioner came before the Supreme Court via special Leave Petition under Article 136 to question the High Court's jurisdiction to try his case in violation of Article 14 and 21 and provisions of the 1952 Act.[13] It then follows that in *A. R. Antulay* an appropriate procedure to assail a final Supreme Court judgment was available to the appellant. This meant that at this point in time there was no need for the Court to propound any new procedures of assailing any of its final judgments that result in a miscarriage of justice. In the next paragraph, I will proceed to look at the how the matter raised in *Rupa Ashok Hurra* came before the Court and move on to show how the fact scenario in *Rupa Ashok Hurra* was completely different to the one in *A. R. Antulay.*

In *Rupa Ashok Hurra* a writ petition under Article 32 had been filed before the three Judge Bench and dismissed since the Court in an earlier judgment, *A. R. Antulay* had held that a final Supreme Court judgment cannot be assailed via writ petitions under Article 32.[14] However, more related writ petitions were again filed before the same three judge Bench. This prompted the three judge Bench to refer these writ petitions to a Constitutional Bench seeking its opinion as to whether an aggrieved person is entitled to any relief against a final judgment/order of the Supreme Court, after dismissal of a

11 *A. R. Antulay V. R. S. Nayak* (1988) 2 SCC 602, Page 641, paras 11 & 12

12 See an appendix of A. R. Antulay V. Union of India (1984) 3 SCR 482, 48 at P. 764 of *A. R. Antulay V. R. S. Nayak* (1988) 2 SCC 602 judgment.

13 *A. R. Antulay V. R. S. Nayak* (1988) 2 SCC 602, Page 641, para 12.

14 *Ashok Hurra V. Rupa Bipin Zaveri*, (1997) 4 SCC 226.

review petition, either under Article 32 of the Constitution or otherwise[15]

At this point in time it is instructive to note that two possible routes confronted the Constitutional Bench: to uphold the already laid down dictum that a final Supreme Court judgment cannot be assailed via writ petition or overlook this dictum and in the interests of justice admit these writ petitions. The latter view seemed most plausible and the Constitutional Bench embraced it. In India such an action by the Supreme Court is not surprising; after all, the Supreme Court considers itself to be 'the guardian angel of fundamental rights'[16]. Writ petitions under Article 32 only involve fundamental rights issues. In *Rupa Ashok Hurra* these writ petitions were admitted by a Constitutional Bench. In India a Constitutional Bench[17] can overrule a Division Bench. The reason for this is that in India there is hierarchy of Courts and Benches hearing matters before them. Consequently, a larger Bench can overrule a smaller Bench.

However, the Constitutional Bench admitted the above mentioned writ petitions with caution[18]. The Constitutional Bench in *Rupa Ashok Hurra* also went ahead to take the same view that a writ petition under Article 32 cannot assail a final Supreme Court judgment[19]. Unlike in *A. R. Antulay, in Rupa Ashok Hurra*, there was no appropriate procedure that petitioners could have adopted to come before the Supreme Court in case the Court decided to dismiss their writ petitions. This is what prompted the Court in *Rupa Ashok Hurra* to propound the modalities of a curative petition. Perhaps the modalities of curative petitions did not fully fit the bill as subsequent Sections will try to show. But it is an undisputed fact that an appropriate procedure to fill up the Constitutional lacunae that the writ petitions in *Rupa Ashok Hurra* had pointed out was the need of the hour.

III. Curative Petitions and 'Second Review Petition'

This part looks at the supposition that a curative petition is not a 'second review petition'. I try to show here that curative petitions are in effect the same as 'second review petitions' filed after dismissal of the first

15 *Rupa Ashok Hurra v. Ashok Hurra and Anr*, (2002) 4 SCC 388.

16 In India, the Supreme Court stands poised with a responsibility to uphold Constitutionalism in the country, this responsibility has resulted in the Supreme Court to refer to itself as the guardian angel of the Constitution and Fundamental Rights. See *V. C. Mohan v. Union of India* (2002) 3 SCC 451 at P. 453, Para 2.

17 A Constitutional bench refers to a Bench of the Supreme Court consisting of more than three judges looking at a matter that is of Constitutional significance.

18 See *Rupa Ashok Hurra v. Ashok Hurra and Anr*, (2002) 4 SCC 388 at P. 403, Para 14 where the Court was categorical that a final Supreme Court decision cannot be assailed via Article 32 of the Constitution, the writ petitions filed in Rupa Ashok Hurra were the last such petitions to assail a final Supreme Court decision .

19 Ibid at P. 417.

review petition. The term 'second review petition' is a hypothetical term used purely illustratively. The above mentioned supposition is necessitated by the huge number of curative petitions that have been filed so far before the Supreme Court. The litigant public seems to have taken curative petitions to amount to the last remedy that is available to a litigant before the Court finally closes its doors to litigation. Since April 2002 when the Supreme Court propounded the modalities of Curative petitions, five hundred and sixty eight curative petitions have been filed before the Supreme Court[20]. This implies that the litigant public will not stop till they have exhausted all remedies available to the Supreme Court including that of filing of curative petitions. Before *Rupa Ashok Hurra*, review petitions marked the finality of a Supreme Court judgment beyond which no further challenge of the judgment was allowed. This state of affairs, as the article will show, is far from what the Supreme Court intended when it propounded the modalities of curative petitions.

Perhaps this confusion is the result of a misinterpretation of the *Rupa Ashok Hurra* judgment by 'curative petitioners', and the Supreme Court itself. In the next four paragraphs, I will explore this confusion further and try to prove that indeed curative petitions are nothing but 'second review petitions'. At the outset, the modalities of curative petitions in *Rupa Ashok Hurra* involved the invocation of Article 137 of the Constitution by implication. No where in *Rupa Ashok Hurra* is Article 137 explicitly mentioned. The Supreme Court held that under its inherent power under Article 142 of the Constitution; it can review its final order that results in a miscarriage of justice[21]. The power of review is granted by Article 137 to the Supreme Court to review any of its judgments. Such power is not provided anywhere else in the Constitution. The Supreme Court has defined review to mean re-examining or reconsidering a final decision.[22] In both curative and review actions, the Supreme Court is only reconsidering its final judgment as such in both the endeavours the activity is the same save for different words being adopted to describe these activities.

The fact that Article 137 is an integral component of the procedure of filing curative petitions is further enhanced by curative petitioners averring in their petitions that such petitions are filed under Article 137, 141 and 142[23]. In *Rupa Ashok Hurra*, it was necessary that the Supreme Court wore

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20 The Source of this information is the empirical data collected from the Supreme Court registry by the author in the months of November and December, 2006.

21 *Rupa Ashok Hurra Vs. Ashok Hurra and Anr*, (2002) 4 SCC 388 at P. 416, Para 49.

22 *S. Nagaraj V. State of Karnataka* 1993 Supp (4) SCC 595, 619, Para 19.

23 Empirical data collected from the Supreme Court registry and also dismissed Curative petitions reported in Law Reports suggest that a curative petitioner has to aver in the petition that it is filed

the mantle of infallibility due to the fact that its decisions are final and that no higher Court exists to correct an error by the Supreme Court[24]. The Supreme Court's review and curative actions amount to an acknowledgement by it that sometimes errors or mistakes in judgments do occur resulting in a miscarriage of justice. Such judgments ought to be corrected through a review procedure. This line of thought might have been an incentive for the litigant public to file unwarranted review and curative petitions in the hope that a mistake if found in the impunged judgment. The many number of curative petitions that have been filed and dismissed so far bears testimony to this inference. We find this despite the Supreme Court providing a stringent procedure for filing review petitions and an even more stringent procedure for filing curative petitions. The procedures and grounds for filing review petitions and curative petitions will be dealt with later on.

The power to review does seem to be the answer to Supreme Court's (in)fallibility. However, the power of review can only be exercised once and not twice[25]. Such a limitation to the number of times the power of review can be exercised marks the first distinction between a curative petition and a 'second review petition'. Once a review petition has been disposed off, a second review petition cannot then lie with the Supreme Court. With such jurisprudence already in place prior to *Rupa Ashok Hurra*, the Supreme Court could not give it the go by and propound modalities of a 'second review petition'[26]. Legally speaking, curative action by the Supreme Court should not amount to review action. However, as already stated the power to review is inherent in curative actions of the Court.

A Court of law, more so the highest Court of the land cannot, will not and should not be seen to be buckling under pressure of expediency and convenience of the moment so as to lightly transgress into unconstitutional acts. Perhaps this mantra was oblivious to the Court in *Rupa Ashok Hurra* when it coined the term curative action while in essence the term only amounts to a 'second review action'. To put it in simple words as long as the Court is re-considering its earlier final judgment it amounts to review, there are no

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under Articles 137, 141 & 142 of the Constitution.

24 *S. Nagaraj v. State of Karnataka* 1993 Supp (4) SCC 595, 619, Para 19.

25 The Supreme Court under Article 145 of the Constitution can from time to time make rules for regulating its practice and procedure. Under this power, the Supreme Court propounded, The Supreme Court Rules, 1966; O-XL Order XL, Rule 5 of the Supreme Court Rules, 1966 provides that where an application for review of any judgment and order has been made and disposed of, no further application for review is maintainable in the same matter. Also Supreme Court in *M.S.L. Patil v. State of Maharashtra*, (1999) 9 SCC 231 held that a second review after the dismissal of the first is considered an abuse of the process of the Court.

26 In *Rupa Ashok Hurra v. Ashok Hurra and Anr*, (2002) 4 SCC 388 at P. 416, para 50, the Court has stated that the modalities of curative petition do not amount to a passport for filing second review petitions.

two ways to the issue. Having said that, one must also be fair to the Supreme Court and try not to dismiss offhand the idea of a marked distinction existing between a curative petition and a 'second review petition'. However, the above observation confounds the litigant public as to what a curative petition actually is.

The above dilemma seems to be further fuelled by the manner in which the Supreme Court has exercised its power of review and, to a lesser extent, its inherent power in the past. What most curative petitioners seem to ask is why the Supreme Court should adopt stringent measures in curative petitions for matters that pertain to review. A scrutiny of the Supreme Court's handling of its power of review is revealing. In *A. R. Antulay*, the Court exercised the power of review without insisting on the formalities of a review petition application.[27] Further the writ petitions filed under Article 32 before the Supreme Court in *Rupa Ashok Hurra* were admitted even though the Supreme Court in *A.R. Antulay* had already held that a final Supreme Court judgment couldn't be assailed via a writ petition under Article 32[28]. Still further, the Court in *Rupa Ashok Hurra* upon admitting the mentioned writ petitions did not insist on the formalities of a curative petition application[29]. If in the past the Court has been lenient with one procedure of review, it seems to turn around and prescribe the procedure for curative petitions that is almost impossible to be complied with[30]. From empirical data that I collected from the Supreme Court, not a single curative petition has been successful before the Supreme Court since *Rupa Ashok Hurra.*

Previous paragraphs have have tried to show that in effect curative petitions amount to 'second review petitions'. I now proceed look at the other side of the coin : that there is a significant court induced difference between a curative petition and a 'second review petition'. I will also move on to analyse curative petitions in the light of the paradigm of review petitions. This is because review petitions have been provided for in the Constitution unlike curative petitions which are a result of a Supreme Court pronouncement. I will restrict my analysis to the grounds and Constitutional provisions involved in filing both the petitions. In the subsequent paragraphs

27 *A. R. Antulay v. R. S. Nayak* (1988) 2 SCC 670, P. 670, para 79, the Appellant came before the Court under Article 136 to challenge a final Supreme Court judgment.

28 See an appendix of *A. R. Antulay v. Union of India* (1984) 3 SCR 482, 483 (The matter had been disposed of by a divisional Bench) at P. 764 of *A. R. Antulay v. R. S. Nayak* (1988) 2 SCC 602 judgment.

29 In *Rupa Ashok Hurra Vs. Ashok Hurra and Anr*, (2002) 4 SCC 388 P. 417, Para 54, the Court directed the Registry to process the writ petitions even though they didn't contain an averment that the grounds raised in the them for coming before the Court had been raised in the earlier disposed off review petitions. The said averment is a prerequisite for filing a curative petition.

30 From the empirical data gathered from the Supreme Court, so far not a single curative petition has been successful before the Supreme Court.

I will first illustratively look in turns at these petitions in light of the above parameters and then proceed to analyze them. At this point it ought to be noted that Article 137 is the only Constitutional provision that is common in both curative petitions and review petitions.

As the name suggests, curative petitions refer to petitions filed before the Supreme Court that seek to prevent the abuse of the Court process and to cure a gross miscarriage of justice[31]. As already stated earlier curative actions are filed under Article 137, 141 and 142. They are filed after the disposal of a review petition. There is no prescribed period for filing a curative petition.[32] A curative petition can only be field under the following grounds:[33]

1. Where there is violation of principles of Natural justice in that the aggrieved party filing a curative petition was not a party to the lis but the judgment adversely affected his interest or if he was a party to the lis, he was not served with notice of the proceedings and the matter proceeded as if he had notice.

2. Where in the proceedings a learned judge failed to disclose his connection with the subject matter or the parties, giving scope for an apprehension of bias and the judgment adversely affects the petitioner."

In addition to the above grounds, the 'curative petitioner' must aver specifically that the grounds mentioned in the curative petition had been taken in the review petition and that such review had been dismissed by circulation.[34] Circulation in this context means discussion at a judicial conference and not in Court through oral arguments.[35] Also, a curative petition has to include a certificate by a Senior Advocate indicating that the same grounds in the curative petitions had also been taken in the review petition.[36] Further, the curative petition has to be circulated to a bench of the three senior most judges and the judges who passed the judgment complained of, if available.[37] In the event of the bench holding at any stage that such curative petition is without any merit and is vexatious, it could impose exemplary costs on the petitioner.[38]

I will now explain what a review petition is. As already mentioned, a review petition is filed under Article 137 of the Constitution. The power to

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31 (2002) 4 SCC 388, 416, para 49.
32 The Supreme Court Rules, 1966.
33 *Rupa Ashok Hurra v. Ashok Hurra and Anr*, (2002) 4 SCC 388 at P. 416, Para 51.
34 P. 417, Para 52.
35 *P. N. Eswara Iyer v. Registrar, SC of India* (1980) 4 SCC 680 at P. 687, Para 14.
36 *Rupa Ashok Hurra v. Ashok Hurra and Anr, (2002) 4 SCC* 388 at P. 417, para 52.
37 Ibid, Para 53.
38 Ibid.

review is not an inherent power[39]. Inherent power is given to the Supreme Court under Article 142 of the Constitution and it refers to the power of the Court to do complete justice. The power of review must be conferred by law either specifically or by implication[40]. The Supreme Court Rules, 1966 made in exercise of the powers under Article 145 of the Constitution prescribe that in civil cases, review lies on any of the grounds specified in Order 47 Rule 1 of the Code of Civil Procedure, which provides:

(i) Discovery of new and important matter of evidence.

(ii) Mistake or error apparent on the face of the record.

(iii) Any other sufficient reason.[41]

In the case of criminal proceedings a review lies on the ground of an 'error apparent on the face of the record'.[42] 'An error apparent on the face record' has been taken to mean an error which strikes one on merely looking at the record and does not require any long drawn process of reasoning on points where there may, conceivably, be two options.[43] However, the Supreme Court has later held that the above restrictive view on criminal review could not have been intended and that it ought to be assumed that the contrary is the case since criminal review matters are more traumatic and touch on issues of life and liberty unlike civil reviews[44]. A review petition lies with the Court if filed within thirty days after the pronouncement of a final Supreme Court judgment[45].The purpose of review is to ensure that justice is not defeated and that errors leading to miscarriage of justice are remedied.[46]

Having put down the various distinctive features of curative petitions and review petitions I now proceed to draw an analysis between curative petitions and review petitions. Firstly, the manner in which the Supreme Court takes note of both curative petitions and review petitions is almost similar, save for slight differences. In both the cases the petitions are first

39 The Supreme Court in *Patel Narshi Thakershi v. Pradyumansinghji Arjunsinghji* AIR 1970 SC 1273, para 4 has held that it is well settled that the power to review is not an inherent power. See also *Lily Thomas v. Union of India* 2000 (6) SCC 224, Para 52 where the Supreme Court has retaliated that review is the creation of a statute.

40 Ibid.

41 The expression 'any other sufficient reason' has been given an expanded meaning and a decree or order passed under misapprehension on true state of circumstances has been held to be sufficient ground to exercise the power of review. See *S. Nagaraj v. State of Karnataka* (1993) Supp. 4 SCC 595.

42 Order XL, Rule 1 of Civil Procedure Code lays down grounds for a review petition but the Supreme Court under its powers in Article 145 has made a distinction between grounds for filing a civil review petition and those for filing a criminal curative petition. See Supreme Court Rules, Order XL.

43 *Meera Bhanja v. Nirmala Kumari Chaudhary* AIR 1995 SC 455 at P. 457.

44 *P. N. Eswara Iyer v. Registrar, Supreme Court of India* (1980) 4 SCC 680 at P. 695, para 34.

45 See Supreme Court Rules, 1966, O-XL relating to review.

46 *Lily Thomas v. Union of India* (2000) 6 SC 224 at P. 252.

circulated to the Supreme Court: for review petitions, circulation is to the judges who passed the impugned judgment whereas in the case of curative petitions, circulation is the three senior most judges in the Supreme Court and the judges who had passed the impugned judgment if available[47]. Secondly in both the reviews a certificate of a senior counsel is essential. The purpose of the certificate is to aver that very strong reasons exist for the Supreme Court to admit the petition. However, in the case of curative petition the Court can impose exemplary costs for those petitions that are; unwarranted this not being so in the case of review petitions. Thirdly, with regard to curative petitions the grounds laid down in Rupa Ashok Hurra are the only grounds that would warrant the admission of a curative petition by the Court[48]. However, with regard to review petitions the Court seems to have taken the grounds for filing review petitions as illustrative not exhaustive. Lastly the grounds for filing a curative petition seem to be based on natural justice principles unlike those of filing review petitions that seem more broad and not necessarily restricted to natural justice. In conclusion I suggest that a very thin line exists between a curative petition and a 'second review petition' and looks like its more of a case of an old wine in a new bottle rather than the Supreme Court breaking down new jurisprudential grounds to propound the modalities of a curative petitions. The Supreme Court has, however sought to lay down different grounds for filing review petitions and curative petitions.

IV. Ex Debito Justitiae Obligation

Though, as already mentioned, the Supreme Court in *Rupa Ashok Hurra* chose not to be 'saddled' by a 'discussion' of *A. R. Antulay*, both judgments relied on the same *ex debito justititiae* obligation, albeit formulating it differently. In India a smaller Bench cannot overrule a larger Bench. The *A. R. Antulay* court consisted of a seven Judge Bench whereas the *Rupa Ashok Hurra* Court consisted of a five Judge Bench. This therefore means that the Court in *Rupa Ashok Hurra* could only base its *ex debito justitiae* obligations within the parameters laid down by *A. R. Antulay*. This part finds out if this was so. I will first state the dictum in *A. R. Antulay* and *Rupa Ashok Hurra* and then proceed to my analysis of *Rupa Ashok Hurra*.

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47 In India a Supreme Court judgment is pronounced by a Divisional bench, usually three judges hence for curative petitions is circulated to five judges in total, however the number of judges to whom curative petitions have been circulated keeps on fluctuating. A quick perusal of the curative petitions that have come up before the Supreme Court shows that the size of the bench hearing them has been fluctuating between five and four. This fluctuation is as a result of unavailability of one of the judges who passed the impugned judgment otherwise the number of senior judges never changes, its always three.

48 Ibid, para 51.

As I have already mentioned before, a bench of seven judges set aside an earlier judgment of the Supreme Court in a collateral proceeding because it was contrary to the provisions of the Criminal Law Amendment Act of 1952[49]. The directions given by the impugned judgment were in violation of principles of natural justice and were without precedent in the background of the Criminal Law Amendment Act of 1952.[50] These directions deprived the appellant of certain rights of appeal and revision and also his rights under the Constitution.[51] In *A.R. Antulay*, the Court held that it can *ex debito justitiae* remedy directions given *per incuriam* and in violation of certain Constitutional limitations and in derogation of the principles of natural justice.[52] It was the position of the Court that no man should suffer a wrong due to procedural irregularities.[53] To grant justice and to review its earlier judgment the Court invoked its inherent power under Article 142 of the Constitution[54].The basic premise in the dictum of *A. R. Antulay* is that if facts are ascertained before the court which prove that the impugned judgment was given *per incuriam* or violated natural justice principles or Constitutional provisions, the Court has no discretion than to set aside the impugned judgment. This means that the *ex debito obligation* cannot be derogated from when such facts are disclosed that call for its use.

In *Rupa Ashok Hurra*, the Court was clear that to be entitled to a relief *ex debito justitiae* a petitioner has to fulfill the grounds laid down for filing a curative petition.[55] This means that a petitioner who seeks to assail a final Supreme Court judgment but is unable to make out a case within the parameters laid down in *Rupa Ashok Hurra* cannot then be heard by the Court. In other words the Court in such a case cannot be 'obliged *ex debito justitiae* since the petitioner has been unable to come before the Supreme Court. This state of affairs is what makes *Rupa Ashok Hurra* dictum appear different from that of *A. R. Antulay*. With regard to curative petitions, the Court can choose to admit or dismiss them depending on whether they fulfill the parameters laid down in *Rupa Ashok Hurra*. In other words the Court can exercise discretionary powers in relation to curative petitions. However when it comes to the *ex debito justitiae* obligation the Court has no discretion as has been laid down in *A. R. Antulay*. If facts ascertained before the Court prove that a miscarriage of justice has taken place in the impugned judgment, the Court would have discretion than to set aside such judgment.

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49 *A. R. Antulay v. R. S. Nayak* (1988) 2 SCC 670, P. 673, para 87.
50 Ibid, at P.670, para 78.
51 Ibid, at P.670, para 78.
52 Ibid, at P.670, paras 78, 79 & 80.
53 Ibid, at P. 672, para 83.
54 Ibid, at P.670, para 79.
55 (2002) 4 SCC 416, para 51.

In *A. R. Antulay*, the Court was not worried about the procedure of ascertaining the said facts whereas in *Rupa Ashok Hurra* we find that procedure is of paramount importance. There is nothing constitutionally wrong with that, but the problem comes to the fore when the Court equates *ex debito justitiae* obligation to the filing of curative petitions as it has done in *Rupa Ashok Hurra*. This in essence amounts to overruling *A. R. Antulay* in so far as *ex debito justitiae* obligation is concerned. The Court in *Rupa Ashok Hurra* introduces a discretionary power to this obligation which is far from the dictum in *A. R. Antulay*. There is a need for the Supreme Court to constitute a large bench to harmonize *Rupa Ashok Hurra* judgment with that of *A. R. Antulay*.

In the next part I will trace the *ex debito justitiae* obligation in the common law and use this as a backdrop for analyzing which of the two dicta *A. R. Antulay* or *Rupa Ashok Hurra* has applied this obligation correctly. However, I must state that this is purely in academic interest since in terms of constitutional validity it is already settled that *A. R. Antulay* dicta having been pronounced by a larger Bench than *Rupa Ashok Hurra* judgment Bench is the binding dicta.

In common law jurisprudence *ex debito justitiae* obligation[56] is often called "as of right rule" and it entitles defendants to have an irregular, default judgment set aside without considering the merits[57]. The ex debito justitiae obligation means no more than this: 'in accordance with settled practice, the court can exercise its discretion in only one way, namely, by granting the order sought'.[58] The rule ensures that litigants comply with the relevant procedural rules and that defendants have notice of proceedings and is protected from the injustice that might result if a judgment is unfairly passed against them. The similarity between the *ex debito justitiae* obligation usage in England and India is that the Court has no discretion than to set aside the impugned judgment. Therefore in conclusion it can be said *ex debito justitiae* is an obligation in which the Court does not exercise its discretionary power. This is what the Supreme Court stated in *A. R. Antulay*.

The fact that so far no curative petition has been successful before the Supreme Court suggests two things. First, that so far no curative petition has been able to make out a case within the *Rupa Ashok Hurra* parameters.

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56 See *Anlaby v. Praetorious* (1888) 20 QBD 764, mentioned in Camille Cameron "Irregular default judgments: should Hong Kong discard the 'as of right' rule?" 30 HKLJ 245 (2000) at www.westlawinternational.com, last visited on March 09, 2006, in Common law is considered as the source of 'as of right rule' see.

57 Ibid.

58 Andrew Keay, "Disputing debts relied on by petitioning creditors seeking winding-up orders", comp. law. 2001, 22(2), 40-46.

Secondly, that so far as no other grounds that result in miscarriage of justice that have been alleged in a curative petition have succeeded. The second suggestion is a hypothetical proposition and hasn't been proven so far however, it cannot be wished away because the Court in *Rupa Ashok Hurra* had stated that it was not possible to enumerate all the grounds on which a curative petition may be entertained[59]. Nevertheless, the Court felt it necessary to control the 'floodgates' of litigation which resulted in the limited grounds on which the Court would accept curative petititions. That apart, the Court must ensure that the formalities of filing an application for curative petition should not deny anyone justice. That several curative petitions have proceeded beyond the notice stage[60] before finally being dismissed strongly suggest that the formalities of filing an application for curative petition may not be a hindrance for approaching the Supreme Court in search of justice. Rather, the difficulties in filing a meritorious claim in a curative petition.

V. Conclusion

Perhaps the propounding of curative petitions by the Court was a judicial fiat. This is so since curative petitions apart from the stringent procedures that have to be fulfilled are nothing but second review petitions. As I have said it is a case of old wine in a new bottle. That the *Rupa Ashok Hurra* dictum is in conflict with a larger Bench's dictum adds weight to the above observation. It cannot be denied that the writ petitions in *Rupa Ashok Hurra* raised fundamental questions, which, disappointingly, as this comment has tried to show, have not been fully answered. I submit that the correct way for the Court to have adopted is through Article 145 of the Constitution. It is equally significant to note that Article 137 of the Constitution grants the Supreme Court the power of review of any of its final decisions.

This power of review as per Article 137 is not restricted to only one time use in relation to a final Supreme Court decision. However, as pointed out, it is through the Supreme Court's pronouncement and in exercise of its power under Article 145 that review power has been used only once in any relevant final Supreme Court decision. Amending Order 40 of the Supreme Court Rules, 1966 would have been the most pragmatic way of dealing with Constitutional questions raised by the Writ petitions in *Rupa Ashok Hurra*. Perhaps one reason for the Court to choose to formulate the procedure

59 *Rupa Ashok Hurra v. Ashok Hurra and Anr*, (2002) 4 SCC 388 p. 416, Para 50.

60 After curative petitions have been circulated before the relevant judges, they are then heard in the open court and the parties to the matter are issued notice to appear before the Court. None of the Civil Curative petitiona have ever proceeded beyond the notice stage but as of December 03 2006, 2 criminal curative petitions had proceed beyond the notice stage and were dismissed that proof of surrender as directed by the Court was dismissed beyond the period thar stipulated by the Court. These petitions were *Deo Narrain Mandal v. State of Uttar Pradesh, Curative petition (CR.L.) No.2 of 2005 and Raj Deo Rai V. State of Uttar Pradesh, curative petition (Cr.L.) No. 19 of 2005.*

through a judgment was to avoid undertaking the elaborate procedure that could have been involved in amending Order 40 of the mentioned rules and the desire of the Supreme Court to deliver instant justice. That may be so but at the end of the day the Supreme Court sacrificed constitutionalism at the altar. This is one thing that the Apex Court, which is the Court of ultimate resort, cannot afford to be seen doing.