J.T.R.I. JOURNAL

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A. M. Ahmadi
Chief Justice of India

MESSAGE

January 13, 1995

India has a long written Constitution and volumes of codified law. "Law", as Roscoe Pound said "must be stable, but it must not stand still". Our laws undergo changes every day-some in the legislatures and others in Courts. All students of law, judges and practitioners alike need to update themselves on these constant changes. The Institute of Judicial Training & Research, Lucknow, U.P. has shown the zeal to bring out a periodical to cover the current topics, articles, legal quiz and critical appraisals concerning law made and law in the making. In view of the present day concern for improving our legal education and our efforts to impart proper training to all judicial officers it is not only timely but also a felt need that a journal of the nature proposed is brought out by the Institute. It is undoubtedly an ambitious project but if everyone concerned with uplifting of our legal system joins hands with the Institute, there is no reason why it should not succeed

I congratulate the Institute on the publication of the maiden number of "JTRI Journal" and pray that the journal proves to be a very valuable instrument not dnly for judges and lawyers but also the general readers.

CHIEF JUSTICE OF INDIA

मोती लाल वोरा
राज्यपाल, उत्तर प्रदेश

सन्देश

जनवरी 7, 1995

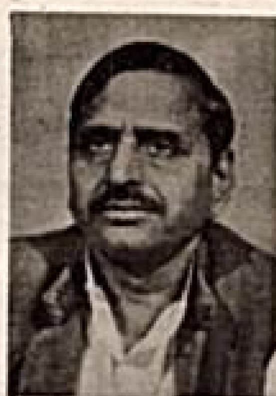
मुझे यह जानकर अत्यन्त प्रसन्नता हुई है कि न्यायिक प्रशिक्षण एवं अनुसंधान संस्थान लखनऊ द्वारा **"जे० टी० आर० आई० पत्रिका"** का प्रकाशन किया जा रहा है।

सर्वविदित है कि नागरिक अधिकार एवं मानव अधिकारों की रक्षा का गुरूत्तर दायित्व न्यायपालिका का हे। हमारे देश में विधायिका एवं कार्यपालिका की अपेक्षा न्यायपालिका को अधिक सम्मान प्राप्त है। इसी वजह से अत्यन्त महत्वपूर्ण संवैधानिक एवं नीतिगत मुद्दों से लेकर छोटे–छोटे विवादों में न्याय पाने के लिए लोग पूरी आस्था के साथ न्यायालयों की शरण लेते हैं और भरोसा करते हैं। इसलिए न्यायपालिका को अपने दायित्वों का निर्वहन पूरी निष्पक्षता, सत्यता और निर्भीकता से करते रहना चाहिए। तभी समाज में निश्चय ही न्याय और कानून का राज बना रहेगा और आत्म–संतोष के साथ सुखमय जीवन व्यतीत करते रहेंगे।

हमें आशा है कि न्यायिक प्रशिक्षण एवं अनुसंधान संस्थान द्वारा प्रकाशित होने वाली यह पत्रिका न्यायाधीशों, अधिवक्ताओं और न्यायिक अधिकारियों के लिए काफी उपयोगी सिद्ध होगी।

इस पत्रिका के सफल प्रकाशन के लिए मेरी शुभ–कामनाएं।

मोतीलाल वोरा



मुलायम सिंह यादव
मुख्य मंत्री
उत्तर प्रदेश

सन्देश

सचिवालय
लखनऊ

मुझे यह जानकर अत्यन्त प्रसन्नता है कि न्यायिक प्रशिक्षण एवं अनुसंधान संस्थान लखनऊ द्वारा शीघ्र ही **"जे० टी० आर० आई० पत्रिका"** का प्रकाशन किया जा रहा है।

लोगों को सस्ता और शीघ्र न्याय सुलभ कराना आज की सबसे बड़ी जरूरत है। वर्तमान सरकार भी चाहती है कि वादों का निस्तारण जल्दी हो, जिससे वादकारियों को अनावश्यक कठिनाई का सामना न करना पड़े। वादों के शीघ्र निस्तारण में न्यायालयों तथा अधिवक्ताओं, दोनों को मुख्य भूमिका निभानी होगी, जिससे मामले अधिक समय तक लंबित न रह सकें। देर से न्याय मिलना न्याय न मिलने के समान है। प्रदेश की गरीब जनता को सस्ता न्याय दिलाने, के हर संभव प्रयास किये जाने चाहिए। आशा है, पत्रिका में इस संबंध में उपयोगी सुझाव दिये जायेंगे।

पत्रिका के सफल प्रकाशन के लिए मेरी हार्दिक शुभ-कामनाएं।

मुलायम सिंह यादव

JUSTICE S. S. SODHI
Chief Justice
ALLAHABAD HIGH COURT

MESSAGE

March 30, 1995.

The Institute of Judicial Training and Research at Lucknow cannot but be looked upon as the pride of Uttar Predesh, being one of a very few such Institutes that have been set up in this country. This Institute is committed to promoting the cause of justice not only in the State of Uttar Pradesh but in the entire nation as it has opened its doors to Judicial Officers of other States too. The Institute is indeed fortunate in having an eminent and dedicated Chairman-Justice U.C. Srivastava, who has come out of retirement to take on this assignment. The publication of this journal and the many more issues to follow, cannot but promote the objectives it has set for itself. The Judicial Officers who come to this Institute have the valuable opportunity of acquiring expert legal knowledge and keeping up with the latest trends in the field of law. Democracy and the rule of law so essential for promoting, the well being and the welfare of the people, need many more such Institutes in the country.

S.S. SODHI

EDITORIAL

The Institute feels extremely honoured in releasing the maiden issue of the journal published by the Institute. The instant Judicial Training & Research Institute, (U.P.), Lucknow, was established in the year 1986 though became functional on 25th April, 1987. The proposal for publishing a journal by the Institute has been on anvil since 1990, but the Institute being in infancy stage, due to various constraints, the proposal could not be materialised earlier. The object of this Institute is to provide pre-service/in-service training to the Judicial Officers, make them abreast with the latest statutory and case-law developments and also to conduct research with a view to making the judicial system more effective and finding out ways and means for expeditious disposal of cases. The Institute conducts legal/judicial orientation training programme for the Judicial Officers and also for officers of other departments, Boards and Corporations.

The Institute has published 137 brochures and 25 books on matters covering law and new frontiers of law and has also held several seminars on issues of national importance.

The Institute has also been organising in-service refresher courses on national level intended for senior members of judicial service who are likely to be elevated to the Bench in the near future and also courses on legislative drafting and parliamentary affairs on national level. The Institute has conducted several such courses in the past, the response was instantaneous and encouraging as District Judges from almost all parts of the country North to South, East to West, actively participated. The officers participating in these various courses conducted by the Institute have been immensely benefitted.

At present the Institute is housed in a rented building. The new complex of the Institute sprawling over a vast piece of land admeasuring about 31 acres with an estimated cost of about Rs. 25.96 crores having capacity of imparting training to about 200 Judicial Officers at a time, having four big hostels comprising 200 rooms, a big auditorium, library and a research unit, swimming pool, with both indoor and outdoor games facility is under

construction. We are hopeful that the Institute starts functioning in its new building in the month of April/MAy of this year.

The Institute is developing day by day under the constant guidance of Hon'ble Mr. Justice S.S. Sodhi, Chief Justice of Allahabad High Court, Hon'ble Mr. Justice V.N. Khare, Senior Judge, Allahabad High Court, Hon'ble Mr. Justice U.C. Srivastava, Chairman of the Institute, and we are sanguine that it will soon acquire global fame.

We are thankful to Sri Ikramul Bari, Judicial Secretary and Legal Remembrancer, Government of U.P. and Sri N.S. Gahlot, Registrar, Allahabad High Court for their kind assistance rendered from time to time in the development of the Institute.

M. L. Singhal

Dated : 20.2.1995 Director

J.T.R.I., U.P.

FROM CHAIRMAN'S PEN

The release of the first issue of the trimonthly journal of the Institute is yet another step towards the fulfilment of our object of training, primarily the judical officers, both intensively and extensively not only in various branches of law, in behavioural etiquette, service to the country and countrymen fear-lessly and without favour with invincible faith and confidence in judiciary and its capacity in delivering effective and speedy justice. The need and importance of training of judiciary at various levels has been emphasised in this country from pre- independence period again and again.

More than 60 years ago Rankin Committee emphasised it and thereafter Law Commission in its various reports emphasised it. The study of law never stands still but flows on all the time, takes zigzag course in search of justice. Thomas Buerzenthal, Dean of American University rightly wrote "The study of law is the search for justice for the equitable resolution of conflict, for tolerance. The search for justice is not easy. That is why the study of law cannot and should not be easy : that is why we ask more question than we know the answers to". What the great educator wrote emphasises the im-portance of training. The Judges governed by their loyalties consciously mould the law to serve the felt necessities of time. They are guided by their sense of realism in changed circumstances. There is need that the Judges have to be above board and be free from prejudice, pressure, and other forms of pollution. There is also the responsibility of a Judge to be equipped with latest law of the land so as to make justice readily available to those who knock on its doors for the purpose of maintaining Rule of Law in a dignified manner.

The Institute is going ahead with the task and the duties cast upon it and is fully conscious of the object of preparing the trainees for reception, assimilation, assessment and feedback. In this respect several steps have been taken in training strategy. Apart from Induction Course, it has been

organizing Refresher Course at all level of the judicial service including Higher Judicial Service of the State. The institute will invite other members of such judicial service from other States after it shifts to its newly constructed building. The Institute has been imparting training to District Judges and has organised courses of legislative drafting and parliamentary affairs at All India level and has organised five such courses. After all country is one, people are the same and judicial system, but for little local variation, is the same. The dignity of individual and unity of nation are assured by the preamble to the Constitution of India which contains the philosophical postulates of our constitution. The Constitution of India emphasises a sense of common brotherhood of all Indians apart from the concept of liberty and equality. The National Level Training of Senior members of judiciary in the Institute is in tune with the object of our Constitution and research is being conducted in the Institute, with a view to make the training more effective. This does not obstruct researches on various other aspects of Constitution of India.

Training cannot be complete unless attention of judicial officers is drawn towards judicial etiquette and behaviour. After all it is the quality, personality, judicial acumen and behaviour of a Judge which count for a good deal. From ancient time attention towards this aspect has been drawn. In Dharma Kosh by Narada, it has been said :

"राजा तु धार्मिकान् सभ्यान् नियुंज्यात् सुपरीक्षितान्,
व्यवहारधुरं वोढुं ये शक्ता सद्‌गवा इव ।
धर्मशास्त्रार्थकुशलाः कुलीनाः सत्यवादिनः,
समः शत्रौ च मित्रे च नृपते स्यु सभासदः ।।"

"Let the king appoint as members of Court of justice honourable men of proven integrity, who are able to bear the burden of administration of justice and who are well versed in the sacred laws, rules of prudence, who are noble and impartial towards friends or foes."

Kautilya in his Arthshastra laid down that judges shall settle disputes from all kinds of circumsention with mind undaunted and unchanged in all moods and circumstances, pleasing and affable to all.

In medieval period particularly in Moghul period the appointment order of Qazi itself directed him to be just honest and impartial and to hold trials in presence of parties and court hours. He was forbidden from accepting presents from the people of the place where he was to serve and not to attend entertainment given by any body and everybody.

In India the concept of justice in all secular matters has also been mentioned. Not to say much, the standard of Indian judiciary and Judges

continued to remain high even before British took control of India. In the 19th century when Peshwas who were ruling over substantial part of country had an organised judiciary. Ram Shastri the head of judiciary did not hesitate in awarding death sentence to Raghunath Rao Peshwa, the King Regent who was held to be the person behind the murder of young Peshwa, Narain Rao his own nephew. The institute is paying and will be paying due attention towards the development of quality and personality of Judges. The Institute has to function as a means to develop the personality of the Judges, it is just a means not an end in itself.

The periodical journal of the institute starting with the issuance of the first issue would be containing articles not only for subordinate judiciary but also for senior District Judges who could be in the zone of consideration for High Court judgeship in the near future. The object of the Institute is a sincere initiative to keep the Judges abreast about the existing laws. Recent amendments alredy made or which are in the offing or on the anvil are intended to facilitate them in the discharge of their judicial function of administration of justice according to law with due regard to judicial ethics, etiqutte and behaviour would also find place in the journal. It is expected that the journal will be of assistance particularly to subordinate judiciary, and will also prove its worth as well as usefulness to jurists and Judges of other States, research scholars, post graduate law students and officers working in various legal departments.

The journal would be containing legal quiz, carrying rewards with it as incentive and encouragement to judicial officers to read and still more to enrich their knowledge and wisdom and purchase books for further study for the reward so awarded by the Institute. The first issue of the journal would be followed by trimonthly digest of recent cases decided by Supreme Court and High Court on Constitution and various other enactments for making the judicial officers up to date so far as case law is concerned.

This is a maiden attempt exactly a new incarnation, but is subject to mutations and modifications demanded by changing times and challenge of thought. Suggestions from readers will be highly appreciated and will be given due attention.

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

DIRECTIVE PRINCIPLES AND THE ROLE OF THE COURT

Justice K. Ramaswamy
Judge
Supreme Court Of India

The Constitution enjoys a pride of place among written Constitutions of the world-nations. It is not merely "Magna Carta" or "the Bill of Rights", but a panoramic social document pregnant with dynamism to usher in the egalitarian social order, through bloodless revolution under rule of law. The spirit and soul of our Constitution would be found in its Preamble, the Fundamental Rights in Part-III and the Directive Principles of State policy in Part-IV.

After 2½ centuries of imperial rule, under the leadership of Mahatma Gandhi Ji, the Father of the Nation, at a great sacrifice of countless precious lives of freedom fighters, Bharat secured independence and we have chosen democracy as a way of life under rule of law in Socialist Secular Republic. The attainment of freedom is not an end itself but is only a means to achieve, egalitarian social order by removing inequality in status, economic disparities assuring needed freedoms, and to have dignity of person and equality of status and of opportunity to every Indian with fraternal brotherhood. This could be done only through our chosen rule of law as means to the end. While debating on the draft Constitution, (during the debate) in the Constituent Assembly, Dr. Servapalli Radha Krishnan, the former President of India, as its member, remarked that "the material conditions to bring about a social economic revolution are necessary under the Constitution and a fundamental change in the structure of the Indian society thereby be brought about." If this social change cannot be brought under rule of law, the architect of the modern India, Pt. Jawaharlal Nehru warned, in his reply to the debates on the Constitution Ist Amendment Act, that "our Constitution would become useless and purposeless", stating that, "If India goes down, all will go down, if India thrives, all will thrive and if India lives all will live."

It is now settled-law that the Preamble is a part of our Constitution which guarantees to secure, socio-economic and political justice, equality of status and of opportunity with freedoms and dignity of person to all the individuals with fraternity in an integrated Bharat. The Fundamental Rights, in the language of Pt. Nehru, are static and the Directive Principles represent a dynamic move to secure social and economic justice. The Fundamental Rights represent something static to preserve certain existing rights. Both are rights. The dynamic movement and the static stand-still are not quite objective but necessarily do not mean the essence of movement.

The Fundamental Rights recognise existing rights of the individuals which are justiciable as well as enforceable against the State and its instrumentalities. The remedy thereof has been guaranteed by Articles 32 and 226 of the Constitution, apart from civil process. The Directive Principles are fundamental in the governance of the State intended to promote the social welfare of the community. Article 38 of the Constitution is a crusader for social and economic justice, in political democracy enjoining the State to strive to promote, the welfare of the people, by securing and protecting as effectively as it may, a social order in which justice, social, economic and political shall inform all the institutions of the national life. In particular it directed the State to strive to minimise the inequality in income and endeavour to eliminate inequality in status and to provide facilities and opportunities not only amongst individuals but also amongst groups of people residing in different areas and engaged in different avocations. Article 51-A brought by Constitution (42nd Amendment) Act, 1976 makes a fundamental duty of every citizen to abide by the Constitution and respect its ideals and institutions, to cherish and follow the noble ideals which inspired our national struggle for freedom, to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversity, to renounce practices derogatory to the dignity of women, to preserve the rich heritage of our composite culture, to develop the scientific temper, humanism and spirit of inquiry and reform, to strive towards excellence in all spheres of individual and collective activity. The object thereby is that the nation constantly rises to higher levels of endeavour and achievement.

As early as 1931 in Karachi Resolution, the Congress Party resolved, "in order to end the exploitation of the masses, political freedom must be including the real economic freedom of the starving millions". When the Fundamental Rights were made justiciable and their infraction at the behest of

the State and its instrumentalities are justiciable and enforceable in a court of law, the directives contained in Part-IV were made unenforceable for reasons of economic priorities and to bring about reforms by mutual discussion and political campaigns but not by writ of courts. However, they are fundamental in the governance of the country as State Policy and State shall apply the principles in its governance and making the law. The political parties are empowered and are mandated to abide by the Constitution and violation thereof disentitles the political party in power to remain in office. In *Bommai's* case[1], the larger Bench of 9 Judges of Supreme Court ruled that the President of India has power to dismiss the political party in power if the party violates the Constitution. Secularism was held to be the basic feature of the Constitution and dismissal of the Government for its violation was upheld.

Part-IV mandates the State to direct its policy towards securing among other things: distribution of ownership and control of the material resources of the community to subserve the common good, [Article 39(b)] prevention of concentration of wealth and means of production to the common detriment [Article 39(c)], right to work, and right to education (Article 41), adequate means to livelihood [Article 39(a)], living wage for workers and full enjoyment of leisure, and social and cultural opportunities (Article 43), equal pay for equal work [Article 39(d)], participation in the management of industries by the workers (Article 43-A), right to legal aid and equal justice (Article 39-A). The prohibition of untouchability (Article 17), prohibition of discrimination of entry into any public place of religious worship, educational institutions, freedom of religion to minorities, prohibition of employment of children of tender age in unsuited employment, and traffic in woman are Fundamental Rights. Right to education, is held to be a Fundamental Right, right to speedy trial is held to be a Fundamental Right, and right to medical treatment of the workmen is held to be Fundamental Right. Putting handcuffs to juvenile children and their detention in jail was held to violate Fundamental Rights of a person. Right to humane conditions in jail was, also, held to be Fundamental Right. Deprivation of right to livelihood offends right to life. These civil rights are aimed to provide opportunities and facilities to the people of India to improve their excellence, to secure dignity of the persons as free citizens. The Fundamental Rights are thereby intended to foster the social revolution by creating egalitarian social order wherein every citizen is free from coercion, restriction by the State or the society.

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1. (1994) 3 SCC 1

The Fundamental Rights are not an end but are means to the end envisaged in the Directive Principles without totally abrogating the means provided in Part-III. Therefore, the Fundamental Rights and the Directive Principles together constitute the conscience of the Constitution as two wheels of the chariot and complimentary to each other.

Unfortunately, the Supreme Court at its inception in *Champakam Dorairajan's case*[2] adopted a traditional statutory interpretation. The Fundamental Rights were held to be "sacrosanct", "transcendental" and "inviolable", while the Directive Principles were held to be "subsidiary" or "subordinate" to the Fundamental Rights. Since right to education was held to be fundamental under Article 29, prohibition on the grounds of caste violates Articles 29 and 15(1). Reservation consistent with social and economic and educational right given in Article 46 was held to be violative of Fundamental Rights under Articles 29 and 15(1). The Directive Principles in Article 46 would be subsidiary to the Fundamental Rights. This led to the reversal of the dynamic content of the Directive Principles, and their thrust to bring about social and economic reform, started from *Shankariprasad*[3] to *Kesvananda Bharati*[4] the journey took 30 years to remove the fetters on the legislative power. In *Kesvananda Bharati's case*[4], the Supreme Court held that the freedom of a few has then to be abridged to ensure the freedom of all and in order to preserve that freedom the privileged few must part with a portion of it. In building up a just social order, it is sometimes imperative that the Fundamental Rights should be subordinated to the Directive Principles. In *Asiad's case*[5], the Supreme Court further held that the time has now come when the courts must become the courts of the poor and the struggling masses of the country and they must shed their character as upholder of the established order and status quo. They must be sensitive to the need of giving justice to the lot of masses of the people to whom justice has been denied by a cruel and heartless society for centuries. The fetter on legislative power within Articles 39(b) and 39(e) put in *Minerva Mill's case*[6], was lifted and enlarged to all directives in *Sanjeev Kokes Ltd.*[7], and host of decisions followed thereafter. Thus, now the courts paved way for social transformation from static past to dynamic future.

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2. AIR 1951 SC 226
3. AIR 1951 SC 458
4. AIR 1973 SC 1461
5. AIR 1982 SC 1473
6. (1980) 2 SCC 591 : AIR 1980 SC 1789
7. (1983) 1 SCC 147 : AIR 1983 SC 239

In *National Workers' Union case*[8], the Supreme Court interpreted Article 43-A holding that the right of Company to carry on its trade or business guaranteed under Article 19(1)(f) must be read down in the light of Article 43-A of the right of the workers' participation in the management. Thereby the sacrosanct status given to the Fundamental Rights and sharp teeth provided in Article 13 have been blunted out. It is, now, settled law that the Fundamental Rights and the Directive Principles must be harmoniously interpreted to give practical content to the right to life enshrined in Article 21 as meaningful. Right to life assured under Article 21 as the focal point is to make every man to have life worth living with dignity of person and of equality of status and of opportunity. The State is, to provide facilities and opportunities in particular as enjoined in Article 46 of the Constitution.

The Courts are sentinel quiver protecting the rights of the citizens against arbitrary and unjust acts of the State apart from illegality in its action and their operation. The Judges are immune from executive interference assuring them of their independence by Articles 235 and 237 of the Constitution to the subordinate judiciary, apart from the protection of the Constitutional Courts, namely, the Supreme Court of India and the High Court in each State, to exercise the power of judicial review protecting not only the rights of the individual but also having a sensitive duty and responsibility to adopt purposive interpretation to allow the dynamic Directive Principles to establish the egalitarian social order under rule of law.

The political democracy of exercising free franchise and right to elect and to be elected to the established democratic institutions by battle of ballot must be made meaningful and accessible to all citizens, the strong and the weak, highest and lowest of a law. Unless political democracy is a way of life, the envisioned social and economic democracy by the dynamic doctrines embedded in Part IV remained to be teasing illusions. As stated earlier the egalitarian social order should be brought about only through rule of law and not by revolution or authoritarian rule which are antithetic to rule of law and destructive of social stability, harmony and of national unity.

With expanded meaning of right to life, the Courts are now free from the fetters of Part III or executive inaction to give practical content to the meaning "life" worth living with dignity of person and of equal status. The Court should, therefore, adopt purposive interpretation whenever issues of

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8. AIR 1983 SC 75

social justice vis-a-vis the Fundamental Rights come in conflict or State action is in question. The doctrine of locus standi has been given to the public spirited individuals and accredited associations to espouse the causes of the poor and under-privileged in a class action. The glorious doctrines in Part III and Part IV, though pregnant with potency to establish an egalitarian social order, they are mere dry-bones without flesh and blood. The Courts, therefore, are enjoined to supply through its interpretative process, flesh and blood to these dry-bones, fostering Fundamental Rights to bring about bloodless social revolution to make life meaningful, a reality worth living and purposeful. The Fundamental Rights and Directive Principles would thus serve as beacon light for social harmony, social welfare to wipe out tears from the eyes of teeming, starving millions, as espoused by the Father of the Nation, Mahatma Gandhi Ji. As John Stuart Mill, a renowned British Philosopher, had said in 1830, "Eight centuries ago, society was divided into barons and serfs. At every succeeding epoch century, this inequality of conditions is found to have somewhat abated. Every century has done something considerable towards lowering the powerful and raising the low." 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.

The faithful implementation of the Directive Principles by the State and its instrumentalities and purposeful interpretation by the courts would foster establishment of the egalitarian social order envisaged in the Preamble of the Constitution, the Fundamental Rights and the Directive Principles, a reality bridging the gulf between the privileged few and the millions of common men through sustained progress from 20th century into the 21st century to make life meaningful, purposeful and worth-living by every citizen, regardless of the rich and the lowest of the law in the Bharat society.

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> *Justice is truth in action*
>
> *Benjamin Disraeli*

WRITS IN GENERAL

Justice B.L. Hansaria
Judge
Supreme Court of India

GENERAL

(1) Meaning of 'writ' :

A written order, under seal, issued by a Court, and commanding the person to whom it is addressed to do or not to do some act.

(2) Who can apply ?

(a) 'person aggrieved'- traditional thinking.

(b) Public Interest Litigation - great stride. All of environmental, bonded labour, child welfare and other cases of deprived, distressed and down-trodden have been entertained of late by courts being approached by public spirited persons acting pro bono publico. Of course, the courts do see that this liberalisation is not misused to settle private scores.

(3) Against whom writ lies ?

(a) Apart from the State, writs can be issued against an authority or a person, as stated in Article 226. The word "person" has however been given restricted meaning and has been confined to one who performs public duty.

(b) But the word "State" has been given extended meaning by Article 12 and it includes, apart from Government, "Parliament and the Legislature of the States and all local or other authorities under the control of the Government of India."

(c) The word "authority" finding place in Article 12 has been interpreted to mean that body which is an instrumentality of the State. Such body is one about which it can be said that (i) financial resource of the State is the chief funding source; (ii) the State has pervasive

control; and (iii) whose functions are akin to that of Government functions.

(d) By applying these tests, bodies like Industrial Finance Corporation, State Financial Corporations, State Electricity Boards, ONGC, LIC, FCI, Warehousing Corporation, Universities, Central Inland Water Transport Corporation have been held to be authorities. Even some co-operative societies and Government companies have been so held.

(e) So, practically all entities discharging public duties are amenable to writ jurisdiction. This is so because the word "authority" finding place in Article 226 has been given wider meaning than the word "authority" mentioned in Article 12, which article finds place in Part III of the Constitution dealing with Fundamental Rights, whereas Article 226 is in different part.

(4) For what purposes writs can be issued?

(a) Enforcement of fundamental right- For this, even the Supreme Court can be directly approached under Article 32, not to speak of the High Court Under Article 226.

(b) Enforcement of legal right - Article 226 permits approach 'for any other purpose' also; but this expression has been understood as enforcement of legal right. For this, however, the Supreme Court cannot be directly approached.

(c) In so far as contractual right is concerned, though the earlier view was that such a right cannot be enforced with the aid of Article 226, there has been of late a change in thinking in this regard. The decision of the Supreme Court in *Mahabir Auto Stores*[1] is mainly responsible for this change. Even so, all contractual rights cannot be so enforced.

CERTIORARI- (It is most widely invoked writ.)

(1) Meaning

It is a writ issued to subordinate court or tribunal to call up the record of the case to examine legality of the action taken with a view to see that conscionable justice is done.

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1. AIR 1990 SC 1031

(2) When may be issued ?

(a) Jurisdictional error :

(i) This is said to occur when the error is one of jurisdiction, as distinguished from error within jurisdiction. It is, however, difficult to distinguish the two, but some cases like improper composition of tribunal and absence of condition precedent for taking action or passing order (say, want of sanction or notice where required) are clear cases. Beyond this, no clear cut demarcation exists.

(ii) The judgment of the House of Lords rendered in 1969 in the case of *Anisminic* has made many errors capable of being described as jurisdictional errors, as, according to this decision, which has been approved by the Supreme Court in a number of cases, if a decision is arrived at by a tribunal by asking wrong questions, it can be said that the tribunal committed error of jurisdiction.

(iii) The latest position appears to be that if a High Court chooses to interfere, it can say the court below had no jurisdiction to decide the question wrongly; if it chooses not to interfere it can say the court below had jurisdiction to decide the question wrongly, as put by Lord Denning in the case of *Pearlman* (1979).

(b) Apparent error of law :

(i) That error is regarded as apparent which is so on its face needing no lengthy argument. In many cases, however, veil has been lifted to see the face.

(ii) Even findings of fact have been reversed by High Courts in exercise of power under Article 226 when the same have been arrived at either by relying on inadmissible evidence or by ignoring admissible evidence. So also, if the finding recorded is such which a reasonable man reasonably instructed in law could not have arrived at or where the finding is regarded as perverse, the same becomes amenable to interference in exercise of power under Article 226.

(iii) The above means that qua a question of fact High Court is

not to come to a different conclusion by appreciating the evidence afresh.

(c) Violation of principles of natural justice :

(i) What is natural justice ?

There are two important rules of natural justice. One, audi alteram partem (hear the other side); and the other 'nemo judex in causa sua' or absence of bias. Passing of speaking order has also been accepted as a part of natural justice.

Audi alteram partem

This facet of natural justice varies in content and cannot be put in any straight jacket. All that it requires is that nobody should be punished unheard. For this purpose it would be enough if (i) allegation in question is made known; (ii) reasonable opportunity of having say in the matter is given; and (iii) the authority acts in good faith.

Nemo Judex in causa sua or absence of bias.

One having any personal or financial interest cannot decide a case or pass an order or participate in the decision making process because of this doctrine. This is to satisfy the principle that justice must not only be done, it must be seen to have been done.

Proof of bias is not required; it is indeed difficult. Likelihood of bias is enough, though such likelihood must be reasonable.

(ii) In which matters natural justice has to be followed ?

In quasi-judicial acts or orders only, as per earlier thinking, and in administrative acts and decisions which entail civil consequences, as per latest thinking.

The expression civil consequences, has been explained to mean "infraction of civil rights, material deprivation or non-pecuniary damages i.e. everything which effects citizen in his civil life". Because of this definition, acts like supersession of municipality, cancellation of election etc. have also been held to entail civil consequences, requiring hearing to be given, though the same can be "littlest, at barest notice and in shortest time".

Silence of statutes has not been regarded as decisive. If, however, natural justice has been excluded expressly or by necessary implication by the concerned statute, the same is not required to be followed.

In some matters, natural justice is excluded because of very nature of acts like pulling down of a building in case of break of fire. Legislative or quasi-legislative acts are not required to comply with this principle.

At times post-decisional hearing is said to take care of natural justice, as predecisional hearing may be inappropriate or inadvisable, say, where passport is required to be impounded following a report requiring urgent action to prevent journey of the concerned person to a foreign country.

(d) Non-passing of speaking order :

To avoid arbitrariness, reasoned order, called speaking order in legal parlance, is being insisted. A Constitution Bench of the Supreme Court has accepted this requirement as a part of natural justice. This was done in the case of *Satyen Mukherjee*[2] decided in 1990. The Bench, however, stated that this requirement can be excluded either expressly or by necessary implication.

(e) Malafide use of power :

(i) Malice in law. This arises when power is used in breach of law, say, by taking into account, bona fide, some extraneous matter or ignoring relevant matter.

(ii) Malice in fact. This results when action is taken to satisfy a private grudge or for wrecking personal vengeance, as was found in *Partap Singh Kairon's case*[3].

(f) Abuse of discretionary power.

Various statutes confer on named authority a power which can be used in its discretion. It may first be pointed that though the power is left to be used as per discretion, there is no absolute discretion in law. It has been said that such a discretion is a "ruthless master" and "more destructive of freedom than any of man's invention". Decision of House of Lords in *Padfield* (1968) emphatically ruled that law does not know of 'unfettered discretion' of anybody be he even a Minister, if the power has been conferred on him.

Secondly, when a power is conferred by statute, the donee of the power has a duty to use it when facts necessary for its exercise exist. This has been the accepted position ever since 1890 when the case of *Julius* v. *Bishop of Oxford* was decided by the House of Lords.

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2. AIR 1990 SC 1984
3. AIR 1964 SC 72

Action taken in exercise of discretionary power can be interfered with in exercise of power of judicial review only in three situations : (i) illegality in exercise of it; (ii) irrationality of the end result i.e. the decision being unreasonable; or (iii) where gross procedural irregularity has been committed while exercising the power.

PROHIBITION

This writ is closely connected with certiorari and the difference relates to the point of time at which these two writs are issued. Certiorari is issued after a decision has been arrived at whereas prohibition is asked for when an authority is seized of the matter, but acts either without jurisdiction or in violation of principles of natural justice.

MANDAMUS

It is a command to do a particular thing which is in the nature of a public duty. A person seeking mandamus must have a legal right or substantial interest to ask for the performance of the duty; and there should have been no efficacious alternative remedy.

QUO WARRANTO

It is issued against a usurper of public office and the court asks the concerned person to state by virtue of what authority he is holding the office.

Even when the person concerned is ultimately found to have had no authority to hold the office, the acts performed by him are protected with the aid of de facto doctrine, which was introduced in law as a matter of policy and necessity to protect the interest of public. It was required to be pressed into service to preserve peace and order in the community at large. The earliest Indian decision on this point is that of Sir Ashutosh Mukherjee in the case of *Pulin Behari.*[4]

HABEAS CORPUS

This is another important writ as a person illegally detained can pray for it, and on a case being made out, it is to be issued ex debito justitiae. This writ has been described as one of *'immemorial antiquity', whose threads are woven deeply within the "seamless web of history".*

(1) *Meaning*

4. (1912) 15 C.L.J. 517

To have the body of the person said to be illegally detained before the Court to examine the allegation made.

(2) When can detention be said to be illegal ?

(a) When the concerned person has no authority of law. This is the clearest case of illegality and needs no discussion.

(b) Invalidity of law - It is apparent that the law authorising detention has to be a valid law. In the very first year of our Constitution coming into force, validity of the law in exercise of which the renowned communist leader, AK Gopalan, was detained was questioned. It is a different matter that the validity of the concerned preventive law was upheld.

(c) Misconstruction of the statutory provision-Challenge on this ground also needs no discussion.

(d) Violation of safeguards.

This is the most frequent ground of asking for a writ of habeas corpus. Procedural safeguards have been provided in all preventive laws and one such safeguard is allowing the concerned person to make representation seeking revocation of the order, which is a constitutional requirement and has been embodied in Article 22(5) of our Constitution.

The importance of strict compliance with the procedural safeguard is so great that Justice Frankfurter's well known saying that one who takes processual sword must perish with it, has been very often quoted by our Supreme Court.

Constitutional right of making representation postulates two rights : one, communication of grounds of detention to the detenu; and two, earliest opportunity of making representation, which has to be dealt with without undue delay.

When grounds are communicated, the following is normally urged to challenge the detention :

(i) Delay in communication of grounds.

(ii) Non-disclosure of full facts especially non-disclosure of materials basing on which the subjective satisfaction requiring detention had been arrived at.

(iii) Non-application of mind by the detaining authority.

(iv) Ground is vague.

(v) Ground is irrelevant, like detention for acts causing breach of law and order, whereas detention is permissible for breach of public order.

(vi) Ground is stale.

(vii) Ground is non-existent.

(viii) Ground not being in language understandable by detenu.

(ix) Vital fact like the detenu being already in jail not considered.

(x) Some other grounds of infirmity are :-

Non-approval of detention order by the State Government where the order had been passed by say, District Magistrate, which requires approval by the State Government.

Infirmity in the proceedings before the Advisory Board; non-providing of legal aid to the detenu can be such an infirmity.

Non-forwarding of the papers to the Central Government, if required by the concerned statute, and non-application of mind by the Central Government to see if revocation of the order is required.

It is apparent that where there is delay in consideration of representation the same would furnish a good ground to set aside the order of detention. As to what length of time would constitute such a delay would, however, depend upon facts of each case. In some cases, delay of even 16 days was regarded as fatal, whereas in some, delay of about a month was held as justified.

