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Justice Jaswant Singh

MESSAGE

I am very happy to learn that the Institute of Judicial Training and Research, U.P., Lucknow, is doing very useful work by imparting training in Law and Legislative Drafting to the judicial officers, quasi-judicial authorities, prosecuting officers, government advocates and other lawyers doing research work, in addition to publication of Journal as well as Quarterly Digest of decided cases. At this juncture when I go down my memory lane I am reminded of the Judicial Officers' and Revenue Officers' training course launched way back in sixties by the High Court of Jammu & Kashmir where I was the senior most puisne judge. The training imparted to the said officers was more or less of similar nature as is being imparted by this august Institute though I must confess that it did not cover a large variety of subjects as this Institute is covering. The establishment of such Institutes is, in my humble view, essential to teach the young officers how to handle cases with efficiency, expedition without fear or favour unmindful of the consequences. The Institute must strive to infuse in the young officers divine attributes of devotion, dedication, tranquillity, placidity, humility, and equanimity. While it is imperative that the said officers should develop the aforesaid qualities, the High Court would do well to vouchsafe to the officers' protection against harassment by the executive when the former master courage to deliver bold judgments against the latter. The assurance that they will have the solid support of the High Court in such cases is essential to ensure dispensation of real justice. It must also be impressed on the judicial officers that in construing remedial statutes they must not go by the technicalities of law but should prefer a construction which has the widest operation and gives relief to a large body of persons and associations.

In conclusion I would like to felicitate the Chairman and Faculty members for doing such splendid work which is conducive to the well-being of the community.

The judicial officers must see that the criminal cases especially the trials of murder cases are not prolonged beyond two to three weeks. I am reminded of the good old days in thirties when I was public prosecutor at the three principal sessions divisions of my State and the aforesaid cases were disposed of in a fortnight and no case had to be adjourned for want of the presence of prosecution witnesses.

(Justice Jaswant Singh)
Former Judge
Supreme Court of India

PHILOSOPHY OF NATURAL LAW

Justice K. N. Saikia
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Director General National Judicial Academy

By philosophy of law, for the purpose of this article, is meant the pursuit of wisdom, truth and knowledge of law by use of reason. In other words, philosophy of law means the rational investigation and study of the basic ideal and principles of law. The philosophy of natural law is the subject of this article. Longing for a Higher Law – In the human bosom there has always been a longing for a higher law than those made by the community itself. The divine theory of law, the theory of natural law, and the principles of natural justice are some theories or notions found in fulfilment of this longing. Divine laws are those ascribed to God. Divine rights of kings were supposed to have been derived from God. Laws which are claimed to be God-made, may not be amendable by man; and their reasoning and provisions also not to be questioned by man.

Greek thinkers from Homer to the Stoics, and reflections of Plato and Aristotle mainly provide the beginning of systematic legal thinking. In Homer, law is embodied in the themistes which the kings receive from Zeus as the divine source of all earthly justice which is still identical with order and authority. Solon the great Athenian lawgiver appeals to Dike, the daughter of Zeus, as a guarantor of justice against earthly tyranny, violation of rights and social injustice. The Code of Hamurapi was handed over by the Sun god. Manu's Code was taught by Bhrigu to the sages as he learnt from Brahma himself.

Plato's (428-348 B.C) Writings – Plato began with the idea of Sophist Callicias that proclaimed the "right of the strong". In natural animal as well as in human life the strong exercise superiority over the weak. In a famous passage in the Republic, Plato puts into the mouth of Thrasymachus, who was convinced that laws are created by the men and groups in power to promote their own advantage. Thrasymachus thus defined justice :

"I declare that justice is nothing else than that which is advantageous to the stronger"

Plato was deeply convinced of the natural inequality of men, which he considered a justification for the establishment of a class system in his commonwealth. He exclaimed :

"You in this city are all brothers, but God as he was fashioning you, put gold in those of you who are capable of ruling; hence, they are deserving of most

reverence. He puts silver in the auxiliaries, and iron and copper in the farmers and the other craftsmen. For the most part of your children are of the same nature as yourselves, but because you are all akin, sometimes from a gold will come a silver offspring, or from silver a gold, and so on all around. Therefore, the first and weightiest command of God to the rulers is this – that more than aught else they be good guardians of and watch jealously over the offspring, seeing which of those metals is mixed in their souls; if their own offspring has an admixture of copper or iron, they must show no pity, but giving it the place proper to its nature, set it among the artisans or the farmers ; and if on the other hand in these classes children are born with an admixture of gold and silver, they shall do them honour and appoint the first to be guardians, the second to be auxiliaries. For there is an oracle that the city shall perish when it is guarded by iron or copper."

In Plato's commonwealth men of gold are to become rulers; they must be philosophers (for until philosophy and governmental power coalesce, there will be no end to evil in the State) and they will be endowed with absolute power, to be exercised rationally and unselfishly for the good of the State. Justice without law Theory Revised. – In his Republic, Plato's view was that in deciding disputes judges should not be bound by fixed and rigid rules embodied in a code of laws, but they should have wide discretion. The State in Plato's Republic is an Executive State, governed by the free intelligence of the best men rather than by the rule of law. Justice is to be administered "without law".

In his 'The Laws', however, Plato changed his earlier view. The governing authorities of the State are no longer free to administer justice without written codes and legal enactments; they are to become the servants of the law, bound to take their directions from general enactments which are to guide the conduct of the citizens without respect to persons.

Aristotle's Sovereignty of Law. – Aristotle (384-322 B.C.) noticed that Plato himself had come to realise that "no human being..... is capable of having irresponsible control of all human affairs without becoming filled with pride and injustice". Aristotle was a realist and he postulated a State based on law as the only practical means of achieving "good life" which, according to him, was the chief goal of political organisation. "Man", he exclaimed, "when perfected is the best of animals, but if he be isolated from law and justice he is the worst of all."

"Rightly constituted laws." said Aristotle, "should be the final sovereign; these laws should be sovereign on every issue, except that personal (that is, executive) rule should be permitted to prevail in those matters on which the law

was unable to make a general pronouncement." Aristotle held that "the rule of law is preferable..... to that of a single citizen." Even though he agreed with Plato that, if there was a men of outstanding eminence in virtue and political capacity in the State, such a man should become the permanent ruler. He insisted that even such a "godlike" man must be a lawgiver, and that there must be a body of laws even in a State governed by such a man." He who commands that law should rule may be regarded as commanding that God and reason alone should rule; he who commands that a man should rule adds the character of the beast. Appetite has that character and high spirit, too, perverts the holders of office, even when they are the best of man. Law.....may thus be defined as "reason free from all passio". Aristotle finds man as part and master of nature. Man dominates nature by his spirit which enables him to will freely, to distinguish between good and evil. This led to the natural law philosophy of Kant as of Hegel; of John Stuart Mill, Herbert Spencer as of Del Vecchio and Kohler. Aristotle distinguishes distributive and corrective justice and analyses natural justice as he distinguishes natural law from positive law, the former deriving force from human nature everywhere and at all times. He envisages natural law as body of rules binding upon the magistrate as well as the people. Natural Law. – Natural law or "jus gentium" of the Roman jurists of the Antonine age denoted a system of rules and principles for the guidance of human conduct which, independently of the enacted law of the systems peculiar to any one people, might be discovered by the rational intelligence of man and would be found to grow out of and conform to his nature, meaning by that word the whole mental and physical constitution.

Mankind's search for justice found the idea of natural law as something higher than positive law. The Romans found applicability of natural law. The Roman jurists followed the Stoics in building that reason governed the universe in all parts as man is a part of universal nature and is governed by reason in fulfilment of his faculties. To live according to nature means to live according to reason. The Romans did not directly create a body of natural law but from the ideas of 'jus gentium' as the embodiment of law and usages observed among different people and representing general good reason followed the idea of 'jus naturale'. While 'jus civile' was applicable to the Roman citizens, 'jus gentium' was applicable to all nations. 'Jus naturale' was higher law and deviation therefrom was not to be Natural law philosophy came to influence legal development and has created notions as 'justum', 'acquum et bonum' and 'ex debito justitiae'.

CICERO (106-43 B.C.), the great Roman lawyer and statesman was strongly influenced by the ideas of stoic philosophers. Like them, he was inclined

to identify nature with reason and to assume that reason was the dominating force in the universe. All men have reason in common and also right reason in common. Law must conform to the right reason, i.e. must be governed by natural law. "True law is right reason in agreement with nature; it is of universal application, unchanging and ever-lasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good man in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely...." Cicero viewed natural law as universal law for all times. He wrote : "And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times and there will be one master and ruler, that is God, over us all, for he is the author of this law, its promulgation, and its enforcing judge". De Re Publica. BK.III, XXII.

The philosophy of natural law influenced the development of Roman law from a law of Rome into a law of the developing world. From the ancient Twelve Tables Gaius (101 A.D. to 177 A.D.) compiled his Institutes and thereafter Justinian (527 A.D. to 565 A.D.) compiled his Institutes which were given the force of law. It is interesting to find, in one view, in the Sumati's Code, Manusmriti, was also composed approximately between 150 A.D. and 500 A.D. and it also contains the idea of revelation. The philosophy of natural law influenced legal thinking throughout the centuries until renaisance; and even thereafter legal philosophers expressed faith in it. Meanwhile the digests, pendects and glossae were written on Roman Law and its study spread over. St. Thomas Aquinas (1226-1274) defines law as "an ordinance of reason for the common good made by him who has the care of the community and promulgated". According to him, since the world is ruled by divine providence, the whole community of the universe is governed by divine reason. Divine law is supreme. But the whole of divine law is not accessible to man. Such part of it as is intelligible to man reveals itself through eternal law as the incorporation of divine wisdom, which gives direction to all actions and movements. Natural law is a part of divine law, that part which reveals itself in natural reason. Man, as a reasonable being, applies this part of divine law to human affairs, and he can thus distinguish between good and evil. It is from the principles of eternal law, as revealed in natural law, that all human law derives. But St. Thomas establishes a fourth category, which seems to stand in a similar relation to human law as eternal law does to natural law. This is the lex divina, the positive law, enacted by God Himself for all mankind, in the Scripture. All law enacted by human authority, that is positive law, must keep within these limits.

William of Occam (1270-1343 A.D.). – A somewhat different system was developed by William of Occam, one of the most original medieval thinkers. His hierarchy consists of :-

(1) Universal rules of conduct, dictated by natural reason.

(2) Rules that would be accepted : as reasonable and therefore binding in a society governed by natural equity without any positive law.

(3) Rules which may be deduced from general principles of the law of nature but, not being of a fundamental character, are liable to modification by authority.

For the philosopher rather than the jurist the significance of Occam's teaching lies in another aspect" he and the slightly older Duns Scotus identified law with the absolute will of God, which is not identical with the essential nature of things. God's will is subject only to His own arbitrary decree. This, according to some non-scholastic philosophers prepares the way for the supremacy of will over intellect, and, politically, for the acceptance of the absolute power of the sovereign.

Medieval jurists developed from natural law the ideas of private rights of the individual. Natural law philosophy has thus performed many functions. It provided an ideal or higher law to which positive law must try to conform. It transformed the Roman Civil law into the law of the world; in its name the validity of international law was ascertained; and Grotius developed the system of international law. It led to two other powerful developments. It led to the idea of inalienable rights of the individual, and the juristic development taking natural law as a higher law which invalidates inconsistent positive law and as an ideal to which positive law ought to conform.

The natural law theory led to the notion of sovereignty of modern State. Both the ideas of universal order governing men and all the inalienable rights of the individual. In the writings of Locke (1632-1704 A.D.) and Pain provided the foundation for the individualistic philosophy, extolling individual's inalienable fundamental rights.

With the development of science and technology and the nations competing in acquisition of knowledge of the common properties of mankind like the sun, the planets, the outer space, the antarctica and the polar regions, the ordering or regulating of human behaviour would be possible only through an ideal law above the positive, the municipal laws of the countries. Reduction and control of trans-boundary pollution also needs such ordering or regulation. Presently we find the United Nations carrying on the declaration and expansion

of human rights including political, economic, cultural rights have advanced a great deal towards acceptance of such a higher natural order. The need for preservation of Global and regional environments, protection of the ozone layer and avoidance of global warming, and protection of nature's bounties like forests, the seas and space make it all the more necessary to pursue such an ideal. Till then the resolutions of the U.N.O. and the international conventions in different fields indicate great deal of Global cooperation without which the fruits of science and knowledge will not be enjoyable to mankind. Throughout human history it has been experienced that human reason, knowledge and sciences are not to be confined to geographical or political territories. Human reason refuses to be confined to political or geographical territories. Recent developments in demolishing the German partition walls, hitherto considered inevitably necessary, and challenges to monopoly of powers in certain groups have amply shown the value of human wisdom, reason, liberty and aspirations. There is, therefore, immense need for Global cooperation to be followed by Global compact and ultimately a Government for the Globe, the home of mankind and the finest creation of God.

VICTIMS' – LEGAL RIGHT TO COMPENSATION

Justice K. Jayachandra Reddy
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The word "victims" means persons who individually or collectively have suffered harm including physical or mental, emotional suffering, economic loss or substantial impairment of the fundamental rights through acts of omissions or commissions that are in violation of criminal laws operative including those laws proscribing criminal abuse of power. The General Assembly of the United Nations in its 96th Plenary Meeting held on 29th November, 1985 made a declaration of basic principles of justice for victims of crime and abuse of power, recognising that millions of people throughout the world suffer harm as a result of crime and the abuse of power and that the rights of these victims have not been adequately recognised and also that frequently their families, witnesses and other who aid them are unjustly subjected to loss, damage or injury. The Assembly affirmed the necessity of adopting national and international methods in order to secure universal and effective recognition of and respect for, the rights of victims of crimes and abuse of power. The Assembly also adopted the declaration of basic principles of justice for victims of crime and abuse of power. It was also declared that offenders or third parties responsible for their behaviour should where appropriate make fair restitution to victims, their families or dependants. Subsequently the General Assembly emphasised that when compensation is not fully available from the offenders or other sources, the State should endeavour to provide financial compensation to the victims, their families and in particular dependents of persons who have died or become physically or mentally incapacitated as a result of such victimization. In this context, it was also stressed that an establishment strengthening the expansion of National Fund for compensation to the victims should be encouraged. Now coming to the victims of the abuse of power, it is noted that though they are not the victims of violation of criminal laws yet they belong to the category who have suffered harm including mental or physical injury, economic loss or impairment of their fundamental rights through acts of omissions and commissions of those wielding power resulting in violation of recognised norms relating to human rights. The Assembly felt that the State should consider incorporating into the National law norms prescribing abuse of power and providing remedy to victims of such abuse by way of restitution or ordering compensation and other incidental supports. The concept underlying is that the State or the Community should restore the victims or their dependents as far as possible to their former conditions through compensation and neighbourly support.

