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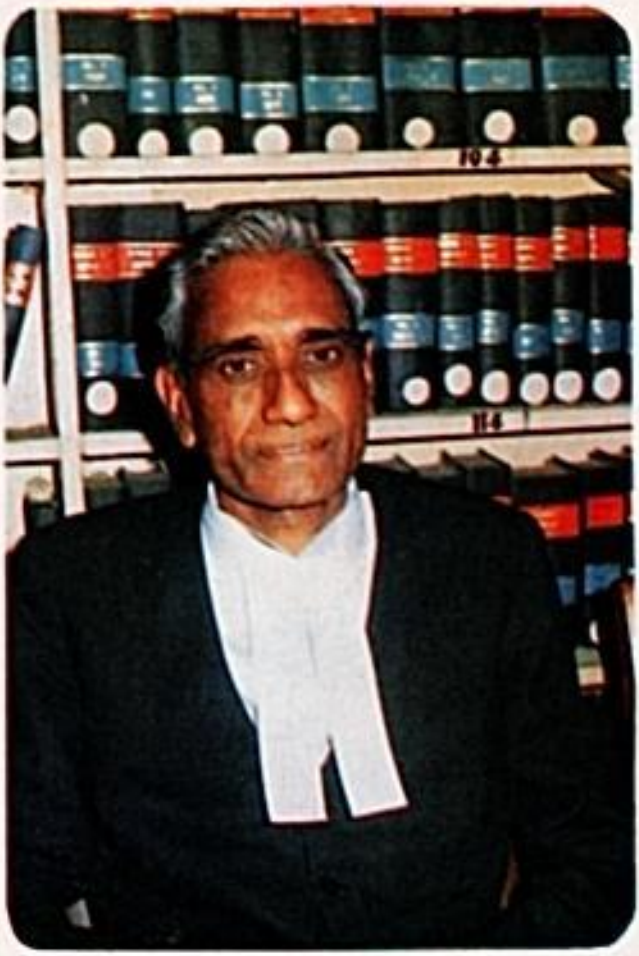
OUR CHIEF JUSTICE



Hon'ble Mr. Justice A. Lakshmana Rao,
Chief Justice, Allahabad High Court
(Since April 10, 1995)

ADVICE TO JUDICIAL OFFICERS*

Justice A. Lakshmana Rao
Chief Justice, Allahabad High Court

Brother Justice Brijesh Kumar, Justice U.C. Srivastava, Chairman of the Institute, Justice Goyal, Mr. Singhal, Director, my esteemed learned brothers and sisters, distinguished invitees and learned members of the judicial fraternity.

It, indeed, gives me a great pleasure to be present amidst you this morning in connection with the inauguration of the refresher course for the judicial officers of the rank of District Judge and Additional District Judge. This is my first visit to this Institute. I know something about this Institute because I was for sometime the Chairman of the Andhra Pradesh Judicial Academy which is run on the same lines.

It is needless to mention that it is essential for the members of the judicial service to update their knowledge from time to time in order to enable them to perform their onerous judicial functions to the satisfaction of one and all. The credibility of the judicial institution and the confidence of the people in the justice delivery system depend upon the way the Judicial Officers and the judges conduct themselves inside and outside the Court. The Judicial Officers presiding in the various subordinate Courts in the State, have an opportunity, in a way, to deal directly with the litigant public and it is the Subordinate Courts at the grass root level to which people have a direct access. They have an opportunity to observe and watch the way the judicial proceedings are conducted in a Court. It is not so in the case of High Court and Supreme Court because very few litigants will have an opportunity to visit these Courts and mostly it is the advocates that argue the cases before these Courts. It is the impression gathered by the litigant public that goes a long way in establishing the credibility of the judiciary. Therefore, it is very essential that a Judicial Officer should imbibe the qualities which help him in conducting himself in a dignified and decent manner while he sits in the Court as well as he moves outside the Court.

A training institute like this, should concentrate on providing an opportunity to learn about these things apart from updating knowledge on the judicial side and the administrative side. A Judicial Officer or any other Judge for that matter is always a learner. Just because we know something, it is not safe to presume there is nothing more to be learnt. Law is an ocean, it should be our endeavour and effort to learn from each and every advocate and every

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* Address at the inaugural ceremony of the Refresher Training Course for Additional District and Sessions Judges on April 25, 1995 at the Judicial Training & Research Institute, U.P., Lucknow.

member of the staff, on various aspects. If a Judicial Officer is thorough with the procedural laws as well as certain important substantive laws with which he has to deal with, having regard to the area in which he has to function, he will be in a better position to perform his functions satisfactorily showing higher rate of disposal of cases.

It has also to be borne in mind that the Courts cannot function without the co-operation of the members of the Bar. It should be our endeavour to maintain cordial and harmonious relationship between the Judicial Officers on the one hand and the members of the Bar on the other. By this, I do not mean, that while seeking the cordial co-operation of the members of the Bar, the Judicial Officer should be either subservient or submissive to the dictates of others. A Judicial officer should be polite and courteous. He should be humane but at the same time he should be firm. You must know how to deal with a problem that arises, in a firm but at the same time in a polite, decent and dignified manner. It is not necessary for us to alienate the feelings of the Bar. We must provide an opportunity to the learned members of the Bar to ventilate their genuine grievance. If it is necessary, we should not hesitate to sit together, negotiate and try to settle the problems if any, in an amicable manner. Neither the members of the Bar nor the members of the judicial fraternity, should think of confrontation.

If you do not keep pace with the march of Law by keeping abreast with the decisions of the High Court and the Supreme Court, you will be committing grave errors in disposal of cases which necessitate the litigant public to carry the matter in appeal or revision and it will lead to multiplicity of litigation. If the judgments are given in accordance with the latest decisions, normally an advocate will advise the client not to file appeal or revision. Updating of knowledge will create a good impression in the minds of the members of the Bar about an officer. If it is realised that a Judicial Officer is thorough, and well conversant with the fundamental legal positions, naturally, such an officer will command the respect of the members of the Bar. Some Judicial Officers like District Judges have to perform administrative functions also. Administrative efficiency is something different from judicial efficiency. If an officer is found to be lacking in administrative efficiency, the members of the staff will try to take advantage of the weakness of an officer, it is very essential that a Judicial Officer should also be conversant about administrative functions of the Court. If the members of the staff come to know that you know the fundamentals of administration, then they would keep themselves within their limits and you can very successfully carry on your administrative functions.

With all your experience as Judicial Officers, it is not necessary to impress upon you the need and necessity of maintaining the dignity of the high office you hold. Administration of justice is a solemn and sacred function. It is not like executive function. The people of this country have entrusted to the Judiciary

very onerous responsibilities. It is for the higher Judiciary to maintain the balance between the Executive, the Legislature and the Judiciary. In a society governed by the rule of law, Judiciary has a vital role to play. It is for the Judiciary to protect the fundamental rights of the citizens as their custodian and guardian. It is for us to ensure that a citizen is not denied of his right of life, liberty and property except in accordance with the law. The functions which are entrusted to the Judiciary are of utmost importance and their significance has to be borne in mind by each of you. May be, you may not be performing the functions of a Constitutional Court, but the way you conduct the proceedings in the Court, in an adversarial system, creates the confidence in the people, at the grass root level which ultimately strengthens the functioning of the entire Judicial system.

I thank the Chairman and Director of this Institute for providing me this opportunity. I hope and trust that you will make best use of the opportunity to equip yourselves with the latest knowledge that is required to enable you to perform your functions satisfactorily.

Thank you all.

"NEAREST MAGISTRATE" IN ARTICLE 22 OF THE CONSTITUTION

Justice U.C. Srivastava
Chairman ,J.T.R.I., U.P.

The question, whether the Constitutional provisions regarding arrest and detention guaranteed under Article 22 of the Constitution could be interpreted in favour of state action, deviating from the language used, was recently posed in one of the training courses conducted by this Institute. The question was raised particularly with reference to judgment of Division Bench of the Allahabad Court in Amarnath and another v. Union of India and others (1990 All. Cri. R. 634), in which the Bench, although held that the provisions of Article 22 (2) including production before nearest Magistrate within 24 hours are imperative, yet observed elsewhere in the judgment that the question of nearest Magistrate would be relevant only when person arrested and detained is produced before another Magistrate beyond 24 hours and the benefit of travelling period is claimed which benefit is available only when production is before 'nearest Magistrate'. The Bench ultimately held that in its view, the detention of person detained in the interior of District Gonda who was produced before a Magistrate at Allahabad within 24 hours itself and not before any Magistrate in any of the intervening Districts, was not vitiated.

The question whether the 'nearest Magistrate' means the Magistrate nearest to the place where a person is arrested and taken in custody or where he is produced by the police within 24 hours, was raised before the Supreme Court in Rajendra Agarwal v. Chief Metropolitan Magistrate, 1985 (Supp.) S.C.C. 607, but the Court did not decide the question, as the accused by that time had been released, observing that the question is not free from difficulty and requires consideration at depth.

The relevant portion of Article 22 of the Constitution reads as under :-

> "(1) No person who is arrested shall be detained in custody without being informed as soon as may be of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by a legal practitioner of his choice.
>
> (2)Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty- four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate."

The provisions of Article 22 (1) and (2) are mandatory in nature but so far as phrases 'as soon as may be' in Article 22(1) and 'the nearest Magistrate' in Article 22(2) are concerned there appears to be some room for interpretation; otherwise the language of Article is quite clear and unambiguous. Article 22 puts check on arbitrary and illegal arrests and gives certain protections and guarantees to the person arrested and taken in custody, also puts a check on police detaining a person for longer period and producing him before a Magistrate of their choice without adhering to the Constitutional provisions limiting the time for production of the person so detained.

A look at legislative history regarding Art. 22 may be of some assistance in the matter of interpretation of phrase 'the nearest Magistrate'. Although external aid in interpreting a provision can be taken yet the views of mover of a Bill are never conclusive in the matter.

Article 22 clause (2) was not in the draft Constitution but at the close of deliberations of the Constituent Assembly it was sought to be added. Dr. Ambedkar, The Chairman of the Draft Commission explained the circumstances which led him to introduce Article 15A (present Article 22(2). He stated:-

> "It merely lifts from the Criminal Procedure Code two of the most fundamental principles which every civilised country follows as principles of international justice. By making these parts of the Constitution, we are making a fundamental change because we put a limitation on the authority of both Parliament and State Legislatures not to abrogate these two provisions because now they are part and parcel of the Constitution itself... the provisions contained in this are sufficient against illegal or arbitrary arrests."

During the course of discussion an amendment was made by Shri Pataskar who wanted that before the word 'Magistrate' the word 'First Class' may be added. The amendment was opposed by Dr. Ambedkar who gave his reasons for the same.

Dr. Ambedkar stated "Well, I find some difficulty in accepting the words suggested by him for two reasons. We have in clause (2) used very important words, namely,"the nearest Magistrate" and I thought that was very necessary because otherwise it would enable a police officer to keep a man in custody for a longer period on the ground that a particular Magistrate to whom he wanted to take the accused or the Magistrate who would be ultimately entitled to try the accused was living at a distance far away and therefore he had a justifiable ground for detaining him for the longer period. In order to take away any such argument, we had used the words, "the nearest Magistrate". Now supposing we were to add the words "the nearest First Class Magistrate": the position would be very difficult. There may be "the nearest Magistrate" who should be

approached by the police in the interests of the accused himself in order that his case may be judicially considered. But he may not be a First Class Magistrate. Therefore, we have really to take a choice: whether we shall give the accused the earliest opportunity to have his matter decided and looked into by the Magistrate near about or whether we should go in search of a First Class Magistrate. I think "the nearest Magistrate" is the best provision in the interests of the liberty of the accused. I might also point out to my Friend, Mr. Pataskar, that even if I were to accept his amendment "the nearest First Class Magistrate"- it would be perfectly possible for the Government of the day to amend the Criminal Procedure Code to confer the powers of a First Class Magistrate on any Magistrate whom they want and thereby cheat the accused. I do not think therefore that his amendment is either desirable or necessary and I cannot accept it"

Thus according to the mover of this provision, the expression 'the nearest Magistrate' was introduced as a check on the police in detaining a person beyond 24 hours, seeking its justification on the ground that nearest Magistrate or one who ultimately was entitled to try the case was not available within this period. It is apparent that the intention of the mover of this provision was not to give police a free hand to produce the person detained before a Magistrate of their choice or only before the Magistrate who would have jurisdiction to try the case which at the stage was not required at all.

The principles of interpretation of Constitutional provisions are that they are to be interpreted broadly and liberally and not in a narrow and pedantic sense but at the same time its language cannot be stretched or perverted. If the language is plain and unambiguous it is the duty of Court to adopt that meaning only and the provision is to be interpreted as it is and not as it ought to be. In the case of State of Punjab v. Ajaib Singh, AIR 1953 SC 10, the Supreme Court observed... "that if the language of the Article is plain and unambiguous and admits of only one meaning, then the duty of the Court is to adopt that meaning irrespective of the inconvenience that such a construction may produce. If, however, two constructions are possible, then the Court must adopt that which will ensure smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well established provisions of law nugatory".

Article 22 gives protection in cases of arrest without warrant issued by a Court on the accusation that the arrested person or the suspected person was or is suspected to have committed or is likely to commit an act of criminal nature or some activity prejudicial to state interest. The expression 'nearest Magistrate' is preceded by the word 'the' which also finds place before the expression 'Court of the Magistrate' in the same Article 22(2). The word 'the' is definite article and denotes a particular person or thing. The Supreme Court in Consolidated Coffee

Ltd. v. Coffee Board, AIR 1980 SC 1468 also particularised the word 'agreement' in view of use of word 'the' before it.

The period of twenty four hours fixed for production excluding the time spent for travelling is for the production before 'the court of the Magistrate'. The word used is again 'the' and not 'a', which means before the court of the said nearest Magistrate. The 'nearest Magistrate' is to be nearest from the place of arrest. The use of word 'such' between the words 'within a period of twenty four hours' and 'arrest'clearly spells out the same, as well as the place from where 'the nearest Magistrate' is to be found out. This provision in the Constitution is obviously for checking illegal and arbitrary arrest and detaining a person for longer time and restraining the police to produce a person within 24 hours, may be after torturing the person, before a Magistrate of their choice or from whom they expect liberalism.

In Amar Nath's case (Supra) apparently no stress was laid on the use of word 'the' at two places and it appears that no difference was sought to be made between 'the' and 'a' and that is why production before a Magistrate after crossing several Districts was taken to be in conformity with Article 22 of the Constitution of India. It may be that some record was produced before the Court and the Bench was satisfied that in the circumstances of the case the same was sufficient compliance with the provisions of Article 22(2).

Occasions may arise when production of a person arrested and detained before 'the nearest Magistrate' may not be in public interest and create situtation of 'law and order', the maintenance of which is the Sovereign function of State. The intention and purpose of the Article could not be that if the production of the person detained before 'the nearest Magistrate' is fraught with danger or is not possible the detention would be illegal and the person so arrested is to be released.

The Constitution of India which is the basic law of the country, when framed could not have envisaged circumstances which were not existing or which may arise in future and many difficulties which may arise in future could not have been seen. In the case of Francis Coralie Mullin v. Administrator, Union Territory of Delhi, AIR 1981 SC 746 (at Page 752) it was observed -" This principle of interpretation which requires that a Constitutional provision must be construed, not in a narrow and constricted sense, but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that the Constitutional provision does not get atrophied or fossilized but remains flexible enough to meet the newly emerging problems and challenges, applies with greater force in relation to a fundamental right enacted by the Constitution."

Similarly, in the case of Video Electronics Pvt. Ltd., v. State of Punjab AIR 1990 SC 820 at page 837, it was observed "Constitution is a living organism and the latent meaning of the expressions used can be given effect to only if a particular situation arises. It is not that with changing times the meaning changes but changing times illustrate and illuminate the meaning of the expressions used. The connotation of the expressions used takes its shape and colour involving dynamic situations".

These principles of interpretation of Constitution keep gates open for flexibility and taking into consideration flexibility and administrative difficulties particularly that of law and order without doing violence to the language of the provision. It is to be noticed that production before any other Magistrate is not foreign to the language of Article 22(2) and at one place it has been expressly provided viz. the subsequent production after first production of a person arrested can be before any other Magistrate, as provided in later part of Article 22(2), who is competent to deal with the matter and not necessarily any nearest Magistrate.

Sometimes adverse situation, like 'law and order' problem, safety and the security of the accused, may crop up justifying production, of detained person not before 'the nearest Magistrate ', but before any other Magistrate. Then in those compelling circumstances, taking recourse to such a procedure, may obviously mean sufficient compliance of the provisions of Article 22(2). If such production is not designed to legalise illegal arrest which Article 22(2) checks or is intended to detain the person arrested for longer period on any excuse and for producing him before a Magistrate chosen by the police for the purpose without any special reason or compelling circumstances itself or on the dictates of some superior authority, the production before any other Magistrate other than nearest from the place of arrest would not be vitiated.

It is thus clear that production is to be before 'the nearest Magistrate' from the place of arrest but under certain compelling circumstances as mentioned before, if it is before any other Magistrate, the same could also be deemed to production before 'the nearest Magistrate' and it will be a substantial compliance of the Constitutional provisions not defeating its object and purpose.

OF PRECEDENTS

Justice Brijesh Kumar,
Senior Judge, Allahabad High Court, Lucknow Bench

'Precedents', also called rulings, are searched and cited at the Bar and analysed and scrutinised in Courts, throughout the proceedings, so much as that, it has become a matter of routine in the system. Undoubtedly, however, this routine exercise plays a very important part in decision making process in the system of dispensation of justice. It is safer to tread a tried path, is not the only consideration, but many others too, behind the sanction of the doctrine of precedents.

It is endeavour of any civilized society to be governed by rule of law. It necessarily requires 'law'. Precedents have been recognized as one of the sources of law. Judges make law is now an acknowledged concept. A reference on the point may be made to a decision, reported in *AIR 1991 SC 101,* Delhi Transport Corpn. vs. DTC Mazdoor Congress and others. Precedents are one of the sources of law, is found to be held in *AIR 1988 SC 1325,* All India Reporter Karmachari Sangh and others v. All India Reporter Ltd. and others. An important limb of 'Rule of Law' is the even application of laws. By following precedents this object of 'Rule of Law' is also achieved.

An important feature of the administration of justice is that 'like cases should be decided alike', to avoid any kind of discrimination in the matter of application of laws in similar cases, though may be decided by different Courts in any part of a State or the country. It is possible only through binding judicial pronouncements.

As a matter of public policy, it is also important that there must be some degree of certainty in the laws so that people may conduct their affairs and plan their future accordingly. In one of the decisions reported in *AIR 1968 Alld. 100,* Ram Manohar Lohia and others v. State of U.P. and others, it has been observed that it is necessary to maintain judicial uniformity and judicial discipline. Precedents maintain judicial uniformity and judicial discipline by which disharmony in the application of laws is well avoided. The observations made in one of the English decisions clearly highlight the importance and use of precedents. The following observations were made by Lord Gardener LC in *Davis* v. Johnson, (1978) 2 WLR 182:

> "their Lordships regard the use of Precedent as an indispensable foundation, upon which, to decide, what is the law and its application to individual cases. It atleast provides some degree of certainty upon which individuals can rely in the conduct of their affairs as well as a basis for orderly development of legal rules."

Broadly speaking, doctrine of precedents, to a great extent advances the cause of rule of law, the ingredients of which as envisaged by Dicey have been construed to mean-

> "Thus the law affecting individual liberty ought to be reasonably certain or predictable; where law confers wide discretionary powers there should be adequate safeguards against their abuse; like should be treated alike and unfair discrimination must not be sanctioned by law; a person ought not to be deprived of his liberty status or any other substantial interest unless he is given the opportunity of a fair hearing before an impartial tribunal." (De Smith -Constitutional and Administrative Law; 6th Edition; Page 19)

Yet another important aspect of binding precedent is that in most of the judicial systems, there is hierarchy of Courts, that is to say, the Original or the Trial Court, the Appellate Court, Revisional Court etc. For working of such a system it is necessary that judgments of the higher Courts are followed unreservedly, otherwise, there may be a judicial chaos; each Court entirely going its own way. In this connection, observations made in *1972 AC 1027*, Caspel Co.Ltd. v. Broome, may usefully be quoted, which read as follows:

> "..In hierarchal system of Courts it is necessary for each lower tier to accept loyally the decision of the higher tiers. It is inevitable in hierarchal system of Courts that there are decisions of Supreme Appellate Tribunal which do not attract the unanimus approval of all members of judiciary. But judicial system only works if some one is allowed to have the last word, which once spoken, is loyally accepted."

Earlier, it appears there has not been any statutory provision about the binding nature of the decisions of the Courts. The only sanction was through the decisions of the Court. In *AIR 1925 P.C. 272.Kr. Mata Prasad and another* v. *Kr. Nageshar Sahai and others*, it was held that law laid down by the Privy Council was applicable with binding force upon all Courts in India. Later, in the two decisions of the Nagpur High Court, namely, *AIR 1943 Nagpur 340 (FB), D.D.Bilimoria, Electric Contractor* v.*Central Bank of India Limited*...and AIR 1944 (FB), Vinayak shamrao Vs. Moreshwar Ganesh Padhe and others, it has been held that binding nature of precedent is an unwritten rule based on judicial comity. In the meantime the Government of India Act, 1935, Section 212 provided for the binding nature of the decisions of the Federal Court and the Privy Council upon all Courts, and ultimately doctrine of precedents received Constitutional recognition under Article 141 of the Constitution of India while providing that the law declared by the Supreme Court shall be binding on all courts and tribunals within the territory of India. The law laid down by the Supreme Court is binding on all Courts and tribunals of the Country. In 1995 (3) SCC 17, Union of India v. Kantilal Hematram Pandya, where the Central Administration Tribunal noticed

the decision of the Supreme Court, but without indicating any distinguishing features on facts of the case before it failed to follow the same, the approach of the Tribunal did hot receive the approval of the Court.

So far the decisions of the High Courts are concerned there has not been any specific provision under the Government of India Act, 1935 nor in the Constitution of India, like Article 141. This question was considered by Hon'ble the Supreme Court in one of the decisions reported in *AIR 1962 SC 1893*, M/s East India Commercial Co.Ltd. v. Collector of Customs, Calcutta. The Supreme Court, on consideration of Articles 215, 226 and 227 of the Constitution of India came to the conclusion that the cumulative effect of the above noted provisions of the Constitution is that the decisions of the High Court have binding effect upon the subordinate judiciary and the tribunals. In AIR 1994 Allahabad *371*, Jagdish Narain v. Chief Controlling Revenue Authority, the same view has been taken. Article 227 of the Constitution also provides that the High Courts can frame regulation for the proper guidance of the subordinate judiciary.

But, every decision does not constitute a precedent nor is a ruling. Many cases are decided and disposed of on facts. What constitutes precedent is the proposition of law as laid down in the decision. This we find held in one of the early decisions of this Court reported in *AIR 1953 Allahabad 378*, Sitla Baksh Singh v. Kr.Surendra Bikram Singh, and it has been observed in *AIR 1992 SC 1593*, State of Punjab and others v. Surinder Kumar and others, that a decision is a precedent if it decides a question of law. Thus, what is to be ascertained from reading of the whole judgment is as to what is the principle of law which has been laid down in the decision. It is necessary to ascertain the rationale of the judgment on the point of law. In *(1992) 4 SCC 363*, Commissioner of Income Tax v. Sun Engineering Works (P) Ltd., it has been observed that it has to be ascertained as to what principle has been laid down in the judgment, in context with the question involved and that stray sentences and words do not constitute a precedent. It is necessary to find out the principle enunciated in the case or the ratio decidendi which actually binds as also laid down in *AIR 1990 SC 334*, Supreme Court Employees Welfare Association v. Union of India and others. As also pointed out in Sukhwant Singh v. State of Punjab, 1995 (3) SCC 367, observations from a judgement of the Supreme Court should not be read in isolation and divorced from the context in which they are made. A point of law which already stands decided by the Supreme Court must be accepted and that question should not be looked into again by the High Court as laid down in 1991 AWC 134, *Firangi Singh and others* v. *Assistant Director of Consolidation and others*.

As a general rule a decision of a Bench consisting of larger number of Judges prevails over the decision rendered by a Bench of lesser number of Judges. Even in a case where there may be a later decision but a decision

rendered earlier on the point by a Bench consisting larger number of Judges will have the binding effect. Reference to some decisions on the point may usefully be made: *AIR 1974 S.C. 1596,* Muttulal v. Radhe's Lal, *AIR 1976 SC 2433,* Union of India and another v.K.S. Subramanian, (1995) 1 SCC 58, *Commissioner of Sales Tax J & K and Ors* v. *Pine Chemicals Ltd. & others.* It has been observed in *AIR 1989 SC 2027,* N.Meera Rani v. Govt. of Tamil Nadu and another, that later decision of lesser number of Judges will have to be read alongwith the decision of a larger Bench or a Constitutional Bench as the later decision cannot mean to hold at variance with what has already been held by a larger Bench.

So far decisions of High Courts are concerned, they have binding effect within the State and the decisions of the High Courts of other States have only persuasive force. The High Court while deciding a matter, if faced with two decisions of its own High Court of co-equal number of Judges, taking irreconcilable view on the point, the proper course is to refer the matter to a larger Bench as this alone is considered to be appropriate. The difficulty, however, is often faced by the Courts when two decisions of the Benches of the higher court consisting of co- equal number of Judges are cited on one point and the two decisions cannot be reconciled. The view which is coming down since long has been that the later decision will have the binding effect as it would be taken that the earlier view stands impliedly over-ruled by the later decision. This view has been taken by different High Courts, e.g., by Calcutta High Court in the cases reported in *AIR 1961 Calcutta 545,* Pramatha Nath Mitter and others v. Hon'ble the Chief Justice of the High Court at Calcutta, and *AIR 1968 Calcutta 174,* M/s Sovachand Mulchand v. The Collector of Central Excise and Land Customs and others, By Mysore High Court in a decision reported in *AIR 1961 Mysore 3,* M/s New Krishna Bhawan v. Commercial Tax Officer, and *AIR 1980 Karnataka 92 (FB),* Govindanaik G.Kalaghatigi v. West Patent Press Co. Ltd. and another; by Bombay High Court in *AIR 1980 Bombay 341,* Vasant Tatoba Hargude and others v. Dikkaya Muttaya Pujari, and by Allahabad High Court in AIR 1977 Allahabad 1(FB) U.P.State Road Transport Corporation v. The State Transport Appellate (Tribunal) U.P., Lucknow and others, and *AIR 1981 Allahabad 300(FB),* Gopal Krishna Indley v. Vth Addl. District Judge, Kanpur and others. But there seems to be a drift in the view that the later decision will have binding efffect. The view which is being now taken is that a decision which is better on point of law should be preferred. The rationale behind the later view is that fortuitous chance of point of time has no relevance and it should not be the deciding factor as to which case should be followed.

The Punjab and Haryana High Court in *AIR 1981 P&H 213*(FB), Indo Swiss Time Ltd.v.Umrao, took the above said view and held that the Court which is faced with two contrary views on one point decided by Benches of co-equal number of Judges, must find out, which of the two views, is better or more accurate on point of law and that should be followed. This view found favour with

some other High Courts as well, namely, Bombay High Court in *AIR 1988 Bombay 9*, The State Land Acquisition officer (I) Bombay and another v. The Municipal Corpn. of Greater Bombay, Patna High Court, in *AIR 1987 Patna 191*, (FB), Amar Singh Yadav and another v. Shanti Deve and others, Calcutta High Court, in *1988 Calcutta 1 (FB)*, Bholanath Karmakar and others v. Madan karmakar and others. Allahabad High Court has also taken the same view in *AIR 1991 Allahabad 115 = 1991 A.L.J. 159 (FB)*, Ganga Saran v. Civil Judge, Hapur, Ghaziabad and others.

It appears that before the Full Bench in Ganga Saran v. Civil judge, Hapur, AIR 1991 Alld. 115, the earlier Full Bench decision reported in AIR 1981 Alld. 300. Gopal Krishna Indley (Supra) was not brought to the notice of the Court since it finds no mention in the Judgment. In the earlier Full Bench case, Gopal Krishna Indley (Supra), however, an argument was sought to be advanced that a decision better on point of law should be followed, but the Full Bench was not impressed by the argument and it was held that later decision is to be taken to have impliedly over-ruled the earlier decision. The Punjab & Haryana Court in Indo Swiss Time Ltd. (Supra) referred two English decisions, viz., *Hampton* v. *Holman*, (1877) 5 Ch.D. 183 and *Miles* v. *Jarvis*, (1883) 24 Ch.D. 633, wherein faced with same difficulty, it was observed:

> "...The question is which of these two decisions I should follow, and it seems to me that I ought to follow that of the master of The Rolls as being the better in point of law."

A reference may be also made to yet another English decision reported in (1944) KB 718, *Young* v. *Bristol Aeroplane Co. Ltd.*, where the Court of Appeal faced with its precious conflicting decision, held that it was duty bound to decide which of the two conflicting decisions of its own will it follow. The Punjab & Haryana High Court also preferred to follow the minority view in the Full Bench decision in Govindanaik G.Kalaghatigi (Supra), wherein it was observed that in the interest of administration of justice one should follow the judgment which is better on point of law than one later in point of time. An excerpt from the Constitutional Law of India by Seervai was also quoted as follows:

> "...But judgment of the Supreme Court, which cannot stand together, present a serious problem to the High Courts and subordinate Courts. It is submitted that in such circumstances the corrrect thing is to follow that judgment which appears to the Court to state the law accurately or more accurately than the other conflicting judgment."

A reference to the case of Mattulal v. Radhe Lal, *AIR 1974 SC 1596*, may be also made, particularly, the observations made by Justice Bhagwati, at page 1602 of the report, while following the earlier view on the ground that it was a decision of a larger Bench, it was also observed :

"..... Moreover, on principle, the view taken in Sarvate T.B's case commends itself to us and we think that is the right view."

However, a direct decision of the Supreme Court on the point is still awaited. The position that emerges, in view of some later decisions of some of the High Courts, indicated above, is that presently it is the task of the lower Court to find out which of the two conflicting decisions of the higher Court is more accurate on the point of law and to follow the same. Possibility of different views as to which of the two judgments is more accurate on point of law is not at all ruled out.

There are a few exceptions to the binding nature of earlier decisions, e.g., a consent decree does not constitute a precedent. It is very obvious too, as a consent decree is dependent on the compromise or the settlement arrived at between the parties. No proposition of law is enunciated or propounded in such a decree. The other two exceptions are 'per incurium' and 'sub-silentio'. In a case where by inadvertence or oversight something which is very obvious to be considered is left out of consideration and such important aspect is not noticed, it is said that the judgment is 'per incurium' and not binding. But such cases are exceptional where negligence or omission is so glaring that it renders the decision ineffective as a precedent. A decision rendered ignoring a provision of law, say, e.g., a later amendment by which certain provisions may have been deleted or added but the same having not been noticed would be one of such cases where the judgment is rendered 'per-incurium'. The literal meaning of the word 'incuria' is carelessness and where what is quotable in law is avoided and ignored and the judgement is rendered 'in ignoratium' of a statute, it is then said the judgment is 'per incurium'. The relevant decisions on the point are *(1991) 4 SCC 139*, State of U.P. and another v. Synthetics and Chemicals Ltd. and another, *AIR 1962 SC 83*, Jaisri Sahu v. Rajdewan Dubey and others, *AIR 1967 SC 1480*, B.Shama Rao v. Union Territory of Pondichery, and *AIR 1975 SC 907*, Mamleshwar Prasad and another v. Kanahiya Lal.

Similarly, when an important or relevant point of law involved, is not perceived by the court or is not present in its mind while deciding the matter, it is said that the decision 'sub silentio'. A reference may be made to (1989) (1) S.C.C.*101* Municipal Corporation Delhi V. Gurnam Kaur It is also observed in the said decision as may usefully be quoted:

"...Restraint in dissenting or over-ruling is for the sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."

It is said that in such matters, application of 'sub silentio' relieves from injustice perpetuated by unjust precedent. But, it is to be carefully noted that 'per incurium' and 'sub silentio' are available only to the Court which is considering

its own earlier judgment or to the higher court, e.g., it may not be possible or permissible to the lower courts to hold a decision of the High Court as rendered 'per incurium' or that it passes 'sub silentio'. Same is the position of the High Court in respect of the decisions rendered by the Supreme Court. It is only the High Court which is considering its own earlier decision that it can apply the concept of per incurium and sub silentio. It cannot be applied by the High Court on a decision rendered by the Supreme Court. This caution we find clear and unequivocal in the observations made by Lord Diploch in *Broom* v. *Cassel*, 1972 AC 1027, where it has been observed :

"The court of appeal found themselves able to disregard the decision of this House in Rook v. Barnard by applying to label per incurium. That label is relevant only to the right of an appellate court to decline to follow one of its own previous decisions, not to its right to disregard a decision of a higher appellate court or to the right of a judge of the High Court to disregard a decision of the Court of Appeal."

However, an effort is always made to adhere to what has been coming down, in law, since long before. It is based on principle of stare decisis'. A view on the point of law which is coming down for long is not lightly to be disturbed or dislodged unless there exist strong reasons for the same. Simply because another view is also possible with equal force would not be a good ground to unsettle a settled position. The principle of stare decisis has been elaborately discussed in *(1981) 2 S.C.C. 362*. Waman Rao others v. Union of India and others and it has been observed that though the rule was enunciated in England where Common Law prevailed in absence of a Code but it was considered to be a wise rule to conform to a certain measure of discipline so that decisions of long standing are not over-ruled for the reason that another view of the matter is being taken. Under the American Law also it has been considered to be a matter of wise policy. In a fit case where a decision is found to be wrong or against the provisions of law, stare decisis would certainly not come in the way. The observation of Lord Denning as quoted in *AIR 1985 S.C. 1585*, Distributors v. Union of India, is :

> "The doctrine of precedent does not compel your lordship to follow the wrong path until you fall over the edge the cliff."

The gist of the matter seems to be that as far as possible within a reasonable limits a view which is coming down since long may be adhered to in the interest of public of predictability and certainty of law but as observed by the Supreme Court also it cannot stretched beyond a limit of rigidity. An obviously wrong judgment against the law, cannot be protected either by doctrine of binding precedents nor stare decisis.

So far obiter dicta is concerned, it may be pointed out that an obiter dicta of the Supreme Court is binding on all Courts. This we find in *AIR 1959 SC 814,* The Commissioner of Income Tax, Hyderabad, Deccan v. M/s Vazir Sultan and sons, *AIR 1975 S.C. 1087,* Municipal Committee, Amritsar v. Hazara Singh, *AIR 1969 Allahabad 304* (FB), Chobey Sunder Lal v.Sonu alias Sonpal and another, *AIR 1989 Delhi 193*(FB), D.C.M. Limited v. Union of India and others, *AIR 1960 Allahabad 672,* Union of India v. Firm Ram Gopal Hukum Chand and others, and *AIR 1967 Rajasthan 1,* Radha Kishan v. State of Rajasthan and others. It has been observed that judicial uniformity and judicial discipline require that courts must also follow the obiter dicta of the Supreme Court.

In the present system of dispensation of justice, precedents play a very important role, but one of the serious problems is about the number of decisions multiplying every day and it is becoming difficult to keep track of the same. This problem is, however, not new and as far back as in *AIR (30) 1943 Nagpur 340* (FB), *D.D.Bilimoria, Electric Contractor* v. *Central Bank of India Ltd., Bombay,* the judgment quotes from professor Allen's 'Law in the Making' as follows:

"A more serious difficulty, and one likely to increase in future with the ceaseless growth of recorded cases, is that exact and comprehensive citation cannot be ensured. If the judge is to be bound by precedents he should have all the relevant authorities at his command. But he cannot carry them all in his head, nor is it always easy to find them, in spite of the many modern devices for facilitating the search. He must depend largely on the assistance of counsel, and since the industry and acumen of the bar are also fallible it is not uncommon to meet with cases which might have been decided otherwise, or are even overruled later, because pertinent decisions have not been taken into consideration."

As rightly foreseen, the growth of case law has been manifold. The difficulty of keeping track of all the decisions still continues. May be, by computerisation, a change may be seen shortly. In any case whatever be the difficulty, the necessity of following the precedents cannot be minimised or undermined. In one of very old decisions reported in 1863-60 All E.R.Rep. 368, it has been observed :

> "A judge would desert his duty who did not act upto what his predecessors handed down as the Rules for his guidance in Administration of Justice."

EXPANDING HORIZONS OF FUNDAMENTAL RIGHTS AND COURTS' OBLIGATION

Justice R. B. Mehrotra
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Founding fathers influenced by Bill of Rights of American Constitution, Declaration of Rights of Man of France, The Irish Constitution of 1935, the post war Constitution of Japan & Burma, the Universal Human Rights' Chapter & Nehru Report of 1928[1] engrafted fundamental rights in Part III of the Constitution of India and conferred on the judiciary of the country the power to ensure that no fundamental right is allowed to be violated. Article 32 of the Constitution which casts an obligation on the highest Court of the country to ensure protection of fundamental rights itself is a fundamental right. This clearly gives a direction and indication on the responsibilities of not only the Apex Court for the protection of sacred provisions of Part III of the Constitution but it confers a responsibility on the entire judicial system of the country to discharge the obligation cast on the Apex Court and High Courts qua fundamental rights, infact it is the responsibility of all the Courts having jurisdiction in the matter to ensure protection of fundamental rights guaranteed under the Constitution.

To analyse the aforesaid proposition, the various provisions of the Constitution need to be scanned with slightly a different angle than what has been done so far.

Under Article 32 of the Constitution, every citizen of this country has been given a fundamental right to move the Supreme Court for enforcement of rights which are guaranteed under Part III of the Constitution. The highest Court of the Country has simultaneously been conferred powers to issue directions, orders or writs including conventional prerogative writs of habeas corpus, mandamus, prohibition,quo warranto and certiorari, a terminology borrowed from English Law. This Article is of fundamental importance for maintaining the basic structure of the Constitution. The Article itself contemplates that this Article shall not be suspended except as provided by the Constitution. Vide Article 359 of the Constitution, the right to move the Court cannot be suspended even during proclamation of emergency in cases where a citizen comes forward for enforcement of right to life and liberty guaranteed by Article 21 and right conferred by Article 20 protecting a citizen from conviction for offences, extending guarantee that a citizen of the country will not be convicted for the same offence twice, nor he will be compelled to be witness against himself and also that for an offence his conviction will be according to the law enforced on the date the offence was committed, and he will not be liable for higher punishment for the offence if the law is later on changed.

In Keswanand Bharti's case[9], the Apex Court while outlining the basic structure of the Constitution, has held that the right to move the Court which is guaranteed by Article 32 is one of basic structures of the Constitution. In regard to the right to judicial remedies guaranteed by this Article, the question of substantial importance is that when a right is conferred by Constitution on its citizen to enforce his fundamental right through a Court, it automatically carries with countervailing duty on that Court to ensure enforcement of that right. It is to be emphasised that it is not merely the right of the individual to enforce those rights but this also casts a duty on the highest Court of the country to enforce those guaranteed rights. The Court has been held to be protector and guarantor of fundamental rights.

Emphasising the importance of Article 32, Dr. Ambedkar told the Constituent Assembly. "If I were asked to name the particular Article in the Constituion as most important without which this Constitution would be a nullity, I would not refer to any other Article except this one".[2] In the words of Justice Gajendragadkar "The fundamental right to move this Court can therefore be appropriately described as corner-stone of democratic edifice raised by the Constitution".[3]

The distinguished Chief Justice Patanjali Shastri described this Article "as protector and guarantor of fundamental rights"and further observed"It cannot, consistently with the responsibility laid upon it, refuse to entertain an application seeking protection against infringement of such rights." In discharging the duties assigned to it, "this Court has to play the role of the sentinel on the qui-vive and it must always regard as its solemn duty to protect the said fundamental right zealously and vigilantly".[4]

This is the introduction for canvassing the point as to what are those rights guaranteed by Part III for which the judiciary of the country has been cast with solemn duty to play the role of sentinel on the qui-vive. It opens before us the wide horizons of fundamental rights guaranteed to 900 million people of this country.

The voyage for opening the horizons of fundamental right began right from Communist Leader A.K.Gopalan's case,[5] in the year 1950 wherein Chief Justice Patanjali Shastri opening gate for wider interpretation to be given to fundamental rights held-

> "The insertion of Fundamental Rights in the forefront of the Constitution coupled with an express prohibition against legislative interference with these rights and the provision of constitutional sanction for the enforcement of such prohibition by means of judicial review...is a clear emphatic indication that these rights are to be paramount to ordinary State-made laws."

However the voyage began with a caution and majority view in Gopalan's case held that the Legislature was competent to lay down any procedure for the deprivation of personal liberty and Court could not interfere. This view was later reversed in Maneka Gandhi's case wherein the Court held that procedure must be fair and proper.

Later on in 1963, the Apex Court upheld the right of privacy in Kharak Singh's case,[6] and decried domiciliary visits by Police.

Thereafter several landmark judgements were delivered construing the provisions of Right of Freedom of Speech and Expression guaranteed by Article 19 (1)(a). In Dr. Ram Manohar Lohia's case,[7] the Court in the year 1966 was confronted with a question, as to how far the right of speech and expression should not affect a law curtailing this right on the ground of public safety and law and order. The Court drew distinction between public safety, public order and law and order and held:-

> "When the liberty of a citizen is put within the reach of authority and scrutiny from Court is barred, the action must comply not only with substantive requirement but also with those forms which alone can indicate that the substance has been complied with."

In Madhu Limaye's case,[8] in the year 1969, the Apex Court advanced the cause of personal liberty by construing Article 22 (1) to mean that detenu has right to know at the time of his arrest the exact charge of accusation against him so that he may consult lawyer of his choice for defending himself and an order of remand can not cure the Constitutional infirmity.

In 1973 came Keshwanand Bharti's case[9] -the epoch making judgment when Constitution Bench reversing Golaknath's case[10] held that though Parliament was competent to amend any part of the Constitution including Fundamental Rights but the Parliament was not competent to alter the basic feature of Constitution.

In 1975, Emergency was clamped in the country, citizens were indiscriminately arrested, humiliated and even killed at whims of Executive. Almost all the High Courts directed release of the detenues despite suspension of Fundamental Rights. The High Courts held that right to life and liberty is not dependant on its conferment by the Constitution, it is inherent in man. But Apex Court in A.D.M. Jabalpur[11] held that since right to life and liberty has been suspended, the Courts have no power to intervene. The glorious exception to majority view was the verdict of Justice Khanna. However, the country was brought back to rails of democracy by 44th Constitutional amendment which placed the right of life and liberty guaranteed by Article 21 and Article 20 beyond suspension even during Emergency.

Thereafter a new Chapter of Judicial activism began, the Court was back to its form with added enthusiasm.

In 1978 came Maneka Gandhi's[12] historic verdict wherein the Constituion Bench overruled A.K.Gopalan's decision and held that for curtailing the fundamental rights, the procedure established by law must be fair and proper. The Apex Court imported the principles of natural justice in Article 21 and thereby equated the words used in our Constitution 'procedure established by law' with American concept of 'due process of law.' Article 21 was given a wider interpretation and the Court held that the right to live should be construed to mean right to live with dignity and in appropriate cases, a citizen can claim a right even to go abroad as his fundamental right for purposes of his trade and profession. The Court reversed the view taken in A.K.Gopalan that every fundamental right is a Code in itself. The Constitution Bench in this case held that the entire fundamental rights are to be interpreted in an integrated manner and they cannot be compartmentalised.

In 1979 Justice Bhagwati speaking for the Court in R.D.Shetty[13] pointed out that the Corporations acting as instrumentality or agency of the Government would obviously be subject to the same limitations in the field of Constitutional or administrative law as the Government itself, though in the eye of law they would be distinct and independent legal entities. In this decision, the Court also held that State or instrumentalities of the State are under an obligation to act in accordance with law and even in the matter of distribution of largesses, they cannot be permitted to act arbitrarily. A person having right or no right can always challenge an arbitrary action of the State or instrumentality of the State.

In 1980 Justice Iyer in Jolly George Verghese[14] held that to cast a person in prison because of his poverty and consequent inability to meet his contractual liability is too flagrantly violative of Article 21 unless there is a proof of minimal fairness of his wilful failure to pay inspite of his sufficient means. The Court held that in execution of money decree, sending a person to civil prison for non-payment of dues despite the fact that he has no money to pay is violative of Article 21 of the Constitution as well as Article 11 of International Covenant on Civil and Political Rights. In this decision, the Supreme Court for the first time equated human rights conceived by International Covenants to be part of Art. 21 i.e., life and liberty guaranteed to the citizens of this country.

Sunil Batra [15], a prisoner in Tihar Jail, Delhi complained that a jail warder had pierced a baton into anus of another prisoner serving life term in the same jail for extracting money from the victim through his visiting relations by a letter to the Supreme Court. In response, the Court initiated proceedings in the natufe of habeas corpus. Justice Krishna Iyer and Justice Chinnappa Reddy speaking for the Court held that even prisoners and convicts should be treated in the prison which would be commensurate with their sentence and safety and the

guarantees contemplated by Articles 14, 19 and 21. The Court laid down guidelines in respect of the Constitutional and administrative aspects of the prison justice and made provision for regular inspections by lawyers nominated by District Magistrates, Sessions Judges, High Courts and Supreme Court, who shall be given all facilities for interviews visits and confidential communications with prisoners etc. The Court held that Human Rights Jurisprudence in India has a Constitutional status and sweep by virtue of Art. 21 so that this magnacarta may well toll knell of human bondage beyond civilised limits. *The Supreme Court will be functional futility as a Constitutional instrumentality if its guns do not go into action until a wrong is righted. The Court is not a distant abstraction only potent in the book but an activist institution which is cynosure of public hope. The Court can issue writs to meet the new challenges. (Emphasis added)*

In Prem Shankar Shukla[16]again Justice Krishna Iyer and Justice Chinnappa Reddy condemned hand-cuffing of undertrials and held that it is necessarily implicit in Articles 14 and 19 that when there is no compulsive need to fetter a person's limb, it is sadistic, capricious, despotic and demoralising to humble a man by manacling him. In this decision, the Court also held that handcuffing of undertrial prisoners by escorts while taking them from jail to Court and back is to be done only in exceptional and extraordinary circumstances for reasons to be recorded which should be got approved by the Magistrate. Handcuffing otherwise of undertrials was held to be violative of Art. 21 of the Constitution.

In 1982 People's Union for Democratic Rights[17] came forward with a public interest petition for the redress of bonded labours. The Court gave an active interpretation to Art. 23 of the Constitution and held that it is not merely a 'begar' which is prohibited by Art. 23 but forced labour also comes in the category of begar and is violative of Art. 23 of the Constitution. It was held that whenever any fundamental right which is enforceable against a private individual such as a fundamental right enacted in Art. 17 or 23 or 24 is being violated, it is the Constitutional obligation of the State to take necessary steps interdicting such violations and ensure observance of fundamental rights by private individual who is transgressing the same. Any person aggrieved or any other person can always come forward to espouse the cause compelling the Government for enforcement of such rights against the individuals who are violating the guarantees contemplated by Articles 17, 23 and 24 of the Constitution.

In 1983 upholding Coking Coal Mines (Nationalisation) Act, 1972, the Court held that for implementing Article 39(b), it is necessary that the industry as a whole should be nationalised. The expression 'material resources of the community', used in Article 39(b) necessarily includes transformation of wealth from private ownership into public ownership by Nationalisation, hence

expression 'material resources of the community', is not confined to natural resources. It means and includes all resources natural and man made, public and private. The Court construing the provisions of Articles 14, 31-C and 39(b) of the Constitution held that the scheme of the Constitution is not for laissez-faire route but for a socialist approach i.e., distribution of wealth for the benefit of the community at large. (Sanjeev Coke Manufacturing Company [18]).

In 1984 Neerja Chowdhry[19], a journalist addressed a letter to a Judge of the Supreme Court complaining about 135 bonded labourers, who had been released from bondage in pursuance of an order of the Supreme Court and had been brought back to their respective villages in Madhya Pradesh with a promise of rehabilitation by the Chief Minister of the State but had not been rehabilitated even after six months since their release, as a result they were living almost on the verge of starvation. The Supreme Court directed that the plainest requirement of Articles 21 and 23 is that bonded labourers must be identified and released and on release they must be suitably rehabilitated.

In 1986 Olga Tellis, [20] a social activist, brought a petition on behalf of Pavement and Slum Dwellers of Bombay City. They constituted half of the population of Bombay City and were living either on foot-path or in slums for their survival. The Apex Court held that Article 21 includes right of livelihood and so if the deprivation of livelihood is not effected by a reasonable procedure established by law, the same would be violative of Article 21 of the Constitution. The word 'life' used in Article 21 of the Constitution, was meant to include right of livelihood also.

In Surendra Singh's case,[21] the Apex Court directed that daily wagers employed by the Central Public Works Department must be given the same pay as the regular employees. The principle of equal pay for equal work enshrined under Article 39 of the Constitution was enforced by a judicial verdict and it was directed that all daily rated employees will be paid same salary and allowances as are paid to the regular and permanent employees of their rank. Similarly in Dhirendra Chamoli,[22] the casual labourers employed in Nehru Yuvak Kendra were held to be entitled for the same pay scale as regular class IV emplyees, who perform the same task in the Union Government. In this decision the principle of equal pay for equal work enshrined in Article 39 was held to be a part of Art. 14 of the Constituion of India and it was held that the equality before law and equal protection of the laws impliedly incorporates the principle of equal pay for equal work.

In Suk Das Vs. Union Territory of Arunachal Pradesh, [23] the Apex Court held that failure to provide legal aid to an indigent accused vitiates the trial even where the legal aid was not demanded by the accused. Unless legal aid was refused by the accused, the trial was liable to be set aside.

In Bhim Singh's case,[24] the Court awarded exemplary compensation against the State for illegal detention of Bhim Singh, who was a political leader of Jammu and Kashmir State and an Advocate of the Supreme Court.

In 1987, Sheela Barse[25] the petitioner complained about state of affairs in an Observation Home for children. There had been delay in restoring the children to their parents despite orders of the Court. The Court directed restoration of these children. The Court held that since India was party to International Covenant on Civil and Political Rights of 1976, a child must be provided with the protections as are required by Article 24 of the aforesaid Covenant. The Court expanded the construction of Article 21 and held that permission to interview the prisoners should be granted for ensuring the rights guaranteed to the prisoners. The Court also held that Article 10 of the Covenant on Economic, Social and Equal Rights, lays down that the children must be protected from economic and social exploitation from employment in harmful occupation below prescribed age. All these rights were held to be guaranteed to the children of this country also. This was not merely a reference to an International Convention but it was held to be of the binding nature of its obligations.

In Catering Cleaners of Southern Railways,[26] at the instance of two workers working for cleaning and catering establishment and pantry cars in Southern Railway, who were working as contract labourers engaged at the rate of daily wages of Rs.2/- and 2.50, the Court directed for abolition of contract labour system. It brought back the smiles on the faces of most ordinary and exploited contract labourers. This was a liliputian voyage to the highest Court and the Apex Court was discharging its obligation of guarantee provided by Art. 32 of the Constitution of India for protecting the rights of 900 million people of this country.

In this very year, in case of Mackinon Mackenzie & Company,[27] lady stenographers of a private company were being paid lower emoluments than their male counterparts. The Supreme Court held it to be a violation of constitutional principles of equal pay for equal work. Again relying on the Convention concerning equal remuneration for man and woman workers for work of equal value adopted in the Conference of Internatioanl Organisation, to which India was a party and applying the extensive meaning of Article 21, the Court held it to be discriminatory and directed the State to ensure that the right of equal pay for equal work is made available to the lady stenographers of the aforesaid Company.

In 1988 came forward M.C. Mehta,[28] an advocate of the Supreme Court and environmental activist, who moved a petition in the Supreme Court for a direction of keeping the holy river Ganga clean and stopping all factories which are discharging their polluted water in the river. The Supreme Court accepted

the challenge, issued notice to all concerned for stopping the pollution in Ganga river, the directions were given even for closing factories which were discharging their polluted water in the river. The Court has pursued the matter and a programme has been initiated under the direction of the Court for cleaning river Ganga which has resulted in Government's starting the Ganga Action Plan for keeping river Ganga as pollution free. The Court is even monitoring this obligation.

In 1989 Kishan Patnaik,[29] a social political activist, wrote a letter bringing it to the notice of the Apex Court that the people of Kala Handi district in the State of Orissa were dying of starvation and were being compelled to sell their children for earning their means. The letter was mentioned before the then Chief Justice Bhagwati by the author of this Article. The Court after knowing the contents of this letter directed issuing of a Commission for reporting the correct position regarding starvation deaths being caused in the district of Kala Handi. The State Government came forward with a Scheme for ensuring that the residents of district Kala Handi are provided employment and are able to earn their wages for maintaining themselves so that they may not be driven to starvation. A Scheme was formulated by the Court which constituted a Committee of independent persons to ensure that no citizen of district Kala Handi is allowed to die only for poverty and starvation.

In 1990, Gaurav Jain,[30] filed a Public Interest Litigation petition praying for providing a separate school and hostel facility for children of prostitutes. The Court extending the guarantee provided by Article 32 of the Constituion and expanding the meaning of Art. 21 directed these children to be separated from their mothers and be allowed to mingle with others and become part of the Society and accommodation in hostels and other reformatory homes should be adequately made available for this purpose. A Committee was constituted for examining the problems and submitting its report to the Court.

In 1991, in Subhash Kumar's case,[31] the Court held that the right to live includes rights to enjoyment of pollution free water.

In 1992 came famous verdict of Indra Sawhney,[32] which upheld the reservation on the basis of Mandal Commission's Report. The remarkable thing which is to be pointed out is that on the issue when Government took a decision to implement the Mandal Commission's Report, the protest was such large and loud that the Government which decided to enforce the Report was dislodged from power. But when the Apex Court upheld the said decision, there was not a voice raised. This shows, what implicit faith the people of this country have in the Court and in the judiciary. In the same year in Mohini Jain's case,[33] the Apex Court held that the right to life guaranteed by Article 21 of the Constitution also includes a right to receive education.

In 1993, George Fernandes,[34] the Socialist leader sent a letter to the Court bringing to its notice a news item wherein the allegation was that Tibetan girls were molested and arrested in view of the visit of Chinese Premier. The Court took suo moto action and got investigated the complaint.

In this very year on the petition of R.S.Sodhi,[35] an advocate of the Supreme Court complaining of deaths caused by police of innocent persons alleged to be Sikh Terrorist in Pilibhit encounter, the Court constituted a Commission of Inquiry and directed payment of Rs. 50,000/- each as an interim measure.

In the same year in Unnikrishnan J.P.[36] the Court struck down the system of capitation fee in the private Medical and Engineering Colleges and held that education cannot be equated with trade or business in this country. Modifying Mohini Jain's decision (supra), the Court held that every child upto 14 years of age has got a fundamental right of education. This was again on the basis of interpretation given to Article 21 of the Constitution. This decision will be dealt with in a different connotation at a later stage.

In Rathinam's case,[37] in the year 1994 again interpreting Article 21 of the Constitution, the Court, held that any law which is based on cruelty is not in consonance with Art. 21 of the Constitution and held that Section 309 of the Indian Penal Code holding a person punishable for attempting to commit suicide is violative of Article 21 of the Constitution.

In Joginder Kumar's case,[38] the Court laid down the minimum guidelines regarding protection available to a person at the time of the arrest and held that these guidelines were to be treated as part of Article 21 of the Constitution of India. The guidelines are as under:-

> "1. An arrested person being held in custody is entitled, if he so requests, to have one friend relative or other person who is known to him or likely to take an interest in his welfare told as far as is practicable that he has been arrested and where is being detained.
>
> 2.The police Officer shall inform the arrested person when he is brought to the police station, of this right.
>
> 3.An entry shall be required to be made in the Diary as to who was informed of the arrest. These protections from power must be held to flow from Articles 21 and 22(1) and enforced strictly."

In 1995 in the case of Smt. Shakuntala Devi,[39] the Apex Court exercising jurisdiction under Articles 142, 32 and 21 of the Constitution in a petition filed by the widow of a deceased employee of Delhi Electric Supply Undertaking, directed payment of Rs. one lakh as ex gratia compensation as one time decision. She did not have to undergo the procedure prescribed for claiming

compensation under the Industrial Disputes Act. The Court came direct to her rescue though it was held that it will not be treated as precedent.

In a petition by Consumer Education & Research Centre and others,[40] Justice K.Ramaswamy speaking for the Court interpreting Article 21 of the Constitution, held that the right to life with human dignity encompasses within its fold, some of finer facets of human civilization which makes life worth living. The expanded connotation of life would mean the tradition and cultural heritage of the persons concerned. In this petition, the plight of the workmen working in Asbestos Industry was brought to the notice of the Court. The Court held that the right to life and health, medical aid and to protect the health and vigour to a worker while in service or post retirement is a fundamental right under Article 21 read with Articles 39 (e), 41, 43, 48A and fundamental human right to make the life of workmen meaningful and purposeful with dignity of persons. The Factories were directed to compulsorily ensure health coverage of every worker, review of exposer to permissible limits and so on.

In P.G.Gupta,[41] interpreting Articles 19(1)(c) and 21, the Court held that it is imperative of State to provide permanent housing accommodation to the poor within their economic means to enable them to pay in easy instalments. In this decision, the Court relied on an earlier decision of 1990 in Shantistar Builders's case,[42] wherein the right to life was interpreted to mean to bring within its sweep the right to decent environment and a reasonable accommo dation to live in.

In Murlidhar Dayandeo Kesekar,[43] the Apex Court held that economic empowerment is a basic human right and a fundamental right to live, and equality of status and dignity to the poor, weaker sections, Dalits and Tribes. Economic empowerment to the poor, Dalits and Tribes is an integral Constitutional scheme of socio-economic democracy and a way of life of political democracy.

The voyage which began in 1950 in A.K.Gopalan has reached the destination in theory. All renowned politicians, journalists, social and political activists have knocked the door of the Court for redressing the cause of general public and public interest litigation became a part of our system for the redress of grievances of those who cannot speak for themselves. This not only shows the faith which the people of this country have in the Court but establishes that even political and social activists, felt that only Court can be a proper forum for redressing the grievances as the Executive has failed to perform its duties. But even all this will remain an illusion, unless what has been said above is implemented and dream of Mahatma Gandhi comes true that tears from the eyes of last man of this country are wiped off, only then destination will be achieved.

The canvas on which now fundamental rights are spread over does not leave anything untouched which a citizen of this country can conceive of. The

horizons on which this canvas is spread over are in essence unlimited. If whatever has been guaranteed is made available to the 900 million people of this country, nothing more is required to be achieved. Whatever one can conceive of to live with dignity has been guaranteed under Art. 21 and other fundamental rights read with directive principles and human rights based on International Covenants to which India is a party. All this is now a fundamental right of the poorest of the poor of this country and he is entitled to get it enforced by a petition under Article 32 of the Constitution of India. However, the larger question is whether 90% of 900 Million people of this country know what their rights are and how to achieve them? Have the State or the Executive been addressing themselves to fulfil the dreams which the Courts have guaranteed to them?

Another important question is, whether only Apex Court which has been conferred with powers under Art. 32 of the Constitution of India or with powers of declaration of law under Article 141 of the Constitution of India can alone fulfil the aspirations of these 900 million people of this country? These are questions at large with which all of us who are in this judicial system are confronted with. Justice K.Ramaswamy in his Article (published in 1995 January-March Part of Judicial Training & Research Institute, U.P.Lucknow Journal) has said that not only The Apex Court but "the subordinate courts also have greater role to play in this area. The declaratory reliefs by judicial process would enable common man to secure justice from lower court at cheaper cost. Expeditious adjudication would inculcate faith of the people in the efficacy of law."

Responsibility of fulfilling these cherished values of life does not rest only on the Apex Court but on all Courts including High Courts and subordinate Courts which have jurisdiction to grant declaratory relief. How the Court manages to discharge this obligation is a question confronting all of us. The Apex Court cannot be absolved of its responsibility by only declaring the law. Simultaneously it is its obligation to get it enforced. Let all of us think how this obligation is discharged. Some modus operandi must be worked out for achieving the object which the Constitution of this great country has envisaged and on which the authoritative seal of the Apex Court has been fixed.

Before this Article is concluded, another debate which is relevant to the point is that the Apex Court having guaranteed to every child education upto the age of 14 years read with Article 14, which contemplates the concept of equality, is it not the requirement of Law that like common Civil Code for enforcement of which the Apex Court has issued notice to the Union of India to inform as to when the Union of India is going to implement the directive principle of having a Common Civil Code throughout the country, the Court may issue another directive to the Union of India and all States to ensure a common schooling system to all the children upto the age of 14 years on the basis of their locality so that the right to get education is coupled with right of equality i.e., all children

should get equal education. The socialist thinker and philosopher Dr. Ram Manohar Lohia conceived of this revolutionary idea that all children of a particular locality should read in a common school, he may be the son of Prime Minister or son of a sweeper. This will not only bring revolution in the entire approach of the country but it will solve a very ticklish problem of the country i.e., 'Reservation'. The reservation has been guaranteed only for socially and educationally backward classes. If all children are educated in common schools, the problem of educationally backwardness will stand solved within a reasonable time and the controversy debating the Nation on reservation may be solved. These issues call for a dabate and the purpose of the Article will be achieved if the issues are debated and solutions are brought forward on the points raised in this Article.

(1) V.D.Mahajan-Constitutional Law in India (Seventh Edition), page 73.

(2) Ibid page 310.

(3) Prem Chand Garg vs Excise Commissioner, U.P., A.I.R. 1963 S.C. 996. (Paragraph 2)

(4) State of Madras vs. V. G. Rao, A.I.R.1952 S.C.196.

(5) A.K.Gopalan vs. State of Madras, A.I.R. 1950 S.C. 27.

(6) Kharak Singh vs. State of U.P., A.I.R. 1963 S.C. 1295.

(7) Dr. Ram Manohar Lohia vs. State of Bihar, A.I.R. 1966 S.C. 740.

(8) In re : Madhu Limaye, A.I.R. 1969 S.C. 1014

(9) Kesvanand Bharti vs. State of Kerala, (1973) 4 S.C.C.225.

(10) Golak Nath vs. State of Punjab, A.I.R. 1967 S.C. 1643.

(11) A.D.M. Jabalpur vs. Shiva Kant Shukla, (1976)2 S.C.C. 521

(12) Maneka Gandhi vs. Union of India, (1978)1 S.C.C. 248.

(13) R. D. Shetty vs. International Airport Authority of India, (1979)3 S.C.C. 489.

(14) Jolly George Verghese vs. Bank of Cochin, (1980)2 S.C.C. 360.

(15) Sunil Batra vs. Delhi Administration, (1980)3 S.C.C. 488.

(16) Prem Shanker Shukla vs. Delhi Administration, (1980)3 S.C.C. 526.

(17) People's Union for Democratic Rights vs. Union of India, (1982)3 S.C.C. 235.

(18) Sanjeev Koke Manufacturing Company vs. Bharat Coking Coal Company, (1983)1 S.C.C. 147.

(19) Neerja Chowdhry vs. State of H.P., (1984)3 S.C.C. 243.

(20) Olga Tellis vs. Bombay Municipal Corporation, (1985)3 S.C.C. 545.

(21) Surendra Singh vs. Engineer in Chief C.P.W.D., A.I.R. 1986 S.C. 584.

(22) Dhirendra Chandra vs. State of U.P., (1986)1 S.C.C. 637.

(23) Suk Das vs. Union Territory of Arunachal Pradesh, (1986)2 S.C.C. 401.

(24) Bhim Singh vs. State of Jammu & Kashmir, A.I.R. 1986 S.C. 49.

(25) Sheela Barse vs. State of Maharashtra, (1987)4 S.C.C. 273.

(26) Catering Cleaners of Southern Railway vs. Union of India, (1987)1 S.C.C. 700.

(27) Mackinon Machenzie & Company, (1987) 2 S.C.C. 469.

(28) M. C. Mehta vs. Union of India, A.I.R. 1988 S.C. 1115.

(29) Krishan Patnaik vs. State of Orissa, A.I.R. 1989 S.C. 677.

(30) Gaurav Jain vs. Union of India, A.I.R. 1990 S.C. 292.

(31) Subhash Kumar vs. State of Bihar, A.I.R. 1991 S.C. 420.

(32) Indra Sawhney vs. Union of India, A.I.R. 1993 S.C. 477.

(33) Mohini Jain vs. State of Karnatak, A.I.R. 1992 S.C. 1858.

(34) George Fernandez vs. Union of India, 1993 Supp. (1) S.C.C. 418.

(35) R.S.Sodhi vs. State of U.P., 1994 Supp. (1) S.C.C. 142.

(36) Unnikrishnan, J. P. vs. State of A. P., A.I.R. 1993 S.C. 2178.

(37) Rathinan P. vs. State of Gujarat, A.I.R. 1994 S.C. 1844.

(38) Joginder Kumar vs. State of U.P., A.I.R. 1994 S.C. 1349.

(39) Smt. Shakuntala Devi vs. Delhi Electric Supply Undertaking and others, JT 1995 (1) S.C. 547.

(40) Consumer Education & Research Centre and others vs. Union of India and others, JT 1995 (1) S.C. 637.

(41) Shri P. G. Gupta vs. State of Gujarat and others, JT 1995 (2) S.C. 373.

(42) Shantistar Builders vs. Narayan Khimalal Totame, JT 1990 (1) S.C. 106.

(43) Murlidhar Dayandeo Kesekar vs. Vishwanath Pandu Barde and another, JT 1995 (3) S.C. 563.

LAW, RELIGION AND POLITICS

Justice M.Katju
Allahabad High Court

The whole progress of mankind has been from ignorance and helplessness before natural and social forces to understanding of these forces and harnessing them.

The basis of religion is ignorance of the real nature of these forces, helplessness before them and fear of the unknown. Thus, for example, many of the vedic gods e.g. Agni, Surya, Indra etc. were personification of natural or social forces. These forces could either benefit man or harm him. Thus, timely rains could benefit agriculture, but failure or delay of rain could ruin the crops, and whether there would be timely rain or not was entirely beyond man's control. Hence rain was conceived of as a god, Indra, who had to be propitiated to save oneself from his wrath.

Even today religion plays a powerful role in our lives because we are still largely dependent on natural and social forces in view of the low development of science. Since man feels helpless before these forces, which can adversely affect his life, he needs religion as a psychological support.

Science is that knowledge by which we can understand the real nature of these forces, the law which govern them, and the method of harnessing them for our benefit. With every step taken forward by science religion recedes. We no longer believe that the sun is a god, and instead we regard it as a huge furnace in which nuclear reactions are converting hydrogen into helium by the fusion process, thus liberating radioactive energy. We no longer regard small pox as caused by a goddess **(mata)** but believe that it is due to a virus, and it can be prevented by vaccination. Thus, with every advance of science the need for religion will become less as we are gradually able to control our own destiny.

Until the coming of industrialization religion was inseparably connected with every aspect of human life. Thus, the Dharmashastras contain religion, law, morality, etc. all inextricably interlinked with each other. In fact the very word 'dharma' has religious, legal as well as moral overtones.

The reason for this predominant position of religion in life upto the feudal age was the relatively low level of scientific knowledge, and the low level of development of the productive forces. Production as well consumption upto this stage was largely local. Human groupings were small and scattered, and science and technology was still at a primitive stage. People lived in small worlds of their own in small groups with little interaction with each other.

With the coming of industrialization human groupings became large. People from different places and belonging to different religions, castes, tribes,

lingual groups, etc. had to come together in urban areas and work together in factories, establishments, offices, institutions, etc. This gave rise to the concept of secularism, for a factory recognizes no religion or caste, but only efficient production, and it cannot function if its organization is compartmentalized on the basis of caste or religion. Thus, industrialization smashes caste, religious and lingual barriers.

The great American, French and Russian Revolutions ushered in a new chapter in the history of the human race. These Revolutions abolished many class distinctions, proclaimed the ideals of liberty, equality and fraternity, and of religious freedom. These ideals were not mere empty declarations. They were incorporated in the Constitutions of these countries and become legally enforceable rights.

Religion was not abolished by these Revolutions. In fact religion cannot be 'abolished' but will wither away gradually with the progress of science and social development and will disappear completely when man is no longer helpless before natural and social forces but is able to control them. What these revolutions, however, did was to relegate religion to a private affair unconnected with the State.

In Europe social development proceeded broadly along a straight line, that is, from tribal society to slave society to feudal society to capitalist society to socialist society (in Russia). In underdeveloped countries, on the other hand, the advent of imperialism considerably complicated the matters. The imperialist policy was to keep the colony (or semi-colony) as a market and source of cheap raw materials, and with this object the imperialists arrested social development and blocked the natural course of industrialization. Moreover, to retain their hold over the colonies the imperialists pursued the divide and rule policy and deliberately created religious, caste-based and lingual friction and hatred. Thus while in their own countries the imperialists preached liberty, equality and fraternity, they denied these rights to the people of the underdeveloped countries.

It is a tribute to our Constitution makers that despite the fact that our economy and social conditions were still largely semi- feudal they adopted a modern Constitution on the model of Western nations. It is also a tribute to them that at a time when religious passions were inflamed they refused to be swayed by these passions and upheld the modern ideal of secularism and incorportated it in Articles 25 to 30 of the Constitution. Thus Articles 25 states "Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion"

Articles 27 to 29 embody the principle of separation of state and religion. Article 27 states "No person shall be compelled to pay any taxes, the proceeds

of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination."

Similarly, Article 28 (1) states "No religious instruction shall be provided in any institution wholly maintained out of State funds".

Article 28(3) states "No person attending any educational institution recognized by the State or receiving aid out of State funds, shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto".

Article 29(2) states "No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on ground only of religion, race, caste, language or any of them."

Mention may also be made of Article 15(1) which states "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them". Similarly 16(2) prohibits discrimination on the ground of religion in public employment.

Thus we see that our Constitution is modern and secular. However, the fact remains that while our Constitution is modern, our social order is still backward and semi-feudal, and this dichotomy gives rise to a host of problems. Since in feudal or semi-feudal society religion has a powerful hold on men's minds, the vested interests seek to exploit this situtlon by perpetuating and accentuating caste and communal divisions and by sowing the seeds of discord among the people. This activity has been stepped up in recent times.

Religion and caste have divided our people. What is it that will unite us? In my opinion this uniting force will be science and industry. By science I mean not merely physics, chemistry or biology but the entire scientific outlook, the scientific analysis of our problems, and the scientific solution to those problems.

It may be mentioned that in our country we have a very old scientific tradition. Out of the six classical systems of Indian philosophy viz. Nyaya, Vaisheshik, Sankhya, Yoga, Purva Mimansa and Uttar Mimansa (or vedanta), the last one laid emphasis on adhyatma vidya (or spiritual knowledge) while the first (Nyaya) represented the scientific outlook, laying emphasis on reason and experience. Thus, the Nyaya system (as well as its adjunct, the Vaisheshik system) gave a philosophical basis and justification to science in ancient India and was thus of immense help in the progress of science. It is well known that in ancient India we made tremendous progress in Physics, Mathematics, Astronomy and Medicine. At a time when most people in Europe (except in Greece and Rome) were living in forests, our scientists like Aryabhatta,

Brahmagupta, Bhaskar, Sushrut, Charak, etc. were making astonishing scientific discoveries e.g. decimal system in mathematics, plastic surgery in medicine etc. (see Will Durant's 'The Story of Civilization: Our Oriential Heritage'). This perhaps may not have been possible if the Nyaya-Vaisheshik system had not given science the philosophical support it needed, particularly when it was faced with a mass of theological dogma.

The Nyaya system rejected the extreme view points of Vedanta and the Sunyavadi and Madhyamik Buddhists who asserted that the world was either unreal or unknowable. It took a balanced, commonsensical and realistic approach and placed great emphasis on pratyoksha pramana or knowledge arising out of sense-object contact (see Gautam's Nyaya sutras). No doubt theological elements were subsequently introduced into the Nyaya system by Vatsyayana, Udayan etc. but as D.P.Chattopadhyaya has pointed out in his 'What is living and what is dead in Indian Philosophy' this was only 'to escape from the inquisition'.

Thus we see that we have a strong scientific tradition in our country supported by a whole system of philosophy representing the scientific outlook. No doubt we have unscientific traditions, too, but the point I am emphasizing is that we are not a race of irrational, unscientific savages, as many Westerners have tried to paint us.

This is the age of science and technology. Unless we develop the scientific attitude we can never hope to catch up with the advanced industrialized nations, and will remain condemned to poverty and backwardness. Therefore whatever promotes science is good for us and is to be encouraged and developed.

Today our country is facing gigantic problems, social economic and political, and in my opinion the root cause of these problems is our backwardness. We are economically backward, we are socially backward, we are backward in every way. Therefore the solution to our problems is to modernize, and this is possible only by adopting the scientific outlook. While the main forces in the country's progress towards modernization will be political and social, the law, too, must give a helping hand.

There are broadly two conceptions of the law viz. the passive and the active. While according to the passive conception law is a reflection of the existing social relations, according to the active conception law is an instrument of change (see Friedman : Legal Theory).

The passive conception is often attributed to Savigny, the renowned German jurist who flourished in the 18th century. Austin, the father of positivism, and Ehrtich, one of the founders of modern sociological jurisprudence, can also be said to belong to the passive school.

According to Savigny's historical school of jurisprudence, law is not a consciously created phenomenon but is a gradual distillation of the 'volksgeist' (the spirit of the people). Thus, Savigny was a strong advocate of customary law, and was opposed to legislation. Most of the ancient codes e.g. Manu- Smriti,

the code of Hummurabi, the Roman Twelve Tables, etc. were merely a reflection of the existing customs.

It would be a mistake, however, to equate the passive conception with customary law. Even positive law can be passive if it seeks not to bring about social change but to preserve the established order. Thus, the positivism of Austin aimed at reinforcing the existing social system in England rather than bringing about any change.

The active conception of the law can be said to originate in modern times from the thinkers of the Enlightenment (Helvetius, Holbach, Diderot, etc.) who regarded law as an instrument for the radical reconstruction of society. Bentham's conception of law as an instrument for bringing about 'the greatest good of the greatest number' can also be classified as an activist theory, though it can hardly be called radical.

In modern times sociological jurisprudence permits an activist approach by the judiciary. Since our country is facing tremendous social and economic problems it is only the activist approach which is acceptable today. It must be remembered that ultimately all organs of the State, legislature, executive and judiciary, are servants of the people. Hence if they do not serve the people, the people have the right to show them the door.

In my opinion in the coming days the judiciary will have to play a crucial role in the people's march to progress. This is because the higher judiciary is objectively so placed in our Constitutional scheme that it is in a position to give correct guidance to the people. Due to their independent Constitutional status the Judges can take a more panoramic and long term view than other authorities. They do not have to face the next election, or worrry about their vote banks, or the next law and order problem. Hence they are in a position to fearlessly put forward modern, progressive ideas which will be of great help to the people in their struggle for social and economic uplift.

I do not mean to say that the Judges by themselves can bring about great social changes. It is the people alone who can do that. But the people need guidance and encouragement from intellectuals, and in the prevailing situation the intellectuals whose voice carries greatest weight in our society are the members of the higher judiciary, not because they are more intelligent than others but because of their status. Hence a heavy responsibility lies on the shoulders of the higher judiciary to show the people the way out of their problems.

It may be objected that the task of the judiciary is merely to decide cases, and not to act as statesmen. In my opinion this is an outdated view belonging to the 19th century positivist jurisprudence of Bentham and Austin. Modern sociological jurisprudence permits judicial activism and calls on the Judges to shoulder the responsibility of giving guidance to the nation.

As a matter of fact our Supreme Court has been responsibly discharging its obligation to the nation by playing an activist role, and by squarely addressing itself to the social problems of the people. The vast expansion of the scope of Articles 14, 19 and 21, particularly after Maneka Gandhi's case (AIR 1978 S.C.597) is clear proof of this. In a poor country like ours the judiciary, too, must make a contribution in solving the country's problems, otherwise it will be living in an ivory tower unconnected with reality.

In my opinion the judiciary must encourage scientific thinking and oppose unscientific and reactionary trends. In a vast country like ours with people of different faiths, castes, etc. the judiciary must oppose attempts to divide our people on the basis of religion, caste,language, etc and must uphold secularism. Communalism and casteism weaken our nation and divert the attention of the people from the real problems which are basically economic.

In my opinion the judiciary should take the following steps:-

1) In the light of the reasonability test in Maneka Gandhi's case it should declare reactionary, backward undemocratic and unscientific laws as unconstitutional on the ground that they are unreasonable.

2) In view of the fact that sociological jurisprudence permits a certain amount of legislative activity by the judiciary (see in this connection the recent Constitution Bench decision of the Supreme Court in Sarojini Ramaswamy Vs. Union of India, 1992, 5 J.T.I. in which in para 93 the observation of Lord Reid that the view that Judges do not make law is a fairy tale is quoted with approval), the Judiciary should make modern progressive laws within the permissible limits.

3) Where such progressive legislation by the judiciary is not possible, the judiciary should make recommendations to the Legislature for enacting modern, progressive laws. Even if these recommendations are not accepted they will be widely publicized, and thus give encouragement and guidance to the people.

Today the situation in our country is that almost everything is unscientific. There is no scientific planning and management of the economy, no scientific education policy, no scientific agriculture, no scientific utilization of our resources (both natural and human). The result is that our country, despite having abundant natural wealth and skilled personnel, is abysmally poor.

Hence to progress we must bring about a situation where everything is scientifically planned and managed, and there is massive application of science and technology, both in urban areas and in the countryside.

The capacity to guide its own development is a unique feature of scientific society. Once we have a scientific society we will no longer be subject to the

vagaries and uncertainties of natural and social forces, but will be masters of our own destiny.

The law of a scientific society will have a high democratic and moral content. The higher the forces of production develop, and correspondingly the higher men's intellectual and cultural level, the greater is felt the need for independence and creative initiative. As Jawitsch says "Man's social essence manifests itself particularly in his striving to effect creative activity, which is inconceivable without freedom of personal choice of variants of conduct within the limits of social interest and objective possibilities" (Jawitsch : The General Theory of Law).

CRUELTY AS A GROUND FOR DIVORCE OR FOR JUDICIAL SEPARATION UNDER THE HINDU MARRIAGE ACT, 1955

Justice A. K. Srivastava
Judge, Delhi High Court

Under the Hindu Marriage Act, 1955, as enacted originally, though cruelty was one of the grounds for obtaining judicial separation but it was not a ground for obtaining divorce. The word cruelty was not defined in the Act but in Section 10 which dealt with judicial separation the word cruelty was used in a restrictive sense because it was provided that either party to a marriage may present a petition praying for a decree for judicial separation on the ground that the other party has treated the petitioner with **such** cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party.

Section 13 of the Act deals with divorce. As enacted originally, it did not have cruelty as one of the grounds for seeking divorce. The Legislature of Uttar Pradesh wished to include cruelty also as a ground for divorce and with that view in mind by its Act No. 13 of 1962, Section 13 of the Hindu Marriage Act was amended to include cruelty as a ground for divorce. The amendment was to the effect that in sub-section (1) of Section 13, after clause (a), clause (i-a) was inserted as under:

> "(i-a)- has persistently or repeatedly treated the petitioner with such cruelty as to cause reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party, or"

This ground was almost similar to the ground of cruelty under Section 10(1)(b) for judicial separation but one distinction was made and that was that the words "persistently or repeatedly" were added. By this addition cruelty as a ground for divorce was made more strict than what it was for judicial separation.

It appears that except Uttar Pradesh, no other State made any amendment in Section 13 of the Hindu Marriage Act so as to have cruelty as a ground for divorce. It was only in the year 1976 that the Parliament by its Marriage Laws (Amendment) Act, amended Section 13 of the Hindu Marriage Act, to make cruelty also a ground for divorce. This amendment extended to the whole of India except the State of Jammu and Kashmir. By this very Amendment Act, Section 10 of the Hindu Marriage Act was also amended in a manner that instead of giving distinct grounds for judicial separation in Section 10 itself, the scheme formulated was that a petition for judicial separation could be made on any of the grounds for divorce specified in sub-section (1) of Section 13.

The result is that now same grounds are there for judicial separation as well as for divorce.

After the aforesaid amendment in 1976, now the ground of cruelty for judicial separation as well as for divorce became as under:

> "(i) has, after the solemnization of the marriage, treated the petitioner with cruelty;"

It may be seen that by the said amendment the Parliament, in fact, has deleted the words "as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party". In doing so the intention of the Parliament appears to be that it did not wish to define the legal conception of cruelty and the kind and degree of cruelty necessary to amount to a matrimonial misconduct giving a right to the other spouse to bring a petition for judicial separation or for divorce. Parliament appears to have avoided the danger of any attempt at giving a comprehensive or inclusive or exclusive definition of 'cruelty' and left it for the Judge-made-Laws. As such the matter is now left to the courts to determine on the facts and circumstances of the case whether the conduct amounts to cruelty or not.

Cruelty contemplated by the aforesaid clause may be both physical and mental. If it is physical the court should have no problem to determine it because it is a question of fact and degree. It is the mental cruelty which may pose a problem and may present difficulty with the courts.

Prior to the amendment made in Section 10 of the Hindu Marriage Act, the concept of cruelty, as it was stated in the old Section 10 (i) (b), was critically examined by the Supreme Court in Dastane v. Dastane, A.I.R. 1975 SC 1534. It was therein observed that the enquiry in any case covered by that provision had to be whether the conduct charged as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for the petitioner to live with the respondent. It was also pointed out that it was not necessary, as under the English Law, that the cruelty must be of such a character as to cause danger to life, limb or health or to give rise to the reasonable apprehension of such a danger, though, of course its being harmful or injurious to health, reputation, working character or the like, would be an important consideration in determining whether the conduct of the respondent amounted to cruelty. What was required was that the petitioner must prove that the respondent has treated the petitioner with such cruelty as to cause reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the respondent.

Now after the amendment in Sections 10 and 13 made by the Parliament in the year 1976, cruelty simpliciter has been made a ground for judicial separation and for divorce without putting any statutory rider. There is now no

requirement of law that the party seeking divorce on the ground of cruelty must prove that the respondent had persistently and repeatedly treated the petitioner with cruelty. Further, the petitioner has also not to prove that he/she was treated with such cruelty as to cause a reasonable apprehension in his/her mind that it will be harmful or injurious to him/her to live with the other party. Now the scheme appears to be to liberalise the provisions relating to judicial separation and divorce. In the statement of Objects and Reasons of the Marriage Laws (Amendment) Act, 1976 also, the object was stated to be so.

It may not be possible for the courts to define mental cruelty exhaustively. It can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put in with such conduct and continue to live with the other party. Now mental cruelty need not be proved to be such as to cause danger to the health, limb or life of the petitioner. Cruelty should be of the type which will satisfy the conscience of the Court that the relationship between the parties had deteriorated to such an extent that it has become impossible for them to live together without mental agony, torture or distress.

The following are some of the conducts which have been held to constitute mental cruelty-demand of dowry by the husband's parents with the support of the husband, wife abusing the husband and his parents in foul language and picking up quarrels, heavy drunkenness or addiction to drugs resulting in intemperate and violent behaviour and acts tending to injure the health, wife not coming to see her husband in the hospital who was seriously injured, husband having a love affair with another woman and keeping her in the same house, husband impotent qua his wife, wife stating that her husband may be killed in an accident so that she may get insurance money, constant insults, abuses and accusations of adulterous character which make married life impossible.

Recently the Supreme Court has given a new angle to the concept of mental cruelty in matrimonial matters. The following two cases need to be looked into.

1. Smt. Chanderkala Trivedi v. Dr. S.P. Trivedi, JT 1993 (4) SC 644.
2. V. Bhagat v. Mrs.D. Bhagat, AIR 1994 SC 710.

In these cases mere allegations and counter allegations without proof thereof have been held to have constituted cruelty, as it was found that the

marriage after such allegations could not in any circumstance be continued any further. In Chanderkala's case, in a petition filed by the husband for divorce on the ground of cruelty when the wife filed a written statement alleging intimacy of the husband with another lady doctor, the husband came out with a case of undesirable association of the wife with young boys. The divorce petition was tried by the lower court and was dismissed. The High Court granted divorce on the ground of cruelty. The wife filed the appeal. The Supreme Court maintained the decree for divorce on certain conditions that the husband would provide a flat and Rs. 2 lacs for the welfare of the wife and the findings of fact recorded by the lower courts were deleted. Justice R.M. Sahai, speaking for the Bench observed, "Whether the allegation of the husband that she was in the habit of associating with young boys and the findings recorded by the three courts are correct or not but what is certain is that once such allegations are made by the husband against wife as have been made in this case, then it is obvious that the marriage of the two cannot in any circumstance be continued any further. The marriage appears to be practically dead."

The case of V. Bhagat v. D. Bhagat is an unusual case. The husband, an Advocate practising in the Supreme Court and Delhi High Court, sued for divorce on the ground that the wife, Vice- President of ITDC, a Public Sector Corporation, is guilty of adulterous course of life. The wife in her defence not only denied the allegations made against her but attributed mental dis-equilibrium on the part of the husband by saying that the husband suffers from mental hallucination, that he has a morbid mind for which he needs expert psychiatric treatment, that he is suffering from paranoid disorder and needs expert psychological treatment and that he is mental patient and needs to be treated by a psychiatrist. Upon such stand taken by the wife in her written statement, the husband amended his petition and added the ground of cruelty as well for seeking divorce and prayed that a decree for divorce be granted to him on the basis of the averments alone made by the wife in her written statement/counter. According to him those allegations amounted to cruelty against him and furnished adequate grounds for passing a decree for divorce. During trial the Senior Advocate appearing for the wife put several questions while cross-examining the husband suggesting that the husband and the several members of his family including grandfather are lunatics and that a streak of insanity is running in the entire family. It may be mentioned that the family of V. Bhagat and D. Bhagat was quite a well-off family. Both husband and wife occupy high status in the society and also having two issues who are doing well in life as the son is a doctor and the daughter holding an MBA Degree is working with an American company in California.

In this case the Supreme Court, in the interests of both parties and to clear up an insoluble mess, resorted to an unusal step by granting divorce on the basis of pleadings and admitted material without waiting for the full trial wherein the allegations and the counter allegations could be proved or disproved. The Court

found that the allegations and the counter allegations were indicative of the intense hatred and rancour between the parties and any reconciliation was out of question. The averments made in the counter affidavit filed by the wife and the questions put by her counsel in the cross-examination of the petitioner were found to constitute clear acts of cruelty. It was also observed that in view of the said averments/questions no further material was necessary to establish the said additional ground of cruelty.

However, Justice B.P. Jeevan Reddy, speaking for the Bench, has at the end of the judgment appended a clarification saying that "Merely because there are allegations and counter allegations, a decree for divorce cannot follow. Nor is mere delay in disposal of the divorce proceedings a ground. There must be really some extra-ordinary features to warrant grant of divorce on the basis of pleadings (and other admitted material) without a full trial. Irretrievable breakdown of the marriage is not a ground by itself. But while scrutinising the evidence on record to determine whether the ground alleged is made out and in determining the relief to be granted, the said circumstance can certainly be borne in mind. The unusual step as the one taken by us herein can be resorted to only to clear up an insoluble mess, when the Court finds it in the interest of both the parties."

The signal of the Supreme Court appears to be that while dealing with allegation of cruelty as a ground for divorce the courts should have in their mind that the petitioner has to prove that the respondent had behaved in such a way that the petitioner cannot reasonably be expected to live with the other. In construing such behaviour to be cruelty within the meaning of Section 13 of the Hindu Marriage Act, the courts will have to look into each and every case having regard to the facts and circumstances of that case. Social status and educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together and all other relevant facts and circumstances will also have to be seen. In very exceptional cases divorce may be granted on mere accusations and allegations but regard must be had to the context in which they have been made. Absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of, could otherwise be regarded as cruelty.

CONSUMER PROTECTION ACT, 1986
NEED FOR FURTHER CHANGES, SOME SUGGESTIONS

Justice V. K. Mehrotra
President State-Consumer Disputes Redressal Commission, U.P.

Consumer Protection Act, 1986 (here after, the Act) was enacted as an Act 'to provids for better protection of the interests of cosumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of Consumers disputes and for matters connected there with.'It received the assent of the President of India on 24 December 1986 and was published in the Gazette of India Extraordinary on 24 December 1986.

The Act has been divided in four chapters and consists of 31 sections. Chapter I, II and IV were enforced on 15 April 1987 while Chapter III came into force on 1 July 1987 in the whole of India except the State of Jammu and Kashmir. It has been amended twice. The first amendment was by the Consumer Protection (Amendment) Act 1991 (Parliament Act no. 34 of 1991) and the second by Consumer Protection (Amendment) Act, 1993 (Parliament Act no. 50 of 1993), meaningful changes were brought in the Act particularly by the later amending Act which came into effect from 18th June 1993. However, in its actual working the Act is still deficient in various aspects. A further amendment regarding them is the immediate need.

2. Some suggestions are, therefore, being made in this short write up.

3. A consumer dispute can be brought before the Consumer disputes redressal agencies, namely, the District Forum, the State Commissions, and the National Consumer Disputes Redressal Commission by a Consumer in respect of goods and services, by some of them in a representative capacity and by a recognised consumer Association or the Central or a State Government. This is to be found in section 12 of the Act.

4. In the absence of a complaint the redressal agencies cannot intervene in a matter requiring action . Power should be given to the National Commission and the State Commissions to initiate suo-motu proceedings in suitable cases where it is found that restrictive or unfair trade practice was being adopted by a trader or goods had been offered for sale to public which will be hazardous to life and safety when used without proper disclosure of information about the contents, manner and effect of its use in accordance with law requiring such disclosure. Similar power to initiate action should be given to these Commissions in respect of deficiency in service affecting the public in general.

5. The wide scope of the directions which can be given by the redressal agencies under Clause (e) to (h) of section 14 (1) of the Act would make it possible for the State Commissions and the National Commission to function effectively if they are empowered to initiate action suo-motu. Experience has shown that some times no one comes forward with a grievance before the redressal agencies in these matters and the redressal agencies feel helpless as they cannot initiate action on their own.

6. The jurisdiction of the High Court and the Courts subordinate there-to in respect of proceedings before the redressal Fora and the orders passed by them deserves to be excluded by appropriate amendment of Article 323-B of the Constitution as well as the Act. It has been noticed over the years that sometimes proceedings before the redressal agencies get unusually delayed on account of orders made by the High Courts in matters relating to Consumer disputes and the object of the Act of ensuring expeditious redressal gets lost.

7. The quantum leap in the number of causes brought before the redressal agencies has resulted in over-burdened dockets of the District Fora and the Commissions. While on the one hand it is indicative of consumer awareness and their trust in these redressal agencies but on the other hand their hopes for early relief are belied due to huge pendency of cases and the consequential delay in their disposal.

8. Apart from the fact that absence of proper infrastructural facilities like trained and adequate staff, lack of proper space, library, furniture, stationery etc. contribute to these delays, the requirement in sub-section (2) and (2A) of section 14, that the President should be present fo conduct each adjudicatory proceeding and be a signatory to every order passed therein results in cessation of its proceeding in his absence even of a casual nature. Besides, with the abnormal increase in the work load particularly in a large State like U.P.it is physically impossible for the District fora or a State Commission to ensure disposal of cases brought before them within the reasonable time frame of 90 to 150 days envisagd under the rules framed for the purpose with only one set of persons working at any given time to hear them.

9. There is urgent need to enlarge the District Fora and the State Commissions by adding atleast two more Members, one of whom should be a Civil Judicial Officer with sufficient experience and enabling the President to constitute Benches, with the presence of a Judicial Member therein being essential, to hear and dispose of the cases. Such a step is imperative in the case of a big state like U.P. where there is huge influx of cases before the District fora and the State Commission in particular.

10. The Presidents of State commissions should be made Heads of Department with the necessary financial, administrative and other ancillary powers to enable the President to ensure proper and speedy functioning of redressal agencies in a State.

11. The appointment of the President and Members of District Fora and State Commissions is mostly being made by the State Governments on a part time basis. It reduces the number of their working hours and in any case lessens the sense of accountability. The solution lies in making full time appointment, on appropriate terms and with adequate facilities for their functioning. Even if, for some reason, it in not possible to make full time appointment, proper facilities for their functioning and adequate amount of honorarium should be assured for them. Suitable amendment be made in section 10 (1) (b) and 10 (3) as well as 16 (1) (b) and 16 (2) of the Act.

12. The absence of power to grant an interim order in the nature of injunction in appropriate cases particularly those relating to discontinuance of some essential service robs the redressal agencies of their efficacy in many instances. The National Commission, the State Commissions and the District Forum should be conferred with this power specifically though, if considered essential, guide-lines may be laid down in the Act like in the case of Order 39 C.P.C.or those contained in some Taxation Acts. Disobedience of the order should be treated as contempt of court and made punishable like-wise.

13. It is some-times noticed that after filing a complaint or an appeal the complainant or the appellant does not pursue the case with reasonable attention. At present, the matter is to be one into on its merits by the redressal agencies as they cannot dismiss it for want of prosecution or default on the part of the complainent or the appellant. Specific power to dismiss case in default and its restoration, on grounds known to law, should be conferred upon the redressal agencies. Likewise, specific power should be given to them, by suitable amendment of section 13 (4) of the Act, of review of an earlier order of restitution, of issuance of Commissions even for matters other than for examination of any witness of and the like. The National and the State Commission should be vested with specific power to transfer a proceeding to itself or to a District Forum other than the one where it is pending.

14. Provision should be made in the Act for 'Reference to Civil Court', subject to available legal pleas, whenever the Forum or the Commission is of opinion that the dispute involves complicated questions of law and facts requiring exhaustive evidence for its determination.

15. The execution of the orders made by the District Fora and the Commissions should be ensured by suitable amendments to section 25 of the Act. Apart from the powers already contained in this provision, powers of the nature possessed by Revenue Courts should also be conferred upon redressal agencies and specific provision should be made that disobdience of their orders would be treated as contempt of court and would be punishable in the like manner.

The Government should establish an Enforcement wing which should remain under the direct control of each redressal agency on the pattern of Civil Courts for effective enforcement of the orders passed.

Section 27 should also be amended by incorporating therein a specific provision for opportunity being given to the person sought to be punished to show cause against the proposed punishment. Similarly, suitable provisions, akin to those contained in the Prevention of Food Adulteration Act, should be made in respect of a company, a society, a firm or a statutory authority or Government agencies for penalising them in respect of failure to comply with an order.

SOME DO'S AND DONT'S FOR JUDICIAL OFFICERS

Justice K.N.Goyal

Eminent Vice-Chancellor of the Allahabad University late Dr. Amar Nath Jha, once addressing law students warned them in the following one sentence (which is being split up here for purposes of analysis), of what they may have to face when they go out to practice in the law Courts:

"You have to deal with

1. judges dressed in authority so comprehensive as to make one terrified;
2. judges who may know no law and yet lay it down, judges so learned that your arguments sound elementary and childish;
3. judges so morose and taciturn that they scarce open their lips;
4. judges waiting for the slightest pretext to make fun of you;
5. judges manifestly unfriendly to your case;
6. judges that interrupt you and disturb your line of thought;
7. judges that go to sleep."

He has thus pithily and sarcastically deprecated the following traits in a judge:-

Re: (1) A Terrifying Show Of Authority:

You have, by your deportment, to make the counsel, litigants and witnesses appearing before you feel easy, rather than nervous. This will normally result in reciprocal cordiality on their part and enable them to present their case or testimony in a cool manner.

This does not mean that you should appear to be weak and soft. You have to be firm with recalcitrant lawyers, acrimonious or frivolous litigants and shifty witnesses.

Re: (2) Ignorance Or Shallow Knowledge Of Law Which One Tries To Cover Up By Showing Off.

Unless you really know law, your showing off will not convince any one. It will only make you an object of ridicule by lawyers and litigants and even by your colleagues. What is important is to make sincere efforts to acquire knowledge. Not all advocates are well equipped nor come well prepared. At the

same time, not all of them are ignorant of law. You should not feel shy of accepting a valid point made by a lawyer even if it goes against your pre-conceived notions.

If you maintain a register of rulings which you have read in your spare time or which are cited before you in arguments, it will be very useful to you. (You will in fact have to maintain several such note books subject-wise). It will often help you in putting a recalcitrant, bombastic or repetitive lawyer in his place. If you can point out to him a relevant ruling he will have to submit to it unless he is able to distinguish it. Such register will also enable you to guide many junior lawyers who may not be very well versed in law. Even when a lawyer is not able to give a valid argument in favour of his case but you happen to be aware of a ruling or legal principle which supports him you should not hesitate to tell the parties' counsel about it.

Display of learning by unnecessary citation of too many rulings and giving long quotations from them in your judgments should also be avoided.

If you are really learned your knowledge will show itself in your handling of cases. You don't have to show it off.

Re: (3) And (6) Remaining Either (3) So Silent And Pompous During The Hearing That The Lawyers Do Not Even Feel Assured That You Are Following Their Arguments Or The Case Itself, Or (6) Being Guilty Of Excessive Interruptions

Of course you should not be guilty of too much interruptions either during the cross-examination of a witness or while a counsel is arguing.

Excessive interruption during cross-examination is liable to be misconstrued. The lawyer may be led to feel that you are unjustly trying to nullify the effect of an admission that he has extracted from the witness through cross-examination. Or that you are making the lawyer lose his set line of cross-examination.

It does not, however, mean that you should hesitate in doing your duty of protecting a witness from a lawyer's unfair or intimidating or bullying tactics during cross-examination. If the lawyer has put to the witness a misleading question, and before you could object to it the witness has blurted out some ambiguous reply and the lawyer insists on your recording it as an "admission" or "contradiction" of the witness, you must reject his plea. You should ask the lawyer to put a proper question afresh or yourself clarify from the witness what he really meant to say, and then record it.

In arguments also, the lawyer is entitled to put across his viewpoint in his own way. But if he is rambling and digressing, you are entitled to tell him to come

to the point. You can and should also ask him to answer a legal proposition which seems to you to go against his case, You can and should stop repetitive arguments. You should also clarify your doubts by questioning the validity of the legal proposition being advanced by him, so that he gets an opportunity to convince you by citing an authority or by re-phrasing his argument. But where a lawyer appears to take offence at such questioning and does not welcome such opportunity, it is more expedient to keep mum.

Re:(4) Trying To Make Fun Of A Lawyer:

This must always be avoided. Even if a lawyer is advancing a ridiculous proposition it is enough to indicate to him the fallacy or the mistake in his argument. But if you try to make fun of him many other lawyers present in the court room may try to humour you by joining you in your laughter. Never be elated by such insincere appreciation of your "wit" The lawyer concerned will in any case become your enemy. He may also sometimes make an offensive retort, which may make you uncomfortable. No one should laugh at others' expense unless he is prepared to appreciate a repartee at his own expense as well.

Re: (5) Being Manifestly Unfriendly To A Party's Case

You are well aware of the two fundamental principles of natural justice. They are applied even to many administrative proceedings. With even greater force, they necessarily apply to proceedings in a court.

One is, the absence of bias. Justice should not only be done but should also seem to be done. The other is, hear both sides.

You have to so conduct yourself, in the court room as well as outside, as to give a clear impression of your impartiality and of fairness of hearing. Of course you can't help if a party or his lawyer makes a false pretence of being treated unfairly merely because you reject his unreasonable requests, such as for adjournment, or because you refuse to succumb to his unfair tactics.

Re: (7) Being Inattentive

If you are not an ignoramus and are really alert and have applied your mind to the facts and the law you can never feel so bored or disinterested as to look like having gone to sleep. There is however one exception. If a lawyer is arguing endlessly and repetitively and is neither prepared to answer your queries, nor is in a mood to listen to any plea of yours to be concise, and in order to avoid creating a scene you let him go on, you, understandably, can't help going to sleep!

QUIZ-NO.2

Justice K.N. Goyal
Retired Judge, High Court

First, the results of Quiz No.1

The response to Quiz No. 1 was not satisfactory in the matter of number of entries. As it transpired that most officers had not been able to have access to copies of the Journal, time was extended till June 30, Happily, it has now been decided to send a separate copy to each officer instead of leaving it to the District Judge to circulate it. There should therefore arise no occasion for extension of time hereafter.

Only 23 entries were received even by the extended date. This included one from an officer of the Registry who was not eligible under the rules then in force. From now on, all officers up to the rank of A.D.J., excepting those working in the J.T.R.I., will be eligible. In other words, officers in the Registry or in the Secretariat or in Raj Bhawan will also be able to compete. The rest of the rules will remain the same as announced in the first issue and must therefore be consulted by you before you enter.

Although the number of valid entries was only 22, it is gratifying that as many as four scored 100% marks (first position), one scored 95% marks (first runner up) and one scored 91% marks (second runner up). Accordingly, the prize money for Quiz No. 1 has been redistributed as follows:-

First prize Rs. 1000 each, Second prize Rs. 800, Third prize Rs. 600. This takes the total to Rs. 5400. The winners are Messrs Avinash Saxena, P.K. Upadhyaya, P.K. Singh and Harish Tripathi (I prize); Lalta prasad (II prize) and Tej Bahadur Singh (III prize).

As two officers below them scored as high as 90% marks, it has been decided as a matter of grace to award them a consolation prize of Rs. 200 each. They are Messrs Musharraf Husain and Pradeep Kumar I. (Fourth position holders).

This leaves out women officers altogether, although as many as four of them had participated. In the special circumstances a consolation prize of Rs. 200 is awarded to the topper among them. She is Km. Vani Ranjan Agarwal who scored 79% marks (Fifth position holder).

Thus the total prize money, courtesy learned honorary Chairman, stands increased by Rs. 1000. This should not however, raise any expectations for any future Quiz, for which the prize monies are the same as announced last time.

Heartiest congratulations to the winners.

Out of 22, only two failed to secure the minimum marks (50%). The names of others, with their marks, are given below. This is being done as a one time exception, only because their number is so small.

Position No.	Name of officer	Marks
6.	Messrs Balbir Prasad, Naresh Chandra Dubey and Shivanand Misra	75
7.	Messrs Niraj Kumar Sangal and Anup Kumar Goyal	73
8.	Messrs R.L. Kesarvani and R.P. Pandey	69
9.	Mrs. Deepa Jain	61
10.	Mr. Sudhir Kumar	59
11.	Miss Kumkum Rani and Miss Poonam Sikand	54

Now the correct solution to Quiz No. 1 is as follows:-

Question No.	Answer
1.	c
2.	c : **Cropper** v. **Smith,** (1884) 26 Ch D 700
3.	a : **State of U.P.** v. **Mohd. Nooh** AIR 1958 S.C. 86
4.	d : **Maneka Gandhi** v. **U.O.I.,** AIR 1978 SC 597
5.(1)	d
(2)	i
(3)	c
(4)	a
(5)	k
(6)	g
(7)	f
(8)	j
(9)	l
(10)	h
(11)	e
(12)	b

(13) r
(14) s
(15) p
(16) o
(17) t
(18) m
(19) n
(20) q

6.(1) c
(2) f
(3) a
(4) k
(5) g
(6) b
(7) e
(8) s
(9) d
(10) p
(11) j
(12) t
(13) r
(14) o
(15) h
(16) i
(17) l
(18) m
(19) q
(20) n

The losers also deserve at least two cheers. After all they did make the effort, and scored fairly high. Better luck next time.

It was a pleasant surprise that all the prizes have gone to the younger officers. Keep it up!

The seniors should also show greater interest from now on. It is not merely the prize money to be considered. That is only in the nature of token. The thrill of participation in the contest should attract you more. And who knows those who matter may be watching your performance (or even non-participation) at these contests. When I am putting in so much effort in preparing the Quiz, is it too much to expect that you will match it by your zeal in answering it?

Thanks are due to Sri U.C.Dhyani, Deputy Director and Sri D.C.Kapri for their valuable assistance in marking the answer sheets and tabulating the result.

You will appreciate that a Quiz, which has to be answered while sitting at home within a month or two, is not so much a test of your knowledge or intelligence as of your capacity and inclination to exert yourself. The answers are all within your reach. You can easily answer them if only you will.

Now, the new Quiz

Quiz No. 2 carries nine questions based on rulings of the Supreme Court. All the rulings relate to subjects with which you are dealing every day. One question is literary, but with a legal slant. So just visit your library and find out the answers.

Answers should reach the Editor by Sep. 15, 1995. When giving a case reference, names of parties as well as reference of any one law report such as AIR, SCC, ALJ, Cr.LJ should be given.

Competititors must read the rules published with Quiz No. 1. The same will govern Quiz No. 2 subject to the widening of the field of eligibility as mentioned earlier.

1. "One who comes to the court must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan- dodgers and other unscrupulous persons from all walks of life find the court process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person whose case is based on falsehood has no right to approach the Court. He can be summarily thrown out at any stage of the litigation.....A litigant who approaches the court is bound to produce all the documents executed by him which are relevant to the litigation".

   Which of the following justices is author of these observations?

   (A) R.M.Sahai (B) M.K.Mukerjee

   (C) S.R. Pandian (D) Kuldip Singh

   (E) B.P.Jeevan Reddy

   -2 marks, plus 8 additional marks if case reference also given.

2. In a Privy Council judgment it was held (within the decade before Independence) that "Fraud like any other charge of a criminal offence, whether made in civil or criminal proceedings, must be established beyond reasonable doubt. A finding as to fraud cannot be based on suspicion and conjecture". This has been relied on by the Supreme Court in a recent decision (during the last five years).

   Give reference of the Supreme Court decision - 6 marks.

3. On a challenge to the validity of an administrative order or notification purporting to be passed in exercise of power under a specified statutory provision, when it is found that the specified provision did not confer such power the order or notification can still be upheld as valid if the authority could justify it under some other provision. (See **Hukum Chand Mills Ltd.** v. **State of M.B.,** AIR 1964 SC 1329 and **P. Balakotaiah** v. **Union of India,** AIR 1958 SC 232). The Supreme Court has (in a case during the last three years) applied the same principle to an order of a Court of Session passed against an accused. The order, though purporting to be passed under a section of Cr.P.C. under which it could not have been passed at that stage, was upheld because it could validly have been passed under a different section of Cr.P.C. which was not noticed by the Sessions Judge.

   (a) What is the reference of the case? - 8 marks

   (b) Section under which the Sessions Judge had passed the order? – 2 marks

   (c) Section under which the order was justified? – 2 marks

4. "A possession of a co-owner or of a licensee or of an agent or a permissive possession to become adverse must be established by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of real owner. Mere possession for howsoever length of time does not result in converting the permissive possession into adverse possession".

   Give reference of the Supreme Court decision (during the period of Jan.'92-June' 95) in which this passage occurs. -10 marks

5. Here are two excerpts from a play by Shakespeare:

   (i) The quality of mercy is not strain'd.
   It droppeth as the gentle rain from heaven
   Upon the place beneath: it is twice blest;
   It blesseth him that gives and him that takes.

(ii) 'Tis very true; O wise and upright judge;
How much more elder art thou than thy looks!

(a) Name the play in which these lines occur - 6 marks

(b) Name the character who uttered lines (i)- 2 marks

(c) Name the character who uttered lines (ii) -2 marks

6. In a suit for recovery of loan advanced the parties arrived at a compromise. Under the compromise the suit was decreed and a charge was created for the decretal amount on certain immoveable property which was not the subject matter of suit. In the Bombay High Court a Division Bench on appeal (differing from the Single Judge) held that the decree amounted to a conveyance, i.e. an instrument of mortgage. Hence it was required to be stamped as such. The matter went up to the Supreme Court. Did the Supreme Court-

(A) uphold the single Judge?

(B) uphold the Division Bench?

(C) remand the case?

-4 marks, plus additional 4 marks for giving reference of the Supreme Court case.

7. Inclusion of Sanskrit, without including Arabic and Persian also, among optional subjects was considered by a well known governmental body to be contrary to secularism, but the Supreme Court did not agree.

Name the body which had taken this stand before the Supreme Court.

-4 marks (Additional 6 marks if case reference also given)

8. A firm which is not registered is barred, by sub-section (1) of Section 69, Partnership Act, from filing a suit. But sub-sec. (3) of the same section creates an exception by permitting the enforcement of any right to sue for the dissolution of even an unregistered firm or for accounts of a dissolved unregistered firm.

If the partnership deed contains an arbitration clause, and the unregistered firm stands disolved on the death of a partner, can his heirs invoke the arbitration clause for seeking accounts of the firm so dissolved?

Answer Yes or No

-6 marks, plus 6 additional marks if reference of Supreme Court ruling on the subject is also given.

9. A suit or a remedy in civil court for possession or injunction normally prevents a person from invoking Sec. 145 Cr.P.C.The reason is that

multiplicity of litigation should be discouraged. It was so held by the Supreme Court in an earlier ruling. Later, in another case, the facts were these. A son threw his father out of a portion of an ancestral house which had been in the father's possession. The father immediately approached the criminal court u/s 145 Cr.P.C. and also filed a civil suit for injunction in which "status quo order was granted." The Magistrate thereupon dropped the proceedings u/s 145. The Supreme Court however set aside the Magistrate's order, and also the High Court order which had upheld the Magistrate, and directed restoration of possession in favour of the father under Sec. 145. Which of the following grounds prevailed with the Supreme Court?

(A) The Civil Court's order of status quo had been infructuous.

(B) There was here no dispute about title or about right to possession but only on the question of possession. Hence the earlier decision was distinguishable.

(C) The Bench differed from the view taken in the earlier decision.

-6 marks plus 6 additional marks if case reference also given.

10. In a Supreme Court judgment within the last three years the following passage from an American judgment has been quoted. Give the reference of the Supreme Court ruling.

"A' court' is an instrumentality of Government. It is a creation of the law, and in some respects it is an imaginary thing that exists only in legal contemplation, very similar to a corporation. A time when, a place where, and the persons by whom, judicial functions are to be exercised, are essential to complete the idea of a 'court' It is in its organized aspect, with all these constituent elements of time, place and officers, that completes the idea of a 'court' in the general legal acceptation of the term. But a 'court' may exist in legal contemplation without any officers charged with the duty of administering justice. The officers might all die or resign, and still the legal fiction would continue to exist. The judge of a court, while presiding over the court, is, by common courtesy, called 'the court', and the words 'the court' and 'the judge' or 'judges' are frequently used in the statutes as synonymous."

-10 marks.

PROFORMA

Question No.	Answer	Additional information if required
1		
2		
3 (a)		
(b)		
(c)		
4		
5 (a)		
(b)		
(c)		
6		
7		
8		
9		
10		

Signature, name and designation of officer

OUTLINE OF CRIMINAL JURISPRUDENCE

Justice S. C. Mohapatra
Chairman, Orissa Administrative Tribunal,
Bhuvaneshwar (Orissa)

When we think of Criminal Jurisprudence, we have to think of the society to which we belong because law which is based on human behaviour varies from society to society. All the same present day civilisation leads to a common goal of protecting human rights so that there would be peaceful co-existence and each human being can have a sense of security that during his life time he will live comfortably with dignity. All laws tend towards the same. This gives rise to the behaviour of man towards others i.e. what he ought to do and what he ought not to. When a man acts it has reflection on others. This reflection creates imbalances. Mode of balancing the imbalances is law. It deals with rights, obligations and their enforcement. When a man is put to an uncomfortable position by action or inaction of another it is said to be wrong. Disturbance of right of one, non-discharge of obligation can be classified as wrongs. Whether the action or inaction is wrong and eradication of the wrongs are called adjudication. Result of adjudication is justice. This system of justice can be called jurisprudence.

Where sovereignty of a society is likely to be affected directly or indirectly by act or omission of a man, criminal jurisprudence emerges. Prevention of wrongs to society for protecting society itself by laws comes within the domain of criminal jurisprudence. Methods of such prevention are by giving direction not to do, attaching a stigma to wrongdoer so that society will identify the wrong doer, taking away or suspending some privileges which otherwise a man enjoys being a member of the society. This assures the members of the society that they are comfortable during their lifetime and can live with dignity in the society.

Broad object of criminal jurisprudence being protection of society from apprehended or committed wrongs, all laws made in this regard come within the scope of criminal jurisprudence. Law being an expression of the will of the community for their peaceful living, disturbance or likelihood of such disturbance are prevented or eradicated by provisions therein. In modern society, old concept that wish of the monarch which is depository of sovereignty has been given a nice burial. Yet in international law, the theory of victor and vanquished has been in existence to regulate which, League of Nations came into existence after the 1st world war and United Nations came into existence after the 2nd world war. By resolutions, this organisation makes endeavour to protect human rights by regulating conduct of one nation towards another and conduct of the sovereign power internally. All this is to give assurance to a man so that he lives in comfort and with diginity. If we enter into that branch it will be never ending.

Therefore, shortly it can be stated that internationally also the internal laws are regulated so that man is assured to live comfortably with diginity and expression of Rousseau, the French philosopher who was the thought provoker of French nationals to give rise to revolution for change of sovereignty that all men are born free but every where they are in chains does not recur again.

These human rights have been incorporated in our Constitution as fundamental rights. They are based on equality, liberty and fraternity. Sovereignty thus shall not be discriminatory, each one shall have freedom to live comfortably with dignity and mutual harmony would be such that fraternity shall develop among members. Laws made by legislature are to have the same object. Executive while enforcing the law is to modulate its action in such a manner that these objectives are fulfilled and judiciary is to consider whether the law in view of its object and language fulfils the object, and where the law is in accordance with these objectives, it considers whether a person has committed the wrong and in case he has so committed, how best it can be dealt with within the framework of the law so that peace and tranquillity in the society are restored or protected.

Liberty being the main object of an individual which brings peace in his mind so that social peace is maintained, a person committing wrong is deprived of this liberty to the extent required. Curtailment of right to enjoy one's property temporarily or permanently, curtailment of right to have association with others either temporarily or permanently are the two broad modes of enforcing the laws. But before such actions are taken a person gets opportunity to know why such steps are required to be taken so that in a competent forum he can explain that he has not committed any wrong, or even if it is wrong, he does not deserve the proposed deprivalon. It is not in a strait-jacket formula but law prescribes how this would be satisfied. Object behind this is that person does not proceed ahead to commit the wrong or is prevented from doing the wrong or even if wrong is committed, he realises that in future he should not commit the wrong, others who know about it become careful that in case they commit such wrongs, they may face the same consequences. Ultimate object is to keep the society in order.

Some wrongs invite punishments. Some wrongs do not invite punishments. Those wrongs which invite punishments are called offences. Those which do not invite punishments to a person are executive actions for enforcement and maintenance of peace. They are so overlapping that the enforcement authorities of the law require care and caution for the same. Few illustrations in short will give an idea of the same. It may not be taken to be exhaustive. They are only illustrative.

Let me take up deprivation of enjoyment of property first. Under the Code of Criminal Procedure, a provision has been made to prohibit persons from creating disturbance in possession of immovable property or obstruction to free

enjoyment of a road, watercourse or the like. These provisions are not remedy of the persons in respect of whom wrongs are committed. Their remedy is in other forums. However, they can initiate such proceeding against persons so that the persons doing wrong can be prohibited until they establish their right in forums provided, from committing wrong. Similarly, properties of a person which are used in commission of offences can be seized and confiscated. Where it is proved that offences have not been committed, the properties are either returned or value thereof is returned. These provisions can be found in the Essential Commodities Act and orders made there under, Forest Acts, Prevention of Corruption Acts and the like.

Curtailment of liberty either by prohibiting a person to be in the society of persons which he desires is another mode. They are causing death of the person against his will, confining him in custody or not allowing him to be in the society he desires. There is no scope in our law to cause death of a person unless he has committed an offence declared to have such penalty. Confining a person in custody may be an accent of committing an offence or on accent of steps for prevention of breach of peace or an accent of disturbing public order. Similarly, restraint imposed on a person to mix with others he desires is a mode of prevention. A person is also directed to have good behaviour. These provisions are found in National Security Act, Criminal Procedure Code, Police Act, Criminal Law Amendment Acts and the like. Where a person is found to have committed an offence he is convicted and thus a stigma is attached to him. In respect of some such offences, he is not punished immediately and allowed to change his behaviour. For some offences he is sentenced to pay fine. For some other offences on conviction, he is sentenced to substantive imprisonment and for committing some offences he is deprived of his life. This is the broad principle of criminal jurisprudence.

As has been indicated earlier, a person deprived of his liberty or property gets a chance to have his say before forums created that he does not deserve to be dealt with in the manner provided in law. For this purpose, where the matter relates to public order, he gets a right to represent and an independent forum called Advisory Board considers whether detention is justified. Ultimate, power is given to High Courts and the Supreme Court in exercise of writ jurisdiction of both and appellate jurisdiction of Supreme Court to consider whether detention is justified. Where the action relates to law and order and not public order, forum created adjudicate the same, where action is an offence, person committing the offence is called accused and he faces trial in a competent court adopting procedure laid down in the Code of Criminal Procedure. Evidence adduced is appreciated on basis of provisions of the Evidence Act. On being satisfied that all the ingredients of the offence are satisfied, accused is convicted. In some cases, accused is sentenced and in some cases imposition of sentence is deferred until convicted person, accused of an offence, is presumed to be innocent.

TRAINING OF MAGISTRATE - STRATEGY

Justice J.K.Mathur
Judge, Calcutta High Court

For any system to work effectively it is essential that the persons who operate the system are efficient and enthused. Where the system is not rigid or mechanical, the role of the operator becomes all the more determinative of the effectiveness of the system.

In Judicial system the mechanism consisting of the laws and rules, is sufficiently malleable, allowing substantial play in the joints by providing judicial discretion whereby a Judge can decide how to act unconstrained by rigid rules. Its effectiveness therefore is essentially dependent on the Judges, who administer the laws.

This conclusion though scientifically deduceable, has also been recognised by the scholars in the field of law.

"The ultimate guarantee of Justice in a court of law is the personality of a Judge, said Ehrlich.

Roscoe Pound also was of the opinion that the quality of justice is dependent more on the quality of Judges, than on the laws that they administer.

Lord Denning in 'Road to Justice' said, "It is no use having just laws if they are administered by bad judges or corrupt lawyers. A country can put up with laws that are harsh and unjust so long as they are administered by just judges who can mitigate the harshness or alleviate their unfairness".

Therefore the Judge who administers laws is the critical factor in the effectiveness of administration of justice and any endeavour to improve the criminal justice system has therefore to consider not only rendering the laws more just and effective, but has also to see, more importantly, that the human component of the system which operates the laws is made more effective, by being better equipped and motivated to dispense robust substantial justice.

Training is a well accepted strategy for preparation or development of human resource in organisations. It has been accorded an important niche in the discipline of personnel management. There is no need for a justificatory prelude to any suggestion advocating use of training for improving the performance of personnel in a system.

Training is meant, initially to provide all the necessary equipment needed for performance of a job and subsequently to periodically refurbish the baggage of the incumbents especially when there is a change in the job, or new tasks are

added or any new method of performance evolved. It is also used to plant new ideas so that the operator can use them if they provide a better alternative.

In-Service training in addition to orienting the personnel for performance of changed roles or tasks also affords an opportunity to the judge to be exposed to the methods used by other judges and to reassess their own methods for their effectiveness. They can also discuss their problems with their peers to evolve a solution to the problems faced. It is more important in the training of judicial officers and judges who usually work alone as such and never get any opportunity to watch any other judge performing.

In India realisation for the need to train judges, though expressed almost 70 years back in the report of Chief Justices (Rankin) Committee and periodically reiterated has recently been given affect to and some training Institutions established in some States. An all India Judicial Academy has also been established a few months back and it is hoped that in due course of time all the judges at all the levels will have the benefit of training. The main issues which have now arisen and face the managers of training are the content of training and training methods.

TRAINING NEEDS

To find whether a person who is selected to perform as a Magistrate has all the equipment needed to perform as such, requirements of the job have to be collected. The various jobs which a selectee may be required to perform within the next 5 to 7 years have to be identified. Each of the jobs is analysed to find various tasks required to be performed in that job. Tools necessary for performance of each of the tasks is found out in terms of knowledge skill and attitude. These aspects of the equipment for each task put together will give the requirement for that specific job. A person has to have this expertise to perform effectively.

In an ideal criminal justice system if any crime is committed, the police should record it, and investigate and find the real culprit.The courts should then convict all the persons who did actually commit crimes and the legal response should be so selected that the convict is corrected and rehabilitated in the society.

A man who is selected to function as a Magistrate is a law graduate and as directed by the Supreme Court recently, has to be enrolled as an advocate for at least three years standing.

Knowledge, skill and and desired behaviour, if any acquired during this period of education and experience has to be discounted from the expertise needed for performance found on analysis of job content. The gap in the training need, to be filled by training.

A detailed excercise, consisting of collection of job requirements, their analysis, and emperical material is necessary to deduce the expertise needed for performance. To demonstrate the gap, if the process of accepting evidence is considered, a Magistrate, in addition to the law regulating the process, the principles of relevancy and admissibility, must also know the principles of communication, should have the skill to use them to optimise flow of information, and should be sensetised to the socio-economic millieu of the witnesses and their problems to understand them correctly and should have firm belief in dignity of human beings. Absence of these attributes creates barriers to effective communication.

The entire judicial system works on information, received, analysed and tested for acceptance. Yet no law school teaches effective receipt of information, principle, skills or the mental traits conducive to its receipt.

After trial a Magistrate has to award a sentence or deal with the convict under Probation of Offenders Act, or in case he is functioning as a part of Juvenile Court to consider the various alternatives provided. A Magistrate is totally innocent of the purpose of this exercise and the end sought to be achieved. No study is made available to him about the impact of any of the alternatives available to him for their effectiveness in correction or even deterrence. The skill to assess the individual convict with his socio economic back ground to diagnose nature of his criminality and to evaluate each of the terminal responses with a view to select one, or the severety of one as would be effective in a given case, is not imparted to him. Nor is any attitude inculcated for him to apply himself to so act as to ensure correction and rehabilitation.

These are only two of the numerous tasks a Magistrate has to perform in discharge of his duties. A detailed analysis of his job will disclose many more areas of operation of a Magistrate as cannot be effectively handled with only the equipment made available to him in the law school or during the practice for the first three years.

In no Institute or Academy has an attempt been made to use the available scientific techniques to chart out the training programmes. Only needs perceived by the managers of training are taken into account and for filling those also only knowledge or information is supplied in addition to some skills. No training is imparted to inculcate appropriate attitudes except when some senior member of the judiciary delivers lectures to the trainees about some desirable behavioural traits. These suggested attitudes are only some of the behavioural traits needed for effective functiong while many more important ones are talked about. They can be uncovered only by persons who know about behavioural sciences.

And as would be presently seen lecture is the least effective mode of inducing attitudinal changes.

Thus for any training for equipping Magistrates for effective performance, training needs have to be deduced scientifically by first analysing the job content and finding the expertise needed for performance of each of the tasks, in terms of knowledge skill and attitude. The expertise available with the inductees, has to be discounted and the remaining expertise will indicate the gap which has to be filled by training.

Training needs having been identified the next important aspect of training is to identify effective vehicle for communication of each of the need.

In all the judicial trainings only lectures are used. Only sometimes exercises in writing judgments are conducted. Even in delivering of lectures sometimes the speakers read out a prepared lecture. It may be pointed out that lecture is meant only to communicate information. It is ineffective mode of transference of skills or inducing attitudinal change, and is retained only in part.

Describing utility of lecture method it is said, "Since it does not, demand active involvement of participants, it is largely unsuited to the teaching of skills which require practice . It is also of limited value in promoting behavioural or attitudenal changes which is a large part of management development. It is very difficult to convince anyone by merely talking at them: attitude are changed best when people convince themselves". (As introductory course in teaching and Training Methods for Management Development. An I.L.O. Publication).

A lecture read out is less effective than the trainees themselves reading those pages, as all the trainees do not listen to the entire lecture, and have no means to catch upon what they missed. In lectures after about 45-50 minutes the receptivity reaches a very low level. Lectures even where necessary have to be aided by discussions and visual aids. The law graduates having prepared for competetive examinations have adequate information about law. It is therefore the less important input in any induction training. Information about other allied disciplines has to be imparted by lectures duly laced with discussions and training aids. More important are skills needed to apply those laws and other skills necessary in the job. Case study, incident methods, role plays exercises, group discussions are some of the methods effective to develop the skills.

Training to bring about change in attitudes is the most delicate, and most important part of training. A knowledgeable and skilled judge may not deliver justice as robust as delivered by a judge who is sensetised and enthused to administer justice. This part of the training is usually left in the hands of experts in sensitivity training. The trainees are made to realise the need of desirable attitudes in response to the problems of contact groups.

Behavioural training is different from other aspects of training in as much as a person already has a behavioural pattern, the training is a twin process of erasing undesirable traits and then inducing the desirable ones. While

information and skills are merely added to the existing baggage, attitudes have to be replaced. In this process making a person realise the need to imbibe new attitudes is the more difficult one. This process, called defreezing, is easier realised when a person enters a new profession. He at that time is in the look out for a manner in which to behave. If therefore the behavioural training is attempted at the very threshhold of a person's career, it is likely to be most effective, as the trainee would be more willing to accept new values and traits.

If the training has to be effective and have a real impact on the quality of justicing not only should it be scientifically structured but also communicated through an appropriate training method.

Other important matter to be kept in mind is the sequencing of the training inputs. It has always to be seen which input should precede the other. More importantly the training should be conducted in intellectually free and open environment. The trainees should feel free or even induced to ask question. Otherwise the trainees will not intellectually accept the communication detracting from its effectiveness.

As has been discussed above what is the equipment needed for a task, and what equipment has been gathered by a set of persons while studying for a law degree or practing for two or three years, is a matter which can be known only after collecting empirical evidence and analysing it. What is the experience in terms of knowledge, skills or attitudes gathered during a specified period of practice will vary with the individual and also with the ethos at the bar which may change with the time and the place, and other variables.

It would have therefore been appropriate to permit personnal management scholars to have found after collection of emperical evidence whether the baggage collected during this period does in any manner fill the job requirements of a Magistrate instead of a direction being issued by the court, not only taking over the function of a management analyst but also preempting any scientific enquiry into the matter.

Every training is a component of an endeavour to render a system more effective. To have a real impact it has to be supplemented by a research cell to study the defects of the existing system and in working of the system so that the training can try to correct to defects in operation. Research can also work out better methods of working which can be introduced into the system by training. It can also monitor the impact of training so that the training, in content and method, may be improved, if any debility, is found in either.

During training the officers are also exposed to the actual working of the courts and offices so that they can visualise the relevance of a training input in context of actual work to be done by them.

After initial induction training, the officers should be permitted to work in court for a period of 3 to 6 months after which period they should again be called to the institute for a week or two. During the initial period of working they may come across various problems which they had not foreseen, and the training not given or even if given was not taken seriously. This programme can resolve all the problems which were faced by them in the court during 3 to 6 months working. It would also reinforce the learning induced in the initial training.

Training as distinguished from teaching is a pragmatic process, and is constantly reviewed in content and mode of delivery to fill all the chinks in the armour of the trainees, needed for performance. The content can be changed even during the course of a session if it is found that the proposed content is already available with the trainees, or some aspect of it which was not planned to be conveyed needs being informed about.

One important step in the direction is to get a feed back from the trainees at the end of the programme to know whether they found the content of each of the sessions relevant and useful for their task, and whether it was effectively communicated. The response should be totally free. Feed back should also be obtained from contact groups especially the suprior officers about the change brought about and the areas still needing strenghening.

All this should be considered in correcting the content, and method, or even changing the speaker if necessay.

Every judicial officer is also manger. He manages his office and infra-structural facilities, like preparation of copies, maintenance of record redressal of grievances etc. He has therefore to be exposed to the basic tenets of management of man. All this training has to be imparted at the entry point. However, no training keeps a man eguipped for the entire career. With the explosion in knowledge, new laws made incessently and new interpretation being continually coming from the higher courts, a Magistrate would be rendered obsolete within a short time. With new techniques developing in regulating activities to render them more efficient it would be necessary to check the equipment and refurbish an officers baggage periodically at least once in five years.

These inservice training programmes may be projected at the officers having similar working situations generally or may update expertise in a specific task in which they are found wanting, or may be arranged for officers assigned to perform specialised functions like Juvenile Courts, economic offences, antipollution courts etc. Without any sensitisation about the purpose of the laws that they are to implement, creation of special courts does not have any effect on the handling of the cases, and the special laws are also implemented like the ordinary penal provisions.

Judicial system has never been studied for its effectiness, to know how many guilty are acquitted or innocent convicted, but the perceptible symptoms show that the proceses is dilatory and harassing. The higher courts being beyond the reach of a common man, the Magisterial Courts have to be made more effective.

It can be substantially affected by equipping the Magistrates better and enthusing them by training.

CONSENT TO SURGERY

P. M. Bakshi
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Our law recognises the general principle that every mentally competent adult has a right to determine what is done to his or her own body. But this general rule may come to be modified in certain special situations (e.g. where a person is unconscious). Again, the application of this principle in certain cases may present complicated issues of fact and law. Some of these knotty problems are proposed to be examined at this place.

Basic human right

It is now regarded as a basic right of a person-at least of a mentally competent adult-to decide for himself or herself whether to agree to a particular medical or surgical treatment. Apart from constitutional aspects, interference by A with the body of B without B's consent, and without specific legal authority would amount to a civil wrong and an offence. The civil wrong that comes to be constituted is known under the genus of the tort of "trespass to the person", of which "assault" and "battery" are its usually known species. Again, from the point of view of the criminal law, such non-consensual interference with the body without legal authority constitutes the offence of using criminal force, which may be aggravated in the light of the person on whom force is used (e. g. public servant or woman) or other circumstances. If the use of force results in a wound, then "hurt" or "grievous hurt" may come to be committed. If death results, the various categories of homicide become relevant.

A doctor who is examining a patient or operates upon a patient must necessarily touch the patient. The case where he merely notes what the patient says and prescribes oral medicine without touching the patient's body is very rare one. In most cases, bodily contact is involved, and therefore consent of the patient is legally required. If the doctor forces the patient to undergo an "invasive" procedure, he acts illegally and may have to pay damages to the patient for the civil wrong so committed. It is further to be noted that the doctor can perform only that procedure to which the patient has consented. In a Canadian case, a woman who expressed her wish to be injected in her right arm was injected in her left arm. She successfully sued the doctor for compensation. *Allan* v. *New Mount Sinai Hospital*, (1980) 109 D. L. R. (3rd), page 536. An analogous case is an English one-*Cull* v. *Butler*, (1932) 1 B. M. J. 1195-in which a woman who merely agreed to curettage was subjected to hysterectomy. She could get damages. A woman consulted a doctor for an ailment which required minor gynaecological surgery. The surgeon, while performing that surgery, discovered that the woman's womb was ruptured. He sterilised her there and

then. She had not agreed to sterilisation. The doctor was held liable to pay damages. *Devi* v. *West Midlands AHA*, (1980) 7 C. L. 44.

Burden of proof

A practical question that may arise is, whether (a) it is for the patient to prove that he did not agree to the medical or surgical procedure in question, or (b) whether it is for the doctor to prove that the patient gave his consent. A High Court judge in England has taken the former view. *Freeman* v. *Home Office*, (1984) 2 W. L. R. 130.

Indian courts may not necessarily take the same view *in every case*. No doubt, consent may be implied (see below) and therefore a court may presume that upto a certain limit, implied consent was given. But beyond that, specific proof may be required in which case, at least in India, the court may hold that under sections 101 to 105, Evidence Act, the burden of proof lies upon the defendant (i. e. the doctor) to justify an action which would be illegal in the absence of consent.

Form of consent

As to the form of consent, two propositions are fairly well established:

(a) Consent need not always be express. It may be implied from conduct.

(b) Consent can be given orally. It need not be in writing. However, in practice, surgical intervention in not resorted to, without obtaining a written consent from the patient or his or her guardian. Generally, standard forms are used in various hospitals.

Injections of drugs which are likely to produce serious side effects should not be given without specific consent. This is illustrated by the controversy that arose in England in 1983 in connection with the drug Depo-prevera. [**Times, Guardian,** (23 July, 1983), page 24; Brazier, Medicine, Patients and the Law (1983), pages 79, 381]. Depo prevera is a synthetic hormone which (i) prevents a human egg from developing, and (ii) also makes the uterus hostile if any fertilised embryo happens to reach it. One injection lasts for at least 3 months. The drug is particularly useful for women for whom pill is harmful or for whom pregnancy should be completely ruled out. e.g., women who have been vaccinated against German measles should not become pregnant. But the drug has several side effects of which the most notable are (i) severe and irregular bleeding and (ii) adverse effect on long term fertility. In the English case of 1983, Mrs. Potts, a woman from Salford, obtained $3,000 as damages after the doctor injected her with Depo prevera concurrently with a vaccination against German measles. She later suffered severe bleeding. The injection was given days after the delivery of her third child, her impression being that it was a routine post-natal

procedure. The object of the doctor was to protect the woman against pregnancy, while the vaccine might harm any unborn child. But the woman must be told that she is being given a contraceptive drug. In addition, the advantages and disadvantages of the drug should be made known. The judge said, "she (Mrs. Potts) should be given the choice and she was entitled to know beforehand what the decision entailed".

Sterilisation

The same principle applies to sterilisation. An adult mentally competent person cannot be sterilised without her consent. In the case of **Devi,**(1980) 7 Current Law 84 mentioned above, a married woman of 33, who already had four children, was admitted into a hospital for minor gynaecological operation. Her religion outlawed contraception or sterilisation. In the course of the operation, the surgeon discovered that her womb was ruptured. Further pregnancy would (according to the surgeon) be harmful. He sterilised her there and then. As the woman's consent had not been obtained, she recovered as damages-

(a) Pound 4,000 for the loss of her ability to conceive in future, and

(b) Pound 2,750 for the neurosis caused to her by knowledge of what had been done to her.

Blood test and transplantation

A person cannot, in the absence of statutory authority, be subjected to blood tests. In **Gautam Kundu's** case, A.I.R. 1993 S.C. 295, it was held that no one can be subjected to blood test against his wishes for determining paternity and the court has no such power to order blood test where no statute exists to give such authority. (In the case of persons accused of offences, physical examination of the body, including pethological tests, have been authorised by section 53, Code of Criminal Procedure, 1973, subject to the observance of certain requirements).

In an American case, the court refused to order a person to donate his bone marrow, though the circumstances were such that he was the only possible donor, being the only close relative of the patient needing bone marrow transplantation. **McFall** v. **shimp,** (1978), noted by Brazier, Medicine, Patients and the Law (1992), page 397.

In India, section 3 (1) of the Transplantation of Organs Act (42 of 1994) expressly requires that a live donor of human organ must have given his voluntary consent to transplantation of an organ from his body.

Experimentation and research

In the course of medical practice,a new drug may have to be used. It may not be totally safe and the doctor may be faced with the question whether he

should take specific consent. The question has been particularly discussed with reference to random clinical trials and the view taken in England is that a patient who does not agree to such a trial, or who cannot understand its full implications, should not be entered in it. Phillips and Dawson, The Doctor's Dilemmas (Harvester Press, London, (1984), pages 61- 71. Consent on the strength of a proper explanation of the trial and free acceptance by the patient of its random nature are necessary and sufficient. Brazier, Medicine, Patients and the Law (1992), page 425. The Helsinki Declaration (On international ethical code for the medical profession) provides that "every subject.....must be adequately informed of the aims, methods, anticipated benefits and potential hazard of the study and (of) the discomfort it may entail.....The doctor should.....obtain the subject's freely given informed consent, preferably in writing".

Children and mentally incompetent persons

The position regarding children and mentally incompetent persons requires separate discussion. However, it may be mentioned that according to recent trends, the wishes of a child who is below 18 years of age but who is mature enough to understand such matters have to be taken into consideration. **Gillick** v. **West Norfolk and Wisbeeli AHA.**(1985) 3 All E.R. 402; **Y. Krishnan** v. **I.G.Rajan,**(1994) Law weekly (Crim.) 16.

Gillick's case upheld the validity of a circular issued by the Health Department instructing doctors in the National Health Service to make available contraceptive advice to girls below 16. The instruction said that every effort should be made to involve the girl's parents. But if the girl was adamant that her parents should not know of her request for contraception, then the parents must not be told. In **Y. Krishnan's** case, the Madras High Court held that a father cannot compel his daughter of 16 years to undergo abortion.

Criminal law

In India, so far as criminal liability goes, sections 87 to 92 of the Indian Penal Code would be important for determining the question how far consent is necessary and sufficient to legalise invasive medical treatment.

COMPENSATION FOR VIOLATION OF FUNDAMENTAL RIGHTS, A NEW REMEDY IN PUBLIC LAW, DISTINCT FROM RELIEF OF DAMAGES IN TORT.

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District Judge, Kanpur Nagar

In **Rudul Sah's** case[1] the apex Court for the first time was faced with a dilemma whether or not to award compensation for violation of right to life and personal liberty guaranteed under Article-21. The stand taken on behalf of the State, was that the petitioner should be left entirely to claim damages under the ordinary Civil Law, by filing a suit in that behalf. This contention was, however, rejected by the Supreme Court as according to Hon'ble Mr. Justice Chandrachud, the then CJ it would have amounted to robbing Article 21 of its **"Significant Content"**. He also felt it necessary to award monetary compensation of Rs. 30, 000 = 00 without impairing the right of the petitioner to claim damages under ordinary law through Civil Courts. Chandrachud, CJ had observed that "the petitioner can be relegated to the ordinary remedy of suit if his claim to compensation was factually controversial in the sense that a Civil Court may or may not have upheld his claim but while the court has already found in the present case, that petitioner's prolonged detention after his acquittal, in prison was wholly unjustified and illegal, there can be no doubt that if the petitioner files a suit to recover damages for his illegal detention a decree for damages would have to be passed in that suit".

After this decision the Hon'ble Supreme Court had occasion to award compensation for violation of fundamental rights in four more cases, namely-**Sebastian M. Hongray**[2], **Bhim Singh**[3], **Saheli**[4] **and Ravi Kant Patil.**[5] Before proceeding further it would be appropriate to notice these decisions in a nutshell. In **Sebastian M. Hongray's** case, Army had taken into custody two persons in Manipur but Army failed to produce them in Court in compliance with the Writ of Habeas Corpus issued by the Supreme Court. The Supreme Court, therefore, concluded that those persons must have met an un-natural death while in Army custody. Union of India was directed to pay an exemplary cost of one lac rupees each to the wives of those persons. In **Bhim Singh's** case the petitioner, who was M.L.A., was illegally arrested and detained with the object

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1 Rudul Sah Versus State of Bihar, AIR-1983 SC 1086.

2 Sebastian M. Hongray, Vs. Union of India (1984)3 S.C.R. 544.

3 Bhim Singh Versus State of J & K. (1985)4 Se.c. 677 AIR 1986 SC-494.

4 Saheli Versus Union of India. AIR 1990 SC 513.

5 State of Maharastra Versus Ravi Kant Patil (1991)2 SC 3C3: AIR 1991 SC 871.

of preventing him from attending the Assembly Session. Supreme Court directed the State Government to pay Rs. 50, 000 = 00 as compensation to the petitioner. In **Saheli's** case[1], writ was moved before the Supreme Court by the mother of the child aged about 9 years who died as a result of police beating. The Supreme Court awarded Rs. 75, 000 = 00 as damages to the mother of the child against the Delhi Administration. In **Ravi Kant Patil's** case[2] High Court's order awarding compensation for violation of fundamental right under Article 21 of an undertrial prisoner, who was handcuffed and taken through streets in a procession by the police during investigation, was upheld by the Supreme Court.

The aforesaid four cases are the authority for legal proposition that the Union or the State Government would be liable for tortious acts committed by their officers in violation of Article 21. However, it may be noted that the basis and the nature of the liability was not clearly spelled out by the Supreme Court in these decisions.

A survey of aforesaid four decisions discloses that in these cases no new jurisprudential foundation was provided for awarding monetary compensation to a person whose right to life and personal liberty guaranteed under Article 21 was violated. In **Rudul Sah's** case interim compensation was awarded as a **"palliative"** without impairing the petitioner's right to claim damages for wrongful detention under ordinary law of torts, as State was responsible for wrongs done by its officers. In **Sebastian M. Hongray's** case the Union of India was directed to pay exemplary cost of rupees one lac each to the wives of persons on their presumed un-natural death. This amount was awarded as an exemplary cost but was in the nature of compensation[3]. In **Bhim Singh's** case the Apex Court had awarded compensation to the M.L.A. petitioner for being illegally prevented by the State from attending the session of the Legislative Assembly, and in **Saheli's** case, damages had been awarded to the mother of child against the Delhi Administration and its police officers who had caused the death of the child. In **Ravi Kant Patil's** case compensation was awarded for hand-cuffing and parading an undertrial prisoner in a procession in streets, during investigation. Thus the principle of vicarious liability of State was invoked in all these cases. It was in **Nilabati's** case[4] that the Supreme Court felt the need for clearly spelling out the true basis and nature of State's responsibility to pay compensation for violation of fundamental rights of the citizen by their officers. The Supreme Court said:

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1 Saheli Versus Union of India. AIR 1990 SC 513.

2 State of Maharastra Versus Ravi Kant Patil (1991)2 SC 3C3: AIR 1991 SC 871.

3 Bhim Singh Versus State of J & K. ("....word compensation was not used but it is obvious that the court awarded compensation").

4 Nilabati Behera Versus State of Orissa AIR 1993 S.C. 1960 (J.S. Verma, Dr. A.S. Anand and N. Venkatachala, JJ.)

"It would, however, be appropriate to spell out clearly the principle on which the liability of the State arises in such cases for payment of compensation and the distinction between this liability and the liability in law for payment of compensation in an action on tort".

The need for providing independent jurisprudential basis to liability of the State for payment of compensation for violation of fundamental rights became imperative due to the fact that in **Rudul Sah's** case there was an observation to the effect that "the petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was factually controversial", and "Article 32 cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through ordinary process". The judgment in **Nilabati's** case clearly seems to have been inspired by the Privy Council decision in **Maharaj Versus Attorney General of Trinadad and Tobago**[1] and Art. 9 of International Covenant on Civil and Political Rights. In the said decision the Privy Council was called upon to interpret Sections 1[2] and 2 of the Constitution Act of Trinadad and Tobago (which correspond to Articles-21 and 22 of Constitution of India) and Section 6 (which corresponds to Articles 32 and 226 of Constitution of India). The Privy Council had clearly laid down in the said decision that Section 6 of the Constitution Act of Trinadad and Tobago "impliedly permitted award of compensation" where it was "the only practical mode left for enforcement of right" to life and liberty of an individual[3]. In the said case a barrister was committed to 7 day's imprisonment by the High Court which was set aside by Privy Council. Thereupon the appellant had applied for redress under Section 6 on the ground that he was deprived of his liberty without 'due process of law'. This application was dismissed by the High Court. In appeal Privy Council held that Section 6 of the Constitution impliedly permitted the High Court to award monetary compensation where that may be the only practical form of redress left for the victim.

In India even prior to the **commencement of the Constitution**, the law was clear that the Government was liable for the tort committed by its officers while acting in discharge of their statutory duties[4].

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1 (1978)2 All E.R. 670.

2 Section-1 of the Constitution of Trinadad & Tobago recognises amongst others the right of the individual of life, liberty, security of person & the right of not to be deprived thereof except by due process of law.

3 Section 6 provides for an application to the High Court for redress. The question in Maharaj's case was whether the provision permitted an order for monetary compensation. Held, "jurisdiction to make such an order is conferred on the High Court by para (a) of Section 6 & 28, viz- jurisdiction to hear and determine any application made by any person in pursuance of Sub-section (1) of this Section. The very wide powers to make orders, issue writs and give directions are ancillary to this". (Lord Diplock)

4 Peninsular and oriental Steam Navigation Co. v. Secretary of State for India **(1868-69)5**

In this case the distinction was made between Sovereign and non-Sovereign functions of the State. Peacock C.J. had observed that "there is a great and clear distinction between the acts done in the exercise of what are usually termed Sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them." As the tort in this case was committed by the servants of the Government in the course of trading activity and the case was not directly concerned with acts done in the exercise of Sovereign powers, the relief was granted. However, **Madras**[1] **and Bombay**[2] High Courts did-not follow this view of Peocock C.J. and had held that Government was liable even for torts committed by its officers in the exercise of Sovereign functions. In post Constitution period, prior to Supreme Court's decision in **Kasturilal's** case, the Punjab High Court and the Supreme Court[3] had held the State liable for torts of its servants. The Supreme Court, however, has approved the decision in Peninsular and Oriental Steam Nevigation Co., in **Kasturi**[4] **Lal's case.** There the State failed to restore the gold ornaments seized and deposited in Police **Malkhana** suspecting them to be stolen property. The Head Constable Incharge of the **Malkhana** after mis-appropriating the gold ornaments had fled to Pakistan. In the said decision the Supreme Court had taken the view that State of U.P. was not liable to return the gold ornaments or to pay compensation for the loss thereof as the tort was committed in the discharge of Sovereign function of the State.

However, the authority of this decision has become very diluted on account of **subsequent Supreme Court** decisions[5] though it has not yet been

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Bom. H. C. R. App. 1 at p-1. (plaintiffs Servant while travelling in a horse driven carriage which passed through Kidderpore Dockyards owned by Government was injured due to negligence of the government servants working there. Court drew a distinction between the sovereign and non sovereign-functions of **East India Company** and held that maintenance of theDock-yard was a non-sovereign function of the East-India Company and thus the government was liable for the negligence of its servants).

1. Secretary of State for India v. Hari Bhanji, ILR (1882) 5 Madras 273.

2 Rao v. Advani, (1949) 51 Bombay L.R. 342 (396) = AIR 1949 Bombay 277.

3 Rup Ram v. State of Punjab AIR 1961 Punjab 336 (F.B.) (b) State of Rajasthan v. Vidya mati, AIR 1962 SC 933.

4 Kasturi Lal Rabia Ram Jain v. State of U.P., AIR 1965 S.C. 1039.

5 State of Gujarat v. Memon Mohamed, AIR 1967 S.C. 1885. (Certain goods seized under Customs Act were not properly kept and were disposed of by order of the Magistrate. The seizure was found to be illegal and the Supreme Court held that there arose bailment and statutory obligation to return the goods and the suit was maintainable.).
(b) Basowa M. Dyamogonda Patil v. State of Mysore, A.I.R. 1977 S.C. 1749. (Certain gold articles, given in police custody by the Magistrate for evaluation by the gold smith, were kept in police guard room, but were lost. In a proceeding Under Section 517 of Cr. P.C., 1898, the Supreme Court held that when "there is no prima-facie defence made out that the State or its officers had taken due care and caution to protest the property", the court

overruled. Therefore, the test to be applied still is, whether tort has been committed within the protected field of Sovereign function or not. There is to be a close nexus between the act complained of and one of the traditional Sovereign functions of the State. According to **Lord Waston**[1] the traditional Sovereign functions are:-

"The making of laws, administration of justice, maintenance of order, repression of crime, carrying of war, the making of treaties of peace and other consequential functions." In short Sovereign powers are those powers "which cannot be lawfully exercised except by a sovereign or by a private individual delegated by a **Sovereign**[2] **to exercise them.**"

Having noticed as to what are traditional Sovereign functions of State, we may in short also notice as to what activities have not been regarded as Sovereign functions of the State by our Supreme Court. **Famine** Relief work[3], **Socio economic and welfare activities undertaken by modern State**[4]; **routine Military duty.**[5] The distinction between traditional Sovereign function and non- Sovereign function of the State is important only in cases of claim for damages in Tort i.e. under private law. In case a tort is committed by an officer of the State in the exercise of its Sovereign function, the defence of Sovereign immunity can be successfully taken by the State but the plea of Sovereign immunity will not be available in case of the public law remedy of claim of monetary compensation for violation of a fundamental rights, specially right to life and personal liberty guaranteed under Article 21 of the Constitution. Herein lies the importance of the decision of Nilabati's case.[6] It has cleared the doubts about the nature and scope of the new public law remedy evolved by the Supreme Court. The following principles clearly emerged from this decision:-

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can order the State to pay the value of the property to the owner.

1 Comber v. Justice of Berks, (1883)9 A.C. 61.

2 (1868-69)5 Bom HCR Appendix 1 p.1 at p.14.

3 Shyam Sunder v. State of Rajasthan, AIR 1974 S.C. 890. (It is not possible to say that famine relief work is a sovereign function of State as it has traditionally been understood.)

4 (a) State of Bombay v. Hospital Mazdoor Sabha, A.I.R. 1960 S.C. 610.
(b) Nagpur Corporation v. its employees, A.I.R. 1960 S.C. 675. (Socio economic and welfare activities undertaken by modern State are not covered by the traditional sovereign functions.

5 Pushpa Thakur v. Union of India, (1984) ACD 559 (S.C.).
(A Military truck, after Indo Pak war was over, was returning to its permanent location at Jhansi when the accident occurred. High Court had held that accident had occurred during the exercise of sovereign function of the State and Union of India was not liable for compensation. Supreme Court reversing the decision of the High Court observed: "we are of the view that on facts of the case the defence of sovereign immunity of the State for the acts of its servants has no application and the High Court was in error in rejecting the claim.").

6 AIR 1993 SC 1960.

1. Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights:

2. Such claim is based on strict liability;

3. Such claim is distinct from, and in addition to remedy in private law for damages for tort;

4. This remedy would be available when it is the only practicable mode of redress available;

5. Against claim for compensation for violation of a fundamental right in writ petition under Article 32 or 226 of the Constitution, the defence of Sovereign immunity would be inapplicable.

Before awarding compensation, the Supreme Court in **Nilabati Behera's case**[1] had directed the District Judge to hold an enquiry and submit his report and evidence so collected by the District Judge report submitted by him was examined by the Supreme Court itself with the assistance of the Amicus Curiae and the counsel of the parties and after being satisfied that victim's right to life and personal liberty had been violated, it had awarded the compensation in money to the victim's dependants. This procedure may be followed in subsequent cases of such nature coming before the Apex Court as well as before the State High Courts.

The new remedy is thus to be welcomed as it would go a long way in providing relief to victims of violation of right to life and personal liberty guaranteed under Article 21 and their dependants, as well as for violation of other fundamental rights. However, this remedy would be available where it is the only practicable mode left for redressal. A contrary view would have merely rendered the Court powerless and made the Constitutional guarantee a mirage if the Court was powerless to grant any relief against the State, except by punishment of the wrong-doer as observed by Verma J. "If the guarantee that deprivation of life and personal liberty cannot be made except in accordance with law is to be real, the enforcement of the right in case of every contravention must also be possible in the Constitutional scheme, mode of redress being that which is appropriate in the facts of each case. This remedy in public law has to be more readily available when invoked by the havenots, who are not possessed of the wherewithal for enforcement of their rights in private law, even though its exercise is to be tempered by judicial restraint to avoid circumvention of private law remedies were more appropriate."[2]

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1 Nilabati Behera v. State of Orissa, A.I.R. 1993 S.C. 1960.

2 Para 19. of the decision in Nilabati's case.

RIGHT TO PROPERTY AND COMPENSATION UNDER THE INDIAN CONSTITUTION

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At present the Right to Property viz. "No person shall be deprived of his property save by authority of law" is enshrined in Art. 300A, inserted by Constitution 44th Amendment.[1] The Constitution of India, as originally adopted safeguarded the Right to Property in a number of ways. **Firstly,** it guaranteed that "All citizens shall have the right to acquire, hold and dispose of the property". The State, however, could impose reasonable restrictions (i) to serve the exigencies of public welfare and (ii) to protect the interest of any Scheduled Tribe [vide Art. 19 Clauses (1) (f) & (5)]. **Secondly,** in the phraseology of Art. 300A, the Constitution makers in Art. 31(1) guaranteed that "No person shall be deprived of his property save by the authority of law". The provision indicates that a person can be deprived of his property only through an Act passed by the Parliament/State Legislature and not by executive order or fiat. The word 'Law' in Art. 300A means an Act of Parliament or a State Legislature, a rule or a statutory order, having the force of law, that is positive or State-made law.[2] **Thirdly,** as provided in Art. 31 (2) (now deleted), the property of a person could be acquired or requisitioned only under two contingencies viz. (i) the acquisition or requisition could be for public purpose and (ii) the law must provide for payment of compensation to the owner of the property either by fixing the amount of the compensation or by specifying the principles upon which it could be determined or fixed. The obligation to pay compensation, however went on diluting continuously by the Constitution First, Fourth, Seventh, Twenty-fifth and Forty-second Amendment Acts.

The Supreme Court in Bela Banerjee's case[3] propounded that the word "Compensation" deployed in Art. 31 (2) implied 'full compensation', that is the market value of the property at the time of the acquisition. The Legislature must "ensure that what is determined as payable must be compensation, that is, a just equivalent of what the owner has been deprived of". The Government realized that due to paucity of resources, it was not feasible for it to pay the full market value of the property acquired and as such the National Planning and Development undertaken by the Government immediately after the independence of the country were bound to be hampered. Hence, the

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1 W.e.f.20.6.1979.

2 Jilubhai Nanbhai Khachar v.State of Gujarat, AIR 1995 SC 142 at p.158; Bishambhar Dayal Chandra Mohan, v.State of U.P., AIR 1982 SC 33.

3 AIR 1954 SC 170.

Parliament came forward with Constitution Fourth Amendment Act, 1955 which enacted that a law which provided for compensation for the property acquired or requisitioned and either fixed the amount of the compensation or specified the principles on which, and the manner in which the compensation was to be determined or given could not be called in question in any Court on the ground that the compensation provided by the law was not adequate.

But even after the Constitution 4th Amendment (1955) the Apex Court in famous R.C.Cooper's case [1] popularly known as Bank Nationalisation case, held that the compensation in Art. 31 (2) implied full monetary equivalent of the property taken from the owner, that is its market value at the date of the acquisition. The Court observed: "Art. 31(2) before and after it was amended guaranteed a right to compensation for compulsory acquisition of property and that by giving to the owner, for compulsory acquisition of his property, compensation which was illusory or determined by the application of principles which were irrelevant, the constitutional guarantee of compensation was not complied with". The result was the Constitution 25th Amendment (1971) which replaced the word 'amount' for the word 'compensation' appearing in repealed Art. 31 (2). But even after this major amendment, the Apex Court in landmark judgment in Keshavananda Bharati's case [2] held that the amount which was fixed by the Legislature could not be arbitrary or *illusory* but must be determined by a principle which is relevant to the acquisition of property.

The fundamental 'right to property' had been modified by the Parliament by several other Constitution Amendments. Art. 31-A, inserted by the Constitution First Amendment Act, 1951 with retrospective effect, saved laws providing for acquisition of estates of the nature referred to in various clauses thereof, declaring that such laws shall not be deemed void on the ground that they are inconsistent with, or take away or abridge any of the rights conferred by Art. 14 or 19 of the Constitution. The object of taking out the acquisition of intermediate interests in land from the obligation to pay compensation was to make it possible for the Government to effect agrarian reform which was so urgently needed to protect the interests of the tenants as well as to improve the agricultural wealth of the country.[3] New Art. 31-B added by Constitution 1st Amendment, like Art. 31-A, saves Acts and Regulations mentioned in Ninth Schedule. Art. 31-C added by 25th Amendment Act, 1971 protects laws giving effect to the policy of the State securing all or any of the principles laid down in Part IV of the Constitution, apart from extending the same protection as extended

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1 AIR 1970 SC 1461

2 AIR 1973 SC 1461

3 Dr. Basu's Introduction to the Constitution of India, 17th Ed. Page 118.

by Arts. 31- A and 31-B, and also declares that no such law shall be called in question in any court on the ground that it does not give effect to such policy.

The Constitution 44th Amendment Act, 1978, robbed the 'right to property' of its fundamental right-character, and adorned it with status of Constitutional/legal right. Arts. 19 (1)(f) and 31 were deleted from the Part III- "Fundamental Rights" and only a fraction in the form of Art. 300A which corresponds to Art. 31 (I) only, has been inserted in Part XII under a separate Chapter V "Right to Property". What is important to note is that Art. 19(1)(f) which had guaranteed freedom to all citizens to acquire, hold and dispose of property and remaining clauses (2) to (6) of Art. 31, which hedged the right of the Legislature, to acquire property with limitations for public purposes and only on payment of adequate compensation, not illusionary one, as interpreted by the Apex Court, have been omitted altogether by the Legislature. The effect of this amendment of vast magnitude is that the 'right to property' is no more a fundamental right but is only a constitutional/legal right and in the event of breach thereof, the remedy available to an aggrieved person is to approach the High Court under Art. 226 of the Constitution of India and not the Supreme Court under Art. 32 of the Constitution, a speedy remedy available earlier.

However, two exceptions have been created by the 44th Amendment to the aforesaid general rule. First, where the property acquired belongs to an educational institution established and administered by a minority, the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right of minorities "to establish and administer educational institutions of their choice" guaranteed by Art. 30 (1) [1] *Secondly,* where the State seeks to acquire any estate and where any land comprised therein is held by a person under his *personal cultivation* and such land is within the ceiling limit applicable to him under any law for the time being in force, or any building or structure therein or appurtenant thereto, the State must pay compensation at the market value for such land, building or structure acquired. [2]

It has been repeatedly canvassed that even though clauses (2) to (6) of Art. 31 which postulated provisions for payment of compensation when land was acquired/requisitioned, have been omitted from the Constituion Statute book, the obligation to pay adequate amount of compensation to the owner of the property still survives. In Basanti Bai's case, [3] a Division Bench of the Bombay High Court held that inspite of deletion of Art. 31(2), there is still obligation on the State to pay adequate amount to the expropriated owner. Further, the law

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1 Vide Art. 30 (1A), added by the 44th amendment Act, 1978 w.e.f. 30.6.79

2 Inserted by Constitution (Seventeenth Amendment) Act, 1964.

3 AIR 1984 Bombay 366

providing for deprivation of property must be fair, just and reasonable as propounded by Hon'ble Supreme Court in the famous Maneka Gandhi's case.[1] In special appeal before Supreme Court, against the judgment of the Bombay High Court titled "State of Maharashtra v. Basanti Bai [2] it was urged that the provisions of sub-sections (3) and (4) of Sec. 44 of Maharashtra Housing and Development Act, 1977, which contained the basis for the determination of compensation in respect of the land were violative of Arts. 14, 19 and 31 of the Constitution and as such were liable to be declared as void. It was further contended that the compensation payable was illusory in its quantum and the procedure prescribed for the acquisition was not fair and reasonable, though the dictum laid down in Maneka Gandhi's case ordained so. The Supreme Court reversed the judgment of the Bombay High Court without finally deciding the mooted points. The Court held that even if it was assumed that the law should be fair and reasonable and not arbitrary and the law should also satisfy the principle of fairness in order to be effective, all those conditions were satisfied by the impugned law in the case under appeal. All the requirments of a valid exercise of the power of eminent domain even in the sense in which it was understood in the United States of America where property rights are given greater protection than what is required to be done in our country were fulfilled by the impugned Act. As to the contention that the impugned Act violated the provisions of Art. 21 of the Constitution, their Lordships of the Supreme Court observed:

> "Then in the end we have to consider the argument based on Article 21 of the Constitution which is urged on behalf of the respondents. Article 21 essentially deals with personal liberty. It has little to do with the right to own property as such. Here we are not concerned with a case where the deprivation of property would lead to deprivation of life or liberty or livelihood. On the other hand, land is being acquired to improve the living conditions of a large number of people. To rely upon Art. 21 of the Constitution for striking down the provisions of the Act amounts to a clear misapplication of the great doctrine enshrined in Art.21. We have no hesitation in rejecting the argument. Land ceiling laws, laws providing for acquisition of land for providing housing accommodation, laws imposing ceiling on urban property etc. cannot be struck down by invoking Art.21 of the Constitution."

Thus the Supreme Court jettisoned the argument that the law relating to acquisition of property must also satisfy Art. 21.

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1 AIR 1978 SC 597

2 AIR 1986 SC 1466

The fundamental 'right to property' has been abolished because of its incompatibility with the goals of justice, social, economic and political and equality of status and of 'opportunity' and with the establishment of a social democratic republic, as contemplated by the Constitution.[1] The 'right to property' under Art. 300A is not a basic feature or structure of the Constitution. It is only a Constitutional right.[2]

The Hon'ble Supreme Court in Tinsukhia Electric Supply Co. Ltd. V. State of Assam, AIR 1990 SC 123 at p.138 has observed that even though Article 31 had not been deleted (at the time of the 42nd Amendment) "Its content had been cut-down so much, so that even under a law providing for acquisition of property which did not have the protection of 31-C the adequacy of the "Amount" determined was non-justiciable and all that was necessary was that it should not be unreal or illusory. By then the Constitution had done away with the idea of a just equivalent or full indemnification principle and substituted therefor the idea of an "Amount" and rendered the question of the adequacy or the inadequacy of the amount non-justiciable".

A Full Bench of the Kerala High Court in Elizebath Samuel Aaron's case[3] observed-

> "The legislative history behind the deletion of Article 31 and the introduction of Article 300-A eloquently shows that Parliament intended to do away with the concept of a just equivalent or adequate compensation in the matter of deprivation of property, and to provide only a limited right, namely that no person shall be deprived of his property save by authority of law. In other words, the limited constitutional protection intended to be continued (not as a fundamental right) was only that there should be a law authorising and sustaining any deprivation of property, and that none shall be so deprived by mere executive fiat. Article 300A does not provide for anything more. It does not go further and provide that the law should provide for compensation and either fix the amount, or at least specify the principles on which the compensation is to be fixed and given. Evidently, Parliament intended to shield all such legislation for acquisition or requisitioning of property from challenge on any of the grounds on which they could be challenged as per the various decisions of the Supreme Court on the ground that the compensation was inadequate or illusory or that the principles laid down for fixing the compensation were irrelevant or irrational. If this were not the intent of the series of Constitutional amendments, and if this were

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1 State of Maharashtra vs. Shandrabhai, AIR 1983 SC 803

2 Jilu Bhai Nam Bhai Khachar v. State of Gujarat, AIR 1995 SC 142

3 AIR 1991 Ker. 162 (FB)

not achieved thereby, one wonders why Parliament should have under taken all the exercise and effaced Article 31(2) altogether from the Constitution".

In a very recent case of Jilubhai Nambhai Khachar v.State of Gujarat [1] the Apex Court held that after the Constitution Forty Fourth Amendment Act has come into force, the right to property in Arts. 19(1) (f) and 31 had its obliteration from Part III, Fundamental Rights. Its abridgment and curtailment does not get retrieved its lost position, nor gets restituted with renewed vigour claiming compensation under the garb 'deprivation of property' in Art. 300-A. The court further held that the principle of unfairness of the procedure attracting Art. 21 does not apply to the acquisition or deprivation of property under Article 300A giving effect to the Directive Principles.

Now, if the property of a person has been acquisitioned/requisitioned even not for a public purpose, and without payment of compensation though under the authority of law, the owner cannot grouse or grumble against the same, the Legislature is no more under a Constitutional obligation to pay the compensation what to say of adequate compensation. Such a person cannot ventilate grievance before the Court that the compensation granted is illusory one. Only where a person is deprived of his property by the executive without the authority of law, in that event he would be entitled to legal relief on the ground that such executive action abridges the provisions of Art. 300A of the Constituion.

The Constitution makers bestowed right on every citizen of the country to acquire, hold and dispose of property and also provided ample safeguards against deprivation of the property by Legislature by confining such deprivation for public purpose only and only on payment of compensation to the expropriated owner either by fixing the amount of compensation or by specifying the principles upon which it could be determined or fixed. Even in pre-Independence era, under the Government of India Act, 1935, similar safeguards were provided in as much it was envisaged therein that no person could be deprived of his property in British India save by the authority of law and that neither the Federal nor Provincial Legislature had power to make any law authorizing the compulsory acquisition of land etc., unless the law provided for the payment of the compensation for the property acquired and either fixed the amount of the compensation or specified the principles on which, and the manner in which, it is to be determined [2] All such injunctions and safeguards have been done away with by the Constitution 44th Amendment, and even the prime condition 'public purpose' which appeared in Art. 31(2) of the Constitution

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1 AIR 1995 SC 142

2 Vide Government of India Act, 1935 Sec. 299(2)

has been eliminated. Dr.Durga Das Basu has observed that "the Author (he) would be happy if the Supreme Court could devise some means to nullify any Legislative attempt to deprive the expropriated owner of any compensation at all".

Other provisions which voice concern are that the property owned by Minority Educational Institutions and the property under personal cultivation of an agriculturist as seen above, have been placed in envious position. Dr. Durga Das Basu has observed-"The net result is that if a poor man's hut is taken away without compensation, by a law which provides for accommodation to the office of the political party in power, the former shall have no legal remedy under the sky. This is contrary to Art. 13 of the 1977 Constitution of the U.S.S.R. which says that "the personal property of citizen and the right to inherit it are protected by the States", and this personal property includes "articles of very day use, personal consumption and convenience, a house and earned savings". Article 9 of the 1978 Constitution of China similarly protects the right of a citizen to own private property which includes his "lawfully earned income, saving, houses and other means of subsistence."[1]

As regards the concession in favour of Minority Institutions given by Constituion 44th Amendment, Dr. Durga Das Basu has remarked-"It is somewhat inexplicable why no such guarantee should be made in favour of educational institutions managed by members of a majority community. Is not education as pure and adorable whether it comes through the Ganges or the Jordan? In their over-zealousness for the addition of a special guarantee in favour of the minority which the fathers of the original Constitution did not envisage, the fathers of the 44th Amendment took no time to ponder that by eliminating Art. 31(2), they were taking away a right which had been guaranteed to all persons in India. Legally speaking, the new provision in Art. 30(1A) is a tail which has lost its head by the repeal of Art. 31(2)."[2]

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1 Dr.D.D.Basu's Shorter Constitution of India 11th Ed.Page 932

2 Introduction to the Constitution of India 17th Ed. Page 120.

CRIMINAL APPEALS

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Is an appeal the insignitia of a democratic assets integrally entwined with the machinery provided for dispensation of justice? Does it mean that Judges like ordinary people are fallible or prone to error is an appeal a valuable right conferred under the criminal jurisprudence to protect an individual against the latent or patent errors of law or facts. A criminal appeal is a statutory creation and the right of such an appeal is not inherent but manifestly restricted one. As aptly remarked by Hon'ble Iqbal Ahmad,C. J. 'The commission of an offence does not give a right of appeal to the offender.' Thus, it is not a fundamental right nor merely a matter of procedure but is substantive right and cannot be presumed or assumed.

2. The Code of Criminal Procedure 1973 provides when an appeal can be filed and specifically prohibits that no appeal shall lie from any judgment or order of a Criminal Court except as provided by this Code or by any other law. There are large varieties of cases providing criminal appeals. On the other hand an appeal does not lie when the accused pleads guilty and has been convicted on such a plea if the conviction is by a High Court but if the conviction is by a Court of Sessions or Magistrate of the Ist and II class, then an appeal lies with regard to the extent or legality of the sentence. In some cases when the accused pleads guilty owing to misconception of his right in property or owing to misconception of law or where there was no fair trial in obtaining the plea or where the plea of guilt was obtained improperly, appeal is not barred and accused can come up in appeal at large. The reason is that his pleading guilty merely amounts to admission of facts which even if true may not be enough to constitute the offence.

Likewise an appeal does not lie in petty cases where the sentence of imprisonment and fine are less than six months and 1000 rupees or both, where the order is passed by the High Court and where imprisonment and fine are less than three months and 200 rupees respectively or both, if ordered by Court of Sessions or Metropolitan Magistrate and where a sentence of fine not exceeding 100 rupees is passed by a Magistrate of the Ist class. However, cases covered under the *First Offenders Probation Act* or conviction followed by admonition under Section 3 of U. P. First Offenders Probation Act are not covered. In cases tried summarily if the Magistrate passes only a sentence of fine not exceeding 200 rupees, an appeal does not lie. However, where several persons are convicted in one trial, all of them have a right of appeal if appealable sentence has been passed on any one of accused persons.

3. Appeals may spring from an order of conviction passed under the Indian Penal Code or under any other law for the time being in force as well as against the orders passed at various stages under the Code of Criminal Procedure. In legal parlance the first may be termed as appeal against substantive offences and the others as appeal against procedural lapse. Generally speaking any person convicted on a trial held by any Criminal Court or by a High Court in its original criminal jurisdiction or any person whose application under Section 85 of Cr. P. C. has been rejected or any person who has been ordered under Section 117 Cr. P. C. to give security for keeping the peace or any person whose surety has been refused or rejected under Section 121 Cr. P. C. or a complainant or informant who has been ordered to pay compensation under Section 250 Cr. P.C. or any person whose application to file complaint has been rejected or against whom such complaint has been made by any court other than the High Court under Section 341 Cr. P. C. may prefer an appeal under the Code of Criminal Procedure. Simultaneously, a Public Prosecutor on the direction of the State or Central Government, or a private complainant by special leave to appeal can also prefer an appeal from an order of acquittal passed by any Criminal Court. The Public Prosecutor can also file an appeal against the sentence alone on the ground of its inadequacy. Conversely, any person aggrieved by an order under Section 452 or 453 Cr. P. C. may file an appeal against it.

4. After the introduction of section 411 A in Cr. P. C. by the Amendment Act 26 of 1943 appeals against the orders from High Court were directed to be filed before the Federal Court instead of Privy Council which used to exercise the appellate jurisdiction 'in the exercise of prerogative right to review the course of justice in criminal cases in the free fashion of fully constituted court of criminal appeals' where ever injustice of serious and substantial character occurred. After the abolition of Privy Council's jurisdiction, the Federal Court was invested and conferred with the jurisdiction to dispose of Indian appeals and petitions as the Privy Council held immediately before it, but after the establishment of the Supreme Court by virtue of Article 124 of the Constitution of India the Supreme Court now stands at the head of judicial system in India, like the House of Lords in England and it is the final appellate tribunal and the fountain head of the judicial system of the land. Articles 132 to 136 of the Constitution of India provide when a criminal appeal can be filed before the Apex Court which include an appeal after the High Court certifies the case to be fit one for appeal before the Supreme Court.

The queer question often posed is as to who can apply for a certificate? Usually an application for a certificate should be made by the convict or by the State and not by a third person. Hence the father of the convict or a lawyer not engaged for the purpose cannot apply for a certificate. Likewise, the State or a complainant cannot ask for certificate against an order of acquittal or against the quashing of proceedings but where substantial question of law decided by

High Court requires an authoritative decision by Supreme Court because of conflicting decisions the State may be permitted to ask for a certificate. What are substantial questions of law is often a question of debate and articulation. However, a catena of cases has established the interspersed legal position providing instances of substantial questions of law where a certificate for leave to appeal was granted.

The question whether the offence of criminal breach of trust can be committed in respect of immovable property there being no decision on it by the Privy Council or the Supreme Court, the question of propriety of sanction, the importance of statement of an accused under Section 30 of the Indian Evidence Act in view of decision of Privy Council in Pakala Narayan Swami Vs Emperor (AIR 1939 PC 47); the question of prejudice to the accused by reason of omission to question him: the effect of the lack of jurisdiction of the Magistrate trying case under Essential Commodities Act; the question about the High Court's power to review and alter its judgment once recorded and question whether the accused could be tried for an offence in India which was committed in an area falling in Pakistan after partition have been held to be involving substantial questions of law.

5. In the following cases the leave to Supreme Court was not granted although the question raised was one of law namely the question of interpretation of Section 524 Cr. P. C. (old) (Now Section 458 Cr. P. C.), and Section 110 of the Indian Evidence Act; the question of construction of documents; the question whether delay in submission of charge-sheet should effect the conviction of the accused and the omission to refer section 34 in a charge under Section 302 IPC. Similarly, where there was omission to draw adverse inference from non-production of witnesses or where High Court arrived at a conclusion different from the Court below merely on medical testimony, or if there was difficulty in applying the law, or the point raised is not a point of law, or where one of the two Judges differed in their views but agreed with the order proposed to be made, or where the question was about the propriety of grant or refusal of an adjournment, or where the only ground was delay in delivery of the judgment and that the points urged were lost sight of have been held to be no ground for granting leave to appeal.

6. The difference between a question of law and a substantial question of law lies not in kind but in degree. A mere existence of substantial question of law is not sufficient unless serious injustice of the substantial nature has been occasioned. The sufficient importance of the case, and the question of great public or private importance which may arise again and again the existence of exceptional and special circumstances where substantial and grave injustice has been done and where the case presents features of sufficient gravity to warrant a review of the decision appealed against are good grounds for permitting leave

to appeal. There exists conflict of views whether certificates for leave to file appeal before Supreme Court can be granted in contempt of Court cases, Calcutta & Orissa High Courts differing with Manipur and Madhya Bharat. The power to grant leave is discretionary which is always to be exercised on same judicial principles.

7. Hon'ble Mr. Justice Hegde in the case of *R. Reddy & others Vs State of Andhra Pradesh* (AIR 1971 SC 460) said that the appellate Court should bear in mind the fact that the trial Court had the benefit of seeing the witnesses. The finding of facts are not to be interfered by the Hon'ble Supreme Court like the practice adopted by the Privy Council nor the Supreme Court would make a re-appraisal of the evidence unless some basic error is brought to notice.

8. Either the appeals are against the acquittals or against the convictions. The quinted-sense of the jurisprudential aspect of criminal justice in an appeal against an order of acquittal is that it has to be firmly indicated and on weighty grounds to discard the reasonings of the trial court in order to reach the contrary conclusion of the guilt of the accused. Unless the trial court's conclusion is palpably wrong or manifestly erroneous and shocking one's sense of justice, no interference is to be made. If two conclusions can be based upon the evidence, then also the acquittal is not to be disturbed. Ram Darshan Shahi V. State, 1994 Cr. LJ 3681 (All). The reason underlying is that the view of the trial judge as to the credibility of the witnesses and the right of the accused to the benefit of any real and reasonable doubt is always there while disturbing appraisal of evidence on facts arrived upon by the court below.Krishna Raddy V. State of Karnataka, 1994 SCC (Cri.) 1667 (SC). The Supreme Court in innumerable cases has held that where the finding of fact was based on a wholesome erroneous approach and the very basis of reasoning was not in right perspective and the intrinsic merit of the evidence of the witnesses was not considered and the trial was summarily or perversely disposed of permitting the manifest errors and glaring infirmities, the appellate court shall interfere.

Then comes the question as to what are the procedural lapses and the matter of their significance in a criminal appeal. The first question is whether there is power to take additional evidence.

There are conflicting views on this question. One view is that in an appeal under Section 341 Cr. P. C. occurring under chapter 26 of Cr. P. C., the provisions of Section 391 of the Code will not apply and as such the appellate court in an appeal under Section 341 Cr. P. C. has no power to take additional evidence. A reference can be made of the case in Dhanpat Rai Vs. Balak Ram, AIR 1931 Lahore 761 (Full Bench) and Munni Lal Vs. Emperor, AIR 1937 Allahabad 305 (Full Bench). The other view is that the appellate court is empowered to take additional evidence within the framework of section 391 Cr. P. C. The third view is that such evidence can be taken under inherent power of the court.

(Ramchander Vs. Lila Ram, AIR 1931 Sindh 115), while the fourth view is that there is no general power vested in the appellate court to take fresh evidence, but it has got a limited power to examine witnesses if it so likes, under Section 311 Cr. P. C. There is no power in the appellate court to return the case to the Magistrate, with the direction to take evidence and then to dispose of the matter afresh.

The decisions regarding the appellate court's power of remand, while dealing with the appeal under Section 341 Cr. P. C. are also not uniform. One view is that it has got power to remand the case to the lower court for disposal under sub-sections (a) (b) (c) of Sec. 386 Cr. P. C. and the other view is that the appellate court has power to remand the case to the lower court for further enquiry.

The High Court has power to transfer an appeal under Section 341 Cr.P.C. pending before a Sessions Judge to its own file or to another Sessions Judge, under Section 407 Cr. P. C. Likewise the Sessions Judge can also transfer a criminal appeal to any judge, subordinate to him, for its disposal.

Queer question of law arises in some cases, where the appeals are sought to be filed after seeking leave as to who will seek the leave and who can present the petition. Generally speaking, the leave is to be sought by the accused, if convicted; and by the complainant, if there is an order of acquittal; and the appeal can be filed under Section 382 Cr. P. C. by the appellant or his pleader, but it cannot be sent by post. If the appellant is in jail, he may present his petition of appeal alongwith copies to the Officer Incharge of the Jail, who shall forward them to the proper appellate court. Previously there was no provision regarding abatement or substitution of heirs in criminal appeals. However, catena of cases has firmly laid down the track record providing guidelines. When the appeal is against the order of acquittal under Section 378 of Cr. P. C. only it abates on the death of the accused, but it does not abate on the death of the complainant-appellant. However, when complainant died before he could obtain leave of the Court and file an appeal against the acquittal, the appeal would not be maintainable at the instance of his son. (Monmathanath & others Vs. Niranjan, AIR 1967 Cal., 442). In admitting appeal there is no necessity of any substitution but substitution may be made by abundant caution. Under Section 256 Cr. P. C. the accused is to be acquitted, if the complainant fails to appear. Sub-Section 2 of Section 256 Cr. P. C. provides that the acquittal can be resorted to where the complainant failed to appear due to his death. Section 394 Cr. P.C. has been amended envisaging provisions for abatement of appeals. It provides that the criminal appeals under Section 377 or 378 Cr. P.C. shall finally abate on the death of the accused and every other appeal except the appeal from a sentence of fine shall finally abate on the death of the appellant, provided that if the appellant dies during the pendency of appeal any of his relatives may, within 30 days of the

death of the appellant, apply to the appellate court for leave to continue the appeal. Proposition of law on the question of substitution of legal representatives, seeking leave to appeal against the acquittal in the case of death of the complainant is silent.

However an heir of the convict-accused can file appeal against the sentence of fine as this would clear the realisation of fine from the estate left by the deceased accused.

The appeals can be summarily dismissed under Section 384 Cr. P.C. where no arguable point had been raised but the dismissal cannot be made without any speaking order in an appeal, which raised arguable questions. The Hon'ble Supreme Court has the undoubted power to dismiss a criminal appeal in limine. However, there can be no partial summary dismissal and the order dismissing the appeals summarily is final and no review lies against it. Appeals can be admitted on the question of sentence only but a criminal appeal can never be dismissed for default of appearance of appellant or his pleader because the appellate court is not relieved of the duty of hearing the appeal on merits and deciding it.

The appellate court can suspend the sentence and the imposition of fine, it can convict or acquit an accused in appeal or can convert the imprisonment into compensation and in suitable cases consider the grant of compensation to the victim instead of punishing the accused to undergo imprisonment.

The judgment once pronounced cannot be altered or reviewed, except to correct a clerical or arithmetical mistake and the judgments are to be delivered after hearing the appellant or his pleader and the complainant as the case may be.

BETWEEN THE TWO WHEELS

P. D. Kaushik, HJS

TO WORK LIKE HORSE AND LIKE HERMIT
CLIMBING LADDER OF SUCCESS
BRIEF BY BRIEF
FLUCTUATING FORTUNES
TENSIONS OF STAY MEANWHILE
BAIL OR JAIL
SURVIVAL BASED ON RESULT
FULL FREEDOM OF EXPRESSIONS

OR TO BE IN STATE OF HINDU WIDOW
SEARCHING TRUTH OUTSIDE AFFIDAVITS
UNDERSTANDING JUSTICE BEYOND ADVOCACY
AMIDST JUNGLE OF PRECEDENTS
SPEEDY JUSTICE
IN A SETUP
WHERE ALL AGENCIES BEING BENEFICIERIES OF DELAY
YET CLARITY AND JUSTICE
TO BE ACHIEVED ACCORDING TO FIXED QUOTA
COMBATING MONSTER OF ADJOURNMENTS
LIMITED ECONOMIC SECURITY
AT THE COST OF PERIODICAL DISLOCATIONS
NEW ASSIGNMENTS NEW SURROUNDINGS
CONSTANT INSINUATIONS
TRANSIENT LIFE

HIGHEST COMMON FACTOR
REDERSSAL OF GRIEVANCES
RELIFE TO CONTESTANTS

ENDLESS INTROSPECTION
CONSCIENTIOUSNESS
AUSTERITY JOB SATISFACTION
THE ULTIMATE REDEMPTION

"PROCEEDINGS-IN-CAMERA"

Azizur Rahman
Addl. Distt. Judge, Farrukhabad

The enjoyment of good reputation is a cherished desire of the human nature. Reputation is that which a man earns in the public opinion. It is also protected under Article 21 of the Constitution of India. It is not necessary that the instances making good reputation may be known to public.

In matrimonial cases-judicial separation, restitution of conjugal rights and divorce-the common grounds pleaded are cruelty, desertion, impotency, adultery, virulent and incurable form of leprosy, communicable form of venereal disease etc. Cruelty may include physical or mental shock, excessive sexual intercourse or refusal to sexual intercourse. It may also include physical assault, molestation, sodomy and bestiality. Sections 10,11 and 13 of the Hindu Marriage Act 1955, Sections 10 and 18 of the Indian Divorce Act 1869, Secs. 25 and 27 of the Special Marriages Act 1954, Section 2 of Dissolution of Muslim Marriages Act 1939 and other like Acts recognise the said grounds in matrimonial disputes. They are directly linked with the reputation of the party in proceeding. In such cases evidence is likely to be of revolting character and may injure the finer instinct of the party and may affect such reputation directly in the eye of general public. It may deter the aggrieved to seek relief in courts.

Although it is cardinal principle of law that the trial shall be held in open court, Order 18 Rule 4 C.P.C. provides as thus:-

"The evidence of the witnesses in attendance shall be taken orally in open court in the presence and under the personal direction and superintendence of the judge."

Hon'ble Mr. Justice Bachawat in Naresh vs. State of Maharastra (AIR 1967 SC 1) has elaborated it as follows:-

"Long ago Plato observed in his laws that the citizen should attend and listen attentively to the trials. Hegel in his Philosophy of Right maintained that judicial proceedings must be public since the aim of the Court is justice, which is a universal belonging to all Save in exceptional cases, the proceedings of a Court of justice should be opened to the public".

The object behind the hearing in open court has been to provide legal assistance readily available to a person facing trial and it is in consonance with Article 21 of the Constitution.

But feminist organisations opposed such hearings in open Court. They propagated that it exposes the secrets of marital life. It also discourages the

weaker section to tell the truth for fear of being propagated and misunderstood in society.

Section 53 of Indian Divorce Act 1869, Order 32-A, Rule 2 C.P.C. and Section 11 of the Family Courts Act 1984 contain similar provisions on the point.

Sec. 11 of the Family Courts Act provides :-

"In every suit or proceedings to which this Act applies the proceedings may be held in camera if the family court so desires and shall be so held if either party so desires."

Section 153-B Proviso C.P.C. inserted by Amending Act No.104 of 1976 also lays down:-

"Provided that the presiding judge may if he thinks fit, order at any stage of any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room of building used by the Court."

In Janaki Ballav v. Bennet Coleman and Co. Ltd. (AIR 1989 Orissa 225) the importance of camera proceedings has been explained precisely as follows:-

> "In exercise of its discretion and if court thinks fit, the court may order that the trial of any suit may be held in camera and the public generally shall have no access or to remain in the court room or building used by the Court. The exception by its very nature requires exercise of due care and caution before the court directs trial of a suit out of the public gaze. In exceptional and appropriate cases after exercise of due care and caution, the court may direct that a part of whole of the proceedings shall be conducted in camera. In the instant case the allegations against the plaintiff which he has challenged are mostly obscene.....The allegations, the words and sentences are so filthy and obscene that generally a normal person much less children adolescents, young girls, ladies and men will hate to hear and read... In the background of the peculiar facts of the case and keeping the principles of law in the background, I am of the view that the administration of justice will not suffer if parts of the proceedings of the suit are tried in camera..... The evidence recorded in camera shall not be printed and published in any newspaper, magazine, periodical, pamphlet, book or otherwise."

But considering the various aspects and increasing obscenity in cross-examination of witnesses and publication, the legislature leaned to make the law mandatory in matters of matrimonial disputes and sexual offences. The Marriage Laws Amendment Act 1976 introduced Sec. 22(1) in Hindu Marriage Act 1955, which provides as follows:-

"Every proceeding under this Act shall be conducted in Camera and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except a judgment of the High Court or of the Supreme Court printed or published with the previous permission of the Court."

The proviso to Section 327 (1) of the Criminal Procedure Code 1973 contains a provision similar to that in the proviso to Section 153-B of C.P.C. The Sub-Section (2) also makes it mandatory to try cases in camera. It reads as follows:-

"Not withstanding anything contained in Sub-Section(1), the inquiry into and trial of rape or an offence u/s. 376, Sec. 376A, 376 B Sec. 376-C or Section 376-D of the I.P.C. shall be conducted in camera."

So circumstances desired that the obscene matters and evidence must be kept away from public gaze and hearing, may it be civil or criminal proceedings. Such matters shall not be printed and published in any newspaper, magazine, periodical, pamphlet, book or otherwise to save our children adolescents, young girls, ladies and men from having an ugly feature of our society and poisoning their minds.

The Courts if they desire to try the proceedings in camera in other like matter shall make order in writing to keep the parties and strangers alike under obligation to obey it. While making such orders it shall also keep in mind the view expressed on obscenity in Samresh Bose v. Amal Mitra (AIR 1986 SC 967) as guide-line and similar other peculiar and prevailing circumstances. Hon'ble Supreme Court in the said case has observed as follows:-

> "In our opinion in judging the question of obscenity, the judge in the first place should try to place himself in the position of the author and from the view point of the author the judge should try to understand what is it that the author seeks to convey and whether what the author conveys has any literary or artistic value. The judge should thereafter place himself in the position of a reader of every age group, in whose hands the book is likely to fall and should try to appreciate what kind of possible influence the book is likely to have in the minds of the readers. A judge should thereafter apply his judicial mind dispassionately to decide whether the book in question can be said to be obscene...."

But where the enactment itself makes it mandatory to proceed in camera, it requires no order in writing. The said provision shall have the force of an injunction in itself.

The law has not been silent in regard to consequences on such orders being flouted by the irresponsible persons. In V.C.Shukla V.Tamil Nadu Olympic Association (AIR 1991 Mad 323) the Full Bench observed as follows:-

"If violation of the court's order will be ignored, there will be nothing left save for each person to take the law into his own hands. Loss of respect for the courts will ultimately result in the destruction of the rule of law and ultimately the society."

The law provides sanction to enforce its implementation.

Section 22(2) of the Hindu marriage Act 1955 provides as follows:-

"If any person prints or publishes any matter in contravention of the provisions contained in Sub-section (1) he shall be punishable with fine which may extend to one thousand rupees."

Section 327(3) Cr.P.C. provides as follows:-

"Where any proceedings are held under Sub-section (2) it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the court."

The breach of the provision in criminal cases has been made punishable U/S-228 of the I.P.C. Disclosure of identity of the victim of certain offences viz; rape, or printing or publication of a proceeding without prior permission of the Court has been made punishable with imprisonment for two years and fine U/S-228- A of the I.P.C.

Inspite of the said provisions, an interference or assualt or interference or wilful disobedience of an order with the process of justice has also been made punishable with the aid of Chapter XXVI of the Cr.P.C. and the matter may also be reported to the High Court for contempt of Court. The Contempt of Courts Act 1971 deals with civil and criminal contempts as defined in section 2 (b) and 2(c) of the Act. Section 7 of the Act deals with publication of information relating to proceeding in chambers or in camera. Such publication has been made contempt, where the publication is contrary to the provisions of any enactment for the time being in force or where the court on grounds of public policy or in exercise of any power vested in it, expressly prohibits the publication of all information relating to the proceedings and so on, and in default one shall be held guilty for contempt of the court and may be punished U/S.12 of the Act with simple imprisonment for a term which may extend to six months or with fine which may extend to Rs.2000/- or with both.

The courts may sometimes be guilty of default in implementing and observing the mandatory nature of law or where the circumstances itself warrant so. The court may in the situation be guilty of the contempt of its own court. It may also deserve criticism in the manner as our Hon'ble Mr. Justice N.N.Mittal observed in A.P.(Tee) Private Ltd. V. Addl. District Judge(1989 All. C.J.page 445):

"I feel pity that in this case an officer of the rank of...who must have put in several years working on the civil side should have passed an order like this in utter disregard to the provisions of...In view of the above, the manner in which the order has been passed betrays serious lack of knowledge of procedure on the part of the learned lower court.

Similarly in rape case Dev Singh v.State (1989 JIC 40) wherein lower court awarded punishment lesser than that provided in the law, the Hon'ble Court observed as under:-

"However ignoring the tenets of the statute he has awarded a sentence... it is thus apparent that... judge is not aware about the provisions and has awarded the sentences in an arbitrary manner which only deserves to be spurned."

One may naturally inquire whether the publication of proceeding may permanently be suppressed. English Courts and our Supreme Court in Naresh v.State of Maharashtra (Supra) have held that prohibition to publication of such proceeding can not be in perpetuity. If it is so, it is violative of Article 19 (1) of the Constitution of India. A few comments about a case which has been heard and finally decided are protected U/S-5 of the Contempt of Courts Act.All the said provisions provide that the court may hold the trial behind closed doors or may forbid publication of the proceedings during the pendency of litigation but certainly not after the conclusion of the proceedings. However, Section 22 of the Hindu Marriage Act 1955 registered a departure from the existing law, it not only prohibits, the publication of the proceedings but also prohibits it in perpetuity. It provides that the printing and publication of the judgment of the High Court or Supreme Court is permissible only if it has accorded permission to do so. It certainly implies that the judgment of the subordinate courts can not be printed or published even with the permission of the court. It clearly makes proceedings or evidence recorded in camera not to be printed or published permanently even after delivery of judgment. The provision itself is violative of Fundamental Rights in view of the observation made in Naresh v. State of Maharashtra (Supra) and how the said provision shall claim justification has yet to be explained.

Laws are framed for common good and to eradicate evil. The demand of dowry, bride-murder and suicidal cases are on increase and are widely reported in news papers, news and views media. A large number of cases are pending for their disposal in different law courts. The matter has been propagated at large to show its ugly face with the object to create fear and hatred in public mind against such offences but it is taking a reverse effect altogether. One may agree with me that most of women are highly sensitive and emotional and they are easily swayed away to revenge their in-laws or express frustration in affairs by committing suicide. If such provisions of trial-in-camera are extended to these cases, the young mind and coming generation may be saved from such poisonous thinking either way.

DOCTRINE OF "LEGITIMATE EXPECTATION "

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The word "Legitimate Expectation" is not defined by any law for, the time being in force. Yet it is another doctrine fashioned by the Court to review the administrative action.

Concept of legitimate expectation in administrative law has now gained sufficient importance. "Legitimate Expectation" is the latest recruit to the long list of concepts fashioned by the Courts for the review of administrative actions, and this creation takes its place beside such principles as the rules of natural justice, unreasonableness, the fiduciary duty of local authorities and in future perhaps, the principle of proportionality.

It was, in fact, for the purpose of restricting the right to be heard that 'legitimate expectation' was introduced into the law. It made its first appearance in an English case where alien students of 'Scientology' were refused extension of their entry permits as an act of policy by the Home Secretary, who had announced that no discretionary benefits would be granted to this sect. They had no legitimate expectation of extension beyond the permitted time and so no right to a hearing, though revocation of their permits within that time would have been contrary to legitimate expectation. Official statements of policy may cancel legitimate expectation; just as they may create it.[1]

"A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise from a representation or promise made by the authority including an implied representation or from consistent past practice."[2]

No order can be passed without hearing a person if it entails civil consequences. Where even though a person has no enforceable right yet he is affected or likely to be affected by the order passed by a public authority, the doctrine of legitimate expectation comes into play and the person may have a legitimate expectation of being treated in a certain way by an administrative authority.[3]

A case of legitimate expectation would arise when a body, by representation or by past practice, aroused expectation which would be within

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1 Administrative Law, 6th Edn. by HWR Wade at page 522.

2 Halsbury's Laws of England Vol. I (1) 4th Edition para 81 at page 151-152.

3 U.P. Awas Evam Vikas Parishad v. Gyan Devi, (1995) 2 SCC 326.

its power to fulfill. The protection is limited to that extent and a judicial review can be within those limits. A person, who bases his claim on the doctrine of legitimate expectation, in the first instance must satisfy that there is a foundation and thus has locus standi to make such a claim.

Legitimate expectations may come in various forms and owe their existence to different kinds of circumstances e.g. cases of promotions which are in normal course expected, contracts, distribution of largess by the Government and some what similar situations i.e. discretionary grants of licences, permits or the like, carry with it a reasonable expectation though not a legal right to renewal or non-revocation, and to summarily disappoint that expectation may be seen as unfair without the expectant person being heard. The court has to see whether it was done as a policy or in the public interest. A decision denying a legitimate expectation based on such grounds does not qualify for interference unless in a given case the decision or action taken amounts to an abuse of power. Therefore the limitation is extremely confined and if the doctrine of natural justice does not condition the exercise of the power, the concept of legitimate expectation can have no role to play and the court must not usurp the discretion of the public authority which is empowered to take the decisions under law and the Court is expected to apply an objective standard which leaves to the deciding authority the full range of choice which the legislature is presumed to have intended. In a case where the decision is left entirely to the discretion of the deciding authority without any legal bounds and if the decision is taken fairly and objectively the Court will not interfere on the ground of procedural unfairness to a person whose interest based on ligitimate expectation might be affected. Legitimate expectation can at the most be one of the grounds which may give rise to judicial review but the granting of relief is very much limited.[1]

The principle of legitimate expectation is closely connected with a 'right to be heard'. Such an action may take many forms. One may be expectation of prior consultation. Another may be expectation of being allowed time to make representations, especially where the aggrieved party is seeking to pursuade an authority to depart from a lawfully established policy adopted in connection with the exercise of a particular power because of some suggested exceptional reasons justifying such a departure.[2]

Ligitimate, or reasonable, expectation may arise from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.[3] The expectation may be based on some statement or undertaking by or on behalf of the public

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1 Union of India v. Hindustan Development Corpn., (1993) 3 SCC 499 at 548

2 (1984) 3 All. ER 935 at 954.

3 R. v. Secretary of State of Transport Exporte Greater London Council, (1985)3 All.ER 300.

authority which has the duty of taking decision, if the authority has through its officers acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry

The expectation cannot be the same as anticipation. It is different from a wish, desire or a hope nor can it amount to a claim or demand on the ground of a right.Howsoever earnest and sincere a wish, a desire or a hope may be and howsoever confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences. A pious hope, even leading to a moral obligation, cannot amount to a legitimate expectation. The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or established procedure followed in regular and natural sequence. It is also distinguishable from a genuine expectation. Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense.[1]

Legitimate expectation gives the applicant sufficient locus standi for judicial review. This doctrine is to be confined mostly to right of a fair hearing before a decision, which results in negativing a promise or withdrawing an undertaking, is taken. The doctrine does not give scope to claim relief straightway from the administrative authority as no crystallised right, as such, is involved.

Legitimate expectation may arise-

1. If there is an express promise given by a public authority; or
2. because of the existence of a regular practice which the claimant can reasonably expect to continue;
3. Such an expectation must be reasonable.[2]

The doctrine of legitimate expectation arises only in the field of administrative decisions. If the plea of legitimate expectation relates to procedural fairness there is no possibility whatsoever of invoking the doctrine as against the legislation.

Administrative action is subject to control by judicial review under three heads :-

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1 Union of India v. Hindustan Development Corpn., (1993)3 SCC 499 at 540.

2 Madras City Wine Merchants Association v. State of Tamil Nadu, (1994) 5 SCC 509.

(i) illegality, where the decision making authority has been guilty of an error of law e.g. by purporting to exercise a power which it does not possess.

(ii) irrationality, where the decision making authority has acted so unreasonably that no reasonable authority would have made the decision;

(iii) procedural impropriety, where the decision making authority has failed in its duty to act fairly.[1]

Judicial review provides the means by which judicial control of administrative action is exercised. The subject matter of every judicial review is a decision made by some person or a refusal by him to make a decision.

The decision must have consequences which affect some person (or body of persons) other than the decision maker although it may affect him too. It must affect such other person either,

(a) by altering rights or obligations of that person which are enforceable by or against him in private law, or

(b) by depriving him of some benefit or advantage which either

(i) he has in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to enjoy until there has been communicated to him some rational ground for withdrawing it on which he was to be given an opportunity to comment or,

(ii) he has received assurance from the decision maker that it will not be withdrawn without giving him first an apportuniy of advancing reasons for contending that they should be withdrawn.[2]

Where a person's legitimate expectation is not fulfilled by taking a particular decision, then decision maker should justify the denial of such expectation by showing some overriding public interest. Therefore, even if substantive protection of such expectation is contemplated that does not grant an absolute right to a particular person.

Legitimate expectation being less than a right operates in the field of public and not private law and to some extent such legitimate expectation ought to be protected not guaranteed.

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1 CCSD vs. Minister for the Civil Service, (1984) 3 All.ER 935.

2 (1984) 3 All ER 935 at 949.

There are stronger reasons as to why the legitimate expectation should not be substantively protected than the reasons as to why it should be protected.

If a denial of legitimate expectation in a given case amounts to denial of right guaranteed or is arbitrary, discriminatory, unfair or biased, gross abuse of power or violation of principles of natural justice, the same can be questioned on the well known grounds attracting Art. 14 of the Constitution of India but a claim based on mere legitimate expectation without anything more cannot 'ipso facto' give a right to invoke these principles.

It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely :

(I) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from other left out groups, and

(II) that that differentia must have a rational relation to the object sought to be achieved by the statute in question.

The classification may be founded on different bases namely geographical or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. Article 14 condemns discrimination not only by a substantive law but also by a law of procedure.[1]

The concept of legitimate expectation is not the key which unlocks the treasury of natural justice and it ought not to unlock the gates which shut the court out of review on the merits, particulary when the element of uncertainty and speculation is inherent in that very concept.

The mere reasonable or legitimate expectation of a citizen may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the

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1 Ram Krishna Dalmia v. Justice S.R. Tendolkar, AIR 1958 SC 538.

claimant. The doctrine of legitimate expectation gets assimilated in the rule of law.

In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Art. 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law. A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is fairplay in action. To satisfy this requirement of non- arbitrariness in a State action, it is, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision and also that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bonafides of the decision in a given case. Rule of law does not completely eliminates discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.[1]

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1 F.C.I. vs. Kamdhenu Cattle Feed Industries, (1993) 1 SCC 71.

IDENTIFICATION OF FINGER PRINTS & LAW

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M.I.A.I.(U.S.A.) M.C.I.S.(Canada) M.I.A.F.Sc. (Calicutta),

The science of Finger Print identification – has reached a stage of perfection and thus assumes a significant role in the day to day Administration of JUSTICE.

Rai Bahadur Shri H.C.Bose of Calcutta has mentioned in his book: Finger Print Companion that:-

> "Finger Prints are SELF-SIGNATURES subject to no fault of observation or clerical error and persistant throughout life;"

Finger Prints serve to reveal an individuals True-Identity despite personal denial, assumed names, changes in personal appearance resulting from age, disease or accidents.Thus the question of identification figures a good deal in both Criminal and Civil cases.

Identity of persons, living or dead, Known or Un-known, of things, or handwriting or finger Prints or Foot Prints play part in establishing the Guilt or innocence of the accused or in proof or dis-proof of the case of the parties in civil matters.

Because of its simplicity and economy the practice of utilizing Finger Prints as means of identification referred to as DACTYLOSCOPY - has become established and indispensable to the Modern Law Enforcement.

DACTYLOSCOPY - is based on the principles:

1. There are no two Identical Finger Prints and
2. Finger Prints are not-changeable

thus-- Individuality and Persistancy.

In Jalaludin v. Emperor (13 Cr.L.J.563) their Lordships said:-

> "It is reasonable deduction from experience that NO TWO HUMAN BEINGS have the same thumb markings....."

Marshall Honts in his treatise entitled "From Evidence To Proof" has discussed in detail regarding Finger Prints, their Examination and their Processing.

According to him:

"Finger Prints-utopian goal of most investigation are Convincing proof of a man's individuality.....

So conclusive is the Finger Print evidence that it acutally shifts the Burden of Proof in Criminal cases. The practical effect is to force the defendant to explain "HOW HIS FINGER PRINT GOT TO THE CRITICAL AREA."

Regarding Identification-there is both the evidence of fact of Identification, which is a matter of Observance and also the Expert Evidence.

The Expert Evidence deals not with the fact of Observance, but instead certain devices are utilized that go to help in this process of Identification. On the basis of those devices the Expert gives his OPINION.

The matter is not so easy as that of an Observance of a Fact, because it is a question of competency both of the witness as of the methods employed.

The Finger Print Expert has to convince the Court that by the methods employed, he did reach at the right conclusion.

The ultimate aim of the Court is to Impart Justice and doing so it incorporates the Opinion of the Finger Print Expert has to convince the Court that by the methods employed, he did reach to at the right conclusion.

The ultimate aim of the Court is to impart Justice and doing so it incorporates the Opinion of the Finger Print Experts, under Section-45 of the Indian Evidence Act.

Section-45 of the Indian Evidence Act, permits a person who possesses special qualifications in regard to a particular Science or depose as an expert witness in cases of such nature i.e. Finger Prints.

The Section does not particularly mention regarding the skill of such persons, nor does it lay down any special qualifications for a person to entitle him to call himself as an Expert.

In United States Shipping Board v. The Ship 'St Albans' (AIR 1931, Privy Council 189), their Lordships observed:-

"The witness must have made a special study or acquired a special experience therein. That is he must be skilled and have adequate knowledge of the subject"

It was held in Chitaman Dissil v. M.Lakshman (ILR Bom 101) that:-

"The mere opportunity to see Finger Prints does not make one an Expert. It is scientific study and outlook on the problem that is required for an Expert. As such a Sub-Registrar is not an Expert on Finger Prints..."

The competency or qualifications of a person who describes himself to be an Expert is left entirely to the discretion of the Court/Judge.

The real worth of the Expert will be judged by his keen observations and correct interpretaion of the Finger Print Patterns and the Ridge Characteristics. The acceptability of his opinion will be solely dependant on his reasonings and the demonstration of those reasons in Court.

For the purposes of examination and comparision the Finger Print Expert is required to prepare or get prepared enlarged photographs of the disputed and the specimen thumb impressions to the same scale. The best enlargements for the purpose of examination are TWO, THREE or FOUR diameters, so that ridges of the impression may not loose definition or sharpness. The identical points should be marked on the enlarged photographs.

The Core and Delta should be located first. If they are clear, one or both should be taken as a starting point for comparison. If the Core and Delta are not clear then ANY RIDGE Characteristic can be taken as a starting point. The ridge characteristics should be marked on the enlarged photographs.

The intervening ridges in between the ridge characteristics marked, should be counted carefully and mentioned in the report so that the similiarity in their relative position can be established.

The task of the Court becomes much easier when the Finger Print expert has made enlarged Photo-Prints of the disputed and the sample thumb impressions and marked distinct points of similiarities in the corresponding clear portion of the impressions.

Regarding the Method of Comparision, Mr.S.C.Chatterjee, has written on page 124 of his book: 'Finger, Palm and Sole Prints', as under:-

"The first attempt at comparing two finger prints would be directed to a rough examination of their respective patterns.

If they do not agree in being Arches, Loops and Whorls, there can be no doubt that the prints are those of different fingers. Nor can there be any doubt when they are distinct forms of the same general class.

But to agree thus far goes only a short way towards establishing identity, for the number of patterns that are promptly distinguishable from one another is not large.

The next step is to examine the numerous ridge characteristics. Some prominent points of reference in their relative position should be identified and marked. The coincidence of ridge characteristics in their relative position is a SURE AND CONCLUSIVE EVIDENCE OF IDENTITY"

If a sufficient number of ridge charcteristics are in complete agreement in the two thumb impressions it can be said definately that impressions were made by the same person.

In State of M.P. v. Sitaram Gajraj Singh (Raipur MPLJ 197 (201): Cr.L.J. 1220 (1223) it was laid down:-

"So no hard and fast rule can be laid down. Each case has to be seen on its own merits and cases of well grouped characteristics in a narrow area and patterns uncommon, SIX points or EVEN LESS may be sufficient to fix the identity."

In Mohan Lal v. Ajit Singh, AIR 1978 S.C. 1183, it was held as follows:-

"Similarily it is for a competent technician to examine and give his opinion whether the identity can be established and if so whether this can be done on eight or even less identical characteristics in an appropriate case."

Here it is worth mentioning that it is not essential that in a disputed or sample thumb impression Delta/Core or any particular area must be present to determine or establish identity. Although Delta/Core are no doubt essential fixed/focal points (except in the case of Arch Type of Pattern) of an impression yet their absence does not at all prevent an Expert from establishing absolute identity between two prints which are otherwise legible in a sufficient number of matching ridge characteristic details.

Any person who attacks the Finger Print Expert's testimony on the ground that the questioned or the sample print does not show the Delta or Core or the portion enclosing the type of Pattern is grossly mistaken or misguided. By doing so, he rather displays his utter ignorance of the basic tenets of the method of Finger Print Identification.

To-day personal identification by means of a Finger or Thumb impressions is not only a SCIENCE in itself but is an EXACT SCIENCE.

In Jaspal Singh v. State of Punjab, (AIR 1979 SC 1708: 1979 CrLJ 1386) their Lordships said:-

"The science of identifying thumb impressions is an EXACT SCIENCE and does not admit of any mistake."

In re Govinda Reddy .(AIR) 1958 Mys 177, CrLJ 1489) it was held:-

"The science of comparison of finger prints has developed to a stage of EXACTITUDE. It is quite possible to compare the impressions, provided they are sufficiently clear and enlarged photography is available. The identification of finger impressions with the aid of a good magnifying glass is not difficult,

particularly when the photographs of the latent and patent impressions are pasted side by side."

As observed above the science of identification of finger or thumb impressions is an EXACT SCIENCE and an accused can be convicted on the evidence of a Finger Print Expert alone.

In Chauthi v. State (1978 CrLJ (NOC) 122 All.), it was held:-

"In a case of forgery in which the accused denied having put his thumb impressions, the accused was convicted on the evidence of the expert who gave his opinion that the thumb impression was that of the accused after comparing the finger prints of the complainant and the accused."

As already mentioned earlier, finally it is the JUDGE/COURT who has to examine and decide the correctness of the conclusions of an Expert.

In Bhaluka Behara and others v. State (AIR 1957 Orissa 172), their Lordships said:-

"If the finger prints are clear enough the Court must verify the evidence of the expert by examining them with a magnifying glass if necessary, and applying its own mind to the similarities or dissimilarities afforded by the finger prints, before coming to a conclusion one way or the other. The science has developed to a stage of exactitude. But the main thing to be scrutinised is whether the Expert's examination is THROUGH, COMPLETE and SCIENTIFIC."

Sometimes it is observed that Experts are produced by both the parties in support of their versions.

The main object in such instances is to nullify the weight of the Expert Evidence produced by one party. In such cases Evidence of the Expert is at times discarded and the case is decided on the other evidences by the Court. In a way it is an injustice to the Expert who has given a correct opinion.

If the presiding officers paid a little attention and observed the facts themselves, the correctness of the opinion of one of the Experts could be judged very easily. Such a view was held by the Hon'ble High Court of Madras (AIR 1923 Mad 178), where the Court observed that:-

"When the Experts appear on both sides, the Court can not leave the matter merely by saying that it was difficult to prefer one of the report. The Court should have examined the characteristics with the magnifying glasses."

The identification of Finger Prints is a SCIENTIFIC problem and to solve, it the Expert must proceed in a SCIENTIFIC MANNER, with a complete freedom from pro-defence or pro-prosecution.

The approach of an Expert should be IMPERSONAL, DETACHED and OBJECTIVE and aim at testifying HONESTLY to the facts which may come to his knowledge, irrespective of temptations which may be offered.

Comparing two thumb impressions is just like READING NATURES INDELIBLE WRITING.

The Expert should invariably realise that in the finger print cases, the decision of the case may depend only upon his opinion, and evidence.

It is therefore desirable that an Expert's opinion should be self explanatory and the evidence should be presented in a clear and convincing manner.

He should live up to the Finger print Expert Method of Identification which is -

FOOL PROOF,

IMMUTABLE and

POSITIVE.

It has undoubtedly become a TRUISM that-

FINGER PRINTS NEVER LIE.

To quote A. Merrium Conner.....

"Now you may love and run away-

Beware, you have a THUMB,

Before its TESTIMONY you

Will stand confused and dumb;

You may commit the perfect crime

And prove an alibi,

But those strang lines upon your thumb

straight away your words belie."

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