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Let Justice be done though the heavens fall
Sir James Mansfield

BASIC FEATURES OF THE CONSTITUTION AND ITS CONSIDERATION WHILE DRAFTING STATUTES

Justice S. Ratnavel Pandian
Chairman
Fifth Central Pay Commission
Formerly Judge, Supreme Court of India

The rubric chiselled in the luminous preamble of our vibrating and pulsating Constitution radiates the avowed objectives in our Sovereign, Socialist and Secular Democratic Republic. In every free country which has adopted a system of governance through democratic principles, the people have their fundamental inalienable rights and enjoy the recognition of inherent dignity and of equality analogous to the rights proclaimed in the 'Bill of Rights' in the United States of America, the 'Rights of Man' in the French Constitution of 1971 and 'Declaration of Human Rights' etc. Our Constitution is unquestionably unique in its character and assimilation having its notable aspirations contained in 'Fundamental Rights' (in Part III) through which the illumination of constitutional rights comes to us not through an artless window glass but refracted with the enhanced intensity and beauty by prismatic interpretation of the constitutional provisions dealing with equal distribution of justice in social, political and economic spheres.

The preamble to our Constitution embodies the great purposes, objectives and policy underlining its provisions apart from the basic character of the State which was to come into existence i.e. a Sovereign Democratic Republic.

In fact the Drafting Committee considered the Preamble at a number of meetings in 1948-49, examined and rejected various amendments suggested.

and ultimately finalised the Preamble and attached the same as a part of the Constitution which is based on the concept of social and economic justice.

However, for the 'Objects and Reasons' mentioned in the Constitution (Forty-Second Amendment) Act, 1976 it has been proposed to amend the Constitution to spell out expressly the high ideals of socialism, secularism and the integrity of the nation, to make the directive principles more comprehensive and give them precedence over those fundamental rights which have been allowed to be relied upon to frustrate socio-economic reforms for implementing the directive principles and to specify the fundamental duties of citizens and make special provisions for dealing with anti- national activities whether by individuals or associations. Resultantly, the amendment was brought to the Preamble by substituting the words, 'SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC' for the words, 'SOVEREIGN DEMOCRATIC REPUBLIC' and substituting the words, 'unity and integrity of the Nation' for the words, 'Unity of Nation'. This amendment made to the Constitution came into force w.e.f. 3-1-1977.

The addition of the word 'SOCIALIST' indicates the incorporation of the philosophy of 'socialism' in the Constitution.The word 'SECULAR' simply recognises the concept of secularism as manifested in the guarantee of freedom of religion as a fundamental right in the Constitution. Further, it is to secure to all its citizens justice - social, economic and political; liberty of thought, expression, faith and worship; equality of status and opportunity; and to promote among the people of India fraternity, assuring dignity of the individual and the unity of the nation.

The Constitution makers knew what they meant by this concept socio-economic justice and it was with a view to implement them, they enacted Part III (Fundamental Rights) and Part IV (Directive Principles of State Policy) - both fundamental in character - on the one hand, basic freedom to the individual and on the other, social security, justice and freedom from exploitation by laying down guiding principles for future Governments.

It is worthwhile to recall that when the Constituent Assembly of India met on 17th October, 1949 to adopt the preamble, the President of the said Assembly, Dr. Rajendra Prasad while insisting to pass the Preamble in the second reading asserted that "the Preamble forms part of the Constitution".

The Preamble contains the ideals and aspirations, as pointed out in *Atamprakash v. State of Haryana*, AIR 1986 SC 854 and the object which

the Constitution makers intended to be realised as observed in *Golaknath* v. *State of Punjab*, AIR 1967 SC 1643.

Keeping in view the above historical background of the constitutional philosophy, I shall now deal with the first limb of this subject for deliberation with regard to the basic structure of the Constitution otherwise known as the frame-work of the Constitution.

The concept of the basic structure arose for the first time in *Kesavananda Bharati* v. *State of Kerala* [AIR 1973 SC 1461], but it arose in the context of amendment of Article 368 by the Constitution (Twenty Fourth Amendment) Act 1971. This was consequent upon the decision in *Golaknath* v. *State of Punjab* [AIR 1967 SC 1643] reversing its earlier decisions in *Sajjan Singh* v. *State of Rajasthan* 1965(1) SCR 933 and *Sankri Prasad* v. *Union of India* [AIR 1951 SC 458] upholding the power of Parliament to amend all parts of the Constitution including Part III relating to Fundamental Rights. The result of the judgment in *Golaknath case* was that Parliament was considered to have no power to take away or curtail any of the Fundamental Rights even if it becomes necessary to do so for the attainment of the objectives set out in the preamble of the Constitution. It was only in this context of the fragmented discussions till then made relating to the amending power of the Parliament in relation to the Constitution what was gathered up in *Kesavananda Bharati's case* which introduced and discussed for the first time *'the concept of basic structure'*. Subsequently the consequences of the application of the said concept enumerated in *Kesavananda Bharati's* case were considered in *Smt. Indira Nehru Gandhi* v. *Raj Narain*, (AIR 1975 SC 2299); *Minerva Mills Ltd.* v. *Union of India* (AIR 1980 SC 1789) and *Waman Rao and others* v. *Union of India and others* 1980 (3) SCC 587 as well as in *Sanjeev Coke Mfg. Co.* v. *Bharat Coking Coal Ltd.* (AIR 1983 SC 239) with reference to the amending power of Parliament. By a majority view in *Kesavananda Bharati*, the decision in *Golaknath* case was over-ruled and resultantly the Twenty-fourth Amendment was held valid. However, it was ruled that Article 368 does not enable the Parliament to alter the basic structure or frame-work of the Constitution. Further it has been observed in *Kesavananda Bharati's case* that the Preamble is part to the Constitution and relates to its basic structure or frame-work.

In *Kesavananda*, the then learned Chief Justice of India, Shri S.M. Sikri observed that 'the basic structure' may be said to consist of the following features:

(1) Supremacy of the Constitution,

(2) Republican and Democratic forms of Government,

(3) Secular character of the Constitution,

(4) Separation of powers between the legislature, the executive and the judiciary, and

(5) Federal character of the Constitution.

He further observed that the basic structure is built on the basic foundation i.e. the dignity and freedom of the individual which is of supreme importance.

In the same judgment Justice Shelat and Justice Grover have illustrated the basic elements of the constitutional structure observing:

(1) The supremacy of the Constitution.

(2) Republican and Democratic form of Government and sovereignty of the country.

(3) Secular and federal character of the Constitution.

(4) Demarcation of power between the legislature, the executive and the judiciary.

(5) The dignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV.

(6) The unity and the integrity of the nation.

They further ruled that the basic structure of the Constitution is not a vague concept.

Be that as it may, it has been commonly held in that case that the basic structure of the Constitution cannot be abrogated or emasculated or damaged or destroyed. There was a controversy during the course of the argument in *Smt. Indira Nehru Gandhi* v. *Raj Narain* on the point as to whether Justice Khanna who was one of the Judges on the Constitution Bench in *Raj Narain's case*, has laid down in his judgment in Kesavananda Bharati that Fundamental Rights are not a part of basic structure of the Constitution. After making detailed discussion, Justice Khanna clarified that some of the observations made by him in *Kesavananda Bharati* case clearly militate against the contention that according to his judgment Fundamental Rights are not a part of the basic structure of the Constitution. In *Kesavananda's case*, seven learned

Judges out of thirteen held that the objectives specified in the preamble contain basic structure of our Constitution.

Referring to the various observations made in *Kesavananda Bharati case*, Chief Justice Y.V. Chandrachud speaking for the majority in *Minerva Mills Ltd. v. Union of India* (AIR 1980 SC 1789) has observed:

> "..........the Indian Constitution is founded on the bed-rock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution............ The goals set out in Part IV have, therefore, to be achieved without the abrogation of the means provided for by Part III. It is in this sense that Parts III and IV together constitute the core of our Constitution and combine to form its conscience. Anything that destroys the balance between the two parts will ipso facto destroy an essential element of the basic structure of our Constitution".

The Constitution makers gave to the preamble, in the words of Justice Shelat and Justice Grover *'the pride of place'*. It embodied in a solemn form all ideals and aspirations for which the country had struggled during the British regime and the present Constitution was sought to be enacted in accordance with genius of the Indian people. In short the preamble is the key to the Indian Constitution.

Our Courts consistently have looked to the preamble for guidance and given it a transcendental position while interpreting the Constitution and other laws in order to have a well regulated democracy and to have the basic features of the Constitution as a functional one.

Undeniably, there were many monumental costitutional issues in relation to the fundamental rights as well as directive principles of the State. All those issues creating a vortex of irreconcilable differences and multiple burning political questions have been settled by the highest Court of this land, namely the Supreme Court by interpreting the Constitution in terms of its basic structure in many leading landmark and historical decisions which help to determine what our Constitution is, means and speaks and which breathe new life into

our Constitution and thereby make the Constitution a living document. Thus, the creative work of the highest judiciary i.e. the Supreme Court which is the ultimate arbiter of constitutional conflicts, over a march of forty five years has from decision to decision progressed in great leaps and convincingly protected the inalienable rights emerging from the constitutional mandates and upheld many legislations which have stood the test of constitutionality and struck down which have infringed the basic structure of the Constitution and other provisions of the Constitution but at the same time without taking the role of super legislature.

Now I shall pass on to deal with the second limb of the subject namely the consideration of the basic structure while drafting a statute.

To perceive and cherish the second part of the subject, it becomes inevitable to have a brief outline about the distribution of legislative powers under the constitutional scheme particularly with reference to the character and structure of the Government.

The question as to whether the Constitution of India can be described appropriately as federal in character, has been discussed in a recent judgment in *S.R. Bommai* v. *Union of India* (1994) 3 SCC 1. Though it is not necessary for me to expatiate the concept of federalism, the federal principle is dominant in our Constitution though with a bias in favour of the Centre. However, in order to maintain the unity and integrity of the nation, our founding fathers have distributed legislative powers between the Centre and the States, of course making the Centre far more powerful vis-a-vis the State and making the States supreme within the sphere allotted to them under the provisions of the Constitution and protecting the powers reserved to the States from being tampered with by the Centre except to the extent provided in the constitutional scheme.

Part XI of our Constitution under the caption 'Relations between the Union and the States' consists of two Chapters. Chapter I under the heading. 'Legislative Relations' deals with distribution of legislative powers under Articles 245 to 255. Chapter II deals with 'Administrative Relations' under the heading, 'General' (Articles 256 to 261). Disputes relating to Waters (Article 262) and Co-ordination between States (Article 263).

In making the distribution of legislative powers between the Union and the States, the present Constitution adopts the method followed in the Government of India Act, 1935. Various matters of legislation are enumerated in the

Seventh Schedule in terms of Article 246 in three Lists, namely List I, i.e Union list, List II, i.e. State List and List III i.e. Concurrent List.

Under clause (1) of Article 246 notwithstanding anything in clauses (2) and (3) of the said Article, the Parliament has exclusive power to make laws with respect to any of the 91 subjects enumerated in List I of the Seventh Schedule. Under clause (3) of the said Article, the State Legislatures have exclusive powers to make laws with respect to 66 items enumerated in List II. The powers in respect of 47 items enumerated in List II are concurrent, i.e. both the Parliament and the Legislature of any State subject to clause (1) have power to make laws. With regard to a law made in respect of matters enumerated in the Concurrent List, provision has been made in Article 254 which gives over-riding effect to a law made by Parliament in the event of there being any repugnancy between the said law and the law made by the legislature of a State and the State law would prevail over a law made by Parliament only if such State law was enacted after the law made by the Parliament and has received the assent of the President.

While examining the legislative competence of Parliament to make a law, the proper approach is to determine whether the subject-matter of the legislation falls in the State List which Parliament cannot enter. If the law does not fall in the State List, the Parliament would have the legislative competence to pass the law by virtue of the residuary powers under Article 248 read with Entry 97 of the Union List and it would not be necessary to go into the question whether it falls under any entry of the Union List or Concurrent List. (See *(1) Union of India v. H.S. Dillon, 1972 (2) SCR 33 at page 61 and 67-68; (2) S.P. Mittal v. Union of India, 1983 (1) SCR 729 at page 769-770; (3) Khandelwal Metal Works v. Union of India, 1985 (Suppl.) 1 SCR 750 at page 775.*

However, the primary duty of the law making has to be discharged by the legislature itself and the legislature cannot certainly stick itself of its essential legislative functions, delegation may be resorted to as a subsidiary or an ancillary measure.

In *Devi Das Gopal Krishnan v.State of Punjab, 1967 (3) SCR 557*, Subba Rao, C.J. provided another justification for delegated legislation that the Constitution confers a power and imposes a duty on the Legislature to make laws, the institution of which has sanction of the Constitution. The term constitutionality of such delegated legislation in reference thereto seeks to

determine the vires of the 'output' and not the 'institution' itself on the anvil of the Constitution. In other words, the touchstone in determining the constitutionality of delegated legislation is the essential legislative function as the determination of the legislative policy and its formulation as a rule of conduct. Thus, a great deal of legislation takes place outside the legislature in Government Departments by the Executive bearing varied nomenclatures i.e. rules, regulations, bye-laws, orders, notifications etc. Whatever power the Executive has, in this behalf, is derived from delegation made under specific enactments. Though the subject for deliberation may not require an elaboration of the various topics on 'Delegated Legislation'; 'Sub-delegation', 'Ancillary Legislation'; 'Colourable legislation'etc, the validity of any law enacted by any authority is tested on the touchstone of the Constitution. However, the Legislature may not delegate its functions of laying down legislative policy.

When the legislative competence of a legislature with regard to a particular enactment is challenged with reference to the entries in various Lists i.e. a law dealing with the subject in one list is also touching on a subject in another list, the doctrine of 'pith and substance' is to be applied. In order to ascertain the 'pith and substance' of any impugned enactment, the Preamble, Statement of Objects and Reasons, the legal significance and the intendment of the provisions of the Act concerned, and its scope and the nexus which the object of that Act seeks to subserve, must be objectively examined. On a scrutiny of any Act under challenge, if found, that the Legislation is in substance one on a matter assigned to the Legislature enacting that statute, then that Act as a whole must be held to be valid notwithstanding any incidental trenching upon matters beyond its competence i.e., on a matter included in the List belonging to the other legislature. To say differently, incidental encroachment is not altogether forbidden as ruled in popularly known as TADA Judgment i.e. *Kartar Singh v. State of Punjab, JT 1994 (2) SC 423.*

The next facet of the second part of the topic for deliberation relates to the process of legislative drafting. The drafting of a Bill is a highly complicated exercise during which the draftsman has to bend the tool of the language to convey the intention of the legislature in a precise and accurate form. In short, the essence of drafting is to communicate laws as accurately as possible to the people so that the law made is not broken but implicitly obeyed because as Lord Chancellor Shankey once remarked that "Amidst the cross currents and shifting sand of public life, the law is like a great ark upon which a man may set his foot and be safe."

It is well accepted that in the countries following the Anglo- Saxon model of legislative drafting there are five stages in the process of drafting. When does the process start? It starts with the receipt of instructions from the Government agency or department whereby a policy is required to be put in the framework of the Bill. An idea or concept concerning certain social aspects of society becomes a policy and it has to be transformed into a legal shape by the drafting process. Thereafter the legislature takes it up, hammers it and pushes it into the State Books as law. When I say "hammers and pushes it into law", it implies that what is introduced in the first stage of drafting is not necessarily prese.ved when the final draft is approved by the Legislature and becomes the Statutory law. For these reasons, whenever question of interpretation of a law arises before Courts, the intention of the legislature is looked into and for this purpose, the original draft, notes on clauses and further amendments and materials are of great help.

Once a legislative policy and instructions are received the drafting work commences. It is needless to say that the primary equipment of a draftsman is a thorough command of the language in which drafting is done and a deep knowledge of all the case laws on the subject. A basic foundation qualification for a draftsman is his familiarity with the basic jurisprudential principles so that errors transgressing the parameters of the jurisprudential limits are not committed. Further, the draftsmen must have with them as many statutes of their countries as is possible and keep them up to date. Law reports of those countries will also be of a great help.

The draftsman's first duty is to understand fully the instructions, the background, implications, design and the purpose of the legislative scheme and thereafter he should proceed to draft. If the background proceeds from the report of a committee or commission, not only the report of the committee or commission but the proceedings before it should also be made available to the draftsman.

The important aspect which is a special responsibility to the draftsman is to avoid any transgression of legislative competence and to see that the legislation proposals drafted by him on the basis of the proposals given to him are constitutionally valid. This is a very great responsibility because it involves two functions namely :

1. A thorough examination of the field of legislation laid down by the Constitution within which the intended legislative proposals must fit in. In a Federal Constitution certain subjects overlap between the centre and the units and the draftsman

should avoid any pitfall against his legislative proposals being construed as overstepping the borders of the field of competence.

2. The second check which the draftsman has to apply, is to see that the legislation does not violate any of the provisions of Part III of the Constitution and/or does not derogate from the provisions of Part IV of the Constitution.

Even after these two tests he has one more basic test to apply, namely, the legislation does not in any manner affect the basic structure of the Constitution such as Democratic form of Government, Federalism, Secularism equality principle, independence of judiciary and so on. The apex Court has given only illustrative case examples of the basic features and therefore great care and circumspection are needed to see that nothing that is said in the Bill offends the basic structure. The next area of concern for the draftsman is of potential danger to challenge on grounds of ignoring rights. Most of the legislations affect personal rights, private property rights, religious freedom, freedom of expression, freedom of association, discrimination and so on. Therefore on everyone of these topics, there are guidelines in judicial decisions and the draftsman must be conversant with them.

As to the language he has to have a clear idea as what is mandatory and what is directory under the scheme of the Constitution. The words you choose to use as mandatory may be different from the familiar command and that is why we have a rule of interpretation for a mandatory "may" and directory "shall". Likewise, the draftsman should also be careful in giving retrospective effect to any provision even if instructed to do it so. Another factor which the draftsman must keep in mind is the interaction of this legislation with international law conventions and treaties, for example, foreign nationals working as diplomats have certain conventional privileges. If the legislative principles deprive them that would go against the principles of Public International Law.

The practicability of the Legislation is another factor. A draftsman must have clearly before him the practical aspects of the legislation proposed and he should be satisfied to the best of his understanding that his scheme will work.

After gaining and understanding all the proposals and analysis as aforesaid the third stage of designing the legislation comes, that is the structure.

The preliminary structure of design to be taken into account are:

(1) The conventional legislative practice being adopted are the long title, short title commencement, application, definition, charging section, machinery provisions, repeal and saving provisions. Normally the definition section comes immediately at the beginning of the legislation itself and the draftsman must be careful to see that what he limits by definition does not hamper the achievement of the purpose of the legislation. That is why the usual definition clause opens with the words unless the context otherwise means. Sometimes the definitions are scattered under several sections to limit application of it to the context of the particular section. Unless it is totally unavoidable such scattered definitions bring in difficulty in interpretation and a draftsman should avoid this as much as possible.

(2) When the draftsman completes the legislative drafting he should give a short precis setting out the statement of objects and reasons and giving thereafter notes for each clause.

(3) If the statutory provisions of the Act enacted either by the Parliament or by the State Legislature are so complicated as to be obscure and unintelligible and cannot be understood even by a clever expert, they not only bring the law into contempt but also do disservice to our democracy and weaken the rights of the individuals and ease a way for wrong doers and place honest and humble people at the mercy of the state.

With reference to the laws full of ambiguities and infirmities many learned Judges have never failed to register their contemptuous remark on such legislations. Lord Reid while referring to certain statutes, said that he found it impossible "to discover or even surmise what the draftsman can have in mind". "Laxity or ambiguity of expression" was the verdict of Statute Law Commissioners in 1835. Vice-Chancellor Kindersley said way back in 1854 "there is at least one passage in it which is absolute nonsense". "Verbose and tautologous", was the comment of the Master of the Rolls in 1834. Lord Justice Mckinnon described a British statute in 1944 as "That chaos of verbal darkness", "Absurd", said Mr. Justice Harman about another law in 1958

Therefore if the law is so obscure and suffering from grave infirmities; it is almost like a ship without a ballast. Though law is found on ethics and moral principles, a moral obligation cannot be converted into a legal obligation and the Courts are seldom concerned with the morality which is the concern of the law makers.

Of course law and morality are married spouse but they are, on many times with judicial separation though not altogether with divorce. Only if the law is enacted in a very plain and unambiguous way, the justice delivery system would be very effective and resilient to meet the contemporary needs of the society. As the law has to reflect our social values and to advance our social, economic and political changes and to bring about an orderly society, we should enact the law keeping in view our long standing traditional custom, heritage and social values as born, grown and developed on the sacred banks of Ganga and Kaveri but not borrowing the laws enacted on the banks of the navigated Missouri and Mississippi or on the banks of the dirty water of the Thames.

To sum up :

Legislative drafting is both a science and an art. Therefore it necessarily follows that every good draftsman is really a skilled creative artist.

During the synthetic process of drafting, the draftsman should collect together the materials that might be helpful to him in preparing the draft which may include the legislation that may already exist on the same subject, the analogous legislation existing in other countries or other parts of the country on the same subject and the opinion expressed by Judges of the highest Court of the land in their judicial decisions especially relating to the rule of interpretation, constitutional values, interpretation of words and expressions and the need for improvement of legislations and also add and mix up several virtues such as clarity precision certainty conciseness and effectiveness which are desirable in legal composition in drafting a legislation. The final product that emerges in the process of such synthesis is a good draft of statute law intended to be enacted in tune with the basic structure of the Constitution which is the fundamental perennial source for making laws.

I may be permitted to say, in this connection, that there is no such thing such as a perfect legislation.

As the topic under discussion is significantly confined only to the consideration of the basic structure while drafting a Statute, it is absolutely essential

that the draftsman must keep in mind the constitutional values and its mandates and dictates.

All the constitutional functionaries - be they legislators, members of the executive or the judiciary-take oath of allegiance to the Constitution and derive their authority and jurisdiction from its provisions. Therefore, all the organs and bodies owe their existence to the Constitution which is supreme and none can claim superiority over the other, and each of them has to function within the four corners of the constitutional provisions.

The framers of the Constitution have given predominant importance to the Fundamental Rights particularly to personal life and liberty of a person as enshrined under Articles 20 and 21 of our Constitution. In fact under Article 359, it is stated that even during the operation of Proclamation of Emergency the enforcement of Fundamental Rights envisaged under Articles 20 and 21 cannot be suspended. Therefore, no State can violate the right to life and liberty constitutionally guaranteed under Articles 20 and 21 and every government is disarmed of powers which may impinge upon those invaluable and inalienable fundamental rights.

If the legislations brought about are found beyond the basic structure of the Constitution or the constitutional limits or to be repugnant to the constitutional provisions, those laws have to be declared as unconstitutional and void. By exercise of judicial powers, the Courts uphold the constitutional values and legislations enacted in accordance with the basic structure of the Constitution. In other words, the result is that judicial review which is discribed as "a terrestrial forum for the peaceful resolution of conflicts" always ends in the upholding of the constitutional values and the legislations made whether by the Centre or the State. In short, the judicial review is the 'means' used for the 'ends' desired.

The Courts while scrutinizing the constitutional validity of a law have to be careful enough to see that they do not deface and deform the basic structure of the Constitution. True, many States and people in group or in individual have valiantly fought on many occasions in their attempt to deface the constitutional values; but all those have honourably bled and lost their battle. Therefore, the draftsman must always keep in mind the supremacy of the basic structure of the Constitution which is expected to endure for acorn to come and which basic features of the Constitution reflects the hopes and aspirations of the people of India. If while drafting a legislation the draftsman infringes upon the basic structure of the Constitution it would be tantamount to say that nothing inflicts a deeper wound on our Constitution than in drafting

or enacting a law running berserk regardless of the basic structure of our Constitution.

Therefore, in order to have a rapid societal transformation, profusion of progressive changes and thereby securing an egalitarian society in terms of the basic structure of the Constitution, let the legislatures have regard to the basic structure of the Constitution.

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Four things belongs to a judge :

to hear courteously,
to answer wisely,
to consider soberly and
to decide impartially.

Socrates

LEGISLATIVE DRAFTING*

Justice S.S. Sodhi
Chief Justice
Allahabad High Court

Hon'ble Mr. Justice Umesh Chandra Srivastava, Chairman of this Institute of Judicial Training and Research, my esteemed colleagues, Director of the Institute, Judges and Presiding Officers of the subordinate courts, members of the Bar, trainees and friends.

The cradle of Indian civilization, is how this part of the country has been described. It has undoubtedly played a pivotal role in the development and enrichment of our civilization. It is fitting, therefore, that the State of Uttar Pradesh not only has such an Institute for judicial officers but also opens its doors to those of other States too. We have with us here today trainees from 9 different States to attend this course in legislative drafting. In the years to come, I have no doubt that this Institute will be recognized as one of the premier Judicial Training and Research Institutes in the country, particularly when it moves to its new campus, which is now under construction.

Ever since the dawn of civilization and when society resolved to be governed by the rule of law, there came on to the scene, that now indispensible character, nay institution–the draftsman. Over the years as society grew more complex, particularly with advance in education, science and technology, as also in trade and industry, and of course, with the phenomenal growth of population, rising at a galloping rate, it became imperative for the draftsman to be a highly skilled technician, well - versed in the language of the people as also laws of the land.

As is well known, there are broadly speaking three sources of law, laws enacted by the legislature, customary or personal laws and there is then what

* The speech delivered at the inaugural ceremony of the National level training on Legislative Drafting and Parliamentary Affairs on December 5, 1994, at the Judicial Training & Research Institute, U.P., Lucknow.

is said to be, Judge made law. Enactments by the legislature far outstrip the two other categories of law. During the 90 years of their rule in India, the British enacted about 500 laws, but in about half of this period, since India became independent, more than 5,000 pieces of legislation have been enacted. In the field of management of labour relations in industry, we have more than 50 Central laws, besides over 100 States laws. Not only this, but as pointed out by Justice H.R. Khanna, a former Judge of the Supreme Court, during the British regime, it was seen to it, that only such laws were enacted as could be enforced and the infraction of which they could tackle in judicial proceedings, with the available administrative and judicial infrastructure. Now, unfortunately, we have a large number of laws which remain unenforced, while in the enforcement of some of the laws, there is often resort to a practice of 'pick and choose', in initiating proceedings against those guilty of thier violation - a feature, unfortunately not uncommon.

In the legal profession today we encounter legislative enactments at practically every step. This is true whether our role be that of Judges, lawyers or teachers. With statute law occupying such an important and wide field, a course in 'interpretation of statutes' must figure as an integral part of the curriculum of all Law Schools.

There is influx of benevolent and welfare legislation. The delegated legislation viz. Rules, Bye-laws, Regulations, Statutory Notifications have tremendously increased. With such mass legislation continually on the anvil, as observed by the Law Commission of India in its 14th Report, the problem is to devise measures which will keep the stream of law clear. The increased legislative activity has imposed a heavy burden upon those who have been assigned the task of drafting lagislation. The importance of role of draftsman, therefore, cannot be overemphasised. As has been remarked, the draftsman is to the legislatures and the Governments, what the pen is to the poet and the brush to the artist. As has also been suggested by the Law Commission, sufficient time should be given to the draftsmen and the administrative officials to ponder upon all implications of the proposed legislation, and to anticipate circumstances and situations, for which provisions may be made in the legislation. Our draftsmen should also be well-trained and adept in the drafting, and possess wide knowledge and a great mastery of the language, which of course is gained by experience and continuous process of learning.

The draftsmen are required to draft the legislation on occasions at a very short notice. The need for training of draftsmen, therefore, is imperative.

To meet emergent situations it is all the more necessary that our draftsmen should be adept in drafting. The Acts after being passed by Parliament/legislature are scanned and interpreted, in the light of the provisions of the Constitution, particularly the fundamental rights, and directive principles of State policy. The draftsmen are, therefore, expected to possess sound knowledge of the provisions of the Constitution of India, particularly with aspects like the limits of legislative jurisdiction as embedded in Article 246 and Seventh Schedule of the Constitution, the extent of the executive power of the Union and the States, as also the limits of delegation of legislative power, legislative over-ruling of judicial decisions, the concept of promissory estoppel, retrospective/prospective application of enactments, the concept of repugnancy, burden of proof in socio-economic offences, basic principles of interpretation of statutes and the principles of natural justice, besides, of course, with the other provisions of the Constitution like Articles 309, 310 and 311. Some basic knowledge of parliamentary affairs is also essential. It is heartening to note that the curriculum of the present course amply covers all these subjects.

In the enactment of laws by the legislature, the language used is the aspect of material significance. Laws, as we know, are in theory at least enacted for the common men, or at any rate, for an average intelligent person, but as we know, many of the laws enacted, are couched in a language which renders their meaning incomprehensible, except to those especially trained and knowledgeable in that field of law. The golden rule, which prescribes the use of plain simple language in the enactment of statutory laws, is often lost sight of by the draftsmen. Contrast this with the Indian Penal Code, which was drafted by Macaulay over 130 years ago, in 1860. It remains even today a model of exquisite draftsmanship in simple understandable language. Left to themselves, the draftsmen would undoubtedly prefer the use of plain simple language, but to expect that they can always do so, in the context of the complexities of the modern world is to take a rather simplistic view of their role.

When a draftsman is called upon to draft legislation, it is to put into effect the intention of the legislature, to achieve a particular result or object. There has thus to be certainty and clarity in the language used, so that what is enacted, carries out and fulfills the intention of the legislature, leaving no scope for it to be understood and applied in any different manner. Yet despite all the care and caution envisaged, unforseen circumstances do at times arise, to test the validity and wisdom of the enacted law. No wonder, instances are not lacking, where the draftsmen, no doubt, conceived certainty but in the context to the particular situation as had, arisen what was brought forth was

obscurity, some times even absurdity. A draftsman, therefore, needs to be able to visualise the situations and circumstances in which the law enacted is designed to be applied and to ensure that in its application it is in accord with the intention of the legislature. It must be remembered that the role of the Judge, while interpreting statutes, is a very limited one. As has been said "a Judge must not alter the material of which it is woven but he can and should only iron out the creases". There are, however, occasions when Judges have been constrained to read words in an enactment so as to do what the legislature would have done, had it had in mind that particular situation.

With such being the importance of the role of the draftsmen, it is obvious that only the most competent can fulfil it. Legislation in India today covers a vast variety of subjects and it consists not only of drafting statute law but also orders, rules, regulations and notifications, flowing from it.

P.M. Bakshi, the Director of the Indian Law Institute, lists out the three major qualities of a good draftsman, first familiarity with the law in general, second, mastery of the language, and finally, familiarity with the Constitution and the statute books of the country. This is not the appropriate time or occasion, to elaborate on these aspects, plenty will, no doubt, be said about them, in the training to be parted to the trainees. The one aspect, which does impel comment here, is with regard to language. Most of our statutory enactments are in the English language. Both the Centre and the States have, no doubt, taken to translation of statutory enactments, either in the official language Hindi or in the regional languages, or both. If law is enacted for the common man, it must be ensured that it is capable of being understood by him. At the same time, it is imperative, in the interest of national integration, that laws and their application are also known and understood not only in the State, where they are enacted, but in the rest of the country too. To achieve these twin objects, let it be accepted as an invariable practice that whenever a law is enacted by the legislature, the draftsman, at the same time explains the provisions of it in the regional language of the area, in the form of a booklet to be published by Government and made available to the people at a reasonable price.

I have no doubt that the trainees, who are here, will find this course in legislative drafting a rewarding and useful experience and I compliment the Chairman and the Director and the other members of the faculty for having organised it. This is indeed a valuable service to the legal profession.

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NOTES ON CASES

Justice K.N. Goyal

Interim Orders : Educational Institutions

There is a general feeling that the courts had until recently been rather too liberal in granting interim orders. Of late, the Supreme Court has been showing considerable strictness in this regard. One sphere in which the indiscriminate passing of interim orders has been disapproved is that of education. In *St. John's Teacher Training Institute v. State of Tamil Nadu*, AIR 1994 SC 43, their Lordships held that "In view of the series of judgments of this Court, the Courts should not issue fiat to allow the students of unrecognised institutions to appear at the different examinations pending the disposal of the writ applications. Such interim orders affect the careers of several students and cause unnecessary embarrassment and harassment to the authorities, who have to comply with such directions of the Court. It is a matter of common knowledge that as a part of strategy, such writ applications for directions to recognise the institutions in question and in the meantime to allow the students to appear at the examinations are filed only when the dates for examinations are notified. There is no occasion for the Courts to be liberal or generous, while passing interim orders, when the main writ applications have been filed only when the dates for the examination have been announced. In this process, students without knowing the design of the organisers of such institutions, become victim of their manipulations."

Reliance was placed on an earlier decision in *A.P. Christians Medical Educational Society v. Government of Andhra Pradesh* (AIR 1986 SC 1490 at pp. 1496-97) in which permission was sought for the students to appear at the University examination although the University had not granted affiliation to the institution. The request was turned down with the remark:

"We cannot by our fiat direct the University to disobey the statute to which it owes its existence and the regulations made by the University itself.

We cannot imagine anything more destructive of the rule of law than a direction by the Court to disobey the laws."

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Discriminatory retrospectivity : Service Rules

Service rules under the proviso to Article 309 of the Constitution can, no doubt, be retrospective. But where retrospectivity would result in discrimination against existing members of his service, the same would be violative of Articles 14 and 16 of the Constitution. A telling instance of such discrimination appears in *K. Narayan v. State of Karnataka* AIR 1994 SC 55. In this case, relating to P.W.D. engineers, an amendment in the Rules was made in 1985 with effect from 1976. The effect of this amendment was that a number of Junior Engineers were deemed to have become Assistant Engineers with retrospective effect as and when they acquired a degree qualification and made senior to many of the existing Assistant Engineers. This was held to be impermissible. Their Lordships observed: "The Government may appoint all the Junior Engineers en bloc after framing of the rule and place them below all those who were working as Assistant Engineers on that date but they cannot be so appointed as to get precedence over those who are working from before. It would result in artificially making unequals as equals. Any person entering the service can justly feel secure of equality in continuance, promotion etc. Any executive action violating it cannot be upheld. Seniority is an incident of service which cannot be eroded or curtailed by a rule which operates discriminately."

Their Lordships further explained:

"Even in *B.S. Yadav v. State of Haryana*, AIR 1981 SC 561, where the power to frame rules retrospectively was upheld, it was observed (para 76):

'Since the Governor exercises a legislative power under the proviso to Article 309 of the Constitution, it is open to him to give retrospective operation to the rules made under that provision. But the date from which the rules are made to operate must be shown to bear, either from the face of the rules or by extrinsic evidence, reasonable nexus with the provisions contained in the rules, especially when the retrospective effect extends over a long period as in this case.'

As seen earlier there is no nexus between framing a rule permitting appointment by transfer and making it retrospective with effect from 1976.

Appointing a person to a higher post in a different cadre in which he has never worked is violative of constitutional guarantee of those who are working in the cadre."

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Interim Orders are not Rulings.

Very often the lower courts are asked by lawyers to pass an interim order in their favour on the ground that in a supposedly similar case the High Court or the Supreme Court had granted interim relief in the terms they are seeking. If the lower court feels that such an interim order is not called for in the light of settled law, particularly in the light of direct rulings of the same superior court, there should be no hesitation in rejecting such a prayer. The Patna High Court clarified this in *Mata Gujri Memorial Medical College v. State of Bihar*, AIR 1994 Patna 22, observing that "So far as the above order passed by the Supreme Court is concerned, it is an interim order passed in relation to a particular case and cannot be taken to be a law within the meaning of Article 141 of the Constitution. What binds all the courts and authorities in the territory of India is the law declared by the Supreme Court in the catena of its judgments including those in the cases referred to above."

In *Cantt. Board v. Lachhmandas*, AIR 1962 Punjab 490 it was similarly clarified that in matters of discretion other decided cases cannot constitute binding precedents. They can only serve as helpful illustrations.

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More on Interim Orders

While on the subject of interim orders the other aspects highlighted in some recent judgments are as follows:-

(a) No bar of res judicata applies to the power of court to modify an interim order: *State v. R.L. Patel*, AIR 1992 Guj. 42

(b) Interim mandamus should not normally be granted which will have the effect of finally disposing of the case: *Gujarat Water Resources Dev. Corpn. v. Pravin Kumar*, AIR 1993 SC 1611

(c) A larger relief includes a smaller one. Hence interim order is permissible for part: *Ramsingh v. Special Judge*, AIR 1993 All 236 (para 6)

(d) Party suppressing or misrepresenting material fact may be denied

any interim relief because of its conduct even though its case be otherwise good on merits: *Udaichand v. Shankarlal*, AIR 1978 SC 265; *Subhash Mohanty v. Orissa*, AIR 1992 Or 44; *Seemax Construction Co. v. S.B.I.*, AIR 1992 Delhi 197; *Charanjit Lal v. Financial Commer.*, AIR 1978 P & H 326 (FB)

(e) Interim relief cannot exceed the prayer in the main petition/suit: *Quaid-e-Millat T.T.Institute v. Tamil Nadu*, AIR 1993 Mad 253.

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Casteism also Communal

The Supreme Court, in its judgment upholding the B.J.P. Governments' dismissal under Article 356 of the Constitution *(S.R. Bommai v. Union of India*, AIR 1994 SC 1918), has held secularism to be a basic feature of the Constitution. The aspect of secularism that has been widely noticed is, however, that of State neutrality and impartiality as between different religious communities.

What has, however, been missed is that a community may be based on religion or on caste or on race, and partiality or hostility on the basis of any of these grounds is equally violative of the concept of secularism. This has been highlighted in the judgment of hon'ble Mr Justice A.M. Ahamadi (now Chief Justice of India) in which his Lordship has placed reliance on the resolution of the Constituent Assembly passed on April 3, 1948 on the danger of communalism. The resolution which has been quoted in the judgment was as follows:

"Whereas it is essential for the proper functioning of democracy and growth of national unity and solidarity that communalism should be eliminated from Indian life, this Assembly is of the opinion that no communal organisation which by its constitution or by exercise of discretionary power vested in any of its officers and organs admits to, or excludes from, its membership persons on grounds of religion, race and caste, or any of them should be permitted to engage in any activities other than those essential for the bona fide religious, cultural, social and educational needs of the community, and that all steps, legislative and administrative, necessary to prevent such activities should be taken."

One of the grounds relied on by the Supreme Court for holding secularism to be a basic feature of the Constitution was that it is mentioned in the Preamble to the Constitution. That was, however, not a very strong

ground because secularism came to be introduced in the preamble only through the 42nd Amendment of 1976. By that amendment, even socialism had been added in the preamble. But everyone knows that socialism has many hues. One pattern of socialism was that of Soviet Union under Stalin, and the other pattern was of the Labour Party of England. The Labour Party itself has travelled far to the right from the times of Attlee and Bevan. Even in India, almost every political party swears by socialism. Some years back nationalisation of industries and banks, insurance companies, etc. was considered to be sine qua non of socialism. Today everyone (not only the Central Government but even those State Governments which are run by "socialist" or "Communist" parties) is for privatisation. This is just the opposite of nationalisation. Yet nobody claims to have abandoned socialism as his creed.

That is why their Lordships were keen to emphasize that they were treating secularism as a basic feature not merely because of its inclusion in the Preamble in 1976, but because it was very much embedded in our constitutional philosophy from the very beginning. For this, reliance was placed by the learned judges on various articles of the Constitution, particularly Article 15 which prohibited discrimination on the *grounds of religion, race or caste*. Their Lordships also relied on the circumstance that any attempt to promote feelings of enmity or hatred between different classes of citizens on grounds of *religion, race, caste, community or language* amounted to a corrupt practice under the Representation of the People Act, 1951.

It thus appears that promotion of casteism would equally amount to communalism which is the antithesis of secularism. Thus whether it is religious communalism or caste communalism or racial communalism or linguistic communalism all are equally antithetic to secularism.

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Proof of document not proof of correctness of its contents

Section 81 Evidence Act lays down that the Court shall presume the genuineness of every document purporting to be any official gazette or to be a newspaper or journal.

It does not imply that newspapers are equated with gazettes.

In *Laxmi Raj Shetty v. Tamil Nadu*, AIR 1988 SC 1274 it was clarified as follows:

"We cannot take judicial notice of the facts stated in a news item being

in the nature of hearsay secondary evidence, unless proved by evidence aliunde. A report in a newspaper is only hearsay evidence. A newspaper is not one of the documents referred to in Section 78(2) of the Evidence Act, 1872 by which an allegation of fact can be proved. The presumption of genuineness attached under Section 81 of the Evidence Act to a newspaper report cannot be treated as proof of the facts reported therein.

It is now well settled that a statement of fact contained in a newspaper is merely hearsay and, therefore, inadmissible in evidence in the absence of the maker of the statement appearing in Court and deposing to have perceived the fact reported"

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Public Interest Litigation : Abuse of process

So many busybodies try to hit the headlines in the press by filing frivolous petitions in the name of public interest. One Charan Lal Sahu was quite a master of such tactics. In one case ultimately the Supreme Court felt so exasperated by the intemperate language and mudslinging indulged in by him that it was constrained to order as follows:

"We are of the view that the petition is an act against public interest. The petitioner has certainly overstepped the limit of self-restraint, so much necessary in a public interest litigation. We direct the Registry not to entertain any application by way of public interest litigation by the petitioner in future."

* * * * *

Contempt of Court : A Poser

Mr Hardwari Lal, was once expelled by the Haryana Legislative Assembly,-just as Mrs Gandhi was later expelled by the Lok Sabha in 1977. Mr Hardwari Lal successfully challenged his expulsion before the High Court. It was held that the privileges of the House did not include the power to deprive a member of his seat. (Mrs Gandhi however went to the people instead of to Court and got re-elected). He is an ex-Minister and ex-Vice Chancellor.

Mr Hardwari Lal has in an article (The Hindustan Times, Dec. 8, 1994) entitled "An Ailing Judiciary" criticised the tendency of presiding officers of Houses of Legislatures in refusing to recognise the jurisdiction of courts over their orders. He deplored the fact that the Executive had also started to disregard clear orders of Courts, and refers in this connection to the sentence

passed by the Punjab High Court on the Chief Secretary for contempt of Court. He adds however:

"But when all is said and done, it is the judiciary which has to earn the respect of people by its performance and not by taking help of the contempt law evolved to enable the judiciary to preserve its dignity. One cannot help repeating what Lord Denning, a great legal luminary of this century, once said : 'Let me say at once that we will never use our jurisdiction as a means to uphold our own dignity. That must rest on surer foundations.' While deciding the celebrated *Sheela Barse's case*, a few years ago, our own Apex Court observed: 'It is the privileged right of the Indian citizen to believe what he considers to be true and to speak out his mind, though not perhaps with the best of taste; and speak perhaps with greater courage than care for exactitude. The judiciary is not exempt from such criticism'."

While recognising that there are judges who have done the country proud he regrets that there are also some who are a liability to the judiciary as an institution. He concludes:

"In any case, the judiciary must regain its health by performing better. People's respect cannot be exacted; it has to be earned by performance. Exposure of undesirable judges would help the judiciary in the process of purification. 'Sunlight is the best disinfectant', according to Justice M.N. Venkatachaliah. There is thus a case for the amendment of the Contempt of Courts Act and for the Apex Court for reviewing its judgments which say that mere imputation of dishonesty to a judge is a gross Contempt of Court. The defence of justification must protect the critics of the ailing judiciary."

Almost similar views were earlier expressed by Justice Krishna Iyer in *In re S. Mulgaonkar*, AIR 1978 SC 727.

Mr. Nani A. Palkhivala has however expressed the opposite view :

"It would be foolish as well as dangerous to relax the rigour of the Contempt of Courts Act and permit truth to be pleaded as a defence when an allegation of corruption is made against a judge. Character assassination is the national sport of India, and some dissatisfied litigants and lawyers will have no hesitation in making allegations which would scandalize the court and then inviting the judge to face a public inquiry" (We, The Nation, p. 222).

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OF JUDGES AND JUDGESHIP

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"For the law of writ and the liberty these are the only men"

- *'Hamlet' Scene II.*

"There is no guarantee of Justice except the personality of the Judge".

- *Ehrlick*

"He is the living oracle of the law."

- *Blackstone*

Tears have been often shed over the melancholy fate of Judge, commiserating his woeful plight, his perpetual involvement in the thickets of argument and counter-argument, his restlessness to reconcile diametrically opposite contentions, his anxiety to maintain an image of infallibility in laying down the law, his comparative seclusion from the throbbing, bustling life around him, his relegation to a monotonous existence comparable to that of Hindu widows. There is, indeed, so much tension which a Judge must live down to resist the ingenuity of casuists and linguists, the superfine distinctions of able counsel, their vehemence and zeal which spring from a large pecuniary interest, the appeal of the so-called aggrieved parties against the bad faith of the legislature in violating the Constitution, which is so easily invoked. A Judge is expected not to be beguiled by any of these devices; he must ferret out the truth which lies at the bottom of a deep well. It is a stupendous task for the weak shoulders of any mortal and little wonder if a Judge groans under his micerable lot and moves others to pity. The nature of the judicial process is such as to place a Judge under the impact of warring forces contending for supremacy. He is all the time in t' a throes of painful strain. The opposing view points tugging him in differen, directions are bound to create tension but he must retain his judicial equilibrium. His vision, should be clouded neither by the heat of the controversy nor the seductive eloquence of a lawyer.

Sad indeed is the condition of a Judge who dodders over a point and cannot arrive at a decision. The lawyer is naturally at liberty to present the most biased, partisan and unacceptable argument but having done it, he has unburdened himself. Thereafter it is the exclusive headache of the judge; delivering a correct judgment is his unavoidable responsibility. He feels miserable between a heap of books and precedents staring him on one side and equally formidable array of law reports and authorities frowning upon him on the other side. He is often like a Buridan's ass which starved itself to death as it was unable to make up its mind from which side to begin first.

More homilies have been administered to judges than to any other class or profession. They have been the target of grave warnings and serious admonitions. "Judges ought to remember" said the wise Bacon, "that their office is jus dicere, and not "jus dare"- to interpret law, and not to make law, or give law". "Judges ought to be more learned than plausible, and more advised than confident. Above all things, integrity is their portion and proper virtue. Reticence and loquacity have both been regarded as shortcomings for a judge. "An over-speaking judge", to quote the famous Baconian epigram, "is no well tuned cymbal". On the other hand, a great Indian lawyer, Dr. K.K. Katju denounced a judge, who did not speak or betray his mind but sat mute and inscrutable like a sphinx.

Judges have been counselled patience and gravity of bearing. It is true that it behoves a judge to be sober. 'Flippancy ill becomes his high office. He should not be lacking in that kind of solemnity' which Dr. Johnson insisted, 'there must be in the members of a professional man'. His very dress is designed to give him an air of authority and solemnity. It was an obitor dictum of Lord Chief Justice Hewart that 'a judge should try to look as wise as he is paid to look'- a variation upon his still more celebrated theme that 'not only should justice be done, but that it should appear to be done'.

Moral precepts have been laid down for the character and behaviour of judges. 'Patience and prudence will be required, a calm content, and a certain staid and settled manner of living'. A Judge is expected to possess infinite patience and unruffled temper. It is reported about Lord Denning that a lady against whom he had delivered a verdict actually hurled a book at his face in the court and yet the noble Lord remained indifferent. Impatient and temperamental judges have been reserved for the scorn and ridicule of posterity. One such instance was Judge Jeffreys of England who has become a legendary

figure, execrated by his countrymen as a supremely unjust Judge. Ever since the bloody assizes of August 1685 Jeffreys has been held up as the most brutal and truculent judge who ever sat on the English Bench. An irate judge who asked in fury F.F. Smith who was arguing a case before him, "what do you think I am here for" was told with becoming indignation by the young lawyer, "It is not for me to fathom the inscrutable workings of Providence."

The place of justice is a hallowed place and ought to be preserved without scandal and corruption. "Judges must beware of hard constructions and strained inferences; for there is no worse torture than the torture of laws." Again, Bacon perhaps anticipating a possible confrontation between the courts and the Governments several centuries later, gave his prudent advice of expediency to judges. He said, "Let them be lions but yet lions under the throne: being circumspect that they do not choose or oppose any points of sovereignty."

Nevertheless I feel that the life of a Judge has its own rewards and a seasoned Judge must eventually come to enjoy his vocation. To me it appears that the human mind cannot be occupied in a loftier or nobler pursuit than the duty of discharging Justice. It is really a divine function to deliver judgments, to pronounce what is right and what is wrong, what is just and what is unjust, what is fair and equitable and what is foul and monstrous. Said Bacon, "Judges should imitate God, in whose seat they sit, who represseth the presumptuous, and giveth grace to the modest".

"A Judge ought to prepare his way to a just sentence, as God useth to prepare his way by raising valleys and taking down hills; so when there appeareth on either side a high land, violent persecution, cunning advantages taken, combination, power, great counsel, then is the virtue of a Judge seen to make inequality equal; that he may plant his judgment as upon even ground". The high conception of the duties and functions of a Judge was eloquantly stated by Sir T. Muthusami Ayyar in his convocation address to the Madras University in 1882 in these words: "The Court of Justice is a sacred temple, the Judges presiding over it are, though men, the humble instruments in the interests of truth, and those who enter this holy edifice with unholy thought, or desecrate it with unworthy actions, are traiters to their God and to their country. Those of you who may rise to the Bench should recollect that the power you may be called on to exercise in the name of your sovereign is according to one of your ancestors a Power Divine".

A Judge has limited emoluments unlike a princely income at the bar.

But he has more security, greater peace of mind, considerable status and prestige, more leisure which he can profitably utilise in indulging in his artistic, literary or spiritual predilections. A high judicial office can be hardly surpassed in sheer dignity and splendour. There are few more impressive sights than a High Court Judge motoring to work with a turbanned functionary sporting his scarlet sash of office, sitting solemnly beside the driver. A prosperous lawyer is an extremely busy person. He has hardly any domestic life; he has no peace of mind. He becomes a money-minting machine. In England the tradition is that a member of the bar, however fabulous his income, never declines judgeship when it is offered to him. I wish it were possible to maintain a similar tradition in India in spite of circumstances which threaten to become increasingly adverse. I have been always greatly impressed by the advice which the Chief Justice of the Bombay High Court, Sir John Beaumont gave to Sri M.C. Chagla while offering him a seat on the Bench. He said:

"Chagla, you are doing very well at the Bar, and I am sure, you will do much better. There are always glittering prizes to look forward to at the Bar. But a time comes when one feels that it is better to decide cases, lay down the law, help the development of the law, rather than spend all your time arguing other people's cases. You will get a salary of Rs. 4000/-, which, in my view is reasonable. You will have plenty of leisure. You will have security. You will have status. Considering everything, I would press you to accept my offer".

Judgeship demands a particular outlook on life, a special kind of temperament. There are some persons who are predominantly money-minded, to whom accumulation of wealth per se affords satisfaction. There are others who regard money merely as means to an end and are contented with only a modicum of wealth which would assure them a decent and respectable standard of living. Persons who share the latter outlook alone are temperamentally fit for judgeship, those of the former variety will feel miserable in that position.

What is required for a Judge is not so much knowledge and erudition as sound commonsense, a grasp of the fundamentals, a lucidity of thought and expression. In the Allahabad High Court we had a very sharp and discerning Judge who has retired, namely Mr. W.Broome. He was formerly a member of the Indian Civil Service, became a District Judge, was later appointed a Judge of the High Court. He had no protension to legal scholarship but he was known for his robust commonsense, his devastating logic which enabled

him to see through the most attractive and plausible arguments presented at bar. He had almost an uncanny sense of putting his finger on the weakest point in the case which was being argued before him. The irony and sarcasm which he constantly shot from the Bench, were withering in their effect. Justice Divatia of the Bombay High Court is also said to have been a person of shrewd commonsense and not of great acuteness of mind. He decided cases from a practical, commonsense point of view rather than from a legalistic one.

On the other hand, there are Judges who overwhelm their colleagues and the bar by their vast erudition, penetrating intelligence and sheer ability. Justice Hari Lal Kania of the Bombay High Court, who later rose to be the Chief Justice of India, was one such outstanding Judge. Writing about him in his autobiography "Roses in December" Sri M.C. Chagla says:

"Kania had a most acute mind, sharp as a razor's edge. He was quick in understanding, quick to go to the root of the matter, and very quick in seeing the flaws and defects in the arguments and submissions of counsel. The speed with which he worked was an object lesson. Case after case was decided in his court in minimum time and to the satisfaction of both contending sides. I had practised a great deal in his court, and I had often to face searching questions and meet strong objections. When I became his colleague, I would often tell him that what grey hair I had, came of practising in his court".

The same is also true of the late Justice S.N. Dwivedi of the Allahabad High Court who later became a Judge of the Supreme Court of India, and whose brilliant career was cut short by his premature and untimely death. He was a peripatetic digest of law and could at times in a single phrase or sentence compress a whole world of abtruse legal concepts.

Little speaking is a positive virtue in a Judge. He must, of course, apply his mind to the case and seek the necessary clarifications of his doubt but there is a limit after which he must cease to be vocal. It is wrong of a Judge to expect a counsel to agree with what he is saying. A Judge inevitably lands himself into a predicament when he undertakes not to part with a case until he has convinced the lawyer concerned that his argument is untenable and his case is devoid of merit. In the Allahabad High Court we had a brilliant Judge (since retired as a Judge of the Supreme Court) Sri Vashistha Bhargava, ICS who shared this notion of the onerous duties of a judge. When I was practising at the bar I always felt that appearing in his court was a traumatic

experience. One who happened to address him first, the appellant's or the respondent's counsel, depending upon the vagaries of chance, collapsed under the shattering impact of his torrential observations. The poor counsel not only abandoned all hope of winning his case but also despaired of being spared from his court until completely vanquished. It is reported about another ICS Judge, Justice Bavdekar of the Bombay High Court that "his one weakness was his tendency to indulge in interminable arguments with counsel at the bar". Sri M.C. Chagla has given a vivid pen pertrait of him in his autobiography. He writes :

"He always insisted on trying to convince the lawyer that his own point of view was right- and very often it was. But the lawyer owed a duty to his client and could not therefore be expected to concede that he might be in the wrong. Bavdekar thought it very dishonest of the Bar not to admit the validity of any particular point which he put to them. I often explained to him that he had not practised at the Bar, and therefore did not realise that a lawyer is paid" to argue his client's case and not to agree with the Judge that his client's case is false. I remember Dapthry's reply when asked how long a matter he was appearing in before Bavdekar would take. He said: "I will take half an hour. I do not know how long the Judge will take".

Judges have sometimes to appear brusque but perhaps it cannot be helped. To a junior lawyer whose cause has been dismissed 'in limine', the Judge appears to be a veritable tyrant, a stone image, impervious alike to human feelings and passionate entreaties. It must have been some such embittered, provincial lawyer who invented the jingle:

'Tis the deuce of a drudge
To budge Judge
You may cite every case
Till you're blue in the face.
But you're wasting your breath;
His mind was made up
Before you stood up.
Your points haven't made
The faintest impression
Your temper's quite frayed
With vain intercession,
Juries are dears, Jurices are dears,
But as for their lordships
They drive one to tears.

'I sometimes think' he went on, 'that a Judge has a second head just where his heart should be, and if so "that head is harder than the other"'.

However elevated his office, a Judge is a man for all that. The story is related of Justice Blagdon of the Bombay High Court who kept himself occupied for an inordinately long time with a petty law suit in which the only point involved was the construction of a single clause in a deed. Still he recorded oral evidence for days and days. Later it was discovered that the real cause of the delay was a very charming and beautiful actress who happened to be the principal witness in the case. Once she entered into the witness box Justice Blagden could not easily persuade himself to part company with her with the result that her evidence lasted for days. One might also remember the luscious Greek story about Phryne, the courtesan who was also the model for the Venus of Praxitcles. She was accused, no doubt by professional rivals, for her lewd behaviour and wisely went for her defence to Hyperides, the finest "orator", as advocates were then called in all Athens. In court, Hyperides employed something more eloquent than words, "tearing her upper garment, he disclosed her naked breasts to the Judgés, at which come liness of body and amiable gesture they were so moved and astonished that they acquitted her forthwith".

Judges are nothing if not human. They have their idiosyncracies and their curious mannerisms. It is recorded about Sir John Beaument, Chief Justice of Bombay High Court that he had a habit of stroking his chin whenever he was puzzled, which was rare. He was mostly sure and categorical in his conclusions. He had a peculiar manner of hearing cases. He would take a few short notes when the case was opened. His interest in it lasted only till he had collected enough material to enable him to prepare a judgment. There-after he became almost indifferent. He would very often allow himself what looked like a short nap and let counsel preceed with the argument. India's most eminent Judge of his time, Sir Muthusami Ayyar of the Madras High Court had an interesting habit. It is said that so long as the toe of his left leg was quivering, he was open to persuasion. When the great toe of the Judge's right foot leaned over and seized the toe adjacent to it, the lawyers knew that further argument was futile and the case was lost, the Judge had made up his mind. There are good stories, still in circulation, of Lord Chief Justice Coleridge, who was prone to sleep on the bench in his later years. Some-one asked Lord Justice Mathew, who was sitting with him, how the Lord Chief was. 'He has quite got rid of his insomnia', replied Mathew. As for Mr. Justice

Darling's bons mots they were legion in his lifetime, and have multiplied since his death. One of the best-and not apocryphal-has to do with a pompous and wordy advocate who was speaking at great length on the subject of bags.

'Concerning those bags, my lord' he went on interminably, 'they might have been large bags or small bags. Again, they might have been full bags or empty bags'.

'Or wind-bags' cut in the Judge with a meaning look, and so brought the speech of the collapsible wind-bag to an abrupt conclusion.

It is the glory of Judges that they are deterred by nothing in administering justice. They are not subjected to any pressure or interference by the executive. They decide cases according to law and not expediency. They feel that they are under a duty to obey the dictates of reason and conscience. As Justice Marshal said, "A Judge ought to be reasonable only to God and to his own conscience". Judges interpret the laws and the Constitution without fear or favour, without care for popular approbation or disapprobation. Their idea is best summed up in the Verse of Bhartrihari:

निन्दन्तु नीति निपुणा यदि वा स्तुवन्तु
लक्ष्मी : समा विशतु गच्छतु वा यथेष्टम् ।
अद्यैव वा मरणमस्तु शतान्तरे वा,
न्यायात्पथः प्रविचलन्ति पदं न धीराः ।।

'Whether people skilled in policy praise or blame, whether the goddess of Fortune favours or goes her way, whether death befalls today or after hundreds of years-persons of steady mind never swerve from the path of justice'.

This naturally provides a most congenial background to the Judges for leading a life of strict rectitude, righteousness and austerity, without tainting their hands with anything which may visit them with the twinges of conscience. Unlike members of other service they have to be and they become by training and long conduct, like Caesar's wife "above suspicion". That is why Judges by and large have been found to be a religious lot, with a spiritual bent of mind. To take only a few examples it is recorded of Justice Mahadeo Govind Ranade by no less a person than Gopal Krishna Gokhale that Ranade always roused him, without meaning to do so, by singing the 'abhangs' of Tukaram.

"The voice was by no means musical", he remarked, "but the fervour with which he was singing was so great, that I felt thrilled through and through". Another great Judge of the Calcutta High Court viz. Sir Gooroodas Banerji was an intensely spiritual person. His biographer has noted that Justice Banerji's manner of death was no less remarkable than the manner of his lie. He was suffering from agonising pain during his last illness, but he never betrayed it either in his looks or in his movements. Shortly before death he got himself removed to the riverside. As death was approaching, he was without fear or despondence and with his friends and relations who came in large numbers to pay their last respects to him he conversed on religion and philosophy and the life after death. He died a death which may be coveted by saints. At a ripe, old age, in the presence of his sons and daughters, and gazing on the holy waves of the Ganges with the words of the Gita (recited by his sons) ringing in his ears, he shuffled off his mortal coil.

One of the most rewarding aspects of judgeship is the pure, intellectual pleasure of the highest kind which it affords. An incisive Judge takes a rapturous delight in unravelling the tangled skein of law spread before him in numerous cases that await his decision. The late Justice Mahajan used to say that nothing diverted him so much, not even a cinema show or theatrical performance, as a really knotty legal problem. There is hardly any other profession which sharpens the mind as much as law. Arthur Warwich observed, "There be many turnings and winding meanders in the law". "Few men", said Gibbon, "without the spur of necessity have resolution to force their way through the thorns and thickets of that gloomy labyrinth". It is the judge's skill and insight that enable him to thread that labyrinth with success and achievement. It was aptly remarked by Bishop Goadley in one of his famous sermons 'whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law giver to all intents and purposes and not the person who first wrote or spoke of them".

It has become a common-place of criticism to label Judges as denizens of the Ivory tower. In this respect I think they are more 'sinned against than sinning'. It cannot be denied that to some extent every Judge is influenced unconsciously in his decisions by his own predilections, his philosophy of life, his "inarticulate major promise", to use the expressive phrase of Justice Holmes. Justice M.C. Chagla, for instance, was known for his leanings "in favour of the weak, the poor and the vulnerable". Mr. Daphtary, the shrewd lawyer that he was, always joked about it and said:

"If you were arguing an appeal before Chagla and you were appearing for a widow or a minor or a poor man, half the appeal was won".

But mostly Judges are posted with the major events, the main trends and currents of their age. They are not wholly oblivious of "the felt necessities of the time". It cannot be disputed that the judiciary cannot prove to be a useful institution to the society unless Judges have insight into social values and exhibit subtleness and adaptation to changing social moods. The Judge is under a duty, as Cardoze said, "to conform to the expected standards of the community, the 'mores' of the times". "The great trends and currents which engulf the rest of men, do not turn aside in their course and pass the Judges by".

In the High Courts in India some cases are cognizable by single Judges, others by two Judges or more sitting together. Perhaps a Judge's special talent and his personal calibre and mental equipment are best displayed when he is sitting alone. Speaking for myself, I always feel most comfortable when I have to sit alone. That affords the maximum scope for the uninhibited exercise of my native capacities. Sitting in Division Benches or larger Benches is somewhat irksome. It always involves some constraint and the rubbing off of many pointed angularities. One Judge may be extraordinarily quick, another may be inclined to be slow and thorough. Personally I prefer to probe deep into every case and utilise to the full the assistance offered at the Bar, without scuttling the same by my impetuosity or petulence or desire for larger disposal. My approach is best reflected in Sri M.C. Chagla's remark which I entirely endorse:

"Despatch is important, but despatch at the cost of justice is a complete perversion of the judicial process. Also, expedition should not be equated with hustle".

Similarly one Judge may look at the problem from one point of view, another from a radically different angle. One may be a formalist, another a latitudenarian, one may be timorous of change, another dissatisfied with the present. Such marked differences do not easily make for harmony. A classic instance of such embarrassing situation is quoted by Sri M.C. Chagla in his autobiography, "Roses in December". He was sitting with Sir Leonart Stone in a Division Bench and hearing a special appeal from the judgment of Mr. Justice Coyaji. The bench allowed the appeal. The losing side in the case

had come to the same bench for leave to appeal to the Privy Council. Theirs was a judgment of variance and the amount involved far exceeded the statutory amount required for a right of appeal to the Privy Council. There was thus no option but to grant leave. The application was merely a formal one. But Stone turned to Chagla and said, "We must refuse leave. This is a most vexatious application. There is nothing in the appeal and we should not waste the time of the Privy Council". Justice Chagla said to him that the law was clear and however unlikely the success of the applicant might be, the bench had no option but to grant leave. Justice Stone was adamant and when his attention was drawn by the brother Judge to the statutory provision he agreed but with greatest reluctance. He insisted, however, on dictating a judgment drawing the attention of the Privy Council to the possibility that its time might be wasted. In the course of this judgment, the Privy Council was informed by Justice Stone how hopeless the appeal was but that he was granting leave only because he was persuaded by his brother Chagla that in law he was obliged to do so. It is interesting to note that the Privy Council set aside the judgment of the Division Bench of the High Court and restored the judgment of Justice Coyaji.

Some Judges are habituated to dictate judgments at home or in the closstered seclusion of their chambers. They often like to reserve judgments. But I think it is most convenient to dictate judgments in open court as soon as the argument concludes. Firstly, it makes a very good impression on the litigant public and leaves no room for any unworthy speculation. Secondly, at the time the whole case remains fresh in the mind, no point is likely to be missed, and when dictating all the facts and reasonings are automatically marshalled and emerge in a natural and systematic pattern. A reserved judgment, long deferred, becomes a festering sore for the judge. Woe betide the Judge who does not polish off his judgments mostly in court and accumulates for himself large quantity of home work which he is not paid to do.

For them who wield a facile pen and command the resources of language writing judgments is a delectable pastime. I pity the Judge whose sole mental pebulum consists of law journals and law reports. If I were permitted a slight variation in Sir Walter Scott's celebrated dictum, I would say that "a Judge without literature is a machanic, a mere working mason", if he possesses some knowledge of literature he may venture to call himself an architect. An interest in literature broadens the vision and keeps the mind from becoming "cabinned, cribbed and confined" within legalistic ritualism. It also induces a

clear, precise and lucid manner of expression which immensely enhances the merit of the judgment. There have been Judges whose style has added greatly to the effect of their opinions. Justice M.C. Chagla revealed the secret of the charming quality of his judgments when he observed in his autobiography:

"I think I also tried to make my judgments not very dull, or too business-like. I think a well turned phrase, a literary allusion, or a humorous remark goes a long way in relieving the tedium inseparable from any dreary recitation of facts, and a still more dreary reference to authorities which every judgment must entail".

The judgments of Justice Mahmood of the Allahabad High Court were remarkable for their elegance of diction and exquisiteness of phrase. Judgements of many eminent English judges, such as lord Macmillan or Earl of Birkenhead or Lord Denning in the present times, to wit only a few, have been noted for their scintillating and chaste style. In the history of American judiciary the Judgments of Justice Cardozo have been seldom matched for the embellishments of language. He may perhaps yield place only to Justice Holmes, who was supreme both in the clarity of his insight and the sublimity of his style. Professor Frank Furter said, "To consider M. Justice Holmes' opinions is to string pearls". Cardozò, himself a consummate literary artist, paid a fulsome tribute to Holmes. "Law in the hands of Holmes" wrote Justice Cardozo, "has been philosophy, but it has been literature too. If one had ever been sceptical of the transfiguring power of style, let him look to his opinions. They will put scepticism to flight. How compact they are, a sentence where most of us would use a paragraph, a paragraph for a page. What a tang in their pointed phrases, what severity in their placid depths, what a glow and a gleam when they become radiant with heat. One almost writhes in despair at the futility, too "painfully apparent, of limitation or approach".

Eminent judges have been men of majestic intellect and their vast impact on the intellectual stock of the world and the evolution of its idealogical and thought patterns can be estimated only when some scrupulous chronicler cares to gather those little fragments of their fleece which they have left upon the hedges of life, to adopt the picturesque imagery of Justice Holmes. To have the chance to do one's share shaping the laws of one's country is a splendid destiny. What is essential is a living faith in the creative possibilities

of law. We must realise that law is an instrument of just relations between man and man and the results of that instrument depend upon the genius of Judges because they are the masters who wield that sensitive instrument and who alone know how to coax sweet melodies from those strings. Judges are not infallible but the courts follow a kind of natural law of self-correction. Every judgment is certainly honest and perhaps correct also according to the lights of the Judge who renders it. If it be, however, really erroneous, there is no doubt that it will sooner or later be overruled and replaced by a correct pronouncement. Francis Bacon felt excessively alarmed of the irreparable injury which erroneous judgments may cause to posterity. "The unjust Judge" he observed, "is the capital remover of landmarks, when he difineth amiss of land and property. One foul sentence doth more hurt than many foul examples; for these do not corrupt the stream, the other corrupteth the fountain". That, I think, is an immoderately lurid picture of the work and achievement of Judges. More to the point and certainly more balanced was the pregnant summing up by Benjamin N. Cardozo in these words:

"The work of a Judge is in one sense enduring and in another sense ephemeral. What is good in it endures. What is erroneous is pretty sure to perish. The good remains the foundation on which now constructions will be built. The bad will be rejected and cast off in the laboratory of the years. In the endless process of testing and retesting there is a constant rejection of the dross and a constant retention of whatever is pure and sound and fine".

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Be just before you are generous.

Bergen Evans

JUDICIAL REFORMS
A CRYING NECESSITY

Justice Amitav Banerjee
Formerly Chief Justice
Allahabad High Court

All those who have worked in the law courts as Judges or lawyers after the independence of the country feel that things have progressively deteriorated to such an extent that the entire system is near collapse and in any case does not infuse the amount or degree of confidence that it did, say some thirty or forty years ago. Yes, the situation is frightful and has given rise to a despondency. Added to the above is the knowledge that the evil of corruption has commenced its inroad into the system to cripple it from inside. The transfer of High Court Judges from one Court to another is indicative of the deep malaise that prevails in the temple of justice. It is not only the lay people outside the Court campus but also the lawyers and Judges feel insecure and uncertain. Huge backlog of cases, delay in disposal of cases, delay in getting a case listed for hearing are features that announce failure of management of its affairs. Not one party can be blamed for it. So many have contributed to the present state of affairs. The present situation calls for some positive and wide ranging judicial reforms that must be comprehensive, cohesive and collectively useful. Unless the leaders of political parties, jurists, Judges, lawyers join in asking for a high Powered Commission to be constituted in this regard, the present drift will ultimately ruin the system and the country. The "rule of law" will be eroded and the very basis of the country, viz. Democracy, will be at jeopardy. That situation must not be allowed to develope for we all know the consequence. The glorious traditions of the Bench and the Bar, so assiduously built, will be lost and gone. This country is wedded to the principle of 'Rule of Law' and that will be gone and the people will lose their rights and effective mode of redressal of their grievances. We cannot afford to be placed in such a situation.

Justice G.D. Khosla, observed in the preface of his book 'Our Judicial System with the Constitution of India- "It is of the utmost importance that our Courts of law should command universal confidence and respect and it is therefore, necessary that the right thinking citizen should know the duties and obligations as well as the difficulties and needs of our Judges and Magistrates." The learned author observed in the Chapter heading. 'Flaws in the machine' "He would find that Courts of Law are treated with scant respect by the people and even officers of the Government entertain sentiments bordering on contempt for those entrusted with the task of dispensing justice..... It is inevitable that crime and litigation should go on increasing and the efforts to dispense justice should frequently end in frustration. Every year hundreds of murderers escape punishment....... Thieves, burglars, kidnappers and cheats continue to flourish. The amount of deception, double dealing and perjury practised in Courts today is enough to break the brave and honest spirit of Megasthenes."

Some people will say that the system, which came from Britain, was and is unsuited to our Indian culture and genius. It is being argued that it is expensive and long drawn and causes matters to simmer for much too long a period. May be, it is long drawn or even slow, may be, it is expensive too, but it has given a fair chance to the adversaries, gives the ordinary citizen a right to petition the Court with high expectation. The view taken by Court is generally guided by settled law of the land which is to be found reported in Journals and does not depend on the whims and mood of the Judge. The hierarchy of Courts gives the loser in the first Court an opportunity to get the order/judgment tested both on facts and law and ultimately on questions of law. What more can a person want ? In short Rule of Law prevails. This makes the system universally acceptable. This is what it should be. And in fact Rule of Law is the bed-rock of democracy. Judiciary is the balancing feature as well as the cementing feature in our present Constitutional set up. We cannot afford to have an archaic system based on the pleasure system of the ruler,as in the past. How will the affected people get relief if the ruler himself erred ? The concept that prevailed, only two hundred fifty years ago, in this country was the cause of the weakening of the majesty of the ruler and ultimately paved the way for the disintegration of the country. A sound system, which

provides the common man a right to approach the law courts easily, and looks into his grievances on the merit, has far more chances of survival and has also the ability to bind the country into a homogeneous one. The same law prevails in the entire country; it is true in regard to the basic laws of Civil Procedure, Criminal Procedure, Evidence etc. And the majesty of tne Supreme Court of India, guiding the interpretation of laws made by the Parliament of India and the State Legislatures gives an even chance to the judiciary to protect the rights of the people. Undoubtedly, the makers of the Constitution of India were wise and sagacious persons, who thought of providing the Country and the people with something to cherish and to be proud of. Must we see to its disintegration and dislocation for want of attention to rectify the situation or the causes of its present problems. Let us be honest and correctly assess the situation. Let us probe deep into the malaise. Let the people who know speak out. Let us ask the Judges, the difficulty they face. Let us find out why witnesses in Sessions cases are not produced and why do lawyers resort to frequent strikes. Let someone find out about the layout of Court rooms and the infrastructure and the basic amenities needed there. How secure are the Courts from the inroads made by criminals and other elements who want their presence felt. Why should cases be adjourned again and again? These are just a few samples of the questions that need to be probed and correct answers found. But this is not all. There is a big question re. the recruitment of the judicial officer and Judges of Higher Courts. Men of integrity and merit are alone needed.

In his book 'Judiciary in India and Judicial Process' (Tagore Law Lectures) by Justice H.R. Khanna, commences Chapter V 'Great names in Indian Judiciary' by the following passages :

"There is no guarantee of justice in a country than the personaity of its judges. India has during the last 100 years produced a galaxy of great judges, imbued with the highest judicial traditions. They never threw their weight about and worked in their silent way, away from the din of the crowd and glare of publicity. They burnt the midnight oil, sparing no pains to themselves in the quest for justice and the right solution for the different controversies which presented themselves in the court. Their judgments were great repositories of thoughts but their thoughts, like those of other great men in

law, were not windfalls of inspiration but were the product of years of contemplation and brooding".

Such was the concept of Judges who sat on the Benches of the High Court and built up the edifice of Judiciary in this country. What has gone wrong so that we are falling short of the standard set up by our predecessors? Is it because the number of Judges appointed are far too many than available talent ? Or is it the scare of being transferred to another Court, outside the State, immediately after the appointment ? Or are the emoluments not adequate enough ? Or whether the conditions of service are not attractive enough ? Whatever it may be, it is obvious that the best available material is not responding to the request of the Chief Justice to join the Bench. But then what is the quality of the Judges compared to those who occupied those seats a decade or two earlier ? What should be the criterion for choosing personnel to manage the Higher Courts ? Apart from absolute integrity, his capability in more than one branch of law will be essential to discharge his onerous duties. There should be fuller particulars available of any person named for appointment to the Bench of High Court. His capability as a lawyer, of having argued important cases independently, his capacity to draw up petitions etc. must be known. Since maximum number of cases that come up before the High Court pertain to Constitutional matters, it is essential that District Judges must have a modicum of experience and knowledge of Constitutional provisions. The State Judicial Training Institute may be able to impart some very essential training in these matters to them. They must have read important rulings of the Supreme Court and High Courts and must be familiar with them.

Now that the finality about the names of persons to be appointed as High Court Judges lies with the Chief Justice of India, it is all the more desirable that greater amount of circumspection and inquiry about their capability and experience be looked into.

Judiciary in India has by and large enjoyed immense public confidence. Even today there is always a clamour for appointing a sitting High Court Judge as one man Inquiry Commission for certain failings or incidents involving public funds or neglect of duty by officials. There is still a general deference towards the judiciary. But, then the erosion of values all-round has also affected the judiciary. It is seen that the Judiciary has often acted to protect public interest and given sound and clear guidance in such matters. People have faith in the Institution - although certain chinks do appear to smudge the image.

Two of the greatest shortcomings are : huge accumulation of cases and the inordinate delay in disposal of cases. Ways and means have to be devised to tackle these two problems. In a way both are interconnected and have caused widespread dissatisfaction with the process and practices. How can these be rectified ? It is not merely to wipe out the pendency but also to see that accumulations do not take place in future. It is not a case of each High Court to device ways and means for rectifying the situation - it has to be a concerted action involving all High Courts and subordinate courts.

The other factors which have besmirched the image consist of inconsistent orders being passed in the same High Court on similar facts by different Benches and even the same Bench. The frequency of adjournments gnaws at the patience of litigants. Today, the litigant comes to Court along with many persons, expenses are heavy and adjournment means further heavy expense on the next date, which may be three or more months away. Apart from adjournment, closure of courts for a variety of reasons causes great dissatisfaction amongst the litigants. Another day wasted, is their comment. Closure not only disrupts hearing of cases but even precludes one from getting an interim order, where it is sorely needed to protect some rights or property. Closure adds to the arrears, and closure means delay in disposal. Add to it the frequency of strikes, that cripples the working of the courts. Should there be any strike at all ? And strike for What ? Lawyers do not constitute a trade union. It is a noble profession. Should they resort to strike? These are matters which are crippling the judiciary and the judicial process.

The transfer of Judges of High Courts is another matter that needs to be reviewed as a policy by the Judges of the Supreme Court. The large scale transfer of Judges has caused concern. No Judge can feel safe - he may be transferred to any High Court - and his entire career may not be affected. He may have language problem and problems regarding residential accomodation etc. He may not be at ease to the transferred place. He may not be able to contribute anything there. Add to this another policy which transfers High Court Judges soon after their appointment to other High Court. These include lawyer - Judges as well Judges from the subordinate courts. The best of the latter are also transferred - the High Court loses such Judges. They are very well acquainted with local laws and customs. That expertise and experience is lost to the transferee High Court. What that High Court gains is the same type of element, who are not acquainted with the local laws and customs of the transferred High Court. Thus there is a loss to both the High Courts. I

have my views on this matter - I feel that transfer to another High Court may be necessary in some cases, where the interest of justice demands it. If the Chief Justice is of the view that the continuance of a Judge in a particular High Court is undesirable, he may refer the matter to the Chief Justice of India, who may after considering the matter, recommend to the President for necessary action. One of the points to be considered is - are the transferred Judges feel at ease to hear and decide cases. They are under some cloud and there is undoubtedly some erosion of their confidence.

Lawyers have a distinct role to play in this set up. They are to assist the court in discharging their duty. There are certain rules and practices of doing so. Age old practices blend the action to give effective edge to the process of dispensing justice. It has been noticed that at times Counsel forget their role and in asserting their client's case they adopt an attitude which tends to prevent the Court from doing justice. Their style of functioning gives rise to new problems. Sometimes courts are intimidated and even abused. Sometimes a group of lawyers combine to humiliate the presiding officer. And more serious matters are also heard. The resort to the contempt of court proceedings is necessary sometimes, for nothing else perhaps would do. But numerous are the cases where the Court in order to maintain peace and get on with the work, swallows pride and suffers. Is this conducive to rule of law ? Who suffers? The litigant no doubt. What is the way out? Can the Bar Council take any action ? Is it in the domain of the Bar Council or the Court ? Should the Advocates Act and the Bar Council Act remain as it is or be amended in this regard ? All these questions raise matters of principle and practice. Since the law will affect all concerned, it will be appropriate that the Commission considers these matters too.

Training of lawyers in the chamber of Seniors is over, it seems. Fresh graduates in law, after getting enrolled from the Bar Council of the State start practice in the subordinate courts or even in the High Court without even knowing the procedure or the Rules of the Court. What assistance can be expected of them ? And the entrance to the Bar - the number joining the Bar every year is very large. Can they all be fruitfully accomodated ? The competition is intense. The standard is constantly lowered. And then there is a mad rush to gather cases. It is not necessary to state further on this point.

The procedure in Courts is long winded - it is time the procedure be simplified or rationalised. Number of adjournments, may have to be fixed. Submission of oral arguments may have to be limited to fixed number of

minutes or hours. There should be a provision for entering into settlement prior to the commencement of recording of evidence. The costs awarded should be heavy and commensurate with expenses incurred. In case issues are settled prior to the recording of evidence there may be reduction of costs to be awarded. Similarly, on the criminal side much can be done to hasten the trial and disposal of the case. The Commission should also consider the question whether it would be appropriate to order the sentence imposed to run consecutively and not concurrently, as at present. The number of cases that end in aquittal is a legend. Failure of the prosecution to establish its case is no doubt the principal reason. But why must they fail too often ? The main witnesses are won over and they turn hostile. What may be the reason for this ? Criminals intimidate the witnesses and compel them to depose contrary to their earlier statement. Threat, assault and pressure from friends and relatives are used to force the witness to contradict their earlier statement. And do we have a proper cell to prosecute criminal cases at the district level ? There is an office of District Attorney in the United States of America, whose duty is to see that laws are enforced and criminals brought to trial and properly prosecuted. It is time we had something akin to it in this country. I also feel that if Sessions trials are held promptly, there would be lesser acquittals. The delay in commencing trials sometimes results in some people being in jail for a long time. All these need to be corrected. But then this may not be enough. The Jail Manual also needs looking into. It is old and archaic. Better and humane treatment to the prisoners in jail is also necessary. Undertrials should be segregated from the convicted prisoners. Prisoners undergoing long term sentences also need to be kept in separate area of the jail or may be in separate jail. In the United Kingdom, they have a separate jail known as 'Maximum Security Prison' where dangerous and long term prisoners are kept after conviction. I understand that such prisoners are usually not released on completion of the period in Jail unless the Prison's highest Psychiatrist certifies that the convict will not be a liability in the society. In this country, we hear of cases where the accused after obtaining bail or release from the prison, starts silencing main witnesses. Well, all these aspects need consideration in depth.

Then there are economic offences these days. Such matters have to be heard speedily and decided promptly. Cases relating to claims made in Motor Vehicle Accidents have to be decided promptly - for the widow of the victim of accident and his children cannot wait for years to get the compensation

or damages. Their entire future will come under cloud. The cases under the heading 'dowry deaths' of young brides, a social horror, are growing with economic well being of the people and the rise of consumerism. These cases have also to be given priority. Delay in all these cases has a pervasive reaction in the society. The image of the Court suffers because of the delay and uncertainty.

I am, therefore, of the view that the creation of a High Powered Judicial Reforms Commission is the only way to consider all aspects of the problem that afflicts the institution of the judiciary. Let the Commission be chaired by a jurist and preferably by a retired Chief Justice of the Supreme Court. The members thereof must include Judges from the Supreme Court, High Courts, and the subordinate courts as well as eminent members of the Bar, one of the former Attorney-Generals and persons well versed in law from other sources. The reason for saying this is that the Commission should represent all sections of the Bar and the Bench, as far as possible all major States (for their problems are acute and endemic) so that a comprehensive view of the matter be taken for forming an opinion as to what is required to be done. Yes, it is a serious matter, and a matter which cannot be allowed to simmer or drift with a pious hope that matters would get solved by passage of time. Image of an institution is what it is presently. What you see reflected in the mirror is the picture of what you look at that moment. The image of the judiciary must reflect genuine public confidence in such an institution. Should this image become hazy, the entire edifice of this country may come down and even the Constitution would be threatened. In the past too there were occasions when one heard or read in the media that the Constitution requires overhauling. Yes, that is a cry of those that want more power to themselves to rule this country or guide its destinies. The institution of judiciary protects the interest of the citizen when the other institutions fail to do so. As a matter of fact the Judiciary is charged with the function of protecting and preserving the Constitution and its provisions by its decisions and interpretation of laws. It is upto the citizens of this country to take effective steps to see that the institution of judiciary maintains its image and plays the role that is envisaged under the Constitution.

The system cannot be underestimated. It has come to stay. Why are people worried about its image ? They are concerned, for they expect the Judiciary to be above board in every respect - it is the ultimate answer to

State's arbitrariness, violation of human rights or interference with rights guaranteed under the Constitution. Its role as protector of human rights or the rights guaranteed under the Constitution cannot be minimised. The system in spite of its inconsistencies, its weaknesses, its delays still embodies so much of our aspirations that we cannot live without it. Hence, any distortion of its image, power, action, or effectiveness causes concern. And the present situation causes serious concern. It is time to ponder, think and to take action.

For all these reasons I strongly urge for the formation of a High Powered Judicial Reforms Commission to look into all aspects of the matter and the problems that beset the High Courts and the subordinate Courts in this country.

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The greatest of all gifts is the power to estimate things at their true worth.

La Rochefoucauld.

FUNCTIONAL EFFICACY OF EXISTING CONSUMER FORUMS - AN ASSESSMENT

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

THE BACKGROUND :

Consumer movement in India is of recent origin. It resulted in the enactment of the Consumer Protection Act, 1986 (briefly, the Act) which came to be enforced in the year 1987. Broadly, it envisages protection of the interests of 'Consumers' in regard to 'goods' and 'services' in the matter of 'defect' or 'deficiency' apart from protection in the matter of 'unfair or restrictive trade practice' adopted by a 'trade'. All these have been defined in the Act.

The object of the Act is 'to provide for better protection of the interests of Consumers and for that purpose to make provision for the establishment of Consumer councils and other authorities for the settlement of Consumer's disputes' and for 'matters connected therewith' says the preamble. Of the four chapters in which the Act is divided, the first contains the various definitions in Section 2 and provides in Section 3 that the provisions of the Act shall be 'in addition to and not in derogation of' the provisions of any other law for the time being in force. The remedy under the Act, thus, is an additional one, by resort to the summary procedure envisaged in it, which is available to the Consumer. For 'goods' a person is a Consumer when he buys it for consideration or uses it with the approval of the buyer but he is not a Consumer when he obtains goods for resale or for any commercial purpose. For 'services' a person who hires or avails of any services for consideration or a beneficiary of such services with the approval of the person who hired it is a Consumer. However, a service offered free of charge or under a contract of personal service is outside the ambit of the Act.

The second chapter deals with Consumer Protection Councils, both Central and State, with the Minister incharge of Consumer affairs as the Chairman, entrusted with the task of promoting and protecting the rights of Consumers against the marketing of goods and services which are hazardous to life and property; to seek redressal against unfair or restrictive trade practices or unscrupulous exploitation; to be assured, whenever possible, access to variety of goods and services at competitive prices and the right to be informed about the quality, quantity, potency, purity, standard and price of goods or services so as to be protected against unfair trade practices. The councils are also required to ensure that Consumers' rights to Consumer education and to be heard and assured of due consideration of their interests at appropriate forums are promoted and protected.

Thus, both at the National and State levels, obligation has been cast upon the Government, acting through these Councils, to take care of the interest of Consumers in various ways to subserve the object of the Act.

Under the Central Consumer Protection Rules, 1987 provision has been made for constitution of the Central Council with 150 members and for setting up of working groups, from amongst its members, by the Council. The resolutions passed by the council are to be recommendatory in nature. This is an unsatisfactory provision and requires a second look. Moreso, when the council consists of a sizeable number of [illegible]ernmental representatives and has to discharge statutory obligations in the matter of protection of Consumers' interests.

REDRESSAL AGENCIES AND THEIR FUNCTIONING :

In the above back-drop we may examine the contents of the third chapter which deals with the Consumer Disputes Redressal Agencies. Disputes, naturally, are bound to arise between a Consumer or a class of them and those from whom he buys goods or hires or avails of services for consideration or is a beneficiary thereof. These are to be considered and adjudicated upon by independent fora by following a quasi-judicial procedure, consistent with rules of natural justice, untrammelled by procedural formalism, in a summary manner to ensure a quick and cheap remedy to the aggrieved person. The Act envisages it in this chapter.

There is a three tier set-up of redressal fora. Each District in a State is to have a three member 'District Forum' presided over by a person who is or has been or is qualified to be a District Judge. Of the other two members, who are to be chosen from amongst persons of ability, integrity and standing,

having adequate knowledge or experience or having shown capacity in dealing with problems relating to economics, accountancy, industry, public affairs or administration, one shall be a woman. The State Government is to appoint them, on the recommendation of a selection committee presided over by the President of the State Commission, for a term of five years or upto the age of sixty five years, whichever is earlier, but they are not eligible for re-appointment.

Each State is to have a State Commission with a person who is or has been a Judge of a High Court, appointed by the State Government in consultation with the Chief Justice of the High Court, as its President. Of the two other members, appointed by the State Government on the recommendation of a Selection Committee, with the President of the State Commission as its Chairman, from amongst persons of the category from whom members of the District Fora are chosen, one shall be a woman. The President and the members, who are not eligible for re-appointment, hold office for five years or till the age of sixty seven years, whichever is earlier.

A National Commission is set up by the Central Government. Its President is a person who is or has been a Judge of the Supreme Court appointed by the Central Government in consultation with the Chief Justice of India. The other four members are appointed by it on the recommendation of a Selection Committee presided over by a Judge of the Supreme Court nominated by the Chief Justice of India from amongst the category of persons from which the two members, apart from the President, of the District Forum or the State Commission are chosen. One of these members is to be a woman.

The Constitution of these fora is basically sound as far as the source from which they are drawn up. On the practical level, however, it is felt that the working is hampered, so far as the speedy disposal of cases is concerned, for two main reasons. One, the requirement that the President should be present to conduct each adjudicatory proceeding and be a signatory to every order passed there-in results in cessation of these proceedings in his absence even of a casual nature. Two, with the abnormal increase in the work load, particularly in a large State like Uttar Pradesh, it is physically impossible for the District Fora or the State Commission to ensure the disposal of cases brought before them within the reasonable time frame of ninety to one hundred and fifty days envisaged under the rules framed for the purposes, with, only one set of persons working at any given time to hear them. The need to enlarge the District Fora and the State Commission by adding 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 seems imperative. To illustrate, the present pendency of cases before the State Commission in U.P. is of nearly six thousand cases including about five thousand appeals from the orders of District Fora. With more than sixty District Fora functioning in the State, even if one decision of each Forum is brought up in appeal before the State Commission every day, there will be an addition of over 1200 appeals every month in its docket assuming that there is a five day a week working in each Forum. The enormity of the load upon the State Commission and the physical impossibility of the disposal of these cases with a single bench functioning is not difficult to visualise. The predicament of most of the District Fora in the State, which receive a large number of complaints every day, is similar.

Another factor which hampers the out-put is the appointment of the President and members of most of the District Fora and State Commissions on a part-time basis. It reduces the number of their working hours and the sense of accountability. The solution lies in making full-time appointment on appropriate terms and with adequate facilities for their functioning.

The District Forum has the jurisdiction to entertain a complaint where the value of the goods and services and the compensation claimed does not exceed rupees five lakhs. An appeal lies against its decision before the State Commission which also has revisional power to correct errors of jurisdiction on the part of a District Forum in a case decided by it or pending before it. The State Commission, in exercise of its original jurisdiction, can entertain a complaint where the value of goods and services and the compensation claimed exceeds rupees five lakhs but does not exceed rupees twenty lakhs. An appeal lies before the National Commission against such a decision. The National Commission also exercises revisional jurisdiction in respect of consumer disputes pending before or decided by a State Commission for correcting errors of jurisdiction therein. The revisional jurisdiction exercised both by the State and the National Commissions is akin to the power of courts under Section 115 C.P.C. The National Commission can entertain original complaints where the value of goods or services and compensation exceeds rupees twenty lakhs. An appeal lies in such cases to the Supreme Court against its decision.

The scheme is clear. A trial on facts and law and one appeal therefrom. This ensures speedier disposal of a dispute. There is a welcome negation of

multiple appeals. But, the absence of exclusion of the jurisdiction of High Court and the Courts subordinate thereto in respect of the Consumer disputes redressal fora, by appropriate amendment of Article 323-B of the Constitution as well as the Act, is causing delay in disposal of matters by these Fora. This aspect deserves urgent attention of the Central Government.

A complaint can be made in respect of goods and services by a Consumer, some of them in a representative capacity, a recognised Consumer Association and the Central or the State Government. In the absence of a complaint, the Fora cannot intervene in a matter requiring attention. Power should be given to the National and the State Commissions to initiate suo motu proceedings in suitable cases where it finds that restrictive or unfair trade practice has been adopted by a trader or goods are being 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 services affecting people in general.

The procedure envisaged by Sub-Sections (1) and (2) of Section 13 for disposal of complaints appears reasonable but experience has shown that sometimes the complainants do not pursue the matter after the filing of the complaint nor provide requisite material to the Forum to arrive at a proper decision. In such cases the District Forum and the State Commission should be conferred with the power to dismiss the case for default or decide it on merits in its discretion like the National Commission which has such a power under Rule 14(3) of the Consumer Protection Rules, 1987. The provision for it should be made in the Act itself. Sub-Section (4) of Section 13 should be amended and some more powers of a Civil Court under the C.P.C. should be given to the Fora. This should include the power to dismiss a cause for default and of its restoration, the power of Review and of directing Restitution.

The absence of the power to grant an interim order in the nature of injunction in appropriate cases sometimes results in great hardship to a Consumer. Moreso, in cases of discontinuance of some essential services. Suitable provision should be made about it in the Act. Disobedience of the order should be treated as contempt of a Court and made punishable likewise.

Section 27 providing for punishment in the event of failure to comply with an order made by District Forum or the Commissions should contain a specific provision for opportunity being given to the person sought to be

punished to show cause against the proposed punishment. Some District Forums are found to have awarded punishment without giving any such opportunity to the person punished by them. Similarly, suitable provisions akin to those contained in the Prevention of Food Adulteration Act should be made in the Act if punishment is to be awarded to a Company, a society, a firm or a statutary authority or Government agencies for their failure to comply with an order.

Consumer Associations should play a more active role in matters of Consumer disputes, as far as the Fora are concerned, by undertaking counselling programme for the Consumers and assisting them in pleading appropriate facts and producing proper and relevant evidence in support of their case. This will help in early disposal of the complaint by the District Forum or the Commission and avoid frequent adjournment of the case to enable them to do so.

Voluntary organisations and activists can render yeoman service to the cause of redressal of Consumer disputes by assisting the Fora in ways more than one. They should concentrate their attention and endeavour to particular services and trades, educate the consumers about their lawful expectations from them, assist the Consumers in first seeking redress directly from the trader or service concerned and upon failure to obtain redress therefrom counsel them about their approach to the appropriate forum or Commission with relevant allegations and the material required to be produced in proof thereof.

Cases relating to excessive billing in matters relating to services like telephone, electricity or water supply can be grouped together and settled between the parties by arranging Lok Adalats. So also, cases pertaining to Insurance claims. This may help in clearing the back-log and also quicken the disposal. The idea deserves serious consideration.

The wide scope of the directions which can be given by the Redressal Agencies under clauses (e) to (h) of Sub-Section (1) of Section 14 of the Act would make it possible for the State Commissions and the National Commission to function as Consumer Ombudsman effectively if they are empowered to initiate suo motu action as suggested earlier. This would not only enhance the effectiveness of these Commissions but also obviate the necessity of setting up another body for the purpose.

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DOCTRINE OF MALICE IN LAW

Justice Brijesh Kumar
Judge
Allahabad High Court

It is not always, that a thing, be the same, as it looks like. The reality may be different from the form it is covered with. It is often found difficult to pin down an action, by direct and cogent evidence, that it is malafide or the impugned act is a direct result of ill-will, malice or spite or by way of revenge etc. Proof required to establish "malice in fact" is strict and not easy. But the law is not so helpless in such circumstances. It infers "malice in law" where impugned action is for achieving a purpose other than for which the provision, under law, has been made or the action is in total disregard of the law or in wanton exercise of power bringing about the same consequences as would result by an action actuated by "malice in fact".

Malice, mala fides or bias have devastating effect. No action is beyond their reach. Broadly speaking the word "bias" means prejudice; show of favour or disfavour; antagonism; spite; hostility; prepossession, that sways the mind. In French, the word "Bias" means something oblique opposed to straight and English word "Bias" has reference to a game of bowls with a tilt of weight on one side. A decision, arrived at influenced by some interest in the matter or motive, hostility or with impaired objectiveness, is said to be done with "Bias", mala fides or with malice.The word "malice" is derived from Latin root "malus". In legal parlance, it is commonly known as doing something intentionally to cause or inflict injury or to do something wrongly without just cause of excuse. The malice may be, as a matter of fact, it is commonly known as "malice in fact" under the English, American and Indian law or actual malice or express malice. In some American decisions, the term has also been used as true malice, real malice and personal malice, particular malice, special malice or positive malice. These words are used interchangeably. This word is used for actions which are affected by evil motive with

a view to cause harm. In these cases, the authority acts in a particular manner to wreak vengeance or other considerations or interest in the matter personally involving the authority.

Similarly, under English, American and Indian law the other kind of malice which is recognised is "malice in law". Under American law, it is also known as "implied malice" to mean "malice which is inferred from the doing of a wrongful act without lawful justification or excuse". The other expressions used under the American law for legal malice are imputed malice, presumed malice or malice of pleading and proof which words are used interchangeably in contradistinction to term which signifies malice which exists as a matter of fact. In some of the American decisions, however, the view which has been expressed is that there is no ground for the distinction between the legal and popular senses of the word saying that in reality there is no distinction between expressed malice and implied malice, the "malice" means in its legal sense exactly what it means in its popular sense, and that both mean precisely the same condition of mind.

In *Parke v. Blackiston*, 3 Del 373, 378 it was observed that malice in law exists where a wrongful act is intentionally done without just cause or excuse. It exists where an unlawful act is done or a lawful act is done in an unlawful manner. In *Nelson v. Melvin*, 19 N.W. 2nd 685 Iowa, it was held that malice in law does not mean and need not be actuated by actual malice that it is from anger, animosity or desire to injure another, dislike, hatred, ill-feeling, revenge, spite but it is wilfulness or evil intent of the act, the wanton disregard of rights and interest of the person injured which suffice to render the act malicious in the legal sense. It is also defined as wilful violation of a known right of another to his prejudice. A malice in fact can be proved by direct evidence. Legal malice may be presumed or implied from the acts done or words spoken or may be presumed from the fact or circumstance done or from unjustifiable conduct.

In the case of *Venkataraman v. Union of india*, reported in AIR 1979 S.C. 49, it was observed that malice in its legal sense means such malice as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse or for want of reasonable or probable care. Similarly, in *Jai Chand's* case (AIR 1967 S.C. 483), it was observed that mala fide exercise of power only means that the statutory power is exercised for purposes foreign to those for which it is in law intended. Viscount Haldane, L.C. held in *Sherrer v. Shields*, (1914) A.C. 808, that a person who inflicts an injury

upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, though so far as the state of his mind is concerned he acts ignorantly and in that sense innocently. In *Barium Chemicals'* case reported in AIR 1967 S.C. 295, it has been observed : "though an order passed in the exercise of powers under a statute cannot be challenged on the ground of propriety or sufficiency, it is liable to be quashed on the ground of mala fides, dishonesty or corrupt purpose".

De Smith in his "Judicial Review of Administrative Action", (1980) stated so : "A power is exercised fraudulently if its repository intends to achieve an object other than that for which he believes the power to have been conferred". Similarly in *Sydney Municipal Council v. Campbell*, (1925) A.C. 338, acquisition of land was held to be illegal as it was not done for the purpose which was sought to be achieved under the Statute. There was no land for improving or remodelling by the Council but acquisition was for extension of highway to increase the value of the land which was not the purpose of the Statute. It was held that the power was exercised with ulterier object.

A power used under the misapprehension that it was needed for effectuating a purpose which was really outside the law or the proper scope of the power, could be said to be an exercise for an extraneous or collateral purpose, *(State of Mysore v. P.R. Kulkarni*, AIR 1972 S.C. 2170). In *R.v. Darlington School*, (1844) 6 QB 682, Warrington L.J. states, "It may be also possible to prove that an act of the public body, though performed in good faith and without the taint of corruption, was so clearly founded on alien and irrelevant grounds as to be outside the authority conferred upon the body, and therefore inoperative".

In an important decision reported in AIR 1985 S.C. 1622, *The Collector (Distt. Magistrate), Allahabad and another v. Raja Ram Jaiswal*, the Supreme Court came across to deal with a case where, as held, the powers were exercised to achieve a certain purpose not envisaged under the Act. A piece of land lying adjacent to Hindi Sahitya Sammelan, Allahabad, was purchased by the petitioner-respondent who wanted to construct a cinema hall. Despite all efforts made and hurdles placed by the Sammelan, he succeeded in getting the permission. Ultimately, seeing no other way, the Sammelan approached the Government for acquisition of the plot of land, which was done. Amongst others, it was challenged on the ground of mala fide exercise of power

conferred upon the Collector to acquire land for public purposes. It was also indicated that in the year 1953, the Sammelan had acquired the land for establishing a museum but it was not utilised so far when the impugned notification was issued acquiring the land for extension of the Hindi Sahitya Sammelan and Sangrahalaya. The High Court though allowed the petition but did not accept the plea of mala fide observing that there was nothing on the record to indicate that the Collector or the State were inclined against the petitioner- respondent for any improper motive. The Supreme Court, however, took the view that the real contention of "legal mala fides" had been missed by the High Court. The Supreme Court also took into account a letter which was written by the District Magistrate saying that the Sammelan sought acquisition so as to stop construction of cinema theatre. It was observed that where a power is conferred to achieve a certain purpose it can be exercised only for achieving that purpose. The purpose for which the land was acquired could not be said to be public purpose as is envisaged under Section 4(1) of the Land Acquisition Act. It was further observed that Sammelan may honestly believe that existence of cinema may have the pernicious tendency to vitiate the educational and cultural environment of the Institution but it did not constitute the public purpose. The Statutory authority knew the fact, yet proceeded with the acquisition which constituted legal mala fides. Exercise of power with extraneous or non-germane considerations, renders the action legally mala fide and in such a situation there is no question of any personal ill-will or motive.

In the case of *State of Punjab v. Gurdial Singh* reported in AIR 1980 S.C. 319, it was observed that when the custodian of power is influenced in its exercise by considerations outside those for promotion of which the power is vested the Court calls it a colourable exercise and is undeceived by illusion. Benjamin Disraeli states - "I repeat....... that all power is trust-that we are accountable for its exercise - that, from the people, and for the people, all springs, and all must exist". The notification of acquisition of land though ostensibly for the purpose of constructing a grain market was struck down as it was actuated by malice and ill-will of the Minister in the matter of selection of site.

The case of *Express Newspapers (Pvt.) Ltd.*, AIR 1986 S.C. 872, is one of the very well known and important decisions of the Supreme Court on the question of legal malice. The petitioner-company, namely, the Express Newspapers (Pvt.) Ltd. was aggrieved by the notices for re-entry issued by

the Engineer Officer, Land Development Office on behalf of the Government of India. It was also threatened that the possession would be taken and building being unauthorisedly constructed would be pulled down. It was pleaded that the proceedings were initiated to settle the scores with the Express Newspapers (Pvt.) Ltd. and its Chairman, as during the period of imposition of emergency the Newspaper had openly and fearlessly written against it. The Supreme Court while dealing with the matter held that there is a distinction between exercise of power in good faith and misuse in bad faith. The former arises when the authority misuses its power in breach of law, say, by taking into account bona fide, and with best of intentions some extraneous matter or by ignoring a relevant matter. It would no doubt render the order ultra vires. It would be a fraud on power. The misuse in bad faith arises when power is exercised for an improper motive, say, to satisfy a private or personal grudge or wreaking vengeance as in the case of *S. Pratap Singh v. State of Punjab*, AIR 1964 S.C. 733. The Court quoted the observation made in 1904 A.C. 515, *General Assembly Free Church of Scotland v. Overtown*, by Lord Lendley - "that there is a condition implied in this as well as in other instruments which create powers, namely, that the power shall be used bona fide for the purpose for which they are conferred". The Court came to the conclusion that the impugned notices were not issued bona fide in the ordinary course of official business for implementation of law or for securing justice but were actuated with ulterior and extraneous purpose and thus were wholly mala fide and politically motivated. The action was taken on the instructions of Lt. Governor of Delhi who could not usurp the powers and functions of the Union of India in relation to property of the Union. It was felt as if the Minister was taking instructions from the Lt. Governor. The real purpose was not to implement the provisions of the master plan or Delhi Development Plan.

In yet another case, *State of Punjab v. Ramji lal** it was held that it was not necessary that any named officer was responsible for the act where the validity of an action taken by the Government was challenged as mala fide as it may not be known to a private person as to what matters were considered and placed before the final authority who had acted on behalf of the Government in passing the order. In (1990)3 S.C.C. 752 *Mahabir Auto Stores & others v. Indian Oil Corporation and others*, it was held that even where there is no duty to hear or give reason for the adverse action, fairness in action, information as well as taking the affected party into confidence are requirement of administrative action and to the concept of good government.

*AIR 1971 SC 1228

The petitioner who was holding the distributorship of the lubricants for the Corporation for the last two decades was abruptly denied supplies without any cause or reason on the ground that the policy of the corporation had changed. It was held to be a case of malice in law. The action of the corporation, it was pleaded, amounted to black-listing of the petitioner. The Court observed that the fairness in the actions of the State should be perceptible if not transparent. Rule of reason and rule against arbitrariness and discrimination; rules of fair play and natural justice are part of the Rule of law applicable to actions of State instrumentalities dealing with citizens. It is well settled that there can be malice in law. Existence of such malice in law is part of critical apparatus of a particular action in Administrative Law. Indeed, malice in law, is a part of dimension of rules of relevance and reasons as well as rule of fair play in action. It may be noted that theory of malice in law has developed so as to provide a safeguard against discrimination and arbitrariness and to ensure fair play and natural justice to uphold the Rule of law. The impugned action was held to be suffering from malice in law. It could not be and had not been established or shown that any particular functionary of the Corporation bore ill-will or intended to cause harm to the petitioner.

In *Workmen of M/s Williamson Magor & Co. Ltd. v. M/s Williamson Magor & Co. Ltd. and another,* AIR 1982 S.C. 78, the grievance and complaint of the workmen through its Union was upheld by the Labour Tribunal holding that the Management had superseded senior and more deserving persons and gave promotions and upgradations out of the way and out of chance to victimize the superseded workmen but the Tribunal felt helpless to grant any relief as there was no standard or norm for giving promotion and it was the function of the Management. It was held, that even if the promotion may not be a condition of service in a private company and it may be the function of the management but their action amounted to victimisation. The supersession was mala fide and should have been set aside by the Tribunal. It was found that despite the allegations made factual mala fide was not proved but malice in law was obvious from the fact of victimization of those who had been unjustly superseded.

In *Shivaji Rao Nilangekar Patil v. Dr. Mahesh Madhav Gosavi and others,* reported in AIR 1987 S.C. 294, the result of M.D. Examination passing the daughter of the Ex- Chief Minister was challenged on the ground that it

was mala fide and there had been tampering with the record etc. The Court cautioned relying upon the observation made in AIR 1964 S.C. 962, *C.S. Rowjee v. Andhra Pradesh State Road Transport Corporation* that against public authorities allegations of mala fides are often made but the Courts have to be cautious and it is possible to decide a matter on probabilities and on the inference to be drawn from all circumstance on which no direct evidence could be adduced. The Court further observed that while Courts be cautious when dealing with the allegations of mala fide or cast aspertions on holders of high office, the Court cannot ignore the probabilities arising from proven circumstances. The above observations of the Supreme Court clearly indicate that in absence of proved mala fide it is quite possible to infer legal mala fides.

To put precisely, malice in law arises when an authority acts on logically viewed extraneous grounds or obviously misconceived grounds - *Regional Manager v. Pawan Kumar Dubey*, 1967 S.C.C (L & S) 436. In the case of *Ram Chandra Chaudhari v. Secretary to Government of West Bangal*, AIR 1964 Calcutta 265, it was observed that legal malice does not necessarily involve malicious intention. It would suffice to establish that the deciding authority had not applied its mind and the impugned order was made for a purpose other than that mentioned on the face of the order. For malice in law, therefore, it is not necessary that intention to harm must actually be present in the mind of the authority. An action which is legally mala fide need not necessarily bear feeling of enmity, spite or ill-will, it may be due to a desire to obtain a collateral advantage or sheer wanton unmindful exercise of power.

It is well-settled that plea of mala fide is not available against Legislation passed by the Legislature. Principles of natural justice also do not apply in legislative matters except where so expressly provided as we often find that it is provided under the Acts that before framing bye-laws, namely, the subordinate legislation, objections be invited or there may be some similar provisions. Mala fide is only one of the aspects of principles of natural justice. It, however, appears that when this legislative function is discharged by the President under Article 123 of the Constitution or the Governor, under Article 213, it is open to challenge the promulgation of the Ordinance on the ground of mala fides. The power to promulgate an Ordinance conferred upon the President and the Governor is a very limited power. The question whether the

conditions necessary for issuing an Ordinance exist or not, is a matter of subjective satisfaction of the President or the Governer. However, we find observations made in the case of *R.C. Cooper v. Union of India*, (known as Bank Nationalisation case) reported in 1970(1) SCC 248, to the effect that promulgation of Ordinance can be challenged on the ground of mala fides. In paragraph 220 of the judgment, it is observed that the only way in which the exercise of power by the President can be challenged is by establishing bad faith or mala fide and corrupt motive. Bad faith will destroy any action. It is further observed that the party alleging has to prove it but in that case, it was found that no allegations of mala fides were made. In another decision, *Dr. D.C. Wadhwa and others v. State of Bihar and others*, AIR 1987 S.C. 579, the petitioner had challenged repromulgation of ordinances on a massive scale by the Governor from time to time, without getting them replaced by Acts, in a routine manner even without considering whether circumstances existed to render it necessary for the Governor to take immediate action by promulgation of Ordinance. The practice adopted by the executive was found to be flagrant and systematic violation of its constitutional limitations. It was observed that this power was in the nature of emergency power for taking immediate action while legislature is not in session. Such power cannot be allowed to be "perverted to serve political ends". It was further observed that "constitutional authority cannot do indirectly what it is not permitted to do directly. If there is a constitutional provision inhibiting the constitutional authority from doing an act, such provision cannot be allowed to be defeated by adoption of any subterfuge. *That would be clearly a fraud on the constitutional provision*". It was not representing legitimate exercise of power of promulgating Ordinances conferred under Article 213 of the Constitution. It was further observed that the Governer cannot assume legislative function in excess of the strictly defined limits set out in the Constitution otherwise he would be usurping a function which does not belong to him. The executive in Bihar had almost taken over the role of legislature in making laws by re-promulgating Ordinances for years together. It is true that the word 'legal malice' has not been used but substantially it is a case where according to the findings of the Supreme Court, power to promulgate ordinance was being exercised for collateral purpose. In *K.G. Gajapati Narayan Deo v. State of Orissa*, AIR 1953 S.C. 375, the Court thus observed : "In other words, it is the substance of the Act that is material and not merely the form or outward appearance and if the subject-matter in substance is something which is beyond the powers of that Legislature to legislate upon, the form in which

the law is clothed would not save it from condemnation. The Legislature cannot violate the constitutional prohibitions by employing an indirect method". In *P. Vajravelu Mudaliar v. Spl. Dy. Collector, Madras,* AIR 1965 S.C. 1017, the Constitution Bench of the Supreme Court observed that when it is said that Legislation is colourable one, what it means is that the Legislature has transgressed its legislative power in a covert or indirect manner, if it adopts a device to outstep the limits of its power.

The doctrine of malice in law, thus, arms the Courts of law to safeguard the interest of those who have been wronged. but they are unable to link the action directly with malice in fact and further checks the authorities from acting in a manner indirectly which is otherwise not permitted to do directly. It also checks the authorities from outstepping their limits of powers, the actions and acts which bring about the same result which would flow from an act done by malice in fact. This doctrine is a device legally developed to remedy the wrong action which may not be defeated by technicalities of law.

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> *Justice delayed is worse than injustice.*
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> *Joseph L. Baron*

CONDUCT OF ADJUDICATING INDIVIDUALS

Justice S.C. Mohapatra
Judge
Allahabad High Court

In our Constitution, every citizen has fundamental right and fundamental duties. These rights and duties are not new to Indian Society. From Hindu mythology, Jatak stories, and stories based on different religious societies, we get support for our fundamental rights and duties as enshrined in our Constitution.

Our Constitution is the frame work of our political society. A political society emerges out of a society of individuals based on economic ties. Economics is nothing else than a principle for good leaving. It depends upon the philosophy of social behaviour. Such philosophy is outcome of psychology. Commonness of this psychological behaviour is basic structure of society. This behaviour is obviously towards another. Behaviour, in other words, can be termed as conduct. Therefore, personal conduct of an individual reflects upon a society of which he is a member. In this context, I am giving vent to my ideas about the conduct which should be of an adjudicating individual.

Adjudication is a basic element of every human being. This is learnt by own experience of an individual and from experience of others. Adjudication is to make a distinction between two and to decide on being of such distinction. In gradual process a child knows who loves him and who does not. In course of proceeding towards maturity of thought he knows how to behave with mother, father, brother, sister or others. He knows what is right and what is wrong. Then he knows which actions or inactions are to be avoided as a member in the society and which wrongs of others are to be tolerated to be in the society. Many of these rights and wrongs are not codified. From time immemorial they exist. An individual is only required to know it and try to practise the same himself. This would contribute to a civilised society being

in existence and such civilized society makes its constitution whether written or unwritten reflecting the political ideas of the society under which it is governed.

For achieving the aforesaid end, an individual to whom power to adjudicate dispute between two is entrusted, is to remember that he is himself a man in the society and he is normally to adjudicate dispute between two belonging to the same society. Our adjudicating system is such that for effective adjudication, the individual adjudicating is directly associated with members of staff engaged to assist him, lawyers representing the parties, witnesses who speak about the dispute, litigants themselves and last but not the least the members of the society for upkeep of which he has been entrusted the duty of adjudication. Therefore, his conduct towards these classes is the governing factor for his being accepted as a good adjudicator.

In my opinion an adjudicator should always bear in mind that he should be an embodiment of the finest element of culture himself. He should act as a model both in his personal life as well as official life so that he can become inspiration of every one who comes across him to cultivate proper values of conduct. An adjudicator is required to appreciate not only facts but apply law to it to give his decision. Hence his foremost duty is acquisition of knowledge, dissemination and advancement of law. He should devote himself single mindedly not only to academic and intellectual pursuit to law but also to social behaviour so that he will be able to distinguish grain from the chaff and should not blindly follow a decision of a higher forum on question of appreciation of evidence unless it comes within the domain of precedent. An adjudicator's outlook and conduct is to be characterized by love for truth and high ideals, conscientious devotion to duty, fairness and impartiality. He should never allow his out-look to become mercenary and he should avoid any method of getting personal comfort which is inconsistent with the dignity of an adjudicator or which is likely to interfere with discharge of his duty as an adjudicator. An adjudicator should always bear in mind his great responsibility to bring peace and harmony in society and therefore, by his own example instil into those who come across, to learn to love, tolerate and to excuse another if the same does not affect the society to which he belongs. By his own example he should instil into the staff associated with him integrity, efficiency, punctuality, devotion to duty, spirit to serve others in spite of personal inconvenience besides being always equipped and willing to help staff requiring the same from him. His attitude to and dealing with staff,

members of the legal profession, those others connected with litigation and the litigants should always be marked by sympathy, helpfulness, courtesy, affection and respect, complete impartiality and strictness in matters of discipline. He should not confine his moral duties to his adjudicating room which in common parlance is called a court room. He should in no case get involved in group afflictions or do any thing at home or outside that may cast doubt on his impartiality and fairness. Last but not the least is that an adjudicator is required to stick to moral values, ethics and high traditions of judiciary in practice and preaching both.

Adjudicators should not close their eyes and ears to find that at present there has been marked erosion in the moral values in the society all around including the adjudicating society to which he belongs. This erosion has given rise to various complexities. Therefore, according to me deviation from the code of conduct by any member of the adjudicating society has no excuse and society to which he belongs will one day take note of the same though in immediate future on account of existence of power or protection, he feels safe. Let us all try and check the downward slide of the judicial morality since adjudicators are guardians of the society in matters of whimsical unreasonable legislations and executive actions in our Republic.

Before parting, I think remind you all about a story which I heard in the childhood and which you all must have heard in some form or other. It is this. A community contributory dinner was arranged in a village. All those who carried on the avocation of supplying milk in that village were to contribute one litre of milk each which they were to put into a common big earthen jar that day at their convenience. Each milkman thought that all others would contribute their share and in case he puts in a litre of water, it would go unnoticed. When in the evening the jar was brought to remove the milk for being used for preparation of the item of food for which it was required, it was found that the whole jar is full of water only and there is no trace of milk. This story is reminded to you all so that you may not develop a feeling that most of the adjudicators would follow the moral values and your departure from it would go unnoticed. Therefore, all adjudicators should follow the morals without taking note how other members of the adjudicating society are acting or remaining inactive. If each such member is alive to his duties more then he becomes conscious of his rights as such a member, I have no doubt that Indian adjudicating system would be ideal in the whole world.

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Binding Bonds Between Bar And Bench

Justice Palok Basu

Judge
Allahabad High Court

The binding bonds between the Bar and the Bench were established and continued eversince the framing of Letters, Patent dated 17.3.1866 framed under the Charter Act of 1861, which had made provisions for enrolment of legal practitioners and their disciplinary control, simultaneously with the creation of the High Court. As far as the records indicate, the High Court of Judicature at Allahabad had only six Advocates and very few legal practitioners in the year 1866 when it made a modest beginning with a Chief Justice and five Judges. Those two paragraph of the Letters Patent may be usefully quoted here:-

Admission of Advocates, Vakeels and Attorneys

"7. And we do hereby authorize and empower the said High Court of Judicature at Allahabad to approve, admit and enrol such and so many Advocates, Vakeels and Attorneys as to the said High Court shall seem meet and such Advocates, Vakeels and Attorneys shall be and are hereby authorized to appear for the Suitors of the said High Court and to plead or to act or to plead and act for the said Suitors according as the said High Court may by its rules and directions determine and subject to such rules and directions.

"8. And we do hereby ordain that the said High Court of Judicature at Allahabad shall have power to make rules for the qualification and admission of proper persons to be Advocates, Vakeels and Attorneys-at-Law of the said High Court and shall be empowered to remove or to suspend from practice on reasonable cause the said Advocates, Vakeels or Attorneys at Law and no person what-

soever but such Advocates, Vakeels or Attorneys shall be allowed to act or to plead for or on behalf of any Suitor in the said High Court except that any Suitor shall be allowed to appear, plead or act on his own behalf or on behalf of a Co-Suitor."

The enrolment of persons desirous of practising before the High Court and the Subordinate Courts was thus regulated by the High Court. By and large, the working conduct of the legal practitioners was also looked after by the High Court. Though the Legal Practitioner's Act of 1879 came out with formal regulatory provisions concerning the enrolment and working of the legal practitioners, but from a close scrutiny of those provisions it transpires that the variety in the class of legal practitioners continued to exist even after the passing of that law. Moreover, there were restrictions on the right to practise conferred on classes of legal practitioners and though some ancillary powers were conferred on the Bar Councils, the power to proceed against legal practitioners for professional or other misconduct remained with the High Courts. Enquiries could be conducted by District Courts or Bar Councils if any matter of misconduct was entrusted to it by the High Court. After about fifteen years of gaining independence a central body of Advocates was thought to be created by law which would have all powers, rights and duties concerning enrolment and enquiries for misconduct of legal practitioners. Consequently, the Advocates Act (Act No. XXV of 1961) was passed which consolidated all laws regarding legal practitioners and established State Bar Councils and Bar Council of India with complete autonomy with regard to legal practitioners' enrolment, their continuance and enquiry into their misconduct. The main features under the Advocates Act are:

Coming into existence of All India Bar Council and common Roll of Advocates; an Advocate being entitled to practise in any part of the country and in any court thus integrating the Bar into a single class of legal practitioners; codifying uniform qualification for enrolling oneself as Advocate out of whom some may be designated as Senior Advocates, and, most important of the features being the creation of an autonomous Bar Council for the entire nation and one for each State.

Now the provisions of the Advocates Act are the only provisions which are attracted for enrolling an Advocate, his continuing as such and removal of his name in case of his misconduct, if so held by the Disciplinary Committee of the Bar Council concerned.

The scribe of these lines began his life as an Advocate being enrolled in the first batch in 1961-62 and if he has been able to achieve or attain anything, it is only because he chose to become an Advocate. The year 1961-62 was the beginning of the transition of the system of regulating "practice" of Advocates by the autonomous bodies. The High Court was no more the guardian of the profession of law.

Notwithstanding the fact that the guardianship of the High Court has ended viz-a-viz the legal profession some Constitutional and statutory provisions still exist which have maintained the thread of amity between the Bench and the Bar intact. Article-217(2) of the Constitution of India, apart from other provisions, provides that a person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and has for at least 10 years been an Advocate of a High Court. Not only this, one might happily note that by Article 124(3) of the Constitution, apart from other provisions, it has been laid down that a person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and has been for the last 10 years an Advocate of a High Court or of two or more of such courts in succession or is, in the opinion of the President, a distinguished jurist. These two constitutional provisions have made it possible for an Advocate to transform himself into a Judge and thus assume the capability of deciding himself a matter today the like of which he was arguing yesterday. Therefore, the qualities imbibed in that person as an Advocate continue to thrive even after his appointment as a Judge and for this reason his anxiety, love and regard for the profession which made him a Judge, remains the same. Therefore, the Advocate's gene ingrained in a person such as the scribe is likely to last till his ultimate breath and the constitutional recognition of the unending relationship between the Bench and the Bar compels such Judge always to look to the Bar with high aspirations, sincere expectations and for genuine guidance.

The scribe had suggested on two previous occasions to bring about compulsorily a qualification of three years practice as Advocate for recruitment as Munsif in the relevant Rules. Infact Andhra Pradesh Rules were quoted extensively which have gone to the extent of giving weightage to candidates having practised as Advocates for more number of years than three. It was thought that the sobriety and cool temperament specially required for a Judicial Officer would be naturally acquired by a candidate who may have practised in courts for three years and had attended the Chambers of some Senior Advocates. While the suggestion of the scribe was perhaps pending con-

sideration, the Hon'ble Supreme Court has in its landmark judgment in the Judicial Officers case laid down that three years practice as Advocate is and would be pre-requisite qualification of those who want to compete in the Munsif's Examination. It may be respectfully submitted that it required the matured thinking of the Hon'ble Supreme Court to lay down three years practice as essential qualification of a Judicial Officer which according to the scribe's thinking, was the solitary method of disciplining the raw student from an University on his entering the said service. Legal profession is a hard task master and once the student joins the Chambers of a Senior Advocate and rubs his shoulder with other Advocates in the courts, his temper and attitude are bound to mould adequately and if he is selected as a Judicial Officer, the members of the Bar will not be foreigners to him and the working in his court is bound to be streamlined. The Hon'ble Supreme Court has immeasurably contributed to the harmoneous working of the Bench and the Bar in the years to come by its aforesaid judgment and the scribe humbly congratulates the Supreme Court on its farsightedness in this regard.

Work culture alone can be the obvious link to keep the Bench and the Bar jointly engaged in legal pursuits. There cannot be a good judgment unless there is active co-operation of the Bar and there cannot be good arguments unless the Judge's receptivity is broad based. The Senior Advocates contribution in shaping the juniors attending his Chambers during "training period" had been unique and unparalleled. The "training" left everlasting impact in the career of the new entrants. It is in this period when the new entrant is taught how and why peaceful co-existence of Bar and Bench is imperative for dispensation of justice. At least one year's training in a Senior Advocate's Chambers appears the need of the hour. Infact, the relationship between the Bench and the Bar has to be made so harmonious that the Courts' atmosphere becomes sublime. But if either side loses melody or goes out of beat or plays unmindful of the tunes, the sublimity is bound to be lost. There is nothing more jarring to the ears than ill- measured and out of scale symphony. Problems highlighted these days, would reduce and eliminate, if the work in courts continues normally. If the Chief Justice of India can, not as of necessity but as of utmost sense of urgency, work for half an hour more every day and hours more individually on selected days, with which the entire Bar co-operates, there is no reason why all efforts should not be concentrated to revive the sense of urgeny in the litigative infra-structure of the judicial system. It is bewildering when at times complete apathy is shown to the work culture by resorting to strikes or boycott of court-work even by lawyers and

that too in the High Courts also. One cannot suppress his anguish at the startling figures obtained from all the districts when the lawyers had struck work in the courts.

Who can dispute that the faith of litigants in the judicial system alone can perpetuate the democratic fabric of our motherland. Foundation of the rule of law is dependent on a cause being taken up in courts and decided in accordance with law with the assistance of the lawyers. If a litigant does not get the opportunity to get his matter decided through courts of law and the established legal methods, he is bound to develop frustration and look out for extra-legal methods. If this attitude develops in the litigants, it is likely to result in raising mafias and criminal gangs as also encourage anti-social elements. Therefore all must endeavour to take all steps to immediately start dialogue with all concerned so that no strike is resorted to and the grievances are redressed at the earliest. It shall have to be ensured that the situation is not permitted to drift up to a stage of striking work or boycott of court work by the employees or advocates. There is nothing which cannot be settled and solved by a dialogue by sitting across the table particularly when the members of the Bar and the Bench are so well-known to each other from before. There is just no scope for confrontation between the Bar and the Bench. The existence of one ensures the existence of the other. No outside agency can or should be called to intervene in finding out solutions to mutual problems if any.

There is no choice for the citizens of this country but to rely upon lawyers and the courts, should any difficulty or grievance relating to personal or legal rights arise. The faith of the citizens in the Judiciary is absolute. Simultaneously, it speaks volumes of the integrity of the Advocates when it is noticed that the clients/litigants hand over their valuable documents and money to their counsel without any hitch or hesitation and repose complete confidence in them. In return the Advocate is to assure a sincere professional discharge of his duty and nothing more. The fees of an Advocate for his professional activity is a legitimately bartered earning in recognition of his professional ability. But his primary duty remains towards his client and not to himself. Strikes by such professional men is perhaps unimaginable. Many administrative difficulties also crop up because of forcible continuous closure of court's working. Monitoring the actual functioning of the courts and their output of work becomes difficult and elusive. Similarly, a Judge or a Judicial Officer is so appointed not to show his prowess. His appointment is not

synonymous with exhibition of power of a Judge for, a Judge is appointed only to perform his duties. No decision of a Judge should be accentuated with anything but sense of duty and discharge of the oath that is administered to him. The only thing a Judge or Judicial Officer has to remember is that litigant's interest is supreme. Therefore, a conscientious officer of the Court can ill-afford to boycott work and thereby force the litigant to go back in a pensive mood.

This State has drawn many of its political leaders from out of the members of the Bar just as so many eminent administrators and Judges. Therefore, all the three wings of the State machinery, the Executive, the Legislature and the Judiciary have a persisting common link between them and that is the Bar. In fact, the Bar has grown in its numerical strength tremendously. The members of the Bar have to be the best security of the Bench while the persons manning the Bench have to be the well wishers of the members of the Bar by upholding the rule of law, impartial conduct and unimpeachable integrity. It appears auspicious to notice a change in the thinking of the younger members of the Bar thus discarding strike or boycott as a mode of solution to any problem and it is so heartening to think that the glory of the courts will be enhanced by the new generation of Advocates by understanding each others responsibility and limitations and the two inseparable wheels, will carry forward the chariot of justice to the envy of every adversary and to the satisfaction of all concerned. To the scribe and the like, the glorious traditions of the Bar and Bench are objects of worship and the binding bonds between them are inseparable, secure and stead-fast.

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> *A good judge conceives quickly, judges slowly.*
>
> *Rosalind Fergussion*

BASIC QUESTIONS INVOLVING A WRIT OF HABEAS CORPUS

Justice Giridhar Malaviya
Judge
Allahabad High Court

A writ of Habeas Corpus means that corpus (body) of a person should be produced in Court. Consequently when a petition under Article 226 of the Constitution is moved before the High Court or the same is moved before the Supreme Court under Article 32 of the Constitution, it is presumed that the person on whose behalf the petition of Habeas Corpus has been moved is in custody. On the petition being moved the Court examines whether alleged custody is valid or there is scope to allege that the custody of the person is not in accordance with law. On being prima facie satisfied that the alleged custody is not in accordance with law, notice is issued to the person or persons under whose custody the illegal detention of the petitioner is alleged. As a general rule and by common practice such petitions are moved in the name of a person whose corpus is sought to be produced in the Court.

The old practice of producing the person in the Court has been given up. Now after the notice is issued to the *opposite party*, *they* are required to file *their* counter affidavit, or return, in the Court whereby *they have* to satisfy the Court that if the person is in custody, the said custody is in accordance with law. The Federal Court of India in the case of *Basant Chandra Ghose V. The Emperor,* reported in 1945 Federal Court 18 has clearly held that if before the matter is taken up by the Court a valid order is produced before the Court then the Habeas Corpus Petition is to be dismissed. It was observed that unlike the civil matters the question is not whether the detention at its inception was illegal but the question to be decided would be whether on the date when the order of detention was being examined by the Court the custody of the detenu was in accordance with law or not. *Even* the *Supreme*

Court has held that the validity of the detention is to be judged on the date of hearing of the petition.

The illegal detentions of any citizen can be of two types. In the first type of cases a person may be detained by an individual in which case the High Court may ask the person, who is detained, to be produced in the Court if the Court is satisfied that the detenu's right under Article 21 of the Constitution has been violated. However in the case of *Vidya Verma v. Dr. Shiv Narain Verma*, 1956 SC 108 it has been held that Article 21 or for that matter fundamental rights of any individual are attracted only in the matters where the detention has been not by an individual but by an order of a person in authority, which, in other words, is known to be an executive act. Hence no person can approach the Supreme Court under Article 32 if it is claimed that the said person has been deprived of his liberty by a private individual.

In the second type of detentions generally matters relating to acts of preventive detention come up before the Courts of law. The matter of preventive detention has been dealt in detail under Article 22 of the Constitution. There remains absolutely no doubt that any action of preventive detention has been always considered to be an extreme step as by an order passed under any of the preventive detention laws, liberty of an individual is deprived without any trial. However the authority to detain a person preventively has been given either to the Central Government or the State Government or the officers subordinate thereto, as it was considered that to provide social and economic security to the people of the country such powers would have to be exercised by persons holding responsible public offices. There was a lengthy debate on this matter when Articles 21 and 22 were being discussed in the Constituent Assembly but ultimately it was felt that retaining such a power with the executive authority was absolutely necessary. Consequently provisions of Article 22 have been retained in the Constitution.

A perusal of Article 22 would *demonstrate* that the framers of the Constitution themselves provided adequate safeguards against arbitrary actions of the executive authorities. It has been provided therein that no person can be preventively detained after a particular period unless an Advisory Board, constituted by the Government comprising of persons who are competent to be High Court Judges, finds that there is sufficient ground to detain a particular person. If the Advisory Board, within the stipulated period, does not positively say that there is sufficient ground for detention, or if the Advisory

Board opines that there is no sufficient ground to detain a person preventively, the Government has no option but to release the detained person forthwith from the custody.

Apart from these safeguards this Article has granted a detenu an absolute right to be communicated the grounds of detention forthwith after his arrest, and it has been further provided that the detenu has thereafter a right to make a representation against the order of detention. The Supreme Court, by a series of decisions, has now held that this right would be meaningless unless the representation made by the detenu was decided expeditiously without any undue delay. Even a day's delay has been held to be fatal and in violation of the right conferred under Article 22(5) of the Constitution resulting in the forthwith release of the detenu from the custody.

It has been a matter of concern that despite repeated judgments of the Supreme Court, the executive authorities have really not taken adequate steps to have the representation of the petitioners considered expeditiously. The result has been that many number of detention orders which were found to be otherwise valid have been set aside by the High Court or the Supreme Court as the Government could not explain the reason why there was some delay in disposal of the representation at one stage or the other.

It may also be mentioned that action for preventive detention is generally taken in respect of activities of persons who disturb the maintenance of public order or are a potential threat to the security of the State. The concept of security of State is absolutely clear to need any explanation. So far as the question of public order is concerned, the Supreme Court, by a series of judgments, has made it clear that public order is a concept different from the maintenance of law and order. The Supreme Court has said that even a ghastly and brutal murder in full view of public due to personal enmity in a busy market place may not be a matter really concerning public order as such a crime can be taken care by the normal law of the land. It has been clarified that to bring the activity of a detenu within the purview of public order, 'even tempo of life of the community' has to be disturbed. While explaining distinction between the security of the State, the public order and the law and order, the Supreme Court, in the case of *Ram Manohar Lohia*, has discussed the concept of three concentric circles. Without adverting to the details of that concept all that may be mentioned here is that concept of disturbance of 'even tempo of the life of the community' 'was really an outcome

of the Civil Disobedience Movement of India during the independance movement of this country where the Government found that the normal law could not be applied to check the activities of the freedom fighters. It is difficult to fully explain the real distinction between the 'law and-order' and 'public order' in this short article but in broad terms it can be said that if by an act of some individual, every person of the society may feel that the 'even tempo of life of the community' is disturbed then it may be a matter concerning public order; whereas if it is simply an illegal act arising out of enmity punishable under the Indian Penal Code then the activity will be a matter relating to the 'law and order'. That is why a brutal murder in a public place due to enmity between two groups is an activity confined merely to a problem of law and order and not public order, whereas repeated roadside incidents of robbery and chain snatching would be an activity covering the field of 'public order'.

Since the Courts are the last repositories of the individual liberty they have zealously guarded that right of individuals. The Courts have scrutinised and examined every preventive detention order with utmost care and on finding the slightest breach in the procedure, have always upheld the cause of individual liberty instead of holding or validating the cause of the State. Thus the writ of Habeas Corpus is not only a very important writ available to the citizens of this country but is also the backbone of a civilised society by which every individual has his right of life and liberty secured to him under the Constitution.

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Fresh Justice is the sweetest.

Francis Bacon

RULE OF LAW & DISCRETION

Justice J.K. Mathur
Judge
Calcutta High Court

Genesis of modern concept of Rule of law is sometimes attributed to Aristotle when he said, "the Rule of the law is preferable to that of any individuals", expressing desirability of a society being governed by known principle of equal application, as against subjective whims of persons. Some other trace is to the statement made by Edward Coke addressed to the King that he was also subject to law. Justice G.D. Khosla in his book "Our Judicial System", narrates an incident recorded by Hieun Sang. An Indian King Bhim-Sara having promulgated a law that any person in whose house fire broke out would be banished, himself went into exile when fire broke out in the palace, to comply with the law of the land. This demonstrates actual prevalance of one of the basic tenets of Rule of law in ancient polities in this country as was advocated by Coke.

The principles of Rule of law were stated by Dicey, being inter alia, absence of arbitrary power in any limb of the Government to punish except in accordance with law, and equality before law.

The nodal concept has since developed, with new facets sprouting to render it an all pervasive tool, to meet emerging challenges to justice and fairplay in functioning of the government. In conferences and declarations, starting from conferences in the University of Chicago in 1957, and in Warsaw in 1958 and in Delhi declaration consequent to an International Conference in 1959, attempt was made to spell out the scope of Rule law and a number of its manifestations in criminal justice system, in protection of human rights and treatment by law were enumerated. Courts have also leaned on the Rule of law to effectively deal with injustice arbitrariness and unfair treatment in dealing with a person's rights by the government. It has begotten principles of natural justice to provide a protective shield against arbitrary and unfair

trampling of a citizen's rights. Law to govern the people being made by a democratically elected legislature with defined powers, and there being an independent judicial system to protect against the trespasses of legislature and executive were also found to be essential postulates of Rule of law[1]. Availability of judicial review was held to be another necessary appendage to the Rule of law.[2]

Today Rule of Law has ripened into a pragmatic instrument potent enough to provide an effective remedy wherever the basic sense of justice and fairness is bruised. It is a concept capable of generating suitable responses to meet emerging challenges, and of reaching out to deal with arbitrariness,unfairness and injustice in administrative acts to foster fairness and justice. The power of judicial review enables the courts in affecting these corrections.

By the very nature of the concept and the manner in which it has grown it is incapable of being contained in defined parameters. Like liberty it is in the heart of men and women of a rule of law polity. Yet it is not uncertain or vague. Its object is very clear. Wherever palpable injustice, unfairness or arbitrariness is perceptable in Government action it can reach out and provide adequate amends.

Dicey's enunciation of Rule of law has been controversial only to the extent it stated that every citizen has a right of adjudication by a common Court of law, which has virtually been rejected by all the societies including England by constituting administrative or specialised tribunals. But equality before law or equal treatment of law is one aspect of it which is a basic canon accepted by all civilised societies. Law to be able to deal equally must be a set of known principles and its effect should be reasonably predictable.

Stanley' de Smith and Rodney Brazier, after stating the three postulates of Rule of law formulated by Dicey construed them 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".[3]

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1. Bachan Singh v. State, AIR 1982 SC 1325
2. Indra Nehru Gandhi v. Raj Narain 1975 (Suppl.) SCC 1
3. Constitutional and Administrative law by De Smith & Brazier, 6th Ed., page19.

Equal treatment before law, treating like persons equally, and avoiding discrimination is an essential component of Rule of law. The content of Rule of law has developed to contain all the aforesaid principles in recent years to deal with administrative actions mainly because of the areas of the state intervention in affairs of citizens, having grown to over-whelming proportions recently. With the state emerging from its laissez faire cocoon, and undertaking welfare, developmental and commercial functions it became more prone to tread on the civil rights of citizens. This enlargement of interface between citizen and state also therefore needed more effective control mechanism to save the citizens from infringement of their rights by the Administrators transgressing their ordained bounds. And consequence was development of the instruments of Rule of law as detailed above and the process of judicial review to effectuate them. A necessary corollary of this development in enforcement of Rule of law to administrative actions was placing the executive actions at the focal point of the beacon of rule of law.

However, the principles of Rule of law are not peculiar in their application to administrative actions alone. They are as much essential in judicial dispensation. In fact the very concept was initially contrived to regulate judicial administration. Statutory rules usually prescribe rights and liabilities of citizens and also lay down the process by which rights are determined by Judges. These statutes take care of the basic requirements of rule of law, and any deviations can be corrected by providing for appeals and revisions. No independent monitoring of the process was thought to be necessary.

However, all the judicial responses are not governed by the statutory principles. Substantial number of decisions are taken by Courts in exercise of their discretion provided by the Statutes. This discretion is exercisable sometimes, also to decide matters which have a vital bearing on substantive rights in addition to regulating procedure. Whether a person accused of a crime will be kept incarcerated or be free during investigation and trial, has a statutory solution only for a small number of crimes classified as a bailable offences. In non-bailable offences this cherished and zealously guarded liberty of a citizen is left to the uncharted discretion of the Court.

Another equally important decision to be taken by a Court, is that of quantification of sentence. Law normally provides maximum and sometimes minimum sentence. Wide is the range of sentence from which the court selects one, without any statutory rules to regulate the selection. Sometimes

the Court may even permit the quality to go unpunished on promise of good conduct and surveillance.

In Civil matters also whether relief of specific enforcement of a contract is to be granted even on proof of a contract, grant of a declaration and of numerous interim reliefs are in the discretion of the Court. Even the grant of high prerogative writs by Higher Courts and grant of interim reliefs by them are discretionary.

Unfortunately, it is not infrequently that one finds contradictory orders passed by different Courts in exercise of these powers. In grant of bail, one Judge may accept one ground as relevant and sufficient to grant bail while another refuses to consider that ground as a relevant consideration at all, neither giving any reason for holding so. There are numerous mute orders passed even by Higher Courts which at their face do not consider or disclose any reason relevant or irrelevant for the decision rendering the liberty of citizen. subject to the "hunch of a bench".

Equally disparate are the decisions made in quantification of sentences. An exercise was conducted in Institute of Judicial Training and Research, Lucknow, in a series of programmes where the participants were given the same set of facts and required to suggest the proposed sentence in each of them. The sentences so suggested showed wide variation to the extent that one of them was four times another, again demonstrative of the fact that a person having committed an offence may have the quantum of his sentences dependent upon the personality of the Judge who tries him, and the variation may be as much as one being four times the other. There could not be a more patent depiction of arbitrariness or inequal treatment violative of Rule of law.

Numerous studies show wide disparities in sentencing practices, said Robert E. Blanchard.[4]

Similar divergence of responses is visible in writ jurisdiction exercised by higher echelons of the system to evoke a reaction that writ jurisdiction is a jurisdiction of surprises.[5]

In exercise of discretionary jurisdiction contradictions are legion, negating the very basic postulate of Rule of law-equality before law.

Judicial discretion is not a holiday from Rule of law. Courts which have been duly armed with the power of judicial review to strike at any perceptible

4. Introduction to the Administration of Justice, page 122.

5. Upendra Baxi in 'Liberty and Corruptión'.

deviation from Rule of Law in exercise of its powers by the government or its officers, cannot themselves deal with the rights of citizens oblivious of its basic tenets. The salutary principles enunciated by the Supreme Court to govern exercise of discretion cannot but govern its exercise by Courts themselves with equal force, when it said, "In a system governed by rule of law discretion when conferred upon executive authorities must be confined within clearly defined limits. The Rule of law from this point of view means that decisions should be made by the application of known principles and rules and in general such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule, it is unpredictable and such a decision is the anti-thesis of a decision taken in accordance with Rule of Law" in the case of *Jai Singhani v. Union of India.*[6]

Discretion exercised by a Judge to be in accordance with rule of law has to be governed by certain well-accepted principles to render the decisions predictable and uniform, and to unshackle them from the personality of the Judge, which subjectivity was the very reason for conceiving of the concept of Rule of law, as against Rule of men, as visualised by Plato.

Need for disciplined exercise of discretion cannot be, better stated than was done by Benjamin N. Cordozo.

"The Judge even when he is free is still not wholly free, he is not to innovate at pleasure. He is not a knight errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise discretion informed by tradition, methodised by analogy, disciplined by system and subordinated to the primordial necessity of order in the social life".[7]

The Supreme Court was viewing with concern the absence of principles in exercise of discretion when it said the following about the process in the consideration of bail :

"It is desirable that the subject (bail consideration) is disposed of on basic principles and not improvised brevity draped as discretion. Personal

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6. Jai Singhani V Union of India AIR 1967 SC 1427.

7. Nature of Judicial Process.

liberty deprived when bail is refused is too precious a value of our constitutional system recognised under Article 21 that the crucial power to negate it is a great trust exercisable not casually but judicially, with lively concern for the cost to the individual and the community. To glamorise impressionistic orders as discretionary may on occasions make a litigative gamble decisive of fundamental right".[8]

Unprincipled exercise of discretion cannot be condoned only because it is being exercised by a Judge. An ideal Judge is one who by his experience has imbibed principles of exercise of discretion, and their application comes to him naturally, without any visible effort, to guide him mental process of decision making which is also duly insulated against his personal predilictions to a fair degree. An ideal Judge not only takes considerable time to develop, but is also as infrequently found as a 'reasonable man', whose conduct is a legal touchstone to adjudge justification of many an acts of commission or emission. He cannot be permitted to administer half-baked justice during the period he is gaining experience to become a seasoned Judge. Mere donning of robes does not ipso facto induce all the qualities which a judge should have.

"It is a dangerous myth that by putting on a robe and taking the oath of office as a Judge, a man ceases to be human and strips himself of all the predilictions, becomes a passionless thinking mechine" was said by Jereme Frank'J.[9] The Supreme Court also so stated in S.P. Gupta.[10]

"A Judge is a human being who is a bundle of passions and prejudices, likes and dislikes, affection and ill will, hatred and contempt, and fear and recklessness."

"We (the Judges in the Superior Judiciary) are made to realise that we are all mortals with all human fraities".

Judges like all other human beings have human fraities but it does not mean that administration of justice by them is always suspect. It only requires channelising the exercise of discretion by them to minimise their personality becoming an integral part of the justice they administer and to maximise even handed decisions substantially according to men's predictions.

"Because Judges are men, not machines, we must expect judicial frailities and not Judge them too harshly. But we can and should take necessary

8. Gudi Kanti Narsimhulu v Public Prosecutor, 1978 Criminal Law Journal 502.
9. In re J.P. Linahan, 138 F 2d-650-5, (1943).
10. AIR 1982 Supreme Court 149, pp 670,672.

precautions to limit the damage such imperfections might otherwise do to the interest of Justice[11] said David Pannick.

It is, therefore, essential that some steps are taken to see that there is reasonable uniformity and predictability in the decisions rendered by Courts in exercise of discretion to conform to the very fundamental mandate of Rule of law, which has repeatedly been stated to be the basic feature of our system.

That the nation shall be governed by a government of laws not of men, was one of the unamendable features of our Constitution enumerated by the Supreme Court.[12]

Judicial dispensation resting on criteria provided by a statute totally rests on statutory considerations, expressly spelt out and very well-known. It is only when exercising discretionary powers that the Court does not have explicitly stated rules to govern the decision making. It is therefore, essential that the exercise of discretion should rest on some principles uniformly applied, to yield uniform dispensation. If there are no principle there cannot be possibly a uniformity of treatment. Each decision will vary with the Judge, and also very with the time, even when given by the same Judges. It will cease to be judicial discretion and degenerate to arbitrary exercise of Judicial power, positively negating the Rule of law.

E.C.S Wade quoted the Committee on Administrative Tribunals and Inquiries as having stated that the rule of law stands for the view that decisions should be made by application of known principles or laws in general such decisions will be predictable and the citizen will know where he is. A decision may be without any principle, without any rules, it is therefore, unpredictable, the antithesis of a decision taken in accordance with rule of law.[13]

All judicial decisions however, do not have strict statutory provision to guide them in substance or in process.

It is, therefore, essential that the exercise of discretion should be guided by principles, and is not un-briddled.

'Unguided exercise of discretion is the law of tyrants, it is always un-known; it is different in different men, it is causal and depends on the

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11. 'Judges', Oxford University Press page 18.
12. Indira Nehru Gandhi V. Raj Narain (1975) Suppl. SCC 1
13. Introduction to Diceys Introduction to the Study of Law of the Constitution.

constitution, temper and passion. In the best it is often time caprice; in the worst it is the very vice, folly and passion to which human nature is liable, was said by Camden.[14]

It may however be stated that the exercise of discretion being guided by explicit principles does not imply even remotely that it should be governed by rigid, or strait-jacketed rules and iron clad formulations. If there are rigid rules to determine availability of a remedy it will cease to be a discretionary remedy and the very purpose of providing discretion shall be lost.

Principles which have been suggested to be the guide of judicial discretion would only spell out or indicate relevant considerations as may be used by the Courts in determining the response in a discretionary situation, and not provide ready made orders to be delivered in pre-envisaged situations. It cannot be said that a bail should always be refused in a case of murder. It would be laying down a rigid rule as would truncate the discretion granted to courts of Sessions and High Court to consider grants of bail in every case, including one of murder. On the other hand, that gravity and nature of the offence is a relevant consideration in deciding bail entitlement, as they would have a bearing on the likelihood of the accused being available for trial or investigation is a principle. It is one of the objects for which a man is kept incarcerated during investigation and trial and bail is a process to determine whether a person need be detained during these proceedings. The other relevant considerations for bail can also be found by identifying the reasons for which a person is kept in custody during these proceedings then and, finding whether facts and circumstances the apprehensions of which would so necessitate curtailment of liberty do exist. Such a process will rationalise the process of bail and render it less prone to be subjective and arbitrary.[15]

This technique of identification of principles to govern exercise of discretion has been always been used by Courts. An injunction in a Civil suit is provided to protect the rights of a party pendente lite. Such a protection being the object of the discretion, the Court has to find whether such a right need be protected. It should therefore, find if prima facie the party claiming such a protection has such a right at all and if there is any apprehended injury as would put that party to an irretrievable harm. It may also see the impact of proposed intervention on the other party so that in the process

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14. Quoted in Babu Singh v. State, 1978.

15. Lakshmi Shankar Gupta v. State, 1994 (1) H.C.P 1 (FB)

he may not suffer a more severe harm. These principles are inherent in the object of the grant of discretion and have been identified for a long time and used as such.

Not using principles cannot be condoned by any other substituted contrivances. Plurality in bench suggested by some as an effective check of arbitrariness may not always induce predictability or uniformity. Any behavioural scientist will inform that the group dynamics in evolving a collective decision will involve the chance of sharing of similar views and personal predilictions, and capacity to exert one's view, which will also be affected by ones status and standing in the group. Unless it rests on explicit principles it cannot be tested for its retionality. A different collective decision will then always be possible with different persons constituting the bench and aforesaid variable changing. Mere plurality will not ensure either predictability or reasonableness or uniformity.

Availability of appeal is given to be the other check against arbitrary exercise of discretion. Firstly, in this country where justice is available only at a considerable expense, a vast majority cannot afford even one decision. Even in appeal, if there are no principles governing the grant of redress, there would be no criteria to Judge the correctness of the decision, and one subjective decision will be substituted by another.

If at the time of hearing principles to be used in exercise of the discretion are not known or certain, the Court will not be able to get any assistance from the counsel nor will affected party be able to place relevant material before the Court as may have a bearing on the decision to be reached by the Court. This will lead to non-consideration of relevant material, which defect will not be rectified if a reason is contrived while writing the opinion. Adversary system will be rendered otiose in absence of clear determinants. Increasing the number of Judges in the Bench involved in a case or providing for an appeal will not by itself therefore substitute the imperative of there being known principles governing the exercise of discretion.

A decision resting on stated principles will also be rational, serve the purpose of the legislation, in addition to inducing uniformity in the system fulfilling an essential requirement of rule of law.

There can be uniformity of treatment in disbursing discretionary remedies only when the exercise of discretion is based on articulated reasons. Even if the Judge has based his decision on accepted principles of uniform ap-

plication; if the reasons are not stated the parties especially the ones who are on the receiving end of the decisions are not likely to be satisfied about even-handedness, an essential requirement of administration of justice. It is expressed in the cliche 'justice should not only be done but appear to have been done' and is necessary to maintain the credibility of the system.

Stating of reason is not a mere cosmetic requirement to lend credibility. It is also a self-disciplining mechanism for decision makers to ensure that the relevant criteria, and they alone have been weighed to arrive at the decision. Once a Judge is put on rails of the rational consideration of relevant determinants, the result is more likely to be a rational one rather than a personalised decision. Non-speaking orders refusing or granting bails, interim orders and dismissing petitions or allowing other reliefs should be a taboo in judicial decisions, if they have to conform to rule of law. They induce arbitrariness and smack of it, and are anathema in a rule of law polity. The higher courts cannot escape the imperative of a reasoned orders which is not only to disclose the reason to the appellate forum but mere essential to methodise the process of decision itself and save it from the peril of being arbitrary.

The difference in decisions may be due to genuine difference of opinion amongast Judges, about the interpretation of law. It may also be due to variance in personal outlook or pre-disposition or value system. Some times unfortunately sheer inclination to grant some relief inspite of clear law to the contrary or to refuse it inspite of clear entitlement are also responsible for such deviations, in which case the deviation being deliberate nothing much can be done to correct, except appellate intervention where possible.

If two different persons approach two different Judges in similar causes may be in the same Court, and are dispensed justice disparately, at least, one of them who does not get the relief would perceive the dispensation as injustice and far a valid reason. Justice and injustice are terms incapable of being defined exhaustively. Yet being denied a relief given to another person in identical circumstances is an irrefutable symptom of injustice and absence of Rule of law.

The aforesaid causes for variations have therefore to be reduced, if not eliminated, to accord with the rule of law.

Effort has to be made to see that there are Seminars, Conferences and other programmes for Judges at all levels, in which such matters are discussed to supply gaps in Judge's equipment, to iron out difference in

interpretation and induce a zeal to dispense substantial healthy justice with a view to minimise personalisation of decisions. It is sometimes urged that such variations are symptoms of Judicial independence and any training would interfere with it. The variation may stem from a misconception, ignorance of a determinant or from personal prediliction. None of them is a component of Judicial independence and any effort to deal with any of them is not likely to effect his independence. Judicial independence is independence from external influences in administering justice and not independence from knowledge. Rule of law or rationality. Mutual discussion amongst Judges cannot in any manner be an undesirable influence. In plural benches it is inherent in the system. Educating a judge cannot be said to be interference with judicial independence especially when its object is to induce dispensation of robust justice.

"Independence is all very well but if it is not backed with justice it turns to abstinacy and recalcitrance. And as to impartiality you can be impartial in distributing injustice as well as justice", said Lord Denning.[16]

An exchange of views as a component of judicial education would not affect the impartiality but would only help in ironing out the disparties to render the dispensation of justice more uniform. It would still be open to any of the Judges to decide the matters coming before him, in the manner he thinks just.

Thus to make the administration of justice more uniform, and responsive to the tenets of rule of law, the exercise of discretion should be based on relevant principles, and the orders should contain reasons. Judge should meet in an intellectually open environment and discuss about areas where opinions are conflicting. This will reduce variance and would induce uniformity. A long as men administer Justice responses cannot be identical but all the same attempt has to be made to induce uniformity to the degree possible.

'Law is always approaching and never reaching consistency' said Holmes.[17]

In a system based on rule of law endeavour to approach consistency at least must continue.

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16. Road to Justice.

17. Holmes, the Canon on Law 36 (1881).

QUIZ - CONTEST

Justice K.N. Goyal
Retired Judge, High Court

RULES

1. Only members of the U.P. Nyayik Sewa and U.P. Higher Judicial Service (up to ADJ level), including officers on deputation, other than officers posted in the Institute of Judicial Training & Research or in the registry of the High Court or in any Legal Remembrancer's branch or in the Raj Bhawan, are eligible to take part.
2. Each correct answer will carry the marks indicated, and each incorrect answer will carry one-half of the same number of minus marks.
3. Maximum marks 100. Minimum qualifying marks shall be 50.
4. Total prize money Rs. 5000: i.e. a first prize of Rs. 2500 to the officer scoring highest, a second prize of Rs. 1500 to the first runner up, and a third prize of Rs. 1000 to the second runner up. However, in case of tie in any category (I, II or III), the total prize money (Rs. 5000) will if necessary be so re-distributed that each first prize winner shall get more than each second prize winner, and each second prize winner shall get more than each third prize winner. If less than three participants qualify in all, the prizes payable to the winners can be increased (within the total of Rs. 5000/-)
5. Entries shall be sent in the enclosed form in a closed envelope with the name and official address of the sender to the Director IJTRUP. The entry shall be signed by the officer. Entry can also be sent on a photocopy of the printed form instead of on the printed form.
6. The decision of the editor on all matters relating to the Quiz shall

be final and not be open to question on any ground whatsoever.

7. Entries should reach the editor by 31 May 1995. The correct answers and the names of the prize winners shall be published in the next issue of the Journal.

QUIZ No. 1

SECTION A
Multiple Choice
(Choose the correct answer)

1. Which of the following statements is correct ?–
   a. An Ordinance can be issued by the President only when both Houses of Parliament have been adjourned.
   b. An Ordinance can be issued by the President only when both Houses of Parliament have been prorogued.
   c. An Ordinance can be issued by the President when any one of the Houses has been prorogued.
   d. An Ordinance can be issued by the President when any one of the Houses has been adjourned.

10 marks.

2. Who said: "There is one panacea which heals every sore in litigation, and that is costs" ?
   a. Justice V.R. Krishna Iyer
   b. Lord Denning
   c. Lord Justice Bowen
   d. Chief Justice M.V. Venkatachalia

5 marks plus additional
5 marks if case reference also given.

3. In a Supreme Court judgment we find the following observations :

"The spectacle of a Judge hopping on and off the Bench to act first as Judge, then as witness, then as Judge again to determine whether he should believe himself in preference to another witness, is startling, to say the least. It would doubtless delight the hearts of a Gilbert and Sullivan comic opera audience but will hardly

inspire confidence in the fairness and impartiality of departmental trials."

Which eminent Judge made these observations ?

a. Justice Vivian Bose

b. Justice Krishna Iyer

c. Justice P.N. Bhagwati

d. Justice Y.V. Chandrachud

5 marks plus additional
5 marks if case reference also given

4. "The principle of reasonableness which, legally as well as philosophically, is an essential element of equality or non- arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14"

Who said this ?

a. Justice R.S. Pathak

b. Justice P.N. Singhal

c. Justice Hidayatullah

d. Justice P.N. Bhagwati

e. Justice Krishna Iyer

5 marks plus additional
5 marks if case reference also given.

SECTION B
Matching entries in parallel columns

5. Match the Latin words, expressions and abbreviations set out in the table on the left with the English meanings given in the table on the right.

1. Sine qua non	a. Without any appointed date
2. qua	b. It does not follow (An irrelevant argument being advanced in support of a proposition or of an inference sought to be drawn)

3. et seq	c. and the (pages) following
4. sine die	d. without which nothing (indispensable condition or qualification)
5. q.v.	e. a great work of literature
6. ibid	f. in the work already quoted
7. op cit	g. in the same book or passage
8. et al	h. and similar things
9. (sic)	i. in the capacity of
10. etc	j. and others
11. magnum opus	k. which see (cross reference)
12. non sequitur	l. used or spelt as written
13. de hors	m. notwithstanding (an overriding provision)
14. mutatis mutandis	n. having attained the age of majority for legal competence
15. prima facie	o. of its own kind; unique
16. sui generis	p. at first sight
17. uno flatu	q. in the presence of
18. non obstante	r. apart from (without taking into consideration a particular capacity or a particular statutory provision etc.)
19. sui juris	s. with necessary changes
20. ex facie	t. at the same time

1 mark for each: total 20 marks.

6. In the table on the left are the names of private parties by whom we readily identify some leading cases decided by the Supreme Court. In that on the right are the legal points for which those cases are recalled.

Match them.

1. Maneka Gandhi	a. Basic features of Constitution cannot

	be touched even by amendment of Constitution.
2. Nandiny Satpathy	b. Whether Article 19 applies even where Article 22 of Constitution satisfied.
3. Kesavanand Bharati	c. Natural justice; when postdecisional hearing permissible.
4. R.C. Cooper	d. Whether statutory law necessary for executive action affecting fundamental rights to freedom under Article. 19.
5. Golak Nath	e. Requirement of fair play and absence of bias in administrative acts,- in particular, promotion or selection for a higher service.
6. A.K. Gopalan	f. Interrogation of suspects by police.
7. A.K. Kraipak	g. Curtailment of fundamental rights whether permissible through amendment of Constitution.
8. S.B. Patwardhan	h. Bias in departmental inquiry
9. Thakur Bharat Singh	i. Whether jurisdiction of civil court excluded for enforcing rights created by statute where the statute while conferring a right at the same time creates a forum for its enforcement.
10. Ram Jawaya Kapur	j. Natural justice in exercise of powers by Election Commission.
11. Mohinder Singh Gill	k. Compensation for nationalisation.
12. D.S. Nakara	l. Promissory estoppel.
13. Indra Sawhney	m. Orders in name of President can be passed by Minister or Secretary according to Rules of Business.
14. R.D. Shetty	n. Proof of mala fide required if transfer of government servant challenged.

15. Mohd. Nooh	o.	Fair play in award of contract or distribution of other largesse by Government or its agencies.
16. Premier Automobiles	p.	Whether statutory law necessary for executive action not affecting fundamental rights.
17. Motilal Padampat Sugar Mills	q.	Can a society be an "authority" covered by Article 12 of the Constitution.
18. Shamsher Singh	r.	Reservation in public services for O.B.C.'s
19. Ajay Hasia	s.	Seniority between promotees and direct recruits.
20. Royappa	t.	Discrimation in giving improved pensionary benefits with reference to date of retirement.

2 marks each: total 40 marks.

PROFARMA FOR REPLY

Serial No. of Question	Answer (Write a.b.c etc.)	Case reference In questions 2.3 & 4
1.		
2.		
3.		
4.		
5. (1)		
(2)		
(3)		
(4)		
(5)		
(6)		
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(15)		
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(18)

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(20)

6. (1)

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(18)

(19)

(20)

RECENT DEVELOPMENTS IN MEDICAL LAW

P.M. Bakshi
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Law Commission of India

Advances in scientific knowledge have inevitably had their impact on law. Medicine, in many respects, is a science and the law has not been able to escape the impact of medicine on its own thinking, structure and content. The extent to which this impact is felt or its occurrence realised, will differ from country to country. However, it is undeniable that sooner or later, the law-makers of every country come to be confronted with problems raised by advances in medical practice and technology. At this place, it is proposed to deal briefly with the way in which medicine and law inter-act towards each other in certain important areas.

Medicine as a science

Medicine is concerned with the preservation and restoration of health. The word "health" itself, according to the concept as accepted by the World Health Organisation, covers health of the human being viewed as a whole. Therefore, it embraces physical as well as mental health. Again, medicine as a science is not confined to the administration of drugs - what is usually called "medication". It takes within its ambit every external measure, applied or administered or employed by the physician in relation to the patient, for the preservation or restoration of health.

The methodology

At the outset, one should note that the methodology of law and that of medicine differ to some extent. Medicine is a branch of science dealing mostly with objective phenomena. It is concerned with facts and their investigation and analysis. In contrast, the law is a normative discipline as it is concerned with the regulation of human conduct. Nevertheless, both share

certain common features. For example, the law deals with a pathological situation - the situation where someone departs from the official norms. Medicine also deals with a pathological situation, namely, the condition of a person who does not enjoy good health. Besides this, it needs to be pointed out that much of the methodology of law bears resemblance to the methods of science. For example, the drawing of a generalised principle on the basis of isolated decided cases involves the use of deductive logic and resembles the work of the scientist who, after performing a number of experiments, puts forth a theory. There may be other similarities also. Most importantly, both law and medicine are concerned with human beings and therefore their human interest and human appeal are apparent.

Medical ethics and medical law

Today, medical ethics make news and legal controversies arising in the medical field attract attention. But problems of medical ethics are not new. From the formulation of the Hippocratic Oath in ancient Greece to the pressent day declarations by the World Medical Association and others, doctors have debated among themselves the codes of conduct which should govern the art of healing. These days, philosophers, lawyers and journalists insist on joining the debate. But it may be noted that Hippocrates himself was a philosopher. Again, throughout the centuries, the Church has asserted its right to pronounce on medical matters of a spiritual import, such as abortion and euthanasia, and to uphold the sanctity of life. One of the first propositions enunciated in the Hippocratic Oath is that the doctor owes loyalty to his teachers and his professional brothers. The second proposition addresses itself to the doctor's obligation to exercise skill for the benefit of the health of the patient. The Oath then prohibits abortion, direct euthanasia and abetment of suicide. It also lays emphasis on the doctor's avoiding improper sexual relations with his patients. It recognises professional secrecy in the field of medicine. It will be seen that most of these subjects have retained their appeal and importance, even for present day doctors.

New developments

At the same time, one has to note that the last 50 years have seen problems of greater magnitude touching law and medicine. Science has given to the doctors tools with which they can work marvels which were not dreamt of by earlier generations. Women whose blocked Fallopian tubes prevent natural conception can be offered the hope of a test tube baby. Women who have never been able to ovulate can become mothers through the donation

of eggs. Surgery can save babies who are born with disabling handicaps. Ventilators can keep alive accident victims whose heart and lungs have given up. Patients of diseases of the kidney, liver and heart can be given a new lease of life through donation of organs.

These developments have been accompanied by changed social thinking. Patients are not always willing to accept the decision of doctors. Litigation against the doctors is becoming more frequent. The power of the doctor to end life or to prolong it with the help of technology has disturbed many persons. The doctor himself often feels the acute moral dilemmas presented by delicate situations. In this manner, questions of medical ethics and medical law are increasing in number and variety.

Major issues

It would not be far from truth to say that most of the legal issues that arise from the practice of medicine relate to medical negligence and matters of life and death. In the field of medical negligence, the possibilities of litigation are endless. As regards matters of life and death, the problems arise because at both the extremities, namely the beginning of life and its termination, technological advances have progressed by leaps and bounds, while ethical thinking and legal measures take some time for keeping pace with medical developments.

Basic propositions

For all practical purposes, the law relating to medical errors, loosely described as medical malpractice, is governed by two basic principles. The first is that the patient must agree to the treatment contemplated or proposed by the doctor. The second is that treatment must be carried out with proper skill and care on the part of all the members of medical profession involved. A doctor who operates on a patient or injects a liquid into the patient's body or even touches his person against his will would, in most cases, be committing the tort of battery, under the head of trespass against the patient's person. Similarly, a doctor who is shown to have exercised inadequate care of his patient, to have fallen below the required standards of competence, is liable under the head of the tort of negligence to compensate the patient for any harm resulting from his negligence, subject to certain parameters of the law.

Consent to treatment

Every adult who is mentally competent has an inviolable right to deter-

mine what shall be done to his or her body. This is illustrated by a string of recent cases. Thus, a doctor who, while performing minor gynaecological surgery, sterilised the patient there and then because he found that her uterus had got ruptured, was liable for battery as she had not agreed to sterilisation. *Devi v. West Midland Area Health Authority*, (1980) 7 Current Law 44. When a woman had merely agreed to Curettege, the performance of hysterectomy was held to be actionable. *Cull v. Butler*, (1932) 1 British Medical Journal 1195.

In India, the law relating to consent (in the context of criminal liability) is codified in Sections 86 to 92 of the Indian Penal Code and although the provisions are somewhat detailed, they furnish reasonably precise guidance to the doctor. For example, the administration of a drug, even with the consent of a patient, to end his life, is not permitted. Conversely, the administration of a drug against the will of an adult mentally sound patient is not permitted, even though the doctor may be of the view that the treatment is necessary for the patient's benefit.

Medical negligence

The law relating to medical negligence is simple. The doctor must exercise reasonable care and skill at every stage, but it is for the plaintiff to show that the doctor fell below the required standard of care. The classical statement on the subject is to be found in *Bolam v. Fiern, FMC*, (1957) 1 WLR 582, 586, where the court said :

"The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill, it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."

A planitiff suing a doctor must prove that the negligence of the doctor was the cause of harm. In *Wilsher v. Essex Area Health Authority*, (1986) 3 All ER 801, a child born prematurely needed oxygen to survive, but the junior doctors made an error in monitoring the oxygen level in his blood. It was alleged that it had caused blindness. But the plaintiff had failed to prove the causative link and therefore could not succeed.

Life and death

Medical science now enables the doctor to promote artificial conception, and a good deal of legal thinking is devoted to the validity and consequences

of such procedures. Conversely, life in the offing can be terminated by medical termination of pregnancy which also has led to interesting controversies. The recent case in Madras (November/December, 1993) in which the High Court refused to compel a girl of 16 years who was pregnant to resort to abortion (although that was the insistence of her father) illustrates the application of the doctrine of free consent in the Indian setting. Conversely, the recent legislation in India defining the moment of death illustrates the serious concern of the law with the other extremity of life. These developments do not constitute the last word on the subject and India is bound to be confronted with many more difficult as well as interesting questions with medico-legal dimensions.

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> *Judges, like Ceasor's wife, should be above suspicion.*
>
> *Charles Bowen*

EX PARTE INJUNCTIONS

M.L. Singhal, H.J.S.
Director, J.T.R.I.U.P.

The matter of issuance of an ex parte injunction is a matter of great concern to Courts of the Country. An ex pârte injunction issued, if the facts, necessity and urgency in the case warranted, saves a party from irreparable injury, from an irretrievable position and gives a great sigh of relief, but if the facts, necessity and urgency did not require, there are chances of abuse of the judicial process of the Court, which have to be warded off. The party who has succeeded in obtaining an ex parte injunction tries to prolong it, puts all obstacles in the way of the court in the disposal of the matter on merit. It has been found that while protecting the plaintiffs from suffering the alleged injury, more serious injury has been caused to the defendants due to continuance of interim orders of injunction without final hearing. On occasions even public interest suffers in view of the interim orders of injunction because the persons who have secured such interim orders are interested in perpetuating the contraventions made by them by delaying the final disposal of such applications.[1] Sometimes the parties endeavour to take possession of lis property on the basis of the ex parte interim injunction. Under the colour of disobedience of ex parte interim injunction it is canvassed that the opposite party contemner must first purge himself by undoing the disobedience before he can be heard in the matter wrangling the matter for months, if not for years before the Court. At occasions it is difficult to adjudicate whether the opposite party has proceeded with the alleged wrong after the issuance of ex parte injunction by the Court. After obtaining ex parte injunction people think in terms of interest, the more the delay in the disposal of the injunction matter, the more they will be earning interest or saving interest on the money which they are required to pay or deposit under some legal liability. This requires all the more vigilance on the part of the courts in issuing ex parte injunctions.

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1. Shiv Kumar Chadha V. Municipal Corporation of Delhi, 1993(1) SCC 161 at page 175

Injunction is a judicial process by which a party is required to do or to refrain from doing any particular act. It is in the nature of preventive relief to a litigant to prevent further possible injury. In other words, the court in exercise of the power of granting ad interim injunction is to preserve the subject matter of the suit in the status quo for the time being.[2]

It is settled law that the grant of injunction is a discretionary relief. The exercise thereof is subject to the court satisfying that (1) there is a serious disputed question to be tried in the suit and on the facts before the court, there is probability of his being entitled to the relief asked for by the plaintiff/defendant; (2) the Court's interference is necessary to protect the party from the species of injury. In other words irreparable injury or damage would ensue before the legal right would be established at trial; and (3) that the comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that would be likely to arise from granting it.[3] The phrases "Prima facie case", "balance of convenience" and "irreparable loss" as observed by the Hon'ble Supreme Court in case of *Dalpat Kumar v. Prahlad Singh*[4], are not rhetoric phrases for incantation, but words of width and elasticity, to meet myriad situation presented by man's ingenuity in given facts and circumstances, but is hedged with sound exercise of judicial discretion to meet the ends of justice. The Supreme Court and various High Courts of the Country have cautioned against issuance of ex-parte injunction. The provisions of the Code of Civil Procedure and other statutory provisions have put great restraint on the grant of ex parte interim injunctions by the Court. The provisions of Or. 39, Rule 3 C.P.C. by the C.P.C. (Amendment) Act 1976 (104 of 1976) have been made more stringent in this regard, a new proviso to the said Rule 3 has been added by the Amending Act 1976. Under the proviso to Rule 3 the Court is required to issue notice to the opposite party before granting an injunction, "*except where it appears that the object of granting the injunction would be defeated by the delay*". It is under these words of exception that what are known as ex parte ad interim injunctions are granted by Courts. By the new proviso to Rule 3 added by the Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976), the law relating to issue of ex parte injunction has been improved

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2. Dalpat Kumar v. Prahlad Singh AIR 1993 SC 276; see also Halsbury's Laws of England 41th Ed. Vol 24, page 511
3. Shiv Kumar Chadha v. Municipal Corp. of Delhi (1993) 3 SCC 161 at P. 175; Dalpat Kumar v. Prahlad Singh, AIR 1993 SC 276 at p. 277; United Commercial Bank v. Bank of India, AIR 1981 SC 1426
4. AIR 1993 SC 276 at p. 278

in the following two ways: *First*, it has been provided that where the Court grants an ex parte injunction, it shall be obligatory on the Court to record reasons for its opinion that the object of the injunction would be defeated by delay. *Secondly*, it has now been provided that where the Court grants an ex-parte injunction, copies of the application etc., shall be sent or delivered to the defendant immediately after the injunction has been granted and an affidavit shall be filed by the applicant for injunction stating that it has been so delivered or sent. To avoid delay in the disposal of the injunction application where ex parte injunction has been granted, under Rule 3-A* added by the C.P.C. Amending Act, 1976, it has been made obligatory on the part of the court to dispose of the application for injunction within thirty days from the date on which an ex parte injunction was granted by it, and where it is not practicable to do so, the Court shall record reasons for such inability. In suits against Government or any public officer in respect of any act purporting to be done by such public officer in his official capacity, a suit can be instituted with the leave of the court without serving notice required under Section 80 C.P.C. but the Court has been restrained from granting injunction without giving to the Government or public officer, as the case may be, a reasonable opportunity of showing cause in respect of the relief prayed for in the suit.

As regards, writ petitions under Article 226 of the Constitution, Cl. (3) has been inserted in Article 226 by Constitution (44th Amendment) Act 1978 providing that where without furnishing copy of the petition and all the documents in support of the plea for interim order, to the opposite party and without hearing the opposite party, an ex parte interim injunction is granted by the High Court, the opposite party may move an application to the Court for vacation of the interim order after serving a copy of his application on the petitioner. Cl. (3) further enjoins upon the Court to dispose of the application for vacation of the interim order within a period of two weeks of service of copy upon the petitioner or from the date of the application, (whichever is later). The Cl. (3) further envisages that in case the Court fails to dispose of the application within the said period the ex parte interim order *shall stand vacated*.

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* Omitted in U.P. Vide U.P. Govt. Gazette. 3-10-81 Pt.2. P.107 (w.e.f. 3-10-81)

"Inspite of the aforesaid statutory requirements" observes the Supreme Court in *Shiv Kumar Chadha's case*[5], "the Courts have been passing orders of injunction before issuance of notices or hearing the parties against whom such orders are to operate without recording the reasons for passing such orders".

The Courts have to be more cautious in granting ex parte injunction as the order is passed without notice or hearing the party who is to be effected by the order so passed.[6] Before any such order can be passed the Court must be satisfied that a strong prima facie case has been made out by the plaintiff including on the question of the maintainability of the suit and the balance of convenience in his favour and refusal of injunction would cause irreparable injury to him.[7] The party who invokes the jurisdiction of the Court for grant of an order of restraint against a party, without an opportunity of being heard, must satisfy the court about the gravity of the situation and the court has to consider briefly these factors in the ex parte order.[8] The Court should take into consideration, all relevant factors, including as to how the object of granting injunction itself shall be defeated if an ex parte order is not passed.[9] Any such ex parte order should be in force up to a particular date before which the applicant should be required to serve the notice on the opposite party concerned.[10] In the Supreme Court Practice 1993 Vol. 1, at page 514, reference has been made to the views of the English Courts saying: "Ex parte injunctions are for cases of real urgency where there has been a true impossibility of giving notice of motion. An ex parte injunction should generally be until a certain day, usually the next motion day......"[11]

An ex parte injunction granted under Rule 3 is not final, either it has to be confirmed or it has to be vacated after due notice to the defendant.[12]

Where both the parties have appeared and filed pleadings before the court, the Court should not grant ex parte injunction.[13]

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5. 1993(3) SCC 161 at page 175
6. Shiv Kumar Chadha v. Municipal Corporation of Delhi (1993) 3 SCC 165 at p. 175
7. Ibid at p. 176
8. Ibid at p. 177
9. Ibid at p. 176, 177
10. Ibid at page. 177
11. Ibid at p. 177
12. ILR (1979) 1 Delhi 84
13. K.B. Singh. v. Mahatsi Devi, AIR 1962 Mainpur 56; Hamumaga v. Anjappa, (1973) 2 Mys L.J. 96

Where the defendant has appeared in the case, an ex parte injunction should not be granted unless the case is very pressing.[14]

An interim injunction may be granted ex parte in an emergency.[15]

An injunction will not usually be granted without notice, but if the court is satisfied that the delay caused by proceeding in the ordinary way might entail irreparable or serious mischief, it may make a temporary order ex parte upon such terms as it thinks just.[16]

The granting of ex parte injunction is the exercise of a very extraordinary jurisdiction, and therefore the time at which the plaintiff first had notice of the act complained of will be looked at very carefully in order to prevent an improper order being made against a party in his absence, and if the applicant has acquiesced for some time it will not be granted. Even when notice of motion for an injunction has been given, an ex parte injunction may in certain circumstances be granted if the motion cannot, either through other engagements of counsel or pressure of business in the court, be brought on. Where an interim or interlocutory injunction is sought, it is a question for the court to consider what is the right order, on the balance of convenience and where the major risk of damage lies, and, in particular, whether there would be any irreparable damage.[17]

Where an application cannot be heard by the Court though no fault of either of the parties to the suit and the court comes to the conclusion on a prima facie view that irreparable damage may be done to the plaintiff by not preventing the continuance of the alleged nuisance or whatever other wrong doing it may be by the defendant, it certainly has jurisdiction to grant an ex parte injunction.[18]

In *Union of India v. M/s Oswal Woollen Mills Ltd.*[19] their Lordships of the Hon'ble Supreme Court cautioned that a drastic interim order may never be passed without hearing the opposite parties even if the circumstances justify it. A statutory order cannot be stayed without at least hearing those

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14. 24th Halsbury's laws of England, 4th Ed. page 587, Para 1051; Bell v. Hull and Silboy Rail Co. (1840) 1 Rly & Can Cas 616 at p. 623
15. Morgon Stanle y Mutul Fund v. Kartick (1994) 4 SCC 225; Shiv Kumar Chadha v. Municipal Corporation of Delhi 1993 (3) SCC162; Union of India v. M/S Oswal Woollen Mills Ltd. AIR 1984 SC 1264; Halsbury's Laws of England, 4th Ed., Vol. 24, page 512, Para 904.
16. Halsbury's Laws of England 4th Ed. page 587 Para 1051.
17. 24 Halsbury's Laws of England 4th Ed. page 587, Para 1051
18. Beese v. Woodhouse, (1970)1 All ER 769(CA).
19. AIR 1984 SC 1264

that made the order. Such a stay may lead to devastating consequences leaving no way of undoing the mischief. Where a plentitude of power is given under a statute, designed to meet a dire situation, further observe their Lordships of the Apex Court, it is no answer to say that the very nature of the power and the consequences which may ensue is itself a sufficient justification for the grant of a stay of that order, unless of course, there are sufficient circumstances to justify a strong prima facie inference that the order was made in abuse of the power conferred by the statute. A statutory order is purported to be made in the public interest and unless there are even stronger grounds of public interest an ex parte interim order will not be justified. The only appropriate order to make in such cases is to issue notice to the respondents and make it returnable within a short period. This should particularly be so where the offices of the principal respondents and relevant records lie outside the ordinary jurisdiction of the Court. To grant interim relief straightway and leave it to the respondent to move the court to vacate the interim order may jeopardise the public interest. It is notorious how if an interim order is once made by a Court, parties employ every device and tactic to ward off the final hearing of the application. It is, therefore, necessary for the Courts to be circumspect in the matter of granting interim relief, more particularly so where the interim relief is directed against orders or actions of public officials acting in discharge of their public duty and in exercise of statutory powers.

Very recently the matter of grant of ex parte injunction came before the Hon'ble Supreme Court in the case of *Morgan Stanley Mutual Fund v. Kartick.*[20] The Apex Court in the said case laid down the following guidelines:-

1. As a principle, an ex parte injunction can be granted only under exceptional circumstances.

2. The factors which should weigh with the court in the grant of ex parte injunction are:

   (a) whether irreparable or serious mischief will ensue to the plaintiff;

   (b) whether the refusal of ex parte injunction would involve greater injustice than the grant of it would involve;

   (c) the court will also consider the time at which the plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is prevented;

20. (1994) 4 SCC 225

(d) the court will consider whether the plaintiff had acquiesced for sometime and in such circumstances it will not grant ex parte injunction;

(e) the court would expect a party applying for ex parte injunction to show utmost good faith in making the application;

(f) even if granted, the ex parte injunction would be for a limited period of time;

(g) general principles like prima facie case, balance of convenience and irreparable loss would also be considered by the Court.

The matter of issuance of ex parte injunction also came before the Supreme Court in a recent case of *Shiv Kumar Chadha v. Municipal Corporation of Delhi.*[21] The Apex Court observed that the power to grant injunction is an extraordinary power vested in the court to be exercised taking into consideration the facts and circumstances of a particular case. The Courts have to be more cautious when the said power is being exercised without notice or hearing the party who is to be affected by the order so passed. Such ex parte orders have far reaching effect.

A controversy has been raising over the issue as to whether the provisions contained in proviso to Rule 3, which require that a court while granting ex parte injunction shall record reasons for its opinion that the object of the injunction would be defeated by delay, are mandatory or not, and whether non-compliance of the provisions vitiates the order. Now the Hon'ble Supreme Court has set the controvercy at rest. In *Shiv Kumar Chadha v. Municipal Corporation of Delhi*, (1993) 3 SCC 162; see also *Shree Mad Brahamanand Inter College v. M.M.M. Trust*, 1990 (2) CCC 66(All); *Administrator of S.C.G. v. H.S. & Sons*, 1993 (1) Guj LR 434(Guj), the Supreme Court has held that the provisions of the proviso are mandatory and flout there of would vitiate the injunction granted ex parte. Their Lordships of the Apex Court observed that the imperative nature of the proviso has to be judged in the context of Rule 3 of Order 39 of the Code. Before the proviso aforesaid was introduced, Rule 3 said "the court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application

21. 1993(3) SCC 162

for the same to be given to the opposite party". The proviso was introduced to provide a condition, where court proposes to grant an injunction without giving notice of the application to the opposite party, being of the opinion that the object of granting injunction itself shall be defeated by delay. In this background, the requirement for recording the reasons for grant of ex parte injunction, cannot be held to be a mere formality. This requirement is consistent with the principle, that a party to a suit, who is being restrained from exercising a right which such party claims to exercise, either under a statute or under the common law, must be informed why instead of following the requirement of Rule 3, the procedure prescribed under the proviso has been followed. The party which invokes the jurisdiction of the court for grant of an order of restraint against a party, without affording an opportunity to him of being heard, must satisfy the court about the gravity of the situation and court has to consider briefly these factors in the ex parte order. The Parliament has prescribed a particular procedure for passing of an order of injunction without notice to the other side, under exceptional circumstances. Such ex parte orders, further observe, their Lordships of the Supreme Court, have far-reaching effect, as such a condition has been imposed that court must record reasons before passing such order. If it is held that the compliance with the proviso aforesaid is optional and not obligatory, then the introduction of the proviso by the Parliament shall be a futile exercise and that part of Rule 3 will be a surplusage for all practical purposes. Proviso to Rule 3 of Order 39 of the Code, attracts the principle, that if a statute requires a thing to be done in a particular manner, it should be done in that manner or not at all.

The aforesaid view has been endorsed by the Apex Court in its subsequent decision in *Morgan Stanley Mutual Funds' Case*[22]

Granting an order of 'status quo' also is granting of injunction and the procedure for recording of reasons has to be followed, if not followed, the order of injunction cannot be said to be in consonance with law.[23]

Rule 3 does not contemplate any special manner of recording reasons. It satisfies the requirement of the Rule if reason is discernible from the order. The test should be whether some kind of reason relatable to the purpose of

22. (1994) 4 SCC 225 at pp. 242, 243
23. Administrator of S.S.G. v. H.S. & Sons, 1993 (1) Guj LR 434 at p. 435(Guj)

the rule is disclosed by the order and whether the court has been conscious of the requirement. Where the injunction order discloses some reason which is proximate to the objects of the Rule and it is also apparent that the Court is not oblivious of the requirement, it should be deemed a substantial compliance of the requirement.[24]

Thus, there should be wisest economy in the issuance of ex parte interim injunctions by the Courts. Only in the cases of extremest urgency, where the party would be placed in irretrievable position unless immediately protected by judicial process, ex parte injunctions should be issued and that too for shortest duration. Where the interim injunction would have the effect of placing the applicant in advantageous position over the opposite party, ex parte injunction should never be granted.

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24. K.K. Puri v. A.K. Puri, AIR 1994 J&K 25

Colourable Legislation And Colourable Exercise of Power

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Beginning with semantics of the expression colourable legislation one is likely to get stuck at the adjective "colourable". This word indicates the possibility of being coloured. But law, and constitutional law at that, does not succumb to bare semantics. Grammar books and dictionaries are good companions but insufficient tools for understanding law. Today many jurists are grappling to forge the tool of legal semiotics for the method of understanding legal expressions. It may perhaps be proper to say that law has dual semiotics, i.e., the text and the context. Many Justices of the apex court, whose forerunners are Justice Krishna Iyer and Bhagwati, have emphasised the context aspect of the semiotics, and into this they pour not only the history, the syntax and other provisions of the particular law, but also the purpose or objective of the law. In a way this aspect is Heydonian in character. So it is more proper to be semiotical without sacrificing the semantics.

Deception

"Colour" according to Black' Legal Dictionary is "appearence, semblance or mimulacrum, as distinguished from that which is real....... a deceptive appearence..... a lack of reality". Refering to this Justice Krishna Iyer in *R.S. Joshi v. Ajit Mills*, AIR 1977 SC 2279, observes "a thing is colourable which is, in appearence only and not in reality, what it purports to be. In Indian terms, it is Maya". Some view life itself as Maya, as unreal. But it is the material jurisprudential sense in which the topic is to be considered. Says Justice Iyer, "In the jurisprudence of power, colourable exercise of or fraud on legislative power or, more frightfully, fraud on the Constitution are expressions which merely mean that the legislature is incompetent to enact

a particular law although the label of competency is stuck on it, and then it is colourable legislation. He further explains that if legislation, apparently enacted under one Entry in the List, falls in plain truth and fact, within the content, not of that Entry, but of one assigned to another legislature, it can be struck down as colourable even if the motive were most commendable. Contrarily, if the Legislature in truth and fact acts within the content of the Entry assigned to it in the VII Schedule of the Constitution, then bad motive alone would not be enough to castigate the legislation as colourable. This is because mala fides cannot be attributed to legislature.

Colourable Legislation is, therefore, a doctrine which operates in the field of constitutional law and it is invoked in order to judge the competence of the legislature which has made the particular law. It is analogous to the general doctrine of the colourable exercise of power which is quite commonly invoked for impugning the administrative exercise of power. It is known that administrative power is exercised by virtue of power conferred by some legislation. Every power is conferred for a particular public purpose, and therefore, the administrative authorities cannot act in pursuance of such power to achieve some other purpose not sanctioned by law. Here also the label assigned to the exercise of power by the executive is not decisive. It is the reality and substance which matters. The difference in the case of Doctrine of colourable legislation arises in view of its user and nexus with respect to exercise of legislative power, which stands hierarchically at a higher level as compared to the subordinate legislations and exercise of administrative power.

Under our constitution, wherein real sovereignty resides, the legislative power is not absolutely un-limited. It is limited by fundamental rights, constitutional limitations, limitations of field with reference to VII Schedule and also territorial limitations. It is judicial review by constitutional courts which checks the legislatures from tress-passing beyond the limits. Thus judicial review is another vital check without which constitutional limitations will have no meaning. In *Indira Gandhi v. Raj Narain*, AIR 1975 SC 2299, judicial review has been rightly described to be part of the basic structure of the constitution, and therefore, not amendable by resort to Article 368 of the Constitution. So through judicial review the Constitutional Courts test whether the impugned legislation is within the competence of the legislature or is a colourable legislation intended to tress-pass covertly into a field reserved for another legislature.

Every contradiction between reality in law and the maya in law is not

within the domain of judicial review. The biggest maya or un-reality one would notice embedded in the beginning phrase of the preamble of the constitution, i.e. "We the people of India.........". The Constitution was never ratified in a referendum by the people of this country. It was also not framed by a Conctituent Assembly elected by the people directly. The members of the Constituent Assembly were elected indirectly and was supported by limited franchise. Merely because the members in general represented the people of the country in the freedom struggle, in reality it can not be said that the Constitution has been framed by the people for themselves. But then this unreality has been repeatedly invoked and referred to by Courts in the exercise of judicial power. So even in the constitutional field the doctorine of colourable legislations is limited to adjudging legislative competence. In this sense the expression colourable legislations has become a term of art.

Distribution of power

The question of legislative competence and therefore of colourable legislation will always arise in the context of the three Lists in the VII Schedule read with Article 246 and cognate Articles of the Constitution. These provisions are components of Part XI of the Constitution which begins with the caption "RELATIONS BETWEEN THE UNION AND THE STATES". Chapter I of this part is titled "DISTRIBUTION OF LEGISLATIVE POWER" ; and Chapter II is titled "ADMINISTRATIVE RELATIONS". The subject with which we are concerned is relatable to Chapter I. However, Part XI as a whole is a consequence of the choice made by the framers of the Constitution to have a kind of federal structure for India which combines Central Governance with State Governance through the scheme of distribution of powers envisaged by Part XI read with VII Schedule of the Constitution. A cursory reading of Chapter I of Part XI reveals that in the eventuality of expediency in national interest, in case where proclamation of Emergency is operating; and where two or more States have consented and to give effect to international agreement, the Parliament can make laws with respect to any matter enumerated in the state List, i.e. List II of VII Schedule. But these are exceptional situations. In normal times Parliament though entitled to make laws for the entire territory of India by virtue of Article 245 is confined with respect to the subject-matter to the Entries contained in List I and III of the VII Schedule. It cannot intrude into the exclusive sphere of the State reserved Under List II of the VII Schedule. The State is also free to make laws with respect to subject-matter contained

in List III, which is also called the concurrent List, with the limitations that State law can be overridden specifically or by necessary implications by subsequent parliamentary enactment. Where Parliament has already made a law with respect to a matter in the concurrent List, there also the States can make a law, but such a law would prevail in the State, if and only if the President gives assent to such a law. This position is made clear by Article 254. That then is broadly the scheme of distribution of legislative powers contemplated by the Constitution and it forms the back bone of the Indian Federal Structure. Our federal structure has little affinity to the federalism in United States. Some writers therefore prefer to use the expression quasi-federal to describe the Indian policy. Such lavels, however, do not help in resolving specific problems. It is best to examine Indian Federalism on the basis of the provisions of the Constitution and then to demarcate the sphere of State action and Union action.

Federation

Today we are noticing considerable strains in the relations between the Centre and the State, in our country. Frequent use or abuse of the power of dismissing State Government and dissolving the State Legislature led to the formation of Sarkaria Commission, and the recent judgment of the Supreme Court in *S.R. Bommai's* case (1994-3 SCC 1) seems to have cleared some ground and to afford protection to the States against Centre's authoritarianism. Article 1(1) of the Constitution significantly declares that "India, that is Bharat, shall be Union of States". Though the territories of the States can be altered by the Parliament, India has to remain a Union of States and States will continue to enjoy plenary legislative power with respect to the subject-matters assigned to them exclusively or concurrently, subject to the mechanism contained in Part XI of the Constitution. It is of immense significance that the Amendatory power contained in Article 368 can be used to amend the Lists in the VII Schedule. But such amendments can be made only by a special procedure, which not only requires passage of the bill by both Houses of Parliament by a majority of not less than 2/3rd of the Members of the House, but also ratification by legislature of not less than 1/2 of the States. In *S.R. Bommai's case*, apex court has rightly held that federalism is a basic feature of the Constitution. Hence while examining the laws on the ground of colourable legislation the courts have to keep in view the federal nature of the Constitution. In fact the problem of colourable legislation would not have arisen at all if the Constitution had been unitary in nature. Delivering judgment for a Division

Bench in writ Petition No. 619 of 1994 (*Varshney General Sales v. State of U.P.*) Justice A.P. Mishra observed "In a federal constitution time and again in exercise of legislative power, conflict arose between the Union and State transgressing into the field occupied by the other". Colourable legislation is, therefore, intimately connected with the Federal distribution of legislative powers.

The pattern of distribution of powers under our Constitution, seems to have been borrowed from the Government of India Act, 1935, and the Canadian Constitution. Considering the topic and time it is not possible to outline the difference and commonality between the aforesaid Constitution Acts and the Constitution of India in detail. More pertinent would be scrutiny of the three Lists contained in VII *Schedule* of the Constitution. The distinctive feature is that important subjects of national interest have been reserved for the Parliament in List I and Entry 97, read with Article 248 gives exclusive power to Parliament to make any law with respect to any matter not enumerated in the concurrent List or State List. The latter is the residuary power. As already indicated parliament has been given a place of dominance with respect to the concurrent List. Yet another feature is that except for certain Stamp Duty and fee in respect of matters in the concurrent List, the concurrent List contains no Entry with respect to taxes. As regards taxes the States power is limited to Entry 46 to 63, and Entry 66. Similarly in List I tax Entries are contained in entry 82 to 92-B and 96 and 97. Tax Entries have therefore been mentioned by the framers of the Constitution with specificity and particularity in List I and II. The general entries and tax entries are distinct and sui generis. General entries do not contain field of tax, even incidentally. Scrutiny of the List shows that the Constitution makers have taken great care to elaborately demarcate the area of legislation for the Union and States and have also provided for resolution in case of conflict. Nevertheless the life is complex and the future is uncertain and development today is multi dimensional and rapid. As a result the 20th century has been racy in scientific and technological change. Space industry, ocean industry, satellites, computers, optic fibre, genetic engineering, electronics etc. have altered the face of the World as never before. Simultaneously, idea has become the bigest property and patient laws are in disarry. Money laundering has become a booming business and crime is also becoming globalised. The word used in the Entries are hardly sufficient to keep the lines of division clear and specific for all times. Therefore, judicial review is facing a testing time, and courts have to keep on intervening

to redefine the contours of entries. One recent example of this is with respect to the power of the States to impose excise duty on industrial alcohol. Entry 8 of the State List talks about intoxication liquor in all its aspect including production, manufacture and sale. Entry 51 of this List empowers States to impose excise duty on alcoholic liquor for human consumption. Several States had made laws for imposing excise duty on industrial alcohol, which is not consumable by human beings.

On the other hand Entry 88 of List I empowers Union to impose Excise Duty on Tobacco, and other goods manufactured or produced in India, excepting alcoholic liquors for human consumption. This Entry is counter part of Entry 51 of State List. In the case of *Synthetics and Chemicals v. State of U.P. and others* (AIR 1990 SC 1927), a seven Judges Bench of Supreme Court considered the onward march of science and the increasing use of industrial alcohol for industrial purposes and concluded that Entry 8 and 51 of State List are limited to intoxicant liquor which is for human consumption and would not cover industrial alcohol, which is not meant for human consumption. Thus the scope of the Entries' in the three Lists is likely to under go variation due to scientific advancement or other reasons and the Parliament or legislature which had power to legislate on a matter at one point of time may cease to have such power at later point of time.

Similar is the judgment of the apex court in the case relating to TADA (*Kartar Singh v. State* 1994 Cr. L.J. 3139). Answering the contention that TADA is a law with respect to Entry No. 1 of the State List concerning public order, Justice R. Pandian after examining the provisions of TADA and the heinous, horrendous and organised nature of crime associated with terrorism held that the law had a special dimension and was with respect to the subject of Defence of India covered by Entry I, 2 and 2-A of Union List read with the residuary entry. Justice Sahai traced it to entry 1 of List 3 while Justice Rama Swamy relied only on residuary entry. But all held Parliament was competent. In this case the scope of the Entry was not altered, but the dangerous dimension of the terrorist activities going on in the country were noticed. The effect of the terrorism on the integrity and defence of the country were properly grasped and TADA was held to be beyond the scope of the Entries in the State List. The law which normally would have been held to be connected with public order was consequently held to be out-side the scope of Entry I of the State List. The aforesaid two cases represent the third semiotical dimension of law in a changing society.

While determining whether a particular law has been competently made by Parliament/Legislature some caveats have to be borne in mind. Firstly, every legislation carries a presumption of constitutional validity. The burden is on those, challenging the law, to establish the law is ultra vires being beyond competence. It is presumed that the legislature understands the scope of its powers and acts within the limits. Secondly, the Entries are to be construed broadly and not restrictively. The reason being that the Framers of the Constitution have elaborately demarcated the field of legislation and consequently the presumption is that no vacuum has been left. The residuary Entry in List I is not to be lightly resorted to. Thirdly, the doctrine of ancillary and incidental power is also a part of the interpretative process. In other words, the entries are construed so broadly as to cover matters which are ancillary and incidental to the main subject mentioned in the entry. Fourthly, the contrary to the common notion, the constitutional courts exercsing sovereign power of dispensation of justice, including judicial review, do not stand at loggerheads with the other sovereign wing, namely, legislature. These sovereign constitutional wings act within the limits defined by the Constitution. But their common pursuit is to work out the Constitution for the welfare of the people and for strengthening the nation in all respects. Thus declaration of a law as being beyond competence and hence ultra vires and un-constitutional is the last resort. The sword of ultra vires is unsheathed only when it is not possible to save the law, just as a surgeon, amputates a limb when it can not be cured.

Despite the uphill task of getting a law declared ultra vires, challenges have not been lacking on the ground that it is beyond the competence of the Legislature. When such challenges are made the court first of all looks at the law and tries to find out whether there is any entry in the list concerned to which the law can be held to the connected. For example if the law has been made by the State then it will have to be seen whether any Entry in the State List or the concurrent List supports the law. But if it is a law made by Parliament then the Entries in List I and III would be relevant. The exercise is not to find a entry in the List of the other Legislature, so as to strike down the law. But this task is not so easy, as it appears on the face. There are various entries in different lists, which are related to each other or which corresspond to each other and it, therefore, appears that there is clash between the two entries in different List. But then the approach of the Courts is to avoid the clash in the Entries as far as possible and for this purpose apart

from the aforesaid principles, the doctrine of the pith and substance is applied. It is not enough for the challenger to demonstrate that the impugned law also touches an entry in the list of other legislature. He will have to establish that in substance the law is beyond the scope of the Entry, with respect to which the legislature has enacted it. It is here that the doctrine of ancillary powers also comes to save the minor over flows and tress-passes beyond the scope of the Entry.

Before the Courts embark upon an enquiry to determine the competence of the legislature to make the impugned law, for declaring whether it is colourable legislation or not, it would be befitting to keep in mind the warning given by Justice Krishna Iyer in the case of *R.S. Joshi v. Ajeet Mills*. Dealing with the question colourable legislation, he observes "certainly, this is a malignant expression and when flung with fatal effect at a representative instrumentality like the Legislature, deserves serious reflection. If, foregetting comity the Legislative wing charges the Judicative wing with 'colourable' judgment, it will be intolerably subversive of the rule of law. Therefore, we too must restrain ourselves from making this charge except in absolutely plain cases and pause to understand the import of the doctrine of colourable exercise of public power, especially legislative power. In this branch of law, 'colourable' is not tainted with bad faith or evil motive; it is not pejorative or crooked. Conceptually, 'colourability' is bound up with incompetency".

Despite the aforesaid caveat and warning occsions have not been lacking when the constitutional courts have held laws to be beyond the competence of Parliament/Legislatures of States. I will first deal with the cases where the laws have been held to be incompetent, and thereafter with some important cases where the challenge was repelled.

(i) In this case of *Buxa Dooars Tea Co. Ltd. v. State of West Bengal* (AIR 1989 SC 2015) (2 JJ) competence of the State legislature to enact West Bengal Rural Employment and Production Act, 1976, fell for consideration. This Act had been amended in 1981 and 1982. A Rural Exployment cess had been imposed. It was a tax. If the legislation was to be regarded a levy in respect of Tea Estates, it would be referable to Entry 49 List III, which speaks of "Taxes on land and building". But if in substance it was a legislation in respect of despatches of tea, legislative authority would have to be found with reference to some other Entry. The Supreme Court said that "for determining true nature of the legislation.....we must...... tale all the relevant provisions

of the legislation into account and ascertain the essential substance of it. It seems to us that although the impugned provisions speak of a levy of cess in respect of Tea Estates, what is really contemplated is a levy on despatches of Tea instead. The entire structure of the levy points to that conclusion". Refering to *R.R. Engineering Co. v.* Zila Parishad, Bareilly (AIR 1980 SC 1088) and *Hinger Rampur Coal Company Ltd. v. State of Orissa* (AIR 1961 SC 459) the Supreme Court observed that the method of determining the rate of levy would be relevant in considering the character of levy, though that is not conclusive. Again refering to *Bombay Tyres International Ltd.* (AIR 1984 SC 420) the court said "any standard which maintains a nexus with the essential character of the levy can be regarded as a valid basis for assessing the measure of the levy". On examining the provisions of the law the court did not find any relationship or nexus between the Tea Estates and the different treatment accorded in respect of the despatches of different kind of Tea. Consequently it concluded that in substance levy was with respect to despatch of Tea, and hence not relatable to Entry 49, List-II of VII Schedule of the Constitution. No other Entry in List-II or List-III was shown to support it. The law was, therefore, held to be beyond the competence of the State Legislature. It was a case of colourable legislation. The legislature had used the expression "in respect of a Tea Estate" though in substance the tax was with respect of despatch of tea.

(ii) In *India Cement Ltd. v. State of Tamil Nadu* (AIR 1990 SC 85) (7JJ) the question was whether levy of cess on royalty is within the competence of the State Legislature. The High Court had held that the cess was on land and therefore, referable to Entry 49, List-III, and the fact that the tax was measured with reference to royalty was not material. The High Court relied upon AIR 1965 SC 177, H.R.S. Murti, in support of its view. After refering to the general principle already noted above (in para16) the provision of law was noted. It ran thus "a local cess at rate of 45 Naya Paisa on every Rupee of land revenue payable". The contention of the State was that the words "land revenue" showed that the cess was on land. The Supreme Court did not accept this contention. In its view the cess was on royalty, which was included in the definition of land revenue. No entry in List II or III of the VII Schedule of the constitution authorises State to impose tax on royalty. The State relied upon Entry 45 of List II, which deals with land revenue. But the Supreme Court held that royalty was different from land revenue, as historically understood, and therefore, the cess in question would not be covered by

Entry 45 of List II. The State then placed reliance on Entry 49 of List II and urged that the cess was with respect to land. The Supreme Court rejected this contention also, as in its view "royalty being that which is payable on the extraction from the land and cess being an additional charge on that royalty cannot, by the parity of the same reasoning, be considered to be a tax on land. It drew a distinction between tax directly on land and tax on income arising from land. The court referred to *New Manek Chowk Spinning and Weaving Mills v. Municipal Corporation, Ahmedabad*, AIR 1967 SC 1801, where the Supreme Court held that a tax on machinery situated in a building would be covered by entry 49, List II concerning tax on land and building. It also referred to S.C. *Nown v. W.T.O. Calcutta* (AIR 1969 SC 59), where Wealth Tax Act framed by the Parliament has been upheld being related to Entry 86 of List I and not Entry 49 of List II. Construing Entry 49, List II, the court held that the levy must be directly imposed on land and must bear a definite relationship to it. Similarly in *Second Gift Tax Officer Mangloor v. D.B. Nareth* (AIR 1970 SC 999) the apex court held that a tax on the gift of land is not a tax imposed directly on land, but with respect to transfer of land by way to gift. Again in *Bhagwan Dass v. Union of India* (AIR 1981 SC 907) Supreme Court made a distinction between levy on income from house property which would be income tax and the levy on house property itself which would be referable to Entry 49, List II. Having referred to all these decisions and delineated the scope of Entry 49, List II, the Supreme Court concluded in *India Cement's case* that the cess on royalty was not a tax directly on land as a unit and could not be supported by Entry 49, List-II. Having referred to all the provisions of the impugned law, the Supreme Court concluded that the pith and substance the tax was on royalty and not a tax on land and consequently it was beyond the competence of the State Legislature. The law was held to be an exercise of colourable legislation and the earlier judgment in H.R.S. Murti's case was over-ruled.

Coming to the cases where the Supreme Court ruled in favour of Legislation, the following few cases are noteworthy.

(i) In *K.C.G. Narain Dev v. State of Orissa* (5-JJ) the constitutional validity of Orissa Estates Abolition Act, 1952 was challenged. Speaking for the Court Justice B.K. Mukherji observed that where the legislative power is distributed by the Constitution amongst different bodies, which are required to act within their spheres, questions do arise whether spheres has been transgressed by the legislative body. Such transgrassion may be apparent,

manifest or direct, but it may also be disguised covert and indirect and it is to this latter class of cases that the expression colourable legislation has been applied in judicial pronouncement

Thus, it is not the form of outward appearance which is material, but the substance of the enactment in question. In this case the challenge was that though apparently the Act purported to be a taxation statute coming under Entry 42, List II, i.e., "taxing of agricultural income" in substance it was not so. The Act was seeking to accomplish an ulterior purpose, namely, to inflate the deductions for the purposes of valuing a Estate, so that the compensation payable might be as small as possible. Repelling this contention, the court held "assuming that it is so, still it cannot be regarded as a colourable legislation ......". Unless the ulterior purpose which it is intended to serve is something which lies beyond the powers of the legislature to legislate upon. The whole doctrine of colourable legislation is based upon the maxim that you cannot do indirectly what you cannot do directly. If a legislature is competent to do directly, then the mere fact that it attempted to do it in an indirect or disguised manner cannot make the Act invalid. Under Entry 42 List III, the Legislature can adopt any principle of compensation respecting the properties compulsorily acquired. Whether the deductions are large or small, inflated or deflated, they do not affect the constitutionality of the legislation under this Entry. The impugned Act was, therefore, held valid. This case is important in the sense that it is not enough to show that the Legislature is really trying to attain some disguised objective. The Act would be a colourable legislation only if it is shown that the real object, which is disguised, is not attainable, being beyond the field of the legislature which has made the law.

(ii) In *Hari Krishna v. Union of India* (AIR 1966 SC 619), tax payers of certain category were required to make annuity deposits for every assessment year, and the rates were also prescribed by the impugned enactment made by the Parliament. The Supreme Court held that the doctrine of colourable legislation has no application where the Parliament is invested with authority to legislate in respect of annuity deposit and it exercised that power. The court found that the Parliament had power to make a law for levying and collecting annuity deposits and the Parliament had not trespassed beyond its domain.

(iii) In *M/s. Seipal and Company v. Lt. Governor of Delhi* (AIR 1979 SC 1550), an Ordinance promulgated by the Resident of India purporting to

amend Punjab Excise Act with retrospective effect and conferring power on the Government to levy special duty on the import of country liquor in Delhi was challenged. The executive power of the Union under Article 123 is co-extensive with the legislative power of Parliament vide Article 123, just as the Executive Power of the State is co- extensive with the Legislative Power of the State vide Article 162. The Supreme Court, therefore, examined whether Parliament had power to impose special duty on import of country liquor in Delhi. Speaking for the court Justice D.A. Desai observed "that the advancement of society, expanding horizon of scientific and technical knowledge, probe into the mystery of creation it is impossible to conceive that every imaginable head of legislation within human comprehension and within forseable future could have been within contemplation of the founding fathers. Demands of welfare states; hopes, aspiration and expectation in a developing society and the complex world situation, as well as complex modern governmental administration in a federal set-up may raise such situation, i.e. subject of legislation may not squarely fall in any specific Entry, in any of the three Lists. In such a situation Parliament can resort to residuary power under Article 248 read with Entry 97, List I. The scope and ambit of this Entry need not be whittled down or circumscribed by process of interpretation. The Supreme Court held that excise and countervailing duty on alcoholic liquor for human consumption was in the State List, and the State also had power under Entry 52 of the State List to tax entry of goods in local area for consumption, use or sale therein. However, the imposed tax on entry of country liquor into Delhi to be recovered by Delhi Administration for its own use was held to be different from the aforesaid subject matters in the State List. Desai J. further observed "if by legislation tax is sought to be imposed in exercise of certain legislative power which under judicial review is found to be wanting it does not prohibit the legislature from exercising the same power if it can be traced to provisions of the Constitution. Merely because an incorrect exercise of legislative power under a mis-conception of power itself is once in-validated that very legislative power, if it is traceable to the provisions in the constitution, cannot be struck down on the ground of colourable legislation". In this case initially countervailing duty was levied, but since country liquor was not manufactured in Delhi, the same could not be imposed. Consequently, the special duty was levied with reference to the residuary power. The Supreme Court held that this power was available to the Parliament, and therefore, the law cannot be said to be a colourable legislation.

(iv) In AIR 1962 SC 922, *Abdul Qadir v. State of Kerala, State had imposed* tax on Tobacco which was in substance found to be in the nature of excise duty, and since Parliament alone had power to impose excise duty on Tobacco under Entry 84, List I, the Act was struck down being beyond the competence of *the State Legislature. Subsequently* the State Legislature passed validating Act mentioned that the very same duty will be deemed to be luxury tax. This enactment was again challenged on the ground of being a colourable legislation. It was asserted that though the name of the tax was mentioned to be Luxury Tax in substance it was the same tax which had been declared to be beyond the competence of the State Legislature. The matter again came up before the Supreme Court in AIR 1976 SC 182, Abdul Qadir. The Supreme Court upheld the competence of the State Legislature this time. It was held that since the State Legislature had power to impose Luxury Tax under Entry 62, List II, and since the Tobacco is a Luxury item, it makes no difference that a tax which had been declared invalid was being validated. So long as the power is there the Legislation could not be termed a colourable exercise of legislative power.

(v) Another important judgment of constitution bench of the Supreme Court is *Federation of Hotel and Restaurant v. Union of India* (AIR 1990 SC 1637). Expenditure Tax was challenged as being beyond the competence of the Parliament. Shri Palkhiwala led the attack and castigated the enactment as being really a Luxury Tax under Entry 62 List II, which was within the exclusive domain of the Legislature. Speaking for the Court, Justice Venkatachaliah (as he then was) observed that when a Legislature with limited or qualified jurisdiction transgressed its power, such transgression may be open, direct and overt, or disguissed, indirect and covert. The latter kind of trespass is figuratively referred to as colourable legislation. He traced the nature of the expenditure tax and considered the same in the light of the basic principle already adverted to. He upheld the contention of the Attorney General that the tax in question was sui generis or non-descript and could be imposed in exercise of residuary power by the Parliament. It was not covered by any Entry in List II and List III. Refering to the "*aspects doctrine*", the learned Judge held that the Luxury Tax singles out the Luxury component of expending on a given object, whereas the Expenditure Tax does not deal with the aspect of Luxury and its object was to generally reduce the expenditure over objects covered by the law. It was a part of expenditure dampening policy. Since the Expenditure Tax was not specifically enumerated in any entry of the List, it was held to be covered by the residuary Entry.

(vi) In *R.R. Engineering Company v. Zila Parishad* (AIR 1980 SC 1088), tax on circumstances and property imposed by the Local Bodies fell for consideration. A full bench of the Allahabad High Court had upheld the Tax. The Supreme Court approved the full bench Judgment and held that the tax was on haisyat or status and it was not an Income Tax. It is concerned with the entire status of the person, and the mere fact that his income from land and building or trade calling was also being considered did not make the tax an Income Tax. It was found to be a composite tax and was held to be supportable by Entry 49 (Taxes on Land and Building), Entry 60 (Taxes on Profession, Trades, calling of Employment) Entry 58 (Taxes on animals and Boats) in List II of the VII Schedule. Thus, the Supreme Court ignored the name of the label and also refused to trace the tax to the residuary entry, as it was not found to be specifically mentioned as a separate entry in any list. The court looked at the substance of the matter and found it to be covered by different entries in List II of the VII Schedule and was, therefore, upheld within the competence of the State Legislature. The challenge based on colourable legislation was rejected.

The challenge to a legislation on the ground of it being a colourable legislation often impose a difficult problem. There are instances where the Supreme Court has frequently reversed its own judgment and the legal position, therefore, remains un-certain. One such instance is where the State Legislature attempted to make a law providing for refunding of illegally collected Sales Tax only to the person who had initially paid it. The dealer who had collected and paid tax in treasury was not entitled to get back the refund. The question was whether such a legislation was within the competence of the State Legislature, the matter being incidental to its power to levy Sales or Purchase Tax under Entry 54, List II, or whether it was some independent or sui-generis tax traceable to the field of Parliament under its residuary powers.

(i) In *Abdul Qader's case*, AIR 1962 SC 922, the provision for making over to the Government amount collected by way of tax, even though it was not due as a tax under the Act, was upheld as valid and within the competence of the State Legislature under Entry 54 of List II. The court said that this exercise of legislative power though not directly connected with realisation of tax under Entry 54; was part of it as incidental and ancillary power.

(ii) In *Ashoka Marketting Company* (AIR 1971 SC 946), the law in question provided that if any person collected any amount as tax, otherwise

than in accordance with the provisions of the Act, then he should pay over the same to the Government. There was no prohibition or penalty or obligation for Government to return such money to the purchaser from whom they were taken. Such a provision had been upheld earlier by the Supreme Court in Orient Paper Mills (AIR 1961 SC 1438). Nevertheless, in Ashoka Marketting, it held that the taking over of sums collected by dealers from public under guise of tax solely with a view to return them to the buyers, so deprived was not incidental to Entry 54. This judgment was followed by Supreme Court in Annapurna Biscuit (AIR 1973 SC 1333). But four years later a Larger Bench of Seven Judges in *R.S. Joshi's Case* (AIR 1977 SC 2279) over- ruled Ashoka marketing and Annapurna Biscuits and upheld the competence of the State Legislature as exercise of incidental power. So R.S. Joshi Judgment for the time being stands as the law declared under Article 141 of the Constitution, and such a legislation would not be a colourable legislation.

While doctrine of colourable legislation appertains to the sphere of distribution of legislative powers, the doctrine of colourable exercise of power is part of judicial review of administrative powers. This doctrine has nothing to do with the federal structure of the Constitution or the administrative relation between the Union and the State. As is known, it is the Constitutional duty of the Legislature to lay down the essential legislative policy by means of legislation. But even Legislature cannot forsee all situations and therefore, powers are conferred on administrative authorities to carry out the purpose and objective of the law. For this purpose guidelines and criteria are provided by the law, so that the decision making process is adhered to by the authorities. Without this there would be a grave risk of the law being ignored by the administrative authorities, and the victim then will be the Rule of Law. But even when the law is well tailored, but for judicial review the law especially nowadays is observed more in its breach, than in compliance.

As in the case of exercise of legislative power the breach of law by administrative authorities is some times apparent and some time disguised. The authority may often seek to achieve some ulterior objective or a purpose not sanctioned by law, while using the phraseology of the law. When such breach is disguised the case is one of colourable exercise of power, and it is hear that judicial review assumes considerable importance.

The significance of this doctrine today is important for yet another significant reason. Today the rule of law is surviving in a atmosphere of

repeated breaches. The authorities appear to be lacking necessary courage to stick to the constitutional obligation of remaining committed to the letter and spirit of law and seem to the succumbing to the pressures of vested interests both within and without the power structure. The manner in which licences and largesse are being distributed, power of transfer is being exercised and the dictate of vested interests are being obeyed in various spheres of social life is well known to the vigilant. This is one vital reason for the expanding horizon of the judicial review, much resented by those affected.

The aforesaid also distinguishes between a mala fide exercise of power and colourable exercise of power. An authority acting under a law may not be carrying a bias of any kind, personal of financial, but yet might by trying to achieve a purpose not sanctioned by law in an indirect manner. While a mala fide exercise of power is necessarily colourable, even bona fide exercise may, where purpose is incorrectly and improperly grasped, be colourable. This will of course the termed arbitrary and consequently violative of Article 14 of the Constitution. In this sense the doctrine of colourable exercise of power can be said to be facet of Article 14 of the Constitution. Though there are several cases where the courts have interfered on this ground, but the following three cases are noteworthy and present an example of colourable exercise of power at the highest level.

(i) In *Vora v. State of Maharashtra* (AIR 1984 SC 866) a flat had been requisitioned in 1951 under Bombay Land Requisition Act, 1948. The petitioners' request made in 1964 for de-requisition was turned down. The Supreme Court held that requisition involves taking of control over property without acquiring rights of ownership and hence by its very nature it can be only of a temporary duration, and further the power can be exercised only for public purpose, which is of a transitory character. If the premises is required for purpose which is of a permanent character from the very inception then the power of requisition is not available. The requisition order was held to be fraud upon the Statute. This is a case of incorrect grasping of purpose of requisition power.

(ii) In sphere of elections to Local Bodies, the State Legislature of U.P. had enacted U.P. Town Areas, Municipalities and Nagar Mahapalika (Alpkalik Vayvastha) Adhiniyam, 1977. This Act made it possible to appoint Administrators in Local Bodies where elections were not held in time. This was obviously a power to make temporary arrangement, and not a power to throw

the Local Self Government over-board. However for more than 12 years no elections were held and in all the Local Bodies the duties and functions had been assigned to the Administrators. In the case of *Anugrah Narain Singh v. State of U.P.*, 1992 (I) U.P.L.B.E.C., Page *170* a Division Bench of the High Court not only castigated this exercise of power as a fraud on the statute, but went to the extent of declaring the law itself to be ultra vires on the ground that Local Self Government was a basic feature of the Constitution, and the law was contrary to the spirit of the Constitution. In my opinion there was nothing wrong with the law itself and the matter could have rested with a mandamus to the Government to hold the elections. But the actual abuse of the power for a very long time probably persuaded the court to strike down the law itself. Recently in *S.K. Gupta's case* (AIR 1994 All 194) an Act making interim arrangement in the context of 74th Constitution Amendment was upheld and *Anugrah's case* was distinguished.

(iii) Third important case in this context is *D.C. Wadhwa v. State of Bihar* (AIR 1987 SC 579). A Professor of Politics exposed the Ordinance Raj in the State of Bihar. This was a case of large scale fraud on the Constitution. Ordinance were being issued by the executive repeatedly under Article 213 of the Constitution, and there was a conscious endeavour to avoid the legislature contrary to the command of the Constitution. The Supreme Court held that the power to promulgate Ordinance is to be used to meet an extraordinary situation and the said power could not be allowed to be perverted to serve political ends. The law making functions have been entrusted by the Constitution to the Legislature consisting of representatives of people and if the executive were permitted to continue the provision of an Ordinance by adopting the method of re-promulgation without submitting to the voice of the Legislature, it would be a case of usurpation of legislative function by the executive. This would subvert democratic process. It was held that except in extreme cases of actual rush of business the Ordinance must go to the Legislature, otherwise it would be a case of colourable exercise of power.

The aforesaid are illustrative cases. During the 1975-77 Emergency, we had witnessed initially the frequent abuse of power under Defence of India Rules, and thereafter under MISA, as a result of which large number of political opponents and other persons were detained and their personal liberty was denied in the name of threats to the nation. Even today there are serious allegations about abuse of power under 'TADA'. Here one would find little fault with the law. The real flaw lies in the exercise of powers, whereby persons

who are not really terrorists are being detained for long period. The case of Sanjay Dutt has really made one sit-up and think about the drastic character of the law. Those who have been caught in espionage activity in connection with ISRO have not been so detained under TADA but a well known filmstar is suffering jail and bail was denied even by the Supreme Court. He had been on bail for some time persuant to the orders of the High Court, and no one accuses him of abusing the bail, yet he continues to languish in jail having been denied bail. Colourable exercise in the sphere of personal liberty by using the provisions of the drastic law poses a serious challenge to the judicial review. We are in times where people are looking intensely towards the Judiciary and complex issues are flowing into the dockets of the Court. I am confident that entire Judicial hierarchy, especially the root level, will stand up to the challenge of colourable exercise of power.

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> *There are no more reactionary people in the world than judges.*
>
> *Lenin*

PUNISHMENTS FOR THE OFFENCE OF RAPE UNDER THE INDIAN PENAL CODE : AN ANALYSIS OF THE SUPREME COURT VERDICTS

DR. N. MAHESHWARA SWAMY*

INTRODUCTION

Sexual instinct plays an important role in human life. It has relevance to the sentiments of the people on the one hand and physico-psychological development of the persons on the other. Emotional implications in contrast with the uncontrollable sexual lust, pressures due to adolescence, opportunities created by chance circumstances, momentary passions, and in certain cases, revengeful attitudes of people, often lead men to indulge into the offence of rape attracting the penal provisions of the Indian Penal Code, 1860 (hereinafter called the IPC).

Section 376 of the IPC provides different punishments for the offence of rape as defined in Section 375 thereof. It contemplates, inter alia, the punishment of imprisonment of either description for a term not less than 7 years and upto a life with fine, or a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case such person shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both (S. 376 (1)). Under Sub-Section (2) of Section 376, the punishment provided for is rigorous imprisonment for a term which shall not be less than ten years but which may be for life and also fine in respect of the offence of rape committed by a police officer, a public servant

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or any person being on the management or on the staff of a hospital, jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution taking advantage of his official position, or in case the victim of rape is a pregnant woman or a woman who is under twelve years of age or in case of gang rape. In either case, the court may for adequate and special reasons to be mentioned in the judgement, impose a sentence of imprisonment for a term of less than seven years or less than ten years as the case may be.

A bird's eye view of the provisions of Section 376 read in the context of the findings of the Supreme Court in a plethora of cases, signifies the fact that in most of the cases the highest Court has adopted a via-media course in so far as imposition of punishments is concerned, and when occasion warranted, the Apex Court did not hesitate even to impose capital punishment where the victim is also caused to brutal murder. On the contrary, it is also evident that in certain cases the courts have taken a lenient view where the prosecutrix is found to have harboured in the commission of the offence of rape either by means of habitual intercourse or by circumstantial instigation.

Inspite of evolving legal inhibitions and imposition of rigorous punishments, the rate of the crime of rape is in an increasong trend. There is a need to further probe into the actual reasons leading to the multiplication of this offence in the light of the recommendations made by the Law Commission of India in its 84th Report on "Rape and Allied Offences", so as to provide possible ways and means for the preventive side of this subject vis-a-vis the various punishments imposed by the highest Court in a series of cases. The paper also provides for suitable suggestions.

KINDS OF THE CRIME OF RAPE

While Section 375 of the IPC defines the term "Rape", Section 376 contemplates the following three types of the offence of rape along with the concomitent punishments, namely :

1. Those cases which are covered by sub-section (1) of Sec. 376,
2. Those cases which are covered by sub-section (2) of Sec. 376, and
3. Those cases wherein the woman raped is one's own wife and is under the age of 12 years (sub-Sec.(1) of Sec.376).

PUNISHMENTS FOR THE OFFENCE OF RAPE UNDER THE IPC

As already mentioned above, Section 376 of the IPC provides for the

following three kinds of punishments in respect of the above named offences of rape, namely :

1. In the first category of cases, the punishments to be imposed are of three types, namely : (a) imprisonment of either description for a term which shall not be less than seven years but which may be for life or (b) imprisonment of either description for a term which may extend to ten years and (c) fine concomitently with (a) and (b) above;

2. In respect of second category of cases, rigorous imprisonment for a term which shall not be less than 10 years but which may be for life and also fine; and

3. In the third category of cases, imprisonment of either description for a term which may extend to two years or with fine or with both.

Provided that the court may, for adequate and special reasons to be mentioned in the judgement, impose a sentence of imprisonment for a term of less than seven years, in case of first category, and for a term of less than 10 years, in case of second category of offences, as the case may be, respectively.

FINDINGS OF THE SUPREME COURT ON THE PUNISHMENTS FOR RAPE

While no case covered by the third category of the offence of rape aforementioned seems to have come before the Apex Court, the following discussion deals with the verdicts of the highest Court in respect of the offence of rape covered by the first and the second category.

PUNISHMENT WHERE THE PROSECUTRIX/VICTIM IS A GIRL CHILD

In State of UP v. Babul Nath[1], the facts were that the respondent-accused, Babul Nath, a 32 years' young man committed the heinous crime of rape on one Kumari Nirmal Devi, a child of about 5 years, in the grove of one Baleshwar Pathak in Village Rampa, Varanasi District. The accused was convicted by the Sessions Judge to suffer imprisonment for a term of 5 years. The doctor (Dr. (Mrs) Santosh Kohli), who examined the victim girl found her in semi-conscious state and her general condition was poor. On external examination the doctor also found that the hymen of the victim was completely torn and there was laceration on all sides of her vagina. There was fresh bleeding. On internal examination, it was found that a finger could easily be

1. 1994 (3) Crimes 230 SC.

inserted in her private part. The doctor opined that the girl was subjected to sexual intercourse. But the High Court of Allahabad, Lucknow Bench acquitted the accused, inter alia, on the ground that from the medical evidence a reasonable probability was made out that the girl was subjected to indecent assault and not subjected to sexual intercourse as the same was not proved beyond doubt. In an appeal moved by the State of UP, the Suprme Court set aside the findings of the High Court and held that the judgement of the High Court is based on surmises and conjectures. The acquittal of the respondent-accused was totally unmerited and such unmerited acquittal, particularly, in a crime against the girl-child encourages the criminals. The Apex Court further opined that Courts have, therefore, to be sensitive to have appreciation of the material on record. Therefore, the highest Court, by allowing the appeal, restored the 5 years' RI imposed by the Sessions Court earlier.

PUNISHMENT IN CASE OF GANG RAPE

In State of Orissa v. Damburu Naiko & Anr.[2], one Manguri Bhotruni, the victim, along with three other girls went to Papedahandi village to witness Dasahara festival celebrations. While they were returning home at about 4 PM through a forest way, the appellants along with two others way-laid, gagged the mouth of the victim and kidnapped her into the forest and gang-raped her by covering her eyes with a piece of cloth and threatening to kill her if she raised any cries. In a parade conducted by the Executive Magistrate, the accused were identified by her. The High Court of Orissa acquitted all the accused on the ground that the victim's identification of the respondents could not be relied on and there was no corroboration to her evidence. The Court further felt that when there was a gang rape, there could be sound injuries on the person of the victim which are absent in the present case. As such the court came to the conclusion that the victim hereself was a consenting party to the act of sexual intercourse. While rejecting the contentions of the High Court, the Apex Court in appeal held as follows :

1. Though the victim was a stranger to the accused, she is the victim of dastardly offences of kidnapping and gang rape and it was done in broad day time. When she was kidnapped, she had the opportunity to see the accused, though later her eyes were closed with a piece of cloth.

2. The medical evidence corroborates amply to prove that the victim had injuries on her private parts to indicate the resistance by her, and

2. 1992 (2) Crimes 77 SC.

3. When there was a threat to her life, the victim cannot be expected to go on resisting the offenders except to resign to her fate and succumb to their assault.

In this case, the highest Court, while wholly accepting the evidence of the prosecutrix as truthful, opined that the casual and mechanical approach without regard to human probabilities, and the consequent acquittal by the High Court resulted in grave miscarriage of justice. Such an approach should not be allowed to stand even for a moment

PUNISHMENT WHERE A POLICE OFFICER IS THE OFFENDER

In State of Maharashtra v. Chandra Prakash Kewal Chand Jain[3] and Stree Atyachar Virodhi Parishad, Maharashtra v. Chandra Prakash Kewal Chand Jain[3], the facts in brief were that the victim Shaminebanu, a 19 year old lady of Nagpur fell in love with her landlord Mohd. Shafi. Both of them went to Bombay and contracted a marriage according to Muslim custom through a Kazi, and returned to home-town. There, they stayed in a lodge to celebrate their first wedding day, but in the very same night they were knotted down by the police kob-web. Ultimately, both the husband and wife were separated in a chain of activities carried out by the police. In the result, the respondent-accused, Chandra Prakash, who had been a Sub-Inspector of Police, committed rape on the wife and also assaulted the husband mercilessly.

On the above facts, the High Court of Bombay refused to confirm the conviction of the respondent-accused on the ground that the evidence of the prosecutrix was full of contradictions and inconsistencies with that of the medical evidence and also to the findings of the chemical analyst. The Court accordingly acquitted the accused. Rejecting the findings of the High Court, the highest Court observed "On the question of sentence we can only say that when a person in uniform commits such a serious crime of rape on a young girl in her late teens, there is no room for sympathy or pity. The punishment in such cases be exemplary. We therefore do not think we would be justified in reducing the sentence (i.e., five years RI and Rs. 1000 fine) awarded by the trial court which is not harsh" In this case, evidently the Courts seem to have invoked the discretionary powers contemplated under the proviso to sub-section (2) of Section 376 of IPC.

PUNISHMENT FOR RAPE FOLLOWED BY MURDER

In Dhananjoy Chatterjee and Dhanna v. State of West Bengal[4] the

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3. 1990 (1) Crimes 724 SC.
4. 1994 (1) Crimes 319 SC.

Appellant, Dhananjoy, was one of the security guards deputed to guard the building 'Anand Apartments' by M/s Security and Investigating Bureau in one of which flats the deceased was residing. The deceased, Hetal Prakash, a 18 year young college going girl was raped and was also brutally murdered by the accused-appellant when she was alone at her flat on 2-3-1990 and there was no eye witness to narrate the incident. The trial Court imposed death sentence which was confirmed by the High Court of Calcutta. While dismissing the appellants' case in appeal, the Apex Court held that :

1. The measure of punishment in a given case must depend upon the atrocity of the crime, the conduct of the criminal and the defenceless and unprotected state of the victim;

2. Imposition of appropriate punishment is the manner in which the Courts respect the society's cry for justice against the criminals;

3. The Courts must not only keep in view the rights of the criminals but also the rights of the victim of the crime and the society at large while considering imposition of appropriate punishment; and

4. We agree that a real and abiding concern for the dignity of human life is required to be kept in mind by the Courts while considering the confirmation of the sentence of death but a cold blooded, pre-planned brutal murder is a rarest of the rare cases and therefore the punishment should be death sentence.

PUNISHMENT WHERE THE CHARACTER OF THE PROSECUTRIX IS QUESTIONABLE

In State of Haryana v. Prem Chand & Ors[5], one Suman Rani was the victim of rape. During the course of hearing on behalf of the respondent-accused, it was contended that the victim was a woman of questionable character and easy virtue with lewd and lascivious behaviour and as such her version is not worthy of acceptance. On these facts, while rejecting the minimum sentence imposed by the lower Courts, the Supreme Court reiterated that this Court is second to none in upholding the decency and dignity of womanhood and we have not expressed any view in our judgement that character, reputation or status of a raped victim is a relevant factor for consideration by the Court while awarding the sentence to a rapist. Such factors are only alien to the very scope and object of Section 376 and can never serve either

5. 1990 (1) Crimes 275 SC.

as mitigatory or extenuating circumstances for imposing the sub- minimum sentence with the aid of the proviso to Section 376 (2) of IPC.

PUNISHMENTS WHERE THE RAPE IS CAUSED DUE TO THE CHANCE CIRCUMSTANCES

In Raju Krishna v. State of Karnataka[6], one Celina D'Souza, a 21 years' young woman/nurse working in a clinic in Hosakote had become the victim of rape by two youngmen of about 18 and 21 years, Raju and Krishna, in a lodge in Hassan during a transit night-halt while going to Sakaleshpur to attend her brother's marriage. Medical evidence proved that she had been subjected to sexual intercourse. In appeal the High Court imposed RI for 7 years on both the accused on the charge of rape as against the findings of the Sessions Court which imposed only sentence of detention on the A1 till rising of the Court and the fine of Rs. 500/- and acquitted A2. The Supreme Court in appeal by the accused, while agreeing with the findings of the High Court observed that it may not be unlikely that the accused persons at the beginning had a genuine desire to help the prosecutrix in reaching her brother's place quickly, but later on when she agreed to share the same room in the hotel with them at night, the two young men became victims of sexual lust and against the consent and protest of the prosecutrix committed rape on her. However, taking into account the very young age of the accused, and the circumstances under which there was every likelihood that they could not overcome the fit of passion and lost all sense of decency and morality and that the incident had taken place long back and during the course of the proceedings upto this court, both of them had suffered disrepute and mental agony, it was felt by the Supreme Court that the ends of justice would be met if both the accused persons are awarded a lesser sentence. Accordingly the highest Court reduced the RI from 7 years to 3 years.

NO PUNISHMENT

Where, from the ossification test the age of the victim was found to be 18 years, and according to the Isshial Tuberosity, her age could be below 20 years, and no injury was found on her private parts, and the doctor deposed that the prosecutrix was used to have sexual intercourse usually, the Supreme Court confirmed the decision of the High Court that the accused could not have done intercourse with her amounting to rape, and accordingly discharged the accused[7].

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6. State of Karnataka v. Sureshbabu Puk Raj Porral, 1993(3) Crimes 600 SC.
7. 1994 (1) Crimes 156 SC (Jayachandra Reddy and G.N. Ray, JJ).

CONCLUSION AND SUGGESTIONS

In view of the foregoing analysis of Section 376 and the various verdicts of the Apex Court it may be concluded that :

1. There appears no reason to provide for two types of punishments i.e., "not be less than seven years," and "which may extend to ten years" appearing in sub-section (1) of Section 376.

2. Absence of any specific term of imprisonment in the provisos appearing below sub-sections (1) and (2) of Section 376, virtually returns in ineffectuating the objective behind Section 376 of the IPC.

3. A perusal of the decided cases reveals that the Courts below are not too serious but lenient in appreciating properly the evidence on record before them while awarding punishments even in serious crimes of rape, and

4. There is immense need to impose higher punishments in respect of the offence of gang rape.

It is, therefore, suggested that ;

1. In sub-section (1) of Section 376, the words "or for a term which may extend to ten years" be omitted in toto.

2. At the end of the proviso below sub-section (1) of Section 376 the words "but which shall not be less than three years, or impose a sentence of rigorous imprisonment for any term as it may deem fit and proper in the circumstances of the case" be added. Similarly proviso below sub-section (2) of Section 376 may be ended by adding the words "except in case of gang rape, in which case the minimum punishment shall be ten years"

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EXCERPTS FROM VISITOR'S BOOK

Hon'ble Mr. Justice K.N. Singh

Judge, Supreme Court of India.

I was glad to see the working of the Institution. It is doing a pioneer work in the field of law.

An enlightened judiciary is an asset to the administration of justice. (4.2.1988)

Hon'ble Mr. Justice Rang Nath Misra

Judge, Supreme Court of India.

I had occasion to spend the afternoon in the Institute and addressed a group of District Judges who were undergoing the course. I have been taken round the library also.

I find that the Institute is maintained in an excellent condition and imparts useful in-service training to the officers. (15.1.1989)

Hon'ble Mr. Justice Zhang Xiao Ming

Judge and Interpretor, People's Court, China.

We are so interesting in this Institute for district judiciary training. You have a very good and useful library, collected very usefull books to help the trainess. We learnt from your programmes with best wish your Institute will become a training centre for the whole India.

We eager to look forward to. (15.4.1989)

Hon,ble Mr. Justice A.M. Ahmadi

Judge, Supreme Court of India.

There are only a couple of such institutions in the country which provide training to judicial officers with an eye to provide improved services to the consumers of Justice. The services provided are variegated and will be of considerable assistance to the trainees in discharging their duties. I wish the institution and its officers every success. (10.2.1990)

Hon'ble Mr. Justice J.S. Verma
Judge, Supreme Court of India.

Visiting the Institute has been a very satisfying experience. The institute is set to render pioneer service in the field of training the personnel to man the judiciary. It is commendable that it has been started with the facilities available without succumbing to the common feeling of waiting to first get all the needed facilities for the venture. The spirit which permeates the project is an assurance to success of the venture. It has satisfied a felt need of the state and should encourage rest of the country to follow suit.

The value of training is in preparing the personnel to give their best in the cause of public service. The authorities concerned deserve to be congratulated and encourged.

The need now is to ensure that the staff is comprised of men, who believe in the venture and are prepared to render devoted service. I have no doubt that the authorities will ensure this in future.

My best wishes for the prosperity and success of this laudable venture. (26.6.1990)

Hon'ble Mr. Justice M.H. Kania
Judge, Supreme Court of India.

I was delighted to visit the Institute, Justice Goyal must be complimented in founding this institution which will serve a lasting purpose and could serve as a model institution for judicial training in India. If the project is completed as planned it could well be turned to National College for judicial training. (17.11.1991)

Hon'ble Mr. Justice R.M. Sahai
Judge, Supreme Court of India.

The Institute is doing remarkable work in field of educating and training the officers. I have been associated with this Institute as a High Court Judge. I can say it with my personal knowledge that Institute is not less either in

contribution to the field of law or training with any other institute in this country. I wish the Institute a great success. (1.12.1992)

Hon'ble Mr. Justice S.C. Agarwal

Judge, Supreme Court of India, New Delhi.

I had the opportunity to discuss the working of the Institute with Shri Hajela, the Director and other members of Faculty. I was highly impressed by the progress that has been made within the short period since the Institute commenced functioning. The Institute has been making valuable contribution in the training of judicial officers at various levels as well as officers in other branches of Government. The work of the Institute is handicapped on account of lack of accommodation. It is a matter of great satisfaction that the State Government has agreed to provide the necessary land and the funds for complex of the Institute. The Director and members of the Faculty appeared to be dedicated to the work they are carrying on at Institute. (6.7.1993)

Hon'ble Mr. Justice M.N. Venkatachaliah

Chief Justice of India.

Training, reflection, and refresher courses to update the judicial and legal skills of the adjudicator are the only means of ameliorating the manifestations of the inadequacies of legal education. This Institute holds great promise in this direction. May God bless its efforts ! (20.12.1993)

Hon'ble Mr. Justice. S.S. Sodhi

Chief Justice, High Court of Judicature at Allahabad.

Legal problems that judges have to confound with in court are human problems, which require understanding, learning and compassion - attributes, which often have to be acquired. This institute is designed to ensure an on going effort to improve the quality of justice to the common man - May this objective be achieved. (27.8.1994)

Hon'ble Mr. Justice K. Ramaswamy
Judge, Supreme Court of India, New Delhi.

I have the pleasure to visit the institution for the first time. It is of necessity to impart reorientation courses to our Judicial Officers to equip with developments in law in diverse branches so that it would be added material in the qualitative dispensation of justice.

The institution has been, I am told, doing invaluable service to legal fraternity and I wish the institution to become one of the leading lights in this country in right directive. (29.10.1994)

Hon'ble Mr. Justice S. Ratnavel Pandian
Chairman, Vth Central Pay Commission.

I had the unique privilege of visiting this reputed Training Institute which is holding the torch of (legal) knowledge on the National Level. It's service in imparting legal knowledge to the Judicial Officers is a very well-come feature. I place on record my high appreciation of the service of this institute. (22.12.1994)

Hon'ble Mr. Justice B.L. Hansaria
Judge, Supreme Court of India.

Good collection, good cataloguing.

This institution within a short span of time has rendered good service and risen high in stature. It has acquired national status and the training imparted is useful. I wish the Institution all success. (23.12.1994)

BROCHURES OF THE INSTITUTE

1. Aarop (charge) (Brochure No. 110)
2. Amendment of Election Petition after the Expiry of Limitation for Filing Petition. (Brochure No. 59).
3. Amendment of Pleadings. (Brochure No. 122)
4. Appearance of parties in Civil Proceedings and Consequences of Non appearance. (Brochure No. 102)
5. Article 21. (Brochure No. 78)
6. Articles 14, 19. (Brochure No. 83)
7. Articles from Law Quarterly Review and other Journals. (Brochure No. 23)
8. Audi Alteram Partem. (Brochure No. 85)
9. B.A.A. Civil Courts Act and P.S.C.C. Act. (Brochure No. 15)
10. Bar of Jurisdiction of Courts and Enforcement of Non-common Law Rights. (Brochure No. 68)
11. Bar to Writs. (Brochure No. 76)
12. Behaviour. (Brochure No. 116)
13. Bias. (Brochure No. 84)
14. Case Law on S. 9, O. 13. and O.14, R. 2, C.P.C (Brochure No. 111)
15. Case Law on substitution. (Brochure No. 108)
16. Case Law Suit by or against Government. (Brochure No. 109)
17. Certiorari, Prohibition and Art. 227 of the Constitution. (Brochure No. 50)
18. Conduct, Behaviour and Etiquette. (Brochure No. 2)
19. Contempt of Court. (Brochure No. 4, 42)
20. Court on Criminal Law. (Brochure No. 132)
21. Creditor's Petition for winding up of company (Brochure No. 41)
22. Delegated Legislation; Excessive Delegation; Ultra Vires; "As if enacted in the Act."(Brochure No. 55)

23. Directive Principles. (Brochure No. 79)

24. Disposal of Property in Criminal Cases. (Brochure No. 121)

25. Distribution of Legislative Powers between the Union and States. (Brochure No. 61)

26. Dockets for the Dock. (Brochure No. 133)

27. Dying Declaration. (Brochure No. 125)

28. English Idioms from the Law. (Brochure No. 19)

29. Executive Powers of the Government : Articles 73, 77, 162, 166, 298 and 299 in the context of Articles 19, 21, 25, 265 and 300 A. (Brochure No. 53)

30. Expert Evidence. (Brochure No. 26)

31. Expert Evidence (Handwriting). (Brochure No. 89)

32. Expert Evidence (Medico - legal). (Brochure No. 91)

33. Expert Evidence (Thumb - impression) (Brochure No. 90)

34. Extracts from Law Quarterly Review - 1. (Brochure No. 36)

35. Extracts from LQR - II (Brochure No. 37)

36. Extracts from LQR III (Brochure No. 38)

37. Forms of Charges. (Brochure No. 11)

38. Hebeas Corpus. (Brochure No. 39)

39. Important Aspects of the Guardian and Wards Act. (Brochure No. 117)

40. Income and Trust. (Brocnure No. 94)

41. Industrial Disputes (Reference of Industrial Disputes to Labour Court or Industrial Tribunal by Government). (Brochure No. 77)

42. Injunction. (Brochure No. 93)

43. Interpretation of Tax Law : Charging and Machinery Provision. (Brochure No. 67)

44. Judicial Miscellany. (Brochure No. 1)

45. Judicial Officer's & Staff Service Rules. (Brochure No. 98)

46. Judicial Review of Discretionary Powers: Concept of misdirection in Law. (Brochure No. 47)

47. Judicial Training. (Brochure No. 20)

48. Jurisdiction of Civil Court vis-a-vis Revenue Court. (Brochure No. 104)

49. Karya Bhar Grahan Kal, Pension Avaim Kalyankari Yojnain. (Brochure No. 119)

50. Land Acquisition. (Brochure No. 6)

51. Land Acquisition Ss. 4, 5, 5 A, 6, 17 & 41. (Brochure No. 74)

52. Law of Possession Vols. I & II. (Brochure No. 118)

53. Law of Railway Claims Parts I, II. (Brochure No. 120)

54. Leading Decisions of the Supreme Court. (Brochure No. 130)

55. Lectures at the Ist Refresher Course for the District Judges. (Brochure No. 71)

56. Lectures at the 2nd Refresher Course for the District Judges. (Brochure No. 72)

57. Lectures at the 3rd Refresher Course for the District Judges. (Brochure No. 73)

58. Lectures at the 4th Refresher Course for the District Judges. (Brochure No. 87)

59. Lectures for Munsif Probationers - 1987 (Vol. I).[Brochure No. 16 (i)]

60. Lectures for Munsif Probationers - 1987 (Vol. II). [Brochure No. 16 (ii)]

61. Lectures for Munsif Probationers. (Brochure No. 113)

62. Lectures on Constitutional Law and Legislative Drafting Vols. I & II. (Brochure No. 35)

63. Lectures to Senior Civil Judges & C.J.Ms. (Brochure No. 24)

64. Lectures to the Senior Civil Judges/Chief Judicial Magistrates; and Munsif Magistrates. (Brochure No. 88)

65. Lectures to Senior Civil Judges/Munsif Magistrates. (Brochure No. 106)

66. Lectures to Senior Munsif Magistrates. (Brochure No. 105)

67. Lectures to Senior Munsif Magistrates. (Brochure No. 25)

68. Lectures "Vittiya Prabandh". (Brochure No. 107)

69. Legal Miscellany. (Brochure No. 18)

70. Legal Quiz Vol. I. (Brochure No. 126)

71. Legislative Drafting I. (Brochure No. 27)

72. Legislative Drafting II. (Brochure No. 28)

73. Legislative Drafting III. (Brochure No. 29)

74. Legislative Drafting IV. (Brochure No. 30)

75. Legislative Drafting V. (Brochure No. 31)

76. Legislative Drafting VI. (Brochure No. 32)

77. Legislative Drafting VII. (Brochure No. 33)

78. Legislative Drafting VIII. (Brochure No. 34)

79. Legislative Drafting IX. (Brochure No. 99)

80. Legislative Drafting Vol. XI. (Brochure No. 103)

81. Legislative Privileges. (Brochure No. 46)

82. Malice in Fact and Malice in Law. (Brochure No. 44)

83. Managing Juvenile Courts. (Brochure No. 96)

84. Mandamus & Quo Warranto. (Brochure No. 49)

85. Material for the Programme on Financial and Personnel management. (Brochure No. 97)

86. Minorities Educational Rights : Article 30. (Brochure No. 58)

87 Miscellaneous Articles on Administrative Law, Legislation etc. (Brochure No. 22)

88. Model Clauses. (Brochure No. 95)

89. Model Judgment Vol. I. (Brochure No. 100)

90. Model Judgment Vol. II. (Brochure No. 101)

91. Motor Accident : Compensation. (Brochure No. 124)

92. Nayayalyon Mein Hindi Ka Prayog. (Brochure No. 86)

93. Notable Murder Trials. (Brochure No. 5)

94. Office Inspection : Imposition, Realization, Deposit of Fines. (Brochure No. 17)

95. Parliamentary Privileges. (Brochure No. 8)

96. Powers of High Court under Article, 226 Constitution and Section 482 (Cr.P.C) in relation to F.I.R., Arrest; Investigation; Enquiry and Trial. (Brochure No. 70)

97. Practical Guidance (Brochure No. 3)

98. Practice and Procedure of Courts. (Brochure No. 10)

99. Preventive Detention. (Brochure No. 81)

100. Prisons, Remand Homes etc. (Article 21) (Brochure No. 9)

101. Probate and Letters of Administration. (Brochure No. 56)

102. Promissory Estoppel in relation to

    (a) Purely Administrative Orders,

    (b) Statutory Powers, and

    (c) Legislative Actions.

    (Brochure No. 60)

103. Protection of Minority shareholders and Creditors of a company. (Brochure No. 43)

104. Recent Civil and Criminal Decisions (Brochure No. 14)

105. Recovery of Public Money - Vol. I. (Brochure No. 62)

106. Recovery of Public Money - Vol. II. (Brochure No. 63)

107. Recovery of Public Money - Vol. III. (Brochure No. 64)

108. Recovery of Public Money - Vol. IV. (Brochure No. 65)

109. Recovery of Public Money - Vol. V. (Brochure No. 66)

110. Reference to High Court under various Taxation Laws. (Brochure No. 40)

111. 'Retrenchment' in Labour Law: Meaning and condition - Precedents for Exercise of Power. (Brochure No. 45)
112. Right to Equality. (Brochure No. 80)
113. Right to Property. (Brochure No. 57)
114. Rights and Obligations of Administrator General and Official Trustee. (Brochure No. 48)
115. Self Development. (Brochure No. 115)
116. Self Management. (Brochure No. 114)
117. Sentencing. (Brochure No. 7)
118. Sentencing in Murder Trials. (Brochure No. 123)
119. Shasnadeshon Ka Sangrsha. (Brochure No. 131)
120. Shaskiya Yatra Avam Bhatte. (Brochure No. 112)
121. Speaking orders. (Brochure No. 52)
122. Suit by or against minor or person of unsound mind O. XXXII C.P.C.) (Brochure No. 127)
123. Tax Statutes : Construction (Interpretation of Tax Law: Charging and Machinery Provisions) (Brochure No. 75)
124. Termination, Discharge, Reversion and Compulsory Retirement. (Brochure No. 69)
125. 'Upbhokta Sangrakshan Avam Vidhi' Per Sangoshthi. (Seminar on "Consumer Protection & Law"). (Brochure No. 129)
126. Validating legislation. (Brochure No. 82)
127. Vividhika (Miscellany). (Brochure No. 12)
128. Word Power. (Brochure No. 13)
129. Words and Phrases. (Brochure No. 21)
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131. Writs in Public Interest Litigation. (Brochure No. 51)
132. Yes Minister. (Brochure No. 92)
133. Zamanat. (Bail) (Brochure No. 128)