The word "victimology" though appears to be a coinage is understood as the science dealing with the crimes and their victims and the history shows that the same is given considerable importance. We find that in Britain as early as in 19th century considerable thought had been given to the victim from the point of view of compensation and reparation. Apropos to the same from time to time schemes providing for compensation to the victims of crimes have been framed and they have been in vogue. Now the latest enactment in that direction is Criminal Justice Act, 1968 which provides for victim of violence being entitled to compensation subject to some restrictions. The justification underlying is that wrong done to an individual extends to him as well as to his family and also to the community of which he is a member.

The concept of compensation to the victim has become popular in U.S. also. Though administratively the compensation in principle has been regarded as an extension of fine but in a large number of cases that may not adequate. It has, therefore, become necessary that the State should also rise to the occasion and provide legal remedies recognising the right of the victim to such compensation in appropriate cases and should set up a separate fund for the purpose. In Britain prior to 1988 there used to be some non statutory arrangements what are called "Criminal Injuries Compensation Schemes". The Criminal Justice Act, 1988 places the criminal injuries compensation scheme on a real awareness on progressive lines that the State must accept its responsibility to rehabilitate such victims.

Though the victim hitherto has not been totally left without any remedy or he has his remedy in tort and can also recover some damages by a suit but experience shows that this remedy is so dilatory, expensive and troublesome and that a victim may not get his due even in his lifetime. Therefore there is a growing awareness to rehabilitate the victim of crime or his family. It is only the State that can endeavour in any event and come to the rescue of the victim in this regard. In many of the countries, the criminal injuries compensation boards have been set up and are functioning for quite some time now. In India the provisions of the Constitution and the Code of Criminal Procedure and the Evidence Act provide for protection consistent with the world human rights conventions. It is, therefore, appropriate and necessary that the States in India too should rise to the occasion in conformity with the international understanding in respect of providing adequate compensation to the victims of the crime and evolve necessary schemes which have legal status. As to the details of implementation and the necessary infrastructure, adequate legal provisions should be made on the lines adopted by the other countries as far as practicable.

Under the Protection of Human Rights Act, 1993, the National Human Rights Commission at the National level is set up. Similarly in some States also similar Commissions of State level are set up. The violation of human rights as distinguished from violation of criminal laws is mainly due to abuse of power. Power as understood in common parlance is the pressure exercised by a person or a group over others so as to influence their actions or their attitudes, and such power may be political, economical, social or religious etc. The abuse of the power is understood as ill-use, inappropriate treatment, application by unlawful means to a wrong purpose of such power which results in the violation of civil rights, other privileges guaranteed under the law. In all such violations, the victims may suffer harm including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights because of acts of omissions or commissions by the persons wielding power, as declared by the United Nations General Assembly. In such cases also the State should consider incorporating into the National law certain norms proscribing abuse of power and providing remedies to victims including restitution and compensation and other social assistance and support. The concept of providing compensation to the victims of crimes would equally be applicable to the victims of human rights abuse. It is to be borne in mind that the setting of National Human Rights Commission is thought of at a time when our country is linking up with other countries to attain social, cultural and economic status at the international level.

No doubt there are certain provisions in the Code of Criminal Procedure and other enactments like Motor Vehicles Act, Fatal Accidents Act, Indian Railways Act, Workmen Compensation Act, Factories Act, etc. providing for compensation to the victims and their families but they are found to be wholly inadequate. Strictly speaking, the cases covered by these provisions belong to different categories and they are not the same as violations of human rights particularly by abuse of power and also do not cover all the categories of cases of criminal injuries. Therefore, a fresh look is necessary in the matter of giving due importance to the concept of "victimology" and the role of the State in its responsibility to rehabilitate the victims of crime or violation of human rights and their family members.

This takes us to the question as to what are the types of violations resulting in crimes and abuse of human rights that should be the criteria for awarding such compensation. In the Draft "Guidelines for measures about victims of crime and abuse of power", the United Nations Social Council has indicated, that the types of harm, injury, loss or damage caused by such violence should be determined

and redressed thus :

> "It shall be the responsibility of the State, as the embodiment of justice, to provide for procedures, mechanisms and institutions through which determinations may be made as to whether the alleged conduct, violations, harm, injury, losses or damage have been committed or suffered, as to the means and the amount of redress or sanction as a result thereof that are appropriate, and to ensure the enforcement and implementation of such determinations."

In the declaration of basic principles of justice for victims of crime and abuse of power, by the General Assembly of the United Nations at its 96th Plenary meeting, the following paragraphs are of importance and noteworthy :

A. Victims of Crime

1. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws prescribing criminal abuse of power.

2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

3. The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or group origin, and disability.

Compensation

12. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to :

(a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;

(b) The family, in particular dependents of persons who have died or become physically or mentally incapacitated as a result of such victimization.

13. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including those cases where the State

of which the victim is a national is not in a position to compensate the victim for the harm.

B. Victims of Abuse of Power

18. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.

19. States should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support.

20. States should consider negotiating multilateral international treaties relating to victims, as defined in paragraph 18.

21. States should periodically review existing legislation and practices to ensure their responsiveness or changing circumstances, should enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power, as well as promoting policies and mechanisms for the prevention of such acts, and should develop and make readily available appropriate rights and remedies for victims of such acts."

It is obvious that the expression "victims of crimes" is not confined to the victims of ordinary crimes only but also enfolds victims who suffer due to abuse of power by persons in lawful authority. With regards violation of legal powers by the agencies of the State resulting in harm to the citizens, the Economic and Social Council of United Nations in their draft guidelines stated thus :

> "Victims of crimes and other illegal acts involving abuse of power shall be entitled to indemnification by the State, organised entity or person in respect of crimes or other illegal acts committed by their agents or other illegal acts committed by their agents or employees in the usual course of the performance of their duties and within the scope of their actual or ostensible authority. Unless it is otherwise proved, employees or agents of the State, organised entity or person shall even when committing crimes or other illegal abuses of power, be presumed to be acting in the usual course of the performance of their duties and within the scope of their actual or ostensible authority.

Thus it is clear that people will have to be protected not only against ordinary offenders violating State criminal laws but also from victimisation by those wielding power. To alleviate the sufferings of such victims and to ameliorate them from the consequences sufficiently by way of compensation and reparation it is felt in all civilised countries that the State should take up the responsibility and chalk out welfare measures and set up appropriate bodies for implementation of such welfare measures. Again the United Nations in its draft guidelines on this subject emphasised :

> "It shall be the responsibility of the State as the embodiment of justice, to provide for procedures, mechanisms and institutions through which determinations may be made as to whether the alleged conduct, violations, harm, injury, losses or damage have been committed or suffered, as to the means and the amount of redress or sanction as a result thereof that are appropriate, and to ensure the enforcement and implementation of such determinations."

In this context, the United Nations Economic and Social Council also suggested the establishment of a fund or funds at international, regional and national levels as means to help and ensure that victims are not left without full redress of the harm, injury, loss or damage especially when the offenders are not identifiable or available to provide or capable of providing such redress.

A perusal of the literature on the various working schemes in this regard in various countries would show that effective measures on somewhat legal basis have been taken for implementation of such criminal injuries compensation schemes. As referred to above one of the schemes proposed is to set up "Victims Compensation Fund" which goes beyond the simple notion of subsidy. One such important scheme is framed in Great Britain in 1990 to implement Criminal injuries compensation scheme by 'Criminal Injuries Compensation Board." The scheme is very exhaustive and contains elaborate provisions and various other conditions and considerations for administrative implementation, filing application, processing and assessment of compensation etc.

As to what should be the nature of the scheme that a can be thought of having regard to the conditions obtaining in our country, a further indepth study has to be made. However, a growing awareness that the State should accept its responsibility to rehabilitate the victims of crime has to be taken cognizance of and the State 'in the present context of international scenario should rise to the occasion and should try to give an immediate articulation and take all the necessary steps to formulate a scheme after due consideration of various conditions and circumstances.'

THE INDIAN JUSTICE SYSTEM/CURRENT PROBLEMS AND CREATIVE PANACEAS

Justice V.R. Krishna Iyer
Former Judge, Supreme Court

The quintessence of justice, in the contemplation of the Constitution, is the liberation from socio-economic subjection and consists in the actualization of the goal of "full and free development of every individual", to use the words of Karl Marx in Das Capital. For the Indian Constitution the holistic conception of freedom is of supreme relevance. Indeed, The International Human Rights Conference in Teheran (1968) called by the General Assembly of the United Nations, one of the most significant of its kind to date, declared in a final proclamation:

"Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without enjoyment of economic, social and cultural rights, is impossible."

This integrality has been stressed again and again.

In the same strain Justice Gajendragadkar in *Workers* of Gold Mines case (AIR 1958 S.C. 923) summed up the response of an aware Court :

"Social and economic justice have been given a place of pride in our Constitution and one of the directive principles of State policy enshrined in Article 38 requires that the State shall 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 national life. x x x The concept of social and economic justice is a living concept of revolutionary import, it gives sustenance to the rule of law and meaning and significance to the ideal of a welfare State."

The judges have a role in transforming people's frustrations into a revolution of expectations of a humane to-morrow.

The dialectic of the rule of law arises from the obvious contradiction of two forces :

The first, the colonial factor, drags the country back; the second, the swaraj urge, spells the need for a revolution forward. From the juxtaposition of these two paradoxical presences follows the third compulsion that if Justice is an inalienable right of the millions of Indian people, with their chronic social squalor, ubiquitous poverty and massive illiteracy, its meaningful fulfilment is a pledge to

our Future and necessitates many radical Changes in the system of law and justice, viewed as a larger undertaking. Lord Denning, looking at the Indian Court, has said in passing :

"Law does not stand still. It moves continually. Once this is recognised, then the task of the Judge is put on a higher plane. He must consciously seek to mould the law so as to serve the need of the time. He must not be a mere mechanic, a mere working mason, laying brick on brick, without thought to the overall design. He must be an architect-thinking of the structure as a whole-building for society a system of law which is strong, durable and just. It is on his work that civilised society itself depends."

[In the Foreword to the Book "The Supreme Court of India, by RAJEEV DHAVAN- Page vii]

Capelletti regards forensic access, in itself, as the foremost human right :

"The right of effective access to justice has emerged with the new social rights. Indeed, it is of paramount importance among these new rights since, clearly, the enjoyment of traditional as well as new social rights presupposes mechanisms for their effective protection. Such protection, moreover, is best assured by a workable remedy within the framework of the judicial system. Effective access to justice can thus be seen as the most basic requirement- the most basic 'human right'-of a system which purports to guarantee legal rights."

Wigs and gowns and the cult of the robes are not substitute for a revolutionary theory of constitutional justice. Granville Austin, in his great work on the Constitution of India, asserts that the judiciary was considered by the founding fathers to be an instrument for engineering the constitutional revolution; but, having regard to the court pyramid's actual performance a pessimistic verdict that the judges have partially failed, is difficult to avoid.

The butcher, the baker, the candle-stick maker, the bonded labourer, the pavement dweller, the damsel in distress, the sweated worker, the starving child, the dalit, the tribal and the socio-economic pariah shall have a vested interest in the Republic, only if the Constitution has a vested interest in their survival, their human worth and personhood.

The unconscious assumptions, the inarticulate politics and the *status quo* thinking, learnt as young law students and hardened in the elite school of life, are not easy to overcome. Judges must, therefore, consent to a course on *Justice under the Constitution*, washing away many interpretive distortions imported by precedents laid down by the pride of great judicial lions who, at best, were liberal,

and, at worst, idolators of dated dogmas, and, hardly ever, iconoclasts with radical thought.

Jawaharlal Nehru, while inaugurating the Conference organised by the International Commission of Jurists (I.C.J.) in Delhi, urged that the rule of law must run close to the rule of life. The I.C.J., in its declaration of Delhi, at that Conference incorporated the same idea :

"The Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized." [ICJ Declaration of Delhi]

While interpreting law, judges must be dynamic. Justice Cardozo quoted President Theodore Roosevelt to emphasize that the :

"Decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy."

[The Nature of the Judicial Process, 1960 Edn.P. 171]

The perceptions of the Judges are partly shaped and conditioned by the lawyers. Firstly, it is the lawyer who is eventually elevated to the bench. Secondly, it is the lawyer who, day in and day out, argues in the Court and impalpable moulds the minds of the robed brethren. Therefore, it is important that for the success of the constitutional transformation contemplated in Article 38 (a social order in which justice social, economic and political shall inform all the institutions of the national life) the Bar must also re-orient itself and not cling to fossil forms, rigid rules, lexical technicalities and patrified meanings out of step with the nation's march. Law is the means, lawyer the tool, justice the end and judges the instruments. It follows that a new breed of lawyers must incarnate as the Bar of Free India so that the new frontiers of radical jurisprudence may be discovered. Mark Twain has an apt observation for broadening the lawyer's vision which I quote here :

> "There is always a strong tendency among lawyers to become interested in the law to the exclusion of everything else. The law is a fascinating study and its practice an absorbing occupation. But to

> consider the law as an abstract system aside from its application to human life, is to see it as a skeleton only stripped of flesh and blood and the living realities. The lawyer who deals with dry bones of the law, and who lives, moves and has his being in rules and jurisprudence, soon becomes self-centred, narrow and provincial. He becomes a hermit of the law. He soon misses the real varieties of life. The growth and expansion of law mean nothing to him. He becomes an antiquarian and loses the broader aspect of legal relations. His values as a Legal Adviser diminish as his legal vision shrinks. No business or profession is as broad in its application as the law. No other, demands greater ability, greater industry or a broader grasp of human nature. Law deals with human conduct, and without a breath of human sympathy, no lawyer can know the law in its manifold applications to human problems. The lawyer, of all men, must have a broad mental horizon."

Human Rights and Human Justice desiderate, as a *sine qua non* the independence of the Justice system. This vulnerable yet indispensable value of Independence of the Judiciary is not the pampered privilege of elite brethren but the people's dearest creed in societies where human freedoms still matter. The emphasis is on Justice, not Justices. The former is the common end, the latter but the constitutional tool. The universal fundamental is *fearless and fair justice*, and independent and humane justices are integral to the fulfilment of this imperative of the world legal order. If the right to justice is non-negotiable, so is the immunity of the judiciary from intimidation by the Executive, the socio-economic mafia, mass hysteria, media propaganda or terrorist forces. Insidious temptations, incurable vices and deep-rooted subjective prejudices of judges themselves may menace that conscientious impartiality which is the essence of independent justice. Equal justice beyond pressure of purchase is the product; easy access to the humblest and the hated, and early finality without expensive appellate procrastination, it the process; public hearing with intelligent application of the law and social sensitivity to facts is the dynamics, and judgments, with reasons recorded and copies thereof given readily, constitute the democracy of justice.

Justice can never be free where the Justices are not free. When Tun Salleh, the former Chief Justice and Lord President of Malaysia, was dismissed unjustly at the instance of the Prime Minister thro'a secret trial by a packed tribunal, the aggrieved Judge wrote a book (May Day For Justice) where he eloquently articulated some basic ideas relevant to the independence of judges as a sine qua non of freedom. Let me quote :

> "Flags and anthems and marching uniforms, let us face it, will not make us free. No Fighter-Bomber squadron or naval patron fleet, no policeman on the beat or his secret Special Branch operation leading innocent men to Room 101 in Police Remand Centres.....is enough to preserve our freedoms. No, not even regular "democratic" General Elections and Parliamentary sessions, oath taking ceremonies and all, can guarantee it. The Constitution itself, and all the laws born of that Constitution, cannot make us free. And most certainly not orchestrated propaganda ditties drooled day and night in saccharine voices.
>
> "As the old saying goes, only the truth can make us free, because all these institutions and their fine trappings can be, and often are, grossly abused and distorted.....
>
> "Unless the truth is known at every turn, all those fine things can become mere Executive weapons for its own preservation and survival, not the armour to protect and preserve the freedom of the citizen which they are supposed to be.

"And the few institutions which can prevent such abuse and distortions are open courts of law with independent judges."

[MAY DAY FOR JUSTICE- Magnus Book, *Kuala Lumpur-at* P. 313]

Therefore, people the world over, consider a free judiciary a constitutional fundamental, absent which authoritarian forces and executive fiats may frustrate human rights, pollute or politicise court verdicts and fob off partisan pronouncements as the rule of law. The broad division of powers, as the guarantee of democratic justice, demands for the judicature a measure of functional autonomy. Montesquieu expressed this view in The Spirit of the Laws thus :

> "Again, there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
>
> "There would be an end to everything, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals".

The core of the Montesquian doctrine is valid and his thrust is the necessity for an independent judicial authority to keep within bounds intimidatory or

excessive exercise of power by the executive and legislative wings imperiling the right to justice free from fear or favour.

How can adjudication ever be fair if it is not free from fear ? So the impregnable autonomy of the judicial process is inviolable. Where the judges are obliged to respond to other commands from beyond forensic walls or calls from within brain-washedbosoms justice is a casualty. It is thus axiomatic that for equal justice between unequal parties and for supervisory jurisdiction over the other organs of the State those who fill the office of judgeship must themselves be beyond pressure or terror, purchase or prejudice.

The Supreme Court of India has explained in emphatic terms, the superlative importance of judicial independence in a dynamic democracy :

> "The concept of independence of the judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective. It is to aid the judiciary in this task that the power of judicial review has been conferred upon the judiciary, and it is by exercising this power which constitutes one of the most potent weapons in the armoury of the law, that the judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse or abuse of power by the State or its officers. The judiciary stands between the citizen and the State as a bulwark against executive excesses and misuse or abuse of power by the executive and therefore it is absolutely essential that the judiciary must be free from executive pressure or influence and this has been secured by the Constitution makers by making elaborate provisions in the Constitution to which detailed reference has been made in the judgments in *Sankalchand Sheth's case* (AIR 1977 SC 2328) (supra). But it is necessary to remind ourselves that the concept of independence of the judiciary is not limited only to independence from executive pressure or influence but it is a much wider concept which takes within its sweep independence from many other pressures and prejudices. It has many dimensions, namely fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the Judges belong. If we may again quote the eloquent words of Justice Krishna Iyer :

> "Independence of the judiciary is not genuflexion ; nor is it opposition to every proposition of Government. It is neither judiciary made to opposition measure not Government's pleasure.
>
> The tycoon, the communalist, the parochialist, the faddist, the extremist and radical reactionary lying coiled up and sub-consciously shaping judicial mentations are menaces to judicial independence when they are at variance with Parts III and IV of the Paramount Parchment."
>
> Judges should be of stern stuff and tough fibre, unbending before power, economic or political, and they must uphold the core principle of the rule of law which says "Be you ever so high, the law is above you". [AIR 1982 SC 149 at pp 197-198]

The judicial office is no bed of roses but a crown of thorns and a cross in prospect if a conscientious functionary, by his diamond-hard impartiality, happens to anger or annoy the vanquished Executive or unwittingly tread on the toes of some vested interest waiting to avenge or willing to corrupt. In our feudatory or fuhrerist societies, during times when the mafia and the militants make no bones about use of violence and where 'deemed' democracies are dominated by quasi-Caesars with secret operations, a fair court faces hard days. In this world of material appetites, the tendency to fall for or seek or be bought thro' pleasures and pains is a common failing of 'ermined' echelons, and these pathological possibilities are so pervasive that an armour of protective principles, a code of 'hands-off courts' and a culture of immunities for judges have been found desirable for a world judicial order.

Lord Atkin in his powerful painful dissent (*Liversidge* V. *Anderson*) in words ring through the world of jurisprudence observes :

> "I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded that the executive. Their function is to give words their natural meaning, not, perhaps, in wartime leaning towards liberty, but following the dictum of Pollock C.B. in *Bowditch* v. *Balchin* cited with approval by my noble and learned friend Lord Wright in *Barnard* v. *Gorman* :' In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute'. In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now

> fighting, that the judges are not respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I." [1942 AC 206]

And these unhappy observations, whatever the boast of British Justice, led to a distressing estrangement and aloofness by other Judges and hastened the end of that high-minded judicial martyr. What a price to pay for forthright judicial outspokenness.

Justice Douglas of the U.S. Supreme Court once stayed, by an interim order, the bombing by U.S. of Cambodia on a petition by the American Civil Liberties Union. He phoned the Court his Order from a public telephone as he was concerned about the safety of life and property. Rare to find such independence and commitment for causes. However the administration in consternation moved Justice Marshall successfully to neutralise the Douglas Order. 'The Brethren inside the Supreme Court' relates this story and also states that in private Douglas referred to Marshall as 'spaghetti spine'.

Judges, as they approach the termination of their tenure, are apt to look for post-retiral bonanza. Many of them, even if the implacable calendar compels termination of office, look for 'fresh woods and pastures new'- Commissions galore. Special enquiries, LOK AYUKTS and other re-incarnations where age is no bar are available avenues if you do not antagonise governments or parties in power or keep in good humour important politicians, Big Business bosses and the like. Heavy fees for consultations and arbitrations allure many judges and so, their anxiety and anguish so to conduct themselves as not to cause a jar or jolt in the minds of those who may help future fortune. Of course, quite a number of judges resist these internal pressures and do not care to cultivate or share drinks with senior lawyers, executives and ministers. But alas, inflation of ambitions and pleasures of office are temptations which weaken impartiality and water down independence. You succumb to tomorrow's prospects by flexible behaviour to-day in a world of expensively materialist appetites, Realism and prudence and a careerist perspective soften the sterner stuff of judges as they advance in age. After all, human frailties do not spare robed brethren. As Thomas Jefferson long ago wrote : Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps.

Justice Venkataramaiah, a simple should who retired as Chief Justice of

India, spoke with naivete :

"Some judges are willing to be influenced by lavish [parties and whisky bottles. In every High Court there are at least 4 or 5 judges who are practically out every evening, wining and dining either at the lawyer's house or a foreign embassy". He estimated that there are at least 90 such judges in the country. He went on to add that all close relatives of judges were thriving as advocates in all the High Courts of the country. Referring to allegations that decisions of judges are influenced through practising relatives, he said that, "it is hard to disregard reports that every other son or son-in-law of a judge, whatever his merit or lack of it as a lawyer can be sure or earning an income of more than 10,000/- rupees per month."

(Indian Post dated 17-12-1989)

Judges of High Courts, in the evening of their tenure, have the tendency to chase prospects of becoming Chief Justices or elevation to the Supreme Court. Until recently the top political executive in Delhi had a decisive voice and so the unhealthy practice of cultivating contacts with appropriate political persons gained currency. The Chief Justice of India also had a key role and was therefore, a worship worthy authority. The unfortunate spectacle of high judicial personages falling a prey to these infirmities has been commented upon adversely by senior, now retired, Judges like Justice Jagan Mohan Reddy.

Inevitably, favouritism, communalism, regionalism and allotropic modifications of these improprieties flourished not on a big scale but in mentionable measure. It is unpleasant to reveal these meretricious habituate instead of sweeping them under the carpet. But the darkness of secrecy never heals, while the sunshine of exposure may cure. Democracy thrives only where truth can be told, although high judicial office must be handled with care and irresponsibility must be punished.

PRIMACY TO DUTY CONSCIOUSNESS

Justice V. S. Malimath
Member, National Human Rights Commission

Rights and duties are like two sides of a coin. Duty is that which is owed by one person to another. Correspondingly, the latter has a right against the former. If we look at the relationship of master and servant, we notice that the servant has certain duties to perform towards his master which become the rights of the master.

2. All of us have some duties and some rights. If we expect others to be conscious of their duties towards us, it is but fair that we should be equally conscious of our duties towards them. As rights are beneficial, they are easily remembered and asserted. Human nature being what it is, it tends to ignore or even forget the duties as they are onerous. It is the fight for right that is the root cause of conflicts and violence, paving the way for anarchy.

3. Duty consciousness is indeed a civilised concept. When man first appeared on this earth, he very much behaved like most of the animals trying to grab what he wanted from others, unmindful of the pain and suffering he was inflicting by such usurpation. It is only in the course of development of the society that the man realised that if he were to live in peace and free from fear and anxiety that he should respect the rights of others so that he can expect others to respect his own rights.

4. There is a qualitative difference between right consciousness and duty consciousness. Duty consciousness is qualitatively superior as there is an element of selflessness in it as against right consciousness which has an element of selfishness. Man having realised that peaceful atmosphere is very vital for enjoying life, evolved a social organisation wherein every member of the society is required to be conscious and perform his duties to qualify himself as a member of the orderly society. The society has evolved procedures and prescribed sanctions to ensure due performances of duties by all its members. In one sense, an important facet of civilisation is the concern for other's rights, privileges, comforts and conveniences – and thereby substituting the rule of 'right is might' in place of the law of the jungle that 'might is right'.

5. The ethos of Indian Epics, the Ramayana and Mahabharata, the Vedas and Upanishads is Dharma. The Sanskrit word 'Dharma' is a very comprehensive concept to convey duty, law, religion, code of moral conduct, etc. Though the English expression 'Duty' is not adequate to convey all that Dharma com-

prehends, let us take the nearest appropriate word 'Duty'. One of the important aspects of our ancient educational system was to teach Dharma, i.e., duty and not what one's rights are. The king or the ruler was taught what his duties towards his subjects were. The student (Shishya) was told what his duties were and the teacher (Guru) was told about his duties towards his student (Shishya). The wife had to remember her duties towards the husband and the husband his duties towards his wife. The host had to perform his duties of Athitisatkar to his guest. The thrust of the ancient system was to emphasise one's duties and not rights. As the emphasis was on duties, the corresponding rights of others stood automatically assured. Rama went to forest in exile to discharge his duty towards his father. Harishchandra readily prepared himself to take the role of the watchman of the graveyard to comply with his duty, to keep up his word. These are the noblest examples of the ethos of our country of duty consciousness. During the freedom struggle, our people sacrificed their lives and properties in discharge of their duty towards their motherland, without, in the least, expecting anything in return. It would be relevant to recall the famous call given by Mr. John F. Kennedy when he told his countrymen : "Ask not what the country can do for you, Ask what you can do for your country" In other words, he asked the people to remember their duties first.

6. Mahatma Gandhiji has in his simple words explained the importance of duty in the following words :

> "I learnt from my illiterate but wise mother that 'all rights to be deserved and preserved, came from duty well done. Thus the very right to live accrues to us only when we do the duty of citizenship of the world. From this one fundamental statement, perhaps it is easy enough to define the duties of Man and Woman and correlate every right to some corresponding duty to be first performed. Every other right can be shown to be a usurpation hardly worth fighting for".

7. After Independene we gave ourselves the Constitution proclaiming the fundamental rights of the citizens. The emphasis is clearly on rights, on the lines of the Western thinking, inspired by the Magna Carta of England and the Bill of Rights of the U.S.A., etc. We have adopted the Westminister type of democratic form of Government. The democratic apparatus has been in operation for more than 40 years and several elections have been conducted to the Parliament, the State Legislatures and other local authorities. The candidates, with a view to persuading the electorate to vote for them have been competing in dinning into the ears of the voters as to what their rights are and as to who has encroached upon them and that they will, if elected, restore their rights to them.

The emphasis on rights is so much that the voter is made to believe that he has only rights and no duties. By this process the Indian society which was basically and historically a duty-conscious society, has been transformed into an utterly selfish right-conscious society. This has contributed to transforming the peaceful and orderly society into a rebellious and utterly selfish society. We hear day in and day out the cry of fighting for the rights of one section against another. By this overplaying of rights, we have ignored the duties. Speaking of duties is out of fashion. Every one wants more pay, more perks and privileges, but less number of hours of work and more holidays, etc. The duties are neither remembered nor emphasised. The strikes and abstaining from work and other forms of agitations result in fall in production and cause inconvenience and hardships to innocent consumers. Schools, colleges, universities do not function - Government offices are closed. Even the superior Courts are not spared. People are killed and public properties are looted and destroyed in the course of the fight for rights. Nobody bothers about his own duties. This has led to inefficiency, loss of production, corruption and violence. Our society is fast drifting towards anarchy. What is developing is shirk-culture and not work-culture. It is unfortunate that we have not paid enough attention to duties.

8. Duties lovingly performed are actually as good as deeds done. The strength of a Nation is built upon the solid foundation of duties, first and foremost Today, there seems to be an unprecedented clamour for rights. In the process, duties are relegated to the background. If one's rights are important, how can others' rights be less important ! For every right claimed, there is a duty to be performed. The duty well performed gives legitimacy to the right claimed.

9. Some attempt has, no doubt, been made – 26 years after the Constitution came into force – to incorporate in our Constitution the duties of its citizens. Article 51A was added by Constitution 42nd Amendment Act, 1976 whereby only a few of the duties like abiding by the Constitution, safeguarding public property and abjuring violence, etc., have been incorporated. Though fundamental rights are enforceable in a court of law, the duties are not so enforceable. Thus, this is only an attempt to show lipsympathy to duties. We all know that India, after Independence, has not been able to make substantial progress as was cherished and expected. One reason for this situation is that we seem to be in the mood to fight for rights alone unmindful of our duties. It is high time that this trend is reversed and primacy for duties and duty-consciousness restored. We should reshape our Constitution, our ethos and style of governance by giving primacy to duty and establishing a duty-conscious society in place of the right-conscious society. Sooner the enlightened people of our country address themselves to this task, the better it is for our Nation.

GOVERNMENT CONTRACTS

Justice U.C. Srivastava
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The Indian Contract Act is a comprehensive law dealing with practically every aspect of contract between the parties including the contractual liability, breach of contract and its redress etc. The contracts by or with Government which is not an individual or body of individuals stand on a different footing and as such the same are not fully governed by the Indian Contract Act. The Government works through many officers and if certain restraints, constraints and safeguards are not put, Government would be saddled with liability because the acts of commission and omission by its officers may be deliberate or non-deliberate, intentional or unintentional and prompted with personal interest too. Ever since the days of East India Company which came to this country from England for carrying on business and gradually took this country under its subjugation and rule, contracts with or by Government were dealt with separately. Even before the enactment of first Government of India Act, 1858, the Supreme Court of Calcutta even in 1785 had held in cases that East India Company even though was vested with sovereign powers yet in all matters dealt with by it as private trading company was subject to jurisdiction of Municipal Court and liable to pay the amount adjudged to be its liability as well as interest. The Government of India Act, 1935 contained provisions for contract with and by Government. The Government of India Act, 1858 passed just after first Indian War of Independence termed by foreign rulers as Mutiny of 1857 also contained specific provision in this behalf and so was the case in the Government of India Act, 1915. Section 175(3) of the Government of India Act, 1935 replacing the Act of 1915 reads as follows :

"Subject to the provisions of this Act with respect to the Federal Railway Authority, all contracts made in the exercise of the executive authority of the Federation or of a Province shall be expressed to be made by the Governor-General or by the Governor of the Province, as the case may be, and all such contracts and all assurances of property made in the exercise of that authority shall be executed on behalf of the Governor-General or the Governor by such person and in such manner as he may direct or authorise."

Free India gave itself written Constitution of India which also contains a specific Article regarding contracts. This provisions is contained in Article 299 of the Constitution of India which with necessary modification is practically in the same language as Section 175(3) of the Government of India Act, 1935. The expression "executive authority" has been substituted by "executive power".

Apart from Article 299 viz. Articles 294, 298 and 300 recognise constitutional liability of the Union of India and the States. During the intervening period viz. August, 1947 to January, 1950 the Government of India Act, 1935 amended by the Provisional Constitution Order, 1947 and Indian Independence (Rights, Properties and Liabilities) Order, 1947 was in force.

Article 298 of the Constitution of India provides that executive power of Union and each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose. Article 299 deals with contracts which are entered into with or by Government in exercise of executive powers. The said Article does not apply in cases of statutory contracts which are governed by the provisions of said statute. Article 299(1) of the Constitution of India reads as under-

"All contracts made in the exercise of the executive power of the Union or of a State shall by expressed to be made by the President or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise."

Article 299 of the Constitution of India mandates three requirements for making contract legal and valid if entered into with or by the Government.

Firstly, it must be expressed to be made by the President or the Governor, as the case may be, and secondly, all such contracts and assurances of property shall be executed on behalf of the President or the Governor, and thirdly, it must be executed by such person and in such manner as the President or the Governor may direct or authorise.

Article 299 by using the word 'executed' excludes oral contracts by or with Government though the word 'expressed' by itself may not fully cannote that meaning. The expression 'assurance of property' legally means any document of conveyance or legal evidence of transfer. Such document can only be in writing. Article 299 could not mean that so far as assurance of property is concerned, it could be in writing only. The contract necessarily is not to be in writing. Article 299 does not prescribe any mode or manner in which contract is to be 'expressed and executed', but directs that the expression and execution is to be in the name of the President of India if the contract pertains to Union of India, and the Governor of the State if it pertains to the State Government.

Article 299 does not necessarily postulate an agreement only between the Government and the contracting party. Government Contracts could be made by

postal correspondence and tender also. The Supreme Court of India after referring to the case of *Chaturbhuj Vithal Das Jasani* vs. *Moreswar Parasram*, AIR 1954 SC 236 and other cases in the case of Union of India vs. N.K. (P) Ltd., AIR 1972 SC 915 observed, "it is now well settled that though the words 'expressed' and 'executed' in Article 299(1) suggest that it should be by a deed or by a formal written contract, a binding contract by tender and acceptance can also come into existence if the acceptance is by a person duly authorised on this behalf by President of India."

The agreements in which the Central Government or the State Government is one of the parties are to be executed in the name of the President or the Governor by a duly authorised person in order to make it valid and not void. It is true in the case of tenders also. The acceptance of tender is to be in the name of the President or the Governor by a duly authorised person complying with the requirement of Article 299 of the Constitution of India.

The Government is not bound to accept even the lowest tender for valid reasons without acting arbitrarily or capriciously but once the tender is accepted by a duly authorised person, a contract comes into existence. In *Union of India* v. *Rallia Ram*, AIR 1963 SC 1680, a case under *Section 175(3)* of Government of India Act which did not provide for execution of a formal contract, tenders were invited, and it was held that a valid contract may come into existence by correspondence and invitation and acceptance of tender in the name of the Head of State, and execution by any person authorised in this behalf would conform to the constitutional requirement. In *Chaturbhuj Vithal Das Jasani's* case (referred to earlier) the Court discarded the plea that contracts by or with the Government must be effected by a ponderous legal document concluded in a particular form and validity of a contract with the Government through correspondence was accepted. The Supreme Court in *Bhagwan Das* v. *Girdhari Lal*, AIR 1966 SC 543 observed that in case of negotiation by post, the acceptance of contract is complete when acceptance of offer is put into a course of transmission to the officer. The said Court also held that similar rule applies in the cases of telegrams and telegraphic communications.

It may happen sometimes that the authority duly authorised for executing the agreement omits to mention on whose behalf it was being executed. The same would not necessarily make the contract void or unenforceable being against the provisions or Article 299. If from the document and its contents it appears that in fact it was executed on behalf of the President or the Governor but for the omission and is not in the nature of implied contract, the same would be sufficient compliance with the provisions of Article 299. In *Davecos Garments Factory* v.

State of Rajasthan, AIR 1971 SC 141 the execution was done by the duly authorised person mentioning his official designation but omitting to mention on whose behalf the same was being made. The Supreme Court held it to be sufficient compliance with the provisions of Article 299 relying on *Rallia Ram's* case (referred earlier).

The third requirement of Article 299 is that execution of all such contracts is to be by such persons in such manner as the President may direct or authorise.

The authority so conferred could be general or particular or it may be even special authorisation. The execution by the person so authorised would be binding and enforceable if the other two requirements of Article 299 are satisfied. It is not necessary that such authority be given by rules expressly framed or by formal notification issued in this behalf (*Bhikraj Jaipurai* v. *Union of India*, AIR 1962 SC 113). In the said case, as the contracts were not executed in the form required u/s 175(3) of the Government of India Act, the same were held to be non-enforceable. The President or the Governor within the Constitutional frame work in such matters are not to issue oral directions or instructions which cannot be searched out unless placed in black and white it any prescribed manner. That is why oral instructions of a Minister were held not to constitute a proper authority in the case of *Karamshree Jethabhai Samayya* v. *State of Bombay*, AIR 1964 SC 1714.

Contracts which are void having not been fulfilling the mandatory requirement of Article 299 cannot be subsequently made valid and enforceable by curing the defect. Subsequent ratification by Government of a void contract would not make it valid and enforceable if initially it was not so. Although Supreme Court earlier leaned in favour of ratification in the case of *Moreswar Parasram* (supra) but subsequently in case of *Mulamchand* v. *State of M.P.*, AIR 1968 SC 1218, it held that if constitutional provisions were not followed, there was no contract in the eyes of law and the question of ratification did not arise.

In case of void contracts remedy under general law that is Indian Contract Act is available under Sections 65 and 70 of the said Act. The scope of Section 65 of Indian Contract Act is limited to those cases only when an agreement is discovered to be void. Any person who has received an advantage under the said agreement is bound to restore it or to make compensation for it from whom he received it. But in cases in which agreements of contract are void and parties are aware of it, Section 65 would not apply. The party which has to suffer from such contracts rendered void because of non-compliance with provisions of Article 299 has a remedy under Section 70 of the Indian Contract Act. Section 70 of the

Contract Act applies where a person lawfully does something for another person or delivers anything to him which was never meant to be gratuitous and the other person has enjoyed the advantage. The said Section 70 creates quasi contractual liability, and the Government, if it is the beneficial party, is liable to compensate the other contracting party on the basis of such liability. Section 70 enforces restitution, and prevents what is known as 'unjust enrichment' under the English Law. The doctrine of unjust enrichment requires that the party, which has been enriched by the receipt of a benefit at the expense of another party, and the retention of this enrichment is unjust, is to compensate the other party. This doctrine applies not only to Government but also to corporations and other agencies. In the case of *State of W.B.* v. *B.K. Mondal*, AIR 1962 SC 779 after construction of a building at the request of the Government, payment was not made to the contractor and defence of non-compliance of provisions of Article 299 was taken making the contract unenforceable. The Supreme Court, taking notice of the fact that Government Officers have invariably to enter into variety of contracts which are sometimes petty in nature and they sometimes have to act in emergency and in pursuit of welfare policy sometimes enter into contract orally or through correspondence, held that although contract was unenforceable yet the Government was liable to pay the contractor on the basis of quasi contractual liability under Section 70 of the Indian Contract Act. Apart from Sections 65 and 70 of the Indian Contract Act the principle of promissory estoppel also comes to the rescue of the party who has been made to suffer if the facts warrant applicability of the principle. This principle has been dealt with exhaustively in the earlier issue of the Journal.

Financial Hand book, Volume V makes it obligatory to have a formal agreement in the matter of contract for and on behalf of Government, and forms for the same are provided in Appendix XIX. Para 9 of Account Rules Part I provides that whenever it is advantageous and practicable, contracts should be placed only after tenders have been invited. The U.P. Government, vide G.O. No. 5501/VI-1-4/C-518/96 dated August 30, 1976, has laid down that contracts beyond value of Rs. 5,000/- are to be executed only by execution of a formal deed but up to the value of Rs. 5,000/- could be executed by way of correspondence or by way of a formal deed. Under para 32 of the above rules standard forms should be adopted as far as possible and the terms should be subjected to adequate prior scrutiny. The advice of the Government law officers should also be taken whenever found necessary. Para 33 further provides that the terms of the contract must be precise and definite and there should be no reason for ambiguity or misconstruction.

Article 299 uses the expression 'all contracts'. Service contracts also come within its ambit. Generally appointment of Government servant is made through appointment letter and after its acceptance the contract is complete. Once contract is complete the Government servant, who holds the office during the pleasure of President or Governor, as the case may be, as provided in Article 310 of the Constitution of India, is governed by Rules framed under Article 309 of the Constitution of India. In the absence of rules the same are governed by Instructions issued in this behalf and the same partake the nature of rules. If the rules require execution of formal contract, the provisions of Article 299 are to be complied in the matter of agreement. If special appointment is made formal contract may be entered into in conformity with Article 310(2) of the Constitution of India which makes payment of compensation obligatory if services are terminated before fixed term. Article 299 of the Constitution of India will not apply to such cases.

The President and the Governor will not be personally liable in respect of any contract or assurance made or executed for the purposes of the Constitution and the person executing contract or assurance on behalf of any of them will not be personally liable in respect thereof. Clause (2) of Article 299 specifically provides it. This would mean that the officer who executed contract or assurance of property without any authority in this behalf cannot claim immunity from personal liability, if the contract or assurance of property does not comply with the requirement of Article 299 of the Constitution. None of these requirements could be waived.

INDIA'S GOVERNANCE– AN AGENDA FOR CHANGE SOME SUGGESTIONS

Justice V.K.Mehrotra
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For good Government it is necessary that there should be accountability as well as stability. The system of Government, under the Constitution of India, follows the pattern obtaining in U. K. Experience of nearly ten years has shown that no single party has been able to secure absolute majority at the centre and in several States, causing great anxiety and concern to the people of the this country. In addition, it has also resulted in distracting the attention of the Leader of the party, which has formed the Ministry, in keeping the flock together and thereby ensuring un-interrupted tenure for the Ministry for the full term for which the Legislature has been elected. Every day there is danger of some people leaving the majority party or, otherwise, creating a situation in which the Leader of the House has to compromise with *quality* in the formation of the Ministry or retaining a good set of Ministers for a reasonable period of time. The ultimate result is that instead of giving un-divided attention towards good Government the Leader of the House has to make compromises and has to bother continuously to keep the numerical strength in- tact at a level where his Ministry does not become vulunerable. In the present system, as soon as the majority in the House is lost, the Ministry has to quit. Besides, in order to keep the members of his party in good humour the Leader has, of necessity, to induct such people in the Ministry or retain them who may otherwise be unworthy for the purpose. The country suffers for lack of good Government.

How, then to ensure both *quality* as well as *stability* of the Government together with its *accountability* to people through their elected representatives in the Legislatures. One method can be to adopt a system in which the person commanding the largest number of votes in a Legislature is entrusted with the task of forming the Ministry in which he may be free to induct even out-siders, having regard to their quality and desirability, and further to ensure that the leader and the Ministry formed by him has undisturbed tenure for a reasonable period of time. Together with it the Legislature should have control over the functioning of the entire Ministry which should be accountable to the House and, thereby, to the people who elect the Members of the House.

It is not necessary that we should find ourselves bound to follow the British pattern or any other pattern from amongst those prevailing in U.S.A., France, Germany or the like, which have a democratic form of Government, in its entirety.

Whatever may have been the position when our Constitution makers were deabating the issue and ultimately adopted the Constitution in its present form, our experience based on the functioning of the governments during the past nearly fifty years has brought out some inadequacies in the system. We must ponder over the matter now, in the light of our experience, and make such changes which may be found necessary to ensure a good Government in the country.

The suggestions made by the former President of India, Sri R. Venkatraman in his address "Stability in Governance: An Alternative to Party System" on the occasion of the inauguration of the M.A. Institute of Public Affairs of Trupati (on April 22, 1995), deserve serious thought. They involve minimum amendment in the Indian Constitution which will be confined to only a few articles thereof. The suggestions are included in substantial measure in the proposals contained hereafter.

There shall be a President to be elected in the same manner as at present.

Clauses 1, 2 and 3 of Art. 75 (namely, 75(1) The Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister.

(2) The Ministers shall hold office during the pleasure of the President.

(3) The Council of Minsters shall be collectively reponsible to the House of the People, shall be deleted.

The Prime Minister shall be elected as soon as may be after a general election or on the occurrence of vacancy in that office by death, resignation or otherwise, by the Lok Sabha by means of single transferable vote. The Prime Minister shall secure the support of more than 50% of the total membership of the House.

The Prime Minister need not be a member of either House of Parliament but he shall not continue in office unless he gets elected to either House of Parliament within six months of his assuming office. The same provision shall apply to members of the Council of Ministers.

The number of members of the Council of Ministers shall be fixed at 11 per cent of the strength of the Lok Sabha.

The inclusion in the Council of Ministers shall be subject to confirmation by a Standing Committee of the Rajaya Sabha.

A person who has served as "Speaker" of any House or 'Governor' of a State shall be disqualified from subsequently becoming a Minister in any Govern-

ment or seeking election to the Lok Sabha.

The Prime Minister and the Council of Ministers shall hold office for the term of the Parliament and shall continue till the new Council of Ministers is appointed in the manner provided.

Decision of the Council of Ministers shall be made by a majority of members present and voting. They shall not be removed by a vote of no confidence or on the failure of any of their proposal in Parliament except till a new Prime Minister is elected by the Lok Sabha by single transferable vote, with the support of more than 50% of the total membership of the House.

The existing power of the President under Art. 111 of the Constitution to return the Bill etc. shall be retained.

Any member of the Council of Ministers may resign from his office in writing addressed to the Prime Minister.

Parliament

The term of the Lok Sabha shall be five years and it shall stand dissolved at the end of term. The Lok Sabha shall not be subject to dissolution before the expiry on its term of any account. Subject to the rules of procedure, there shall be in the House of Parliament complete freedom of expression and vote and restriction thereon shall be void and of no effect.

In the light of the changes envisaged under this Scheme consequential amendments to several Articles in the Constitution will have to be carried out.

Art. 355 should be strengthened to ensure that the Government of the State functions in accordance with the Constitution.

The nation has to be protected against corruption and abuses by the irremovable executive, namely, the Council of Ministers. It is, therefore, necessary to provide for a Constitutional Authority in the Centre to handle such cases with effective powers like in the State of Karnataka and Madhaya Pradesh and unlike in other States to enforce its decision and should have necessary infrastructure. This authority shall have the same immunity as the Judges of the Supreme Court. It may be named as Lok Pal and shall have jurisdicton over the Ministers including the Prime Minister and other elected functionaries of the Government including Members of Parliament and senior beurocrats

The States should likewise have a similar Constitutional Authority to deal with cases under this category.

The present election process including delimitation of constituencies shall

be maintained.

(1) People standing for elective offices should –

(a) have minimum educational qualification of higher secondary level,

(b) not be involved in activities involving moral turpitude or serious criminal action, that is, there should not be allegations against them, prima facie established by conviction in a criminal Court or detention under any preventive Detention Law or binding over under Sections 107 to 110 Cr. P.C. or an externment order or is in custody where bail has been refused that they were concerned with activities casting doubt upon their integrity and personal character.

(2) Reservation in constituencies should not be extended beyond January 26, 2000.

(3) An elected member changing his party or forming a new party should first vacate his seat and seek re-election.

Similarly, an independent member should also resign, if he wants to join a party in the House.

A member elected on one mandate should not be allowed to betray it.

(4) In Art. 102 (1) (a) and Art. 191 (1) (a) the words "other than ..... by law". (i.e..... power to issue declaration that a particular office will not disqualify as an office of profit)., shall be omitted.

(5) **In Xth Schedule:**

"..... Election Commission to take the place of Speaker in paragraph 6. Paragraphs 3 and 4 relating to split in and merger of political parties shall be deleted.

(6) Ministers should be precluded from simultaneously holding office as President or Secretary in their political party.

(7) There should be more effective control of the Legislature upon the Government through Committees, like in U.S.A.

To discourage frivolous candidates, provision may be made that a candidate whose security deposit is forfeited shall not be eligible to contest any election for 6 years.

No person shall be permitted to stand as a candidate unless at least one elector from each Gram Panchayat or Ward of a local body in the constituency proposes his name for a seat in Parliament or State Assembly.

An appreciable increase should be made in security amount.

No candidate shall be permitted to seek election except from only one Constituency.

Electoral refrorms to ensure free and fair elections, to reduce money power and to ban appeals based on religion, caste, creed language or region shall be given highest priority. Appeal to members of any community, caste or religion to vote for any particular candidate or party should be made a penal offence and a disqualification for the candidate in whose favour it is made with his consent or connivance.Political parties shall not be recognised unless they publish their audited accounts of income and expenditure and file them with the Election authority, which shall have the power to get it audited itself.

Chapters on Fundamental Rights and Directive Principles of State Policy shall be maintained and cheaper methods of enforcement of fundamental rights devised.

Practices based on British precedents, like Addresses to Parliament and State Legislatures by President or Governor may be abolished.

The scheme envisaged differs from the Presidential Government of the United States in the following respects –

1. The President is not the executive head of Government.

2. The Prime Minister and a Council of Ministers elected by the Parliament shall be executive authority of the State.

3. The Council of Ministers shall be members of either House of Parliament.

But it is in consonance with the American system in the following respects:

(i) The House of the People shall not be dissolved during its stipulated term.

(ii) The executive authority of the State, namely, the Conucil of Ministers shall not be subject to removal during the currency of their term except till a new Prime Minister is elected by the whole House (Lok Sabha) by single transferable vote.

degrees. Even the French style, like the English, involves the oral hearing, with prosecution and accused separately represented and with no compulsion upon the accused to answer questions; and even the Indian judges can inspect the spot under Section 310 Cr. P.C., call any witnesses or documents under Section 311 Cr. P.C. or they may put any question to the witnesses under the Indian Evidence Act. They have power to examine the accused.

The defect of inquisatorial system is that the suspicion of bias attaching to the judge in the continental countries is recognised even by domestic observers to be one of the weakest elements in their procedure. It turns the presiding judge, whatever his intentions, into a second and more august prosecutor. A by-product of the continental practice is that the President cannot come in the Court with a perfectly open mind.

The English judge on the other hand comes fresh to the case. His aloof and unbiased position is responsible in part for the esteem in which he is held. So is the position in India.

If instead of making improvements where required we wholly accept the French system, the prosecuting agency, that is the police, will feel no responsibility and every judge will require so much protection, that is not required at present and which is not necessary in the case of police which itself wields a great deal of power.

In fact, we need not go by the name of the system. The present system be allowed to continue with the improvements wherever they are required. A change may be made after considering the practical working. It must be remembered that the rules and institutions are of far less importance than the mode and spirit in which they are administered. Scot's Criminal Procedure was very different from English. Yet there was as much satisfaction in Scotland with the conduct of prosecution as there was in England. This was because both countries observed the basic decencies. Conversely, United States have inherited the broad principles of common law procedure, but in that country there has been the sharpest criticism of its working, which is not entirely to be explained by differences of legal details.

Prof. Peneletah Howard, an American visitor to United Kingdom, who wrote the most penetrating and most salutary study of English Criminal Justice found that its success was largely due to what may be shortly described as good administration – not only the aloofness, impartiality and efficiency of the judge, but also the detachment and fairness of prosecuting counsel, the restraint of defending counsel and the care taken by the police to preserve good public

relations, which itself involves respect for the rights of suspected persons. So unless we try to improve the human factor involved in imparting criminal justice and make it more efficient and reliable, no amount of change in law will bear fruits. Thus merely change in the system will not suffice.

The first point which is of some importance is accused's privilege to say "No questions" and this is causing worry even to Police Commission when they say that the prosecution does not know the case of the accused till its own evidence is over. This is naturally something serious because then it is not possible for the prosecution to demolish the case of the defence when the prosecution leads evidence. The court also does not have the advantage of weighing the versions when an accused can refuse to speak. In a case of circumstantial evidence if the version put forward by the accused is found false it becomes a link in the chain of the circumstances.

The methods of the criminal courts are hundred years old and their conceptions a thousand year older than that. The whole material world has been made over, but the law and its administration stood defying time and all the intellectual changes of our day and age. According to the rule that an accused's right is not to be questioned, neither the judge nor the prosecution is entitled at any stage to question the accused unless he chooses to give evidence. In the old days the system of interrogation was practised in England. The old ecclesiastical courts and the star chamber claimed the power to summon an accused with no warning of the charges to be made against him and to examine him on oath. The law was that oath can be administered to the accused, and he can be punished for refusing to take the oath. Lilburn who was charged in 1637 with sending seditious liables out of Holland into England was so punished but afterwards this advantage of examination was used to rack men's conscience, nay perplex them with intricate questions, thereby to make contrarieties, which may easily happen to simple men and men were examined upon one hundred interrogatories, and on whole course of their lives.

Then a change started and the practice died out after 1688 though in the early years of Victoria's reign it was still regarded as proper for the Privy Council to make a preliminary examination of prisoners charged with State offences. In the early 1700's the habit of overtly questioning the accused ceased, though whenever the accused conducted his own defence there was in practice a strong compulsion upon him to answer the case against him for otherwise his failure to make an effective defence would naturally be taken as his inability to do so.

Thus there came a time when in England there is no power to interrogate the accused whether before trial or at the trial itself unless he volunteers to speak. The first great opponent of the rule was Bentham and his criticism of it is still the fullest and best. Bentham did not hesitate to adopt a strong attitude, calling the rule one of the most pernicious and most irrational notion, that ever found its way into the human mind. This attack took considerable courage for then and indeed to a lesser degree now, the rule was firmly entrenched in public favour as one of the most important safeguards of the English legal system.

Dispassionately regarded, however, the rule cannot be supported by an argument referring to torture, for no one supposes that in the present day England or India a permission to question an accused, if accompanied, as it would be, by the safeguards, would result in any ill-treatment of him. The risk if there is one is just the opposite : that if dangerous criminals cannot be questioned before the Magistrate or judge, the frustrated police resort to more of illegal questioning and brutal third degree methods to obtain convictions ; and unnecessary acquittals would lead to frustration in society, the members of which will seek or rather have started seeking justice by taking law in their own hands. That is why at times we have chain of murders on both sides.

Historically regarded the rule against questioning the accused is an example of the indifference of the society to the need for securing the conviction of the guilty. Bentham was scornful of the analogy between the criminal trial and a private combat. He pointed out to the evil results of the rule in so far as it hindered the conviction of the guilty ; it might operate to prevent the conviction of the apprentice in crime while he was yet open to redemption, besides neglecting the immediate interest of the society that dangerous criminals should not be left free. When the guilty is acquitted, society is punished. Therefore, it is felt that questioning of the accused should be permitted under certain safeguards. This questioning should be at different stages, so that the prosecution may know the version of the accused before giving evidence and the accused may be able to explain the evidence and circumstances which the prosecution is able to put before a Court. The answers given by the accused should be taken into considerations in reaching the conclusion.

Firstly, the version of the accused may be recorded by the Magistrate after reading over the First Information Report to him when the accused is produced for remand within 24 hours or when he is summoned by a court in a case in which he is not arrested. The second examination of the accused may be made at the time when investigation is over, all evidence to be produced by the prosecution is known to the accused and charge is framed by the Court. This is the stage

when in a session's case under Section 228(2) Cr. P.C. the accused is asked whether he pleads guilty or claims to be tried. The third examination may be when evidence of the prosecution has been recorded so that accused may explain the circumstances that may appear against him. This is the stage of examination under Section 313 of the Cr. P.C. All this questioning should be directed towards clarifying the version of the accused and facts such as where he was at the time of occurrence. It should not take the form of too minute and detailed cross-examination. The questioning of the accused by the prosecuting counsel should not be permitted. All this will suffice to give notice to the prosecution of the version of the accused and to enable the court to weigh the evidence and circumstances and reach a conclusion. Of course, accused should be left free to come to the witness box if he so chooses.

Then there is the question of burden of proof. Under the present system every man is presumed to be innocent until he is proved to be guilty. This proposition dear to the hearts of English men is popularly to epitomize the difference between English law and French criminal law.

To say that the burden of proving a crime is generally on the prosecution does not conclude all questions. What degree or quantum of proof is needed ? Is it merely likelihood or certainly or something in between these two extremes? This question in turn raises the fundamental issue of penal policy. How far is it permissible for the purpose of securing the conviction of guilty to run the risk of innocent persons being convicted.

The Romans had the maxim that it is better for a guilty person to go unpunished than for an innocent one to be condemned, and Fortescue turns it into the sentiment that twenty guilty men should escape death through mercy rather than one just man be unjustly condemned. Sir Edward Seymour opined that ten guilty persons should escape than one innocent person should suffer. Hale took the ratio as 5 to 1 and Blackston reverted to ten to one and in that form it became established. Paley is the most celebrated opponent of this rule. According to him, when certain rules of adjudication must be pursued, when certain degree of credibility must be accepted, in order to reach the crimes, with which the public are infested, Courts of justice should not be deterred from the application of these rules by every suspicion of danger or by mere possibility of confounding the innocent with the guilty. They ought rather reflect that he who falls by a mistaken sentence may be considered as falling for his country. Sir Carleton Allen ably points out that some sentimentalists would assent to the proposition that it is better that a thousand or even a million guilty persons should escape than one innocent should suffer.

The evil of acquitting a guilty person goes much beyond the simple fact that one person has gone unpunished. If unmeritted acquittals become general, they tend to lead to a disregard of law. A miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent. It is then a question of degree. Some risk of convicting an innocent must be run. What this means in terms of burden of proof is that a case need not be proved beyond all doubt. The evidence of crime against a person should be overwhelming or convincing. And this is recognised in our law when we say that benefit of every doubt should not go to the accused, it is only reasonable doubt which may help the accused and this doubt should not be of a weak kneed arbiter or a vacillating mind.

Still there may be cases when we may have to shift the burden of proof to the accused to a certain extent. It needs to be studied in which form burden to explain can be shifted to the accused in cases of dowry death, custodial death, murder inside ones own house ; such outlaws, who have abandoned their residence and are reported to be staying in jungles with their gangs.

EQUAL RIGHTS OF ALL COMMUNITIES TO ESTABLISH AND ADMINISTER EDUCATIONAL INSTITUTIONS

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INTRODUCTION

The way important sections of the Hindu community like the Arya Samajists[1], the Brahmo Samajists[2], and the Ramakrishna Mission[3] running their schools and colleges have from time to time been making claims to be non-Hindus would make one think that it is only members of a minority community who can claim the right to establish and administer educational institutions, as if this were a special privilege conferred on the latter. Except in the two Patna decisions the disclaimers have been rightly negatived. As very properly clarified in the Hindu Code enactments, it is not merely believers in orthodox rituals or *karmakand*, called Sanatanists, but also adherents of reform movements like Virashaivas, Lingayats, Arya Samajists, Brahmo Samajists, Prarthana Samajists, Radha Swamis, Bishnois, and even Dravidian or other rationalists and atheists, if born of Hindu parents, who continue to be Hindus[4]. Though Sikhs, Jains and Buddhists also follow more or less the Hindu way of life and are governed by the Hindu personal law, yet their religions being distinct, they have been held to be minorities in Hindu - majority States[5]. Conversely, Hindus have also been held to be a minority in the Sikh - majority State of Punjab[6].

Surely the followers of the Arya Samaj and the Ramakrishna Mission, or even of the Brahmo Samaj, did not suddenly develop any genuine aversion to Hinduism. The preposterous and deplorable claims to non-Hinduism made by them were obviously dictated by the advice of their lawyers who must have told them that in order to shake off the tentacles of excessive State control on their educational institutions, it was necessary for them to claim minority status and

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1 **Arya Samaj Education Trust** v. **Director of Education**, AIR 1976 Delhi 207 ; **Arya Pratinidhi Sabha** v. **State of Bihar**, AIR 1958 Pat 359.
2 **Dipendra Nath Sarkar** v. **State of Bihar**, AIR 1962 Pat 101.
3 **Bramchari Sidheshwar Shai** v. **State of West Bengal**, (1995) 4 SCC 646.
4 **Shastri Yognapurushadji** v. **Muldas Bhudardas**, AIR 1966 SC 1119 : (1966) 3 SCR 242.
5 **Arya Samaj Education Trust (supra,** footnote 1) ; **Sree Jain Shwetambara Terapanthi Vidyalaya** v. **State of West Bengal**, AIR 1982 Cal 101.
6 **D.A.V. College, Bhatinda** v. **State of Punjab**, (1971) 2 SCC 261 : 1971 Supp SCR 677 : AIR 1971 SC 1731 ; **DAV College, Jullundhar** v. **State of Punjab**, (1971) 2 SCC 269 : AIR 1971 SC 1737 : 1971 Supp SCR 688.

for that purpose to make a pretence of distancing themselves from the Hindu religion. Such advice, with due respect, smacks of an unprofessional cynicism towards sensitive matters of faith.

The Genesis : The Katra Education Society Case

The first case that the Supreme Court came to decide on the extent of permissible control over the management of educational institutions was the *Katra Education Society* v. *State of U.P.*[7] In U.P. the Intermediate Education Act had been amended with a view to conferring very wide powers on authorities vis a vis the managements. A statutory Scheme of Administration provided for a uniform pattern of governing bodies. The Principal and two teachers selected by rotation according to seniority are ex-officio members. The Scheme has to be approved by the Director. On the Director's adverse report Government may appoint an Authorised Controller for the institution. If the management defaults in complying with any direction of the Controller then even the property and assets of the institution can be taken over by Government. For appointment of teachers a selection committee is provided for. It was also provided that the selection committee shall send its recommendations to the Deputy Director who may reject the same. Then another selection may be made by the Committee. If it is again rejected then the Director (in the case of Principal) or Deputy Director (in the case of any other teacher) may himself make the final selection and appointment. Conditions of probation, confirmation, punishment of teachers and their transfer from one institution to another are all prescribed by regulations. Prior approval of the Inspector is required for any order of punishment. These provisions were challenged by a society running a girls' school.

The power of the authorities in regard to appointment of teachers was upheld in a couple of sentences (in para 9 of the report) as it was held to be implicit that it would be exercised in the interests of the students and of the institution and for serving the cause of education and could not be said to be uncontrolled, hence it was not hit by Article 14.

The power to appoint an Authorised Controller was likewise upheld as "disciplinary and enacted for securing the best interests of the students", as "the State in a democratic set up is vitally interested in securing a healthy system of imparting education for its coming generation of citizens" (para 10 *ibid*).

It was added in para 13, that "since the termination of the Second World

7 AIR 1954 SC 1307 (Constitution Bench headed by Gajendragadkar, C.J. ; per Shah J. as he then was.)

War there was marked increase in the number of private schools and there were many complaints against the managements of those schools, and discontentment among the teachers was rife". Hence these salutary provisions had been made on the recommendations of a Committee appointed by the State Government.

The exemption in favour of Anglo-Indian schools was assailed by the petitioner as discriminatory but the contention was rejected on the ground that the writ petition did not lay any factual basis for the plea. It was pointed out that "the number of students appearing from the Anglo-Indian schools is very small, that no adverse reports were received against the managements of such institutions". For want of "a full averment" to assail the classification their lordships did "not propose to deal with the question in this appeal" (para 14, *ibid*).

Emboldered by this curial endorsement of their action the State Government has since made further amendments from time to time and also enacted the U.P. High Schools and Intermediate Colleges Teachers and Employees Payment of Salaries Act, 1971. The effect of all these measures is further to extend the control of the authorities as against the managements. While originally only a few Anglo-Indian institutions were exempted, now in view of various pronouncements of the Supreme Court all minority institutions covered by Article 30(1) stand exempted. Similar is the position with regard to degree colleges. Now all selections of teachers have been centralised and the managements are required to make appointments according to the decisions of a statutory Commission. Provisions regarding appointment of Authorised Controllers have been enacted in relation to colleges affiliated to every University.

Now one need not controvert the factual data adduced by Government, namely, that "many" private institutions were not well managed, and the 'very small number' of Anglo-Indian institutions were relatively better managed. There were no doubt some very good Christian mission schools coming down since British times. But can we generalise on that basis that every "minority" institution in U.P. - whether old or newly established, - which means every institution run by Muslims, Jains, Buddhists, Sikhs and by such Hindus as have immigrated from non-Hindi States like West Bengal, Punjab, Maharashtra, Gujarat, Tamil Nadu, etc. or are displaced from Pakistan, should all be presumed to be well managed. Again, the mere fact that "many" institutions run by the Hindi speaking Hindus were badly managed cannot lead to the general presumption that an institution will require greater control merely because it is established by the majority community. To make any such generalisation will amount to the worst possible

communal and linguistic discrimination. It may further be respectfully pointed out that as the exemption in favour of Anglo Indian schools had not been sought to be justified by the Government on the ground of Article 30(1) but solely on the ground of absence of complaints about their managements, the classification should have been struck down as it was ex-facie communal : one cannot generalise about quality of management on the ground of "Anglo-Indian" and the rest. The very fact that complaints were only against "many" and not "all" non-Anglo-Indian schools should be enough to show that the classification was communal and not on the merits of the institutions, and no other factual averments need have been considered necessary for the plea of discrimination.

In this case, the extensive controls and displacement of managements were justified as needed for "securing a healthy system of imparting education for its coming generation of citizens" in which "the State in a democratic set up is vitally interested". Is the State not equally interested in a healthy system for the coming generation of citizens from the minority communities ?

Approach outdated

That this approach has become outdated is evident from various views expressed by the Supreme Court in the subsequent cases. Although those subsequent cases happened to relate to minority institutions, the observations, to the extent they do not dilate on the need to protect the minorities from discrimination, are of general application. Even the observations referring to the minorities in particular do not suggest that the latter should receive favoured treatment, but only that they should be protected from unfair discrimination.[8] We will revert to this question later.

(a) Appointment and conditions of service of teachers

While in *Katra*[7] the vesting of powers in the authorities in regard to appointment of teachers was justified as being exercisable impliedly in the interests of the students and of the institutions and for serving the cause of education, - and no discussion was considered necessary for resting the justification on these vague generalities, – similar provisions were condemned in *Re Kerala Education Bill*[9] as destructive of the rights of the minorities to manage the

8 See for instance **Ahmedabad St. Xaviers Society** v. **State of Gujarat** : AIR 1974 SC 1389 : (1974) 1 SCC 717 (per Dwivedi J in para 268 of SCC report ; Jaganmohan Reddy and Alagareswamy JJ in para 55, ibid ; Khanna, J in para 75 ibid)

9 **In re Kerala Education Bill**, AIR 1958 SC 956.

institutions. This was reiterated in a Bihar case[10]. The reference to the minorities has been made in the latter decisions only because it was Article 30 which was invoked by the aggrieved managements. But the Court did not rest content with merely interpreting the words of Article 30. It has also spelt out the theoretical justification for upholding the rights of the managements referred to in that article. In the *Second Kerala Case*[11] Hidayatullah CJ speaking for the Constitution Bench dwelt on the desirability of the founders and the community having a hand in the administration. The institution should be managed by persons in whom the founding community would have confidence. In the *Ahmedabad St. Xaviers case*[8] which was decided by a nine Judge strong Bench, - the largest so far on the subject, – Khanna J in similar vein observed that "the management must be free of control so that the founders or their nominees can mould the institution as they think fit and in accordance with their idea of how the interest of the community in general and the institution in particular will be best served". Another aspect emphasised by Mathew J. in the same case was the need "to give the parents in those communities an opportunity to educate their children in institutions having an atmosphere which is congenial to their religion". (para 135 of SCC). He elaborated that "the parents have the right to determine to which school or college their children should be sent for education" (para 138). "The parental right in education is the very pivotal point of a democratic system" (para 142).

There is absolutely nothing in these reasonings, namely, the need to respect the wishes of the children's parents and the wishes of the founding community or the undesirability of destroying the powers entrusted in the management by the founders, on the basis of which they could be confined only to minority communities. All communities have indeed been held equally subject to regulations "made in the true interests of efficiency of instruction, discipline, health, sanitation, morality, public order and the like"[11] and in particular, regulations prescribing the qualifications of teachers[12] and also those providing reasonable conditions of service for the teachers. These have been considered justified for preventing maladministration of the institutions and for securing their proper functioning in educational matters.

But even while accepting the desirability of protecting the teachers from exploitation or victimisation by the management, the Court has been at pains to

10 **Rev Father W. Proost v. State of Bihar, AIR** 1969 SC 465

11 **State of Kerala v. Very Rev. Mother Provincial,** AIR 1970 SC 2079 : (1970) 2 SCC 417

12 **Sidhrajbhai v. State of Gujarat,** (1963) 3 SCR 837 : AIR 1963 SC 540 (Para 10 of AIR) ; **Ahmedabad St. Xaviers, supra** (f.n. 8)

emphasize that the management should not be rendered impotent in the exercise of disciplinary powers in suitable cases. Thus in the *first Kerala case*,[13] provisions relating to protection and security of teachers and to reservations in favour of backward classes which covered Government schools and aided schools alike, were characterised as "perilously near violating that right", (namely, the right to manage) but "at present advised" were held to be permissible regulations (para 31 of AIR report). On the matter being further thrashed out in the *Second Kerala Case*,[11] provisions to the effect that teachers be not dismissed, removed or reduced or suspended for a period exceeding 15 days without the previous sanction of the Vice-Chancellor were struck down.

Again, the nine Judge bench in *Ahmedabad St. Xaviers, supra*, held the provision conferring power on the Vice Chancellor or on officer authorised by him to approve or disapprove any penal action proposed by the management against a teacher or other employee to be impermissible "inasmuch as it confers arbitrary power on the V.C. to take away the right of administration" (para 43). Another provision under which any dispute between the management and a teacher or other employee of an affiliated college was to be referred to a tribunal of arbitration, comprising a representative each of the two parties and an umpire nominated by the V.C., was also disapproved. "These references to arbitration will introduce an area of litigous controversy inside the educational institution. The atmosphere of the institution will be vitiated by such proceedings" (para 44).[14] This was followed in *Lily Kurian*[15]. This view has to some extent been whittled down in later cases[16], and it may now be taken as settled that a time limit of upto, say, four months may be imposed for an inquiry by the management to conclude, pending which it may suspend a teacher[17], and an appeal against a penal order of the management may lie to a truly judicial tribunal.[18] But any requirement of prior approval of a Governmental or University functionary before disciplinary action, or provision for subsequent appeal to such functionary, would still be impermissible. This is a compromise approach reasonable enough to accommodate the view points of the employees as well as the management.

13 **In re Kerala Education Bill, supra** (f.n.9) ;

14 Per Ray C.J. in his leading majority judgment. (The para references are to the SCC report).

15 **Lily Kurian v. Lewina,** (1974) 2 SCC 124 : (1979) 1 SCR 820 : AIR 1979 SC 52 (CB).

16 **All Saints High School v. Govt. of A.P.,** AIR 1980 SC 1042, (1980) 2 SCC 478 ; **Frank Anthony Public School Employees Assen. v. Union of India,** (1987) 1 SCR 238 : AIR 1987 SC 311 ; (1986) 4 SCC 707 ; **Y. Theclamma v. Union of India,** (1987) 2 SCC 516 ; **All Bihar Christian Schools Assen. v. State of Bihar,** (1988) 1 SCC 206 ; **Manohar Harries Walters v. Basel Mission Higher Education Centre,** (1992) Supp (2) SCC 301.

17 **All Saints, supra** (f.n. 16)

18 **Frank Anthony, supra** (f.n. 16) (The appeal provided for was to the District Judge)

What, again, could be the possible justification for adopting a different approach towards institutions run by a majority community ?

(b) Standard pattern of Management Committee ; Authorised Controller

The type of provision relating to a standardised Scheme of Administration and to the power to supersede the management and to appoint an Authorised Controller in its place which was upheld in the *Katra case, supra*[7] has been consistently rejected when challenged by minority institutions. It has been held to be destructive of the right of the community to administer educational institutions of *their choice*.[19]. Imposition of nominees of the Government or of the University in the committee of management was objectionable as it would lead to interference by persons other than those in whom the founding community would have confidence[20]. "Permissible regulatory measures are those which do not restrict the right of administration but facilitate it and ensure better and more effective exercise of the right for the benefit of the institution and through the instrumentality of management of the educational institution and *without displacing the management*" (para 40 of SCC report). "The choice in the personnel of management is a part of the administration"[21] (para 41, ibid). As a result of "new elements in the shape of representatives of different types", namely, a nominee of the Vice-Chancellor and representatives of teachers, non-teaching staff and students of the college, it was said, "the calm waters of an institution will not only be disturbed but also mixed"[21] (para 41, ibid). Following these decisions, the Calcutta High Court[22] has laid stress on the need to free the management from such control so that the founders or their nominees can mould the institution as they think fit and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served. The Calcutta decision has been highly commended by Seervai (III Edn), para 13.31.

(c) Teachers as Legislators

In States having a Legislative Council teachers of secondary schools have their own constituencies. Graduates' constituencies are also more or less the preserve of teachers who constitute the numerically strongest organised body of graduates. There is also no bar to their contesting elections to the Legislative Assembly or Parliament or to a panchayat or municipality, - the disqualification

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19 **In re Kerala Education Bill, supra** (f.n.9) (para 44, AIR).

20 **The second Kerala case, supra** (f.n. 11) (para 9, 15); also **St. Xaviers, supra** (paras 40, 41 of SCC).

21 **Ahmedabad St. Xaviers, supra** (f.n.8), per Ray C.J. and Palekar J.

22 **State of West Bengal** v. **Guru Nanak Education Trust**, AIR 1987 Cal 232.

related to office of profit being ignored with impunity. After election they are allowed to draw salary from the institution as well as the legislative body concerned, - in both cases, the source being the same, namely, the public exchequer.

In the *second Kerala case*,[11] on the other hand, the provision in the statute that such a teacher shall not be disqualified from continuing as a teacher but shall be deemed to be on leave during the period in which the House concerned was in session was expressly disapproved on the ground that it would enable political parties to come into the picture of the administration of the institution. Could it be said for a moment that political interference is undesirable in respect of minority institutions only and not in respect of majority institutions?

Since the fourth general elections (1967) many States have had unstable governments and the party in power is often in a minority in the Upper House. A ministry with a precarious majority in the Lower House cannot afford to lose every day in the Upper House. Apart from legislative powers, every House and its members have so many other powers and privileges. Members can make things hot for the Government and its officials through points of order, questions, motions, privilege and other notices. So the ministers go out of the way to keep the solid bloc of teacher M.L. Cs. happy and thus the latter enjoy considerable clout with ministers as well as officials of the Education Department. All laws relating to educational institutions are framed according to the dictates of this bloc. Thus the Secondary Education Boards now include elected representatives of teachers too. Managements' powers to take action against any teacher are severely circumscribed by requirements of approval from and appeals to inspectors and higher officials. Powers vested in the officers of the Education Department are in practice often exercised under the influence of teacher leaders. Actual experience has thus confirmed the apprehensions expressed in the *second Kerala case*,[11] about political interference and in St. Xaviers[8] about litigation vitiating the atmosphere in the educational institutions. The remedy (of excessive State control) has thus proved worse than the disease (of mismanagement).

In order to avail of the exemption in favour of unaided institutions affiliated to the Central Board of Secondary Education or to the Anglo-Indian body, namely, the Indian Council of School Education, many educationists belonging to the majority community now choose to forgo Government aid altogether and seek affiliation to I.C.S.E. or C.B.S.E. and make up for the aid foregone by charging heavy fees from students. Even the poor people choose to pay fees which they

can hardly afford for getting their children educated in these schools rather than sending them to Government-aided and controlled schools although only nominal fees, if any, are charged by the latter. Could such a result be viewed with equanimity by the courts or by educationists ?[23]

Communal discrimination not permissible : Articles 14 and 15(1) and the Preamble.

We have seen above that the reasons given by the Supreme Court from time to time for circumscribing State control over educational institutions are such as apply equally to majority and minority communities. Let us proceed to examine whether there is any valid ground to assume that the right to establish and administer educational institutions is a special privilege granted to the minorities and denied to the majority communities.

The mention of minorities alone in Article 30 does no doubt lead to a first impression that the right is denied to the majority community. No less a jurist than Hidayatullah C.J., with the utmost respect, fell into this trap when he made a gratuitous obiter dictum[24] to this effect even in the face of the Kerala Government's concession, conveyed through its eminent counsel Sri Mohan Kumarmangalam, that the Government did not intend to enforce any provisions which may be found violative of Article 30, against the majority institutions either,[25] and even though because of that concession the writ petition of the majority institutions was also, in the result, allowed by the Court.

It is now well settled that "no article in Part III is an island but part of a continent, and a conspectus of the whole Part gives the direction and correction needed for interpretation of these basic provisions".[26] The "cocooning of any Article into a self-contained code," in other words, the assumption that certain Articles exclusively deal with specific matters has been decisively rejected.[26] Thus

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23 For comments on the constantly falling "standards of discipline and education" in the Universities which have "grown into battlefields for warring caste groups", **see Maharashtra State Board of S. & H.S. Education** v. **K.S. Gandhi**, (1991) 2 SCC 716 (paras 13 to 15).

24 **The second Kerala case, supra** (f.n.11) : Mohan J. in **UnniKrishnan** v. **State of A.P.**, (1991) 1 SCC 645 (para 69), in similar vein observes that the conferment of such a right on the minorities in a positive way under Art. 30 negates it in other citizens.

25 In **Bramchari, supra** (the Ramakrishna Mission case), (f.n.3) also, the result was in favour of the institution run by the mission although its claim to minority status was rightly negatived. It is interesting to note that in both the cases it was the Communist governments who accommodated the aspirations of the majority community, while other State Governments have failed to show similar solicitude and fairness.

26 **Maneka Gandhi** v. **Union of India**, (1978) 1 SCC 248 (para 96 per Krishna Iyer J), following **R.C. Cooper** v. **U.O.I.**, (1970) 1 SCC 248 (Bank nationalisation case), and departing from **A.K. Gopalan** v. **State of Madras**, AIR 1950 SC 27 (preventive detention case).

while examining the validity of a case of preventive detention it is not enough to show that Article 22 has not been violated ; Articles 14, 19 and 21 may also have to be looked into. While Article 19(1)(d) confines the right to move to only the territory of India, yet the right to travel abroad may be spun out of Articles 14, 19 and 21. If positive conferment of the right to travel throughout the territory of India does not negate the right to travel outside India, why should the mention of minorities in Article 30 negate the majorities' right to establish and administer educational institutions ? Again, even though the now repealed Article 31(2) curbed judicial review of compensation, yet the adequacy of the amount could still be challenged with reference to Article 14 and Article 19(1)(f) (also since repealed).

Before referring to other Articles of Part III, we may first consider why it was considered necessary to make a special mention of minorities in Article 30. The key to this riddle is provided by the speech of Sardar Patel in the Constituent Assembly on February 27, 1947 that it was to show the falsity and hollowness of the claim of the British Government that they alone could protect the minorities and to prove "that nobody can be more interested than us in India in the protection of our minorities that we had made such provisions[27]. As explained by Khanna J. these provisions were made "so that *none might have the feeling that any section of the population consisted of first-class citizens and the other of second-class citizens*", and that they flowed from the secular character of the Constitution to "*ensure that no one shall be discriminated against on the ground of religion*" (para 75 ibid). This view of Khanna J. that the idea of giving some special rights to minorities is *not to have a kind of privileged or pampered section of the population* but to give minorities a sense of security and a feeling of confidence has been reiterated in subsequent cases[28].

There is however another dictum of Khanna J. which calls for comment here. He has added that " *the majority in a system of adult franchise hardly needs any protection. It can look after itself and protect its interests.* Any measure wanted by the majority can without much difficulty be brought on the statute book because *the majority can get that done by giving such a mandate to the elected representatives*" (para 77 ibid). It may be submitted with the greatest respect that the theory that the majority's rights do not need any protection is no longer accepted after what the Nazis were able to do to the people as a whole, not merely

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27 **Ahmedabad St. Xavier's case, supra** (f.n.8) (quoted by Khanna J.).

28 **Gandhi Faiz-e-Am College** v. **University of Agra**, (1975) 2 SCC 283 (para 12) ; **Frank Anthony Public School, supra** (f.n. 16), (para 16).

to the Jewish minority, because the Weimar Constitution did not provide for judicial review. It was in recognition of this hard reality in regard to the disastrous effects of the positivist doctrines that the U.N. Declaration of Human Rights was adopted and our Constitution makers also enacted Part III of the Constitution[29]. Besides, in a parliamentary democracy based on "first past the post" electoral system the minority vote is often more decisive with the result that the majority's say in governmental decisions may be less than that of a minority. Moreover the right to establish and administer educational institutions can never be a communally emotive issue for a majority. Politicians, teachers and bureaucrats will not like to part with the powers they presently enjoy through State control in this field and would, if they had their way, like to extend them to minority institutions too. Elections anyway are fought on the basis of casteism, communalism and the use of muscle and money power and not on issues like education. It is thus unrealistic and escapist on the part of the judiciary to pass the buck to the electorate on this question alone.

There are no doubt some provisions in the Constitution providing for affirmative action or reverse discrimination in favour of what were perceived to be under-privileged or deprived classes, such as Articles 15(4), 16(4) and Part XVI. But Article 30 cannot be one of them. The simple reason is that educational backwardness has no correlation with whether a person belongs to a minority or not. Among religious communities, we find that Parsis are easily the most advanced. According to the National Sample Survey, 43rd round, 1987-88 (for both males and females), the averages of literacy and of graduation were higher among Christians than among Hindus. Backwardness among Jains and Sikhs is certainly not more than among Hindus. The only minorities who, educationally, may be more backward than Hindus are Muslims and Buddhists. Again Hindus, who are a religious minority in J & K and Punjab, are certainly not more backward than the majority communities in these States.

Linguistically considered, none will suggest that Bengalis or Tamils or Maharashtrians or Malayalees or Punjabis or Sindhis living in Delhi or U.P. are more backward than the Hindi speaking inhabitants of these States who constitute the majority. Conversely, a Hindi speaking migrant belongs to a linguistic minority in Calcutta, Bombay or Madras. The same person who is part of the majority community at one place becomes a member of a minority at another place. Even if he does not move from one place to another, States' reorganisation may also alter his status in this respect. For instance, Sikhs were a minority in

29 **See Kesavananda Bharati v. State of Kerala**, (1973) 4 SCC 225 (paras 533, 645-646, 1120).

undivided Punjab but are a majority in the new Punjab.

It is thus clear that Article 30 was not enacted to bring about equality among unequals. Its only object was to ensure, in the words of Khanna J., that the minorities may not be discriminated against or suppressed, and to assure them in that behalf. The idea was surely not to make them a pampered class of citizens or to reduce the status of the majority to that of second class citizens.

There are some passages in *St. Xavier*[30] suggesting that differential treatment was required for the minorities to enable them to preserve their distinct cultural characteristics. This suggestion was made on the basis of observations in an Australian case[31] and an Advisory Opinion of the Permanent Court of International Justice on Minority Schools in Albania[32]. These foreign dicta have however no relevance in the context of Article 30 of our Constitution inasmuch as Article 29 separately guarantees the right to all citizens, irrespective of majority or minority, - though by inadvertence the marginal heading of Article 29 speaks of protection of interests of "minorities" alone, - to conserve their distinct language, script and culture. Ray C.J. (para 6 of SCC, **ibid**) rightly exphasises this aspect.

It will thus be safe to conclude that there is no rational classification within the meaning of Articles 14 and 15(1) on the basis of which the educational rights analogous to those specifically conferred on minorities by Article 30 can be denied to a linguistic or religious majority in any State. Such discrimination will be specially repugnant to secularism. The Preamble envisages a common brotherhood ("fraternity") of all Indians, for which, as stressed by K. Ramaswamy J., quoting Dr. Ambedkar,[33] communalism and linguism have to be discouraged, and for preservation of the unity and integrity of India every citizen must be made to feel equal.

We cannot also be oblivious to the possibility of a government of a State where majority consists of Muslims discriminating against Shias, or a State where Hindus constitute the majority discriminating against those Hindu educationists who refuse to toe the line of the ruling party, or a Sikh majority State practising discrimination on the basis of Akali versus non-Akali Sikhs or of one Akali faction

30 **Ahmedabad St. Xavier, supra** (f.n.8) (per Mathew J., para 131 of SCC ; per Khanna J., para 76 (**Ibid**).

31 per Latham C.J. quoted by Khanna J. in para 77, **Ibid**.

32 per Jaganmohan Reddy J. in para 55 **Ibid**.

33 **Raghunathrao v. Union of India,** (1994) Supp 1 SCC 191 (para 109).

versus another Akali faction. If it be argued that any such discrimination could be taken care of by Article 14 and be challenged on the ground of mala fide, then it will be pertinent to point out that Article 30 was redundant for minorities also who could even without it have likewise sought relief against any discrimination.

The guarantee of equality and non-discrimination and the basics of secularism apart, the right to establish and administer educational institutions also flows from Articles 19(1)(g), 21, and 26(a), as will now be seen.

The Right to Carry on Any Occupation

Article 19(1)(g) confers on all citizens the right to practise any profession, or to carry on any occupation, trade or business. Teaching may be a profession but establishing or running an institution is not a profession[34]. Trade and business are also ruled out, the Supreme Court having set its face against commercialisation of education[35] even while noticing the *Bangalore Water Supply*[36] case holding an education institution to be an "industry" and also recognising the hard reality "that private educational institutions are a necessity in the present context" "because the Governments are in no position to the meet the demand".[37] Hon'ble Jeevan Reddy and Pandian JJ. in their concurring judgment however added that they did "not wish to express any opinion on the question whether the right to establish an educational institution can be said to be carrying on any occupation within the meaning of Article 19(1)(g), - perhaps it is".[38] The qualifying word "perhaps" was, it may be submitted with respect, over-cautionary. Even Gajendragadkar J's dictum,[35] quoted by the learned judge (Reddy J.) in the same paragraph had used the word "vocation", which does not mean anything different from occupation".[39]

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34 **Unnikrishnan** v. **State of A.P.**, (1991) 1 SCC 645 (para 202).

35 **Ibid** (para 197, following Gajendragadkar J's. dictum that "education in its true aspect is more a mission and a vocation rather than a profession or trade or business"). This view was dealt with by Krishna Iyer J in the **Bangalore** case (f.n.35, **infra**), observing that "Indeed all life is a mission, and a man without a mission is spiritually still born".

36 **Bangalore W.S. & S. Board** v. **Rajappa**, (1978) 2 SCC 213 ("To christen education as a mission, even if true, is not to negate its being an industry" - para 98, per Krishna Iyer J.) followed in **A. Sundaram-bai** v. **Govt. of Goa**, (1988) 4 SCC 42.

37 **Unikrishnan, supra** (para 194 of SCC).

38 ibid (para 197).

39 See meanings of "occupation" in Aiyer's **Law Lexicon**, Reprint Edition, 1987, at p. 897 and Black's Legal Dictionary, Fifth Edition at p. 973, extracted in Mohan J's concurring judgment in **Unnikrishnan, supra** (paras 56 and 57 of SCC) and **P.V.C. Raju** v. **Commr. of Exp. Tax**, (1972) 86 ITR 267 quoted in para 58, **ibid**, and Mohan J's conclusion in para 63 **Ibid** that "establishment of an educational institution may fall under the category of occupation provided no recognition is sought from the State or affiliation from the University is asked for on the basis that it is a fundamental right." This, it is respectfully submitted, is a somewhat novel qualification.

Some decisions[40] were cited before their lordships in which it was assumed that such a right does flow from Article 19(1)(g), but they were distinguished. In the *second Kerala case*[41] both sub-clauses (f) and (g) of Article 19(1) were invoked by the minority as well as the majority institutions, but the High Court, as appears from the judgment of the Supreme Court, upheld the plea of both on the basis of Article 19(1)(f) (since repealed). It is not clear how the plea of Article 19(1)(g) was dealt with. It is not even mentioned that the plea on sub-clause (g) was negativated. As mentioned earlier, the Supreme Court upheld the High Court decision on the basis of concession of State counsel.

There is at any event nothing in any of the cases to suggest that establishment and running of an educational institution is not an "occupation". Indeed, it may even be respectfully suggested that whatever be one's views on the vexed issue of commercialization of education the ground reality that thousands of educational institutions, including some very good ones, all over the country are run on business lines with a profit motive, cannot be wished away. Nor need one by unduly alarmed about it in these days of economic liberalisation, particularly when their being a "necessity" is expressly recognised. Of course if undue profit motive leads an unscrupulous owner or manager to dilute the quality, official recognition or affiliation[42] may be denied to such an institution. But we cannot on that ground treat all educational institutions run on business lines as if they were extra-commercium like running a lottery or a liquour trade, as seems to have been suggested[43] in the above case. Law and medicine are also noble professions but that does not mean that the right to establish law firms or corporate hospitals should be denied. But for commercially run educational institutes India could not have made so much progress as it has in the fields of computer and information technology. Government itself has now bowed to this reality by introducing in Parliament a "Private Universities (Establishment and Regulation) Bill, 1995" providing for self-financing Universities. The Court too has only regulated and not prohibited capitation fees. Regulations placing reasonable

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40 **Bharat Sevashram Sangh** v. **State of Gujarat**, (1986) 4 SCC 51 at 56; (1986) 3 SCR 602 at 609; **State of Maharashtra** v. **Lok Shikshan Sansathan**, (1971) 2 SCC 410; 1971 Supp SCR 879.

41 **supra** (f.n.11) (vide para 6 of SCC).

42 As held in **Unnikrishnan, supra** (f.n.33), itself, there is no fundamental right to affiliation or recognition (para 204 or SCC). This is however subject to the decisions in the first Kerela case, supra (f.n. 9), and St. Xaviere, supra (f.n.8) that affiliation, recognition or aid cannot be unreasonably denied for forcing the management to surrender its right to administer.

43 In **Unnikrishnan supra** (para 198 ibid), **State of Bombay** v. **R.M.D.C.**, AIR 1957 SCC 699, which was a crosswords (lottery) case, has been referred to while suggesting strong disapproval of commercialisation in the field of education.

restrictions within the meaning of Article 19(6) can always be made in respect thereof[44], which will of course be uniformly applicable to all institutions, including those run by a minority, as recognised in cases noted earlier on Article 30. Such regulations may relate not only to standards of education and protection of teachers from exploitation but also to curbing profiteering and racketeering as can be done in respect of any other business or occupation. So no public policy will be infringed by accepting education as comprised in the expressions"business" and "occupation".

The Right to Education : Article 21

The right to education has been held to flow directly from the right to life[45]. It follows that all the arguments relating to parents' rights regarding education of their children and students' rights to proper education and even a community's rights to have its children educated in institutions managed and headed[46] by people in whom the community and the founders of the institution had confidence, the need to enable them to preserve their basic distinguishing characteristics and racial peculiarities and traditions, the need to insulate the institutions from political interference and from a litigative atmosphere, that we noticed earlier, in the *Kerala Education Bill*[47] *case* and the *St. Xavier's case*[48], among others, are squarely attracted to institutions run by a majority community as well. A majority community, its parents, and pupils have the right to education in institutions having an atmosphere congenial to their religion[49]. Why should they be compelled by necessity to send their children to other religions' missionary institutions for securing good quality education?.

The Right to Establish and Maintain Institutions for Charitable Purposes – Article 26(a)

Article 26(a) confers a fundamental right on every religious denomination or any section thereof to establish and maintain charitable institutions. In *Sidhrajbhai*,[50], a six-judge Constitution Bench had expressed the "tentative view" that "in a larger sense an educational institution may be regarded as

44 **Unnikrishnan, supra** (para 198).
45 **Mohini Jain** v. **State of Karnataka** (1992) 3 SCC 666 : Unnikrishnan, supra (f.n.33).
46 The right to have a Principal or Vice-Principal of the community's choice was upheld in **Virendra Nath Gupta** v. **Delhi Administration**, AIR 1990 SC 1148 : (1990) 2 SCC 307 (linguistic minority) and **Miss Shainda Hassan** v. **State of U.P.**, AIR 1990 SC 1381, para 5 (religious minority).
47 **supra** (f.n. 9).
48 **supra** (f.n. 8)
49 per Mathew J in St. Xaviers (f.n.8) (para 135).
50 **supra** (f.n. 12) (para 8 of A.I.R.).

charitable" within the meaning of Article 26(a). A sort of doubt seems to have created in *Bramchari's case*[51] by saying that the question whether Article 26(a) covers institutions for general education also as distinguished from religious education was left open. When Article 30 is not limited to institutions imparting education in a linguistic or religious minority's language or religion respectively., it passes comprehension why any such limitation should be thought of in Article 26(a). That the expression "charitable purposes" includes education is clear from the treatises on the *Law Relating to Hindu and Mohamedan Endowments* (page 46 of Chap. III) by P.R. Ganapathy Iyer and the one on the *Hindu Law of Religious and Charitable Trusts* (page 58, para 2,7-A) by B.K. Mukherjee in which the learned authors have also relied on English authorities.[52] Seerval in his *Constitutional Law of India* (IV Edn., 1993), Vol. 2, para 12, 100 at at p. 1302 has supported the view that Article 26(a) is attracted to educational institutions. This right under Article 26(a) will of course avail only charitable institutions and not those run purely as a business proposition.

Conclusion

The Supreme Court has so far been quite expansive[53] so far as rights of minorities are concerned and rather hesitant and over-guarded[54] whenever it has come to rights of a majority community. However, the Court has not yet authoritatively negatived the latter. If and when the issues are placed in their proper legal and factual perspective the Court is bound to reach the irresistible conclusion that citizens of all communities have similar rights to establish and administer educational institutions of their choice, subject to similar regulations for preventing maladministration, profiteering and racketeering and for ensuring proper educational standards. It follows that in regard to affiliation, recognition and grants-in-aid too they have a right to be treated equally irrespective of

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51 **supra** (f.n.3).

52 Both treatises have been quoted from by Mohan J. in **Unnikrishnan, supra** (paras 94 and 95 of SCC).

53 In **St. Stephen's College** v. **University of Delhi**, (1992) 1 SCC 558, even communal preference and reservation in admissions in favour of Christians was approved ignoring the fact that Christians are educationally less backward than other communities excepting, presumably Parsis. They were characterised as 'underprivileged" merely because of their being a minority, and thus Article 29(2) was got over. Against their own claim for 10% relaxation in marks, the Court was prepared to concede upto 50% reservations on the analogy of cases under Article 16(4). In **St. Xaviers, supra**, (f.n. 8) Mathew J. supported the view that even in subjects like science and music the community and parents may choose to have the teaching being coloured by their religious texts and traditions. (paras 136 and 137 of SCC report)

54 As seen above, in avoiding stating categorically that Articles 19(1)(g) and 26(a) are attracted.

community. In all these matters, instead of a classification based on religious or linguistic community, a more rational classification on the lines suggested by Dwivedi J.[55] in *St. Xavier's case* need be devised. Any other approach will run counter to the promise of the founding fathers to aim at securing to all our citizens "fraternity, assuring the dignity of the individual and the unity and integrity of the Nation".

55 **supra** (f.n. 8) (paras 266 and 267 of SCC).

"जनपदीय न्यायिक प्रशासन - एक विहंगम दृष्टि"

न्यायमूर्ति प्रेम शंकर गुप्त
निवृत्तमान न्यायाधीश,
इलाहाबाद उच्च न्यायालय

समग्र विश्व, राष्ट्र और समाज में द्रुतगति से हो रहे स्वीकृत मूल्यों में परिवर्तनों का प्रभाव न्यायिक प्रशासन पर भी पड़ना स्वाभाविक ही है, परन्तु न्यायिक प्रशासन पर पड़े हुये बदलाव का यह साया अपेक्षाकृत कुछ अधिक ही उजागर रूप में दृष्टिगोचित हो रहा है। न्यायिक कार्यकलाप पूर्व मान्यताओं, परम्पराओं, परिपाटियों एवं उदाहरणों पर आश्रित होता है और जब उनमें उथल-पुथल होने लगती है तो स्थापित आस्थाओं पर ठेस लगना भी स्वाभाविक ही है।

आज भी न्यायालय को न्यायमन्दिर के रूप में सम्बोधित किया जाता है। इस परिप्रेक्ष्य में न्यायमन्दिर के पुजारियों का उत्तरदायित्व और भी गहन है। उसकी शुचिता, धवलता, पावनता और सत्यनिष्ठा को स्थापित रखने का गुरुतर भार न्यायिक अधिकारियों के कन्धों पर है। उसे पूरा करने के लिये ने तो आकाश से किसी प्रतिभा-पुन्ज का अवतरण ही होगा और न ही पाताल से किसी शक्ति का प्राकट्य ही होना है। हमें स्वयं ही मन, कर्म और वचन से इस आस्था को अक्षुण्ण रखने का भरपूर प्रयास करना चाहिये।

जिला जज एवं मुख्य न्यायिक मजिस्ट्रेट जनपदीय न्यायिक-प्रशासनिक ढांचे की रीढ़ की हड्डियां हैं। मुख्य न्यायिक मजिस्ट्रेटों को नई दण्ड प्रक्रिया के अन्तर्गत लगभग वही अधिकार दे दिये गये हैं जो दाण्डिक न्यायालयों की कार्यविधि के सम्बन्ध में न्यायपालिका और कार्यपालिका के विभाजन के पूर्व जिला मजिस्ट्रेटों का हुआ करते थे। इस प्रकार वह सम्पूर्ण मजिस्ट्रेसी का आसन्न नियन्त्रक है। वास्तव में मुख्य न्यायिक मजिस्ट्रेट स्थानीय दाण्डिक न्यायरथ की धुरी है। उसे प्रशासन के अन्य अंगों से समुचित तालमेल स्थापित रखने की व्यवहारिक आवश्यकता भी रहती है, जिस कारण उसका उत्तरदायित्व और भी बढ़ जाता है, परन्तु उसे सदैव इस बात का ध्यान रखना श्रेयकर है कि वह वस्तुतः एक न्यायिक अधिकारी है और न्यायपालिका की ज्योति को जागृत रखना ही उसका मूल कर्तव्य है उसे इस तथ्य को भी कभी विस्मृत नहीं करना है कि उसका सारा कार्य जिला जज के दिशा निर्देशन में ही अपेक्षित है।

जिला न्यायाधीश जनपदीय न्यायिक परिवार का मुखिया (पेटेस्टा) है उसके आचरण, व्यवहार और मार्गदर्शन पर ही स्थानीय न्यायपालिका की संरचना आधारित होती है। उसके कुशल नेतृत्व में ही स्थानीय न्यायपालिका को अपने कर्तव्यपथ पर अग्रसित होना रहता है।

उसका रन्चमात्र भटकाव उसके सारे सहयोगियों को दिशा भ्रमित कर सकता है। दीर्घकालीन न्यायिक सेवा में अर्जित उसका परिपक्व अनुभव उसे न्यायिक सन्तुलन की सम्पदा का धनी बना देता है। उसकी यह पंजी उसे विभिन्न समस्याओं से जूझने की शक्ति प्रदान करती है।

हम इस बात से भलीभांति अवगत है कि जिला न्यायाधीशों को प्रशासनिक क्षेत्र में चतुर्मुखी कठिनाइयों का सामना करना पड़ रहा है। उन्हें जहां एक ओर प्रायः वकीलों के अवांछित कोप का भाजन होना पड़ता है, वहीं दूसरी ओर कभी-कभी प्रशासनिक अधिकारी भी उनके लिये अप्रत्याशित चिन्तायें उत्पन्न कर देते हैं। केवल कर्मचारियों की वाजिब-गैर-वाजिब मांगों की आपूर्ति सम्भव न हो पाने से उत्पन्न समस्यायें ही उन्हें सालती नहीं रहती हैं, वरन् यदाकदा उनके अपने सहयोगी भी उनके लिये सिरदर्द का कारण बन जाते हैं। इन सभी झंझावातों के बीच से उन्हें अपनी राह खोजनी होती है।

वकीलों की ओर से हड़ताल की धमकी कमोवेश हर स्थान पर न्यायिक प्रशासन को आजकल मिलती रहती है। कभी-कभी अवांछित उच्छृंखलता एवं उद्दण्डता के दृश्य भी न्यायलय में उत्पन्न कर दिये जाते हैं। यह सब पिछले कुछ वर्षों की ही देन है। मैंने पांचवे और छठवें दशक में जनपद न्यायालय में लगभग बीस वर्ष तक वकालत की है। मुझे याद नहीं पड़ता कि इस लम्बी अवधि में दो चार दिन भी वकीलों ने हड़ताल की हो, परन्तु अब तो यह बतलाया जाता है कि कुछ जिलों में हड़ताल के कारण वर्ष भर में कठिनाई से सौ-सवा सौ कार्य दिवस ही न्यायालयों में कार्य हो पाया है। निश्चय ही यह शोचनीय स्थिति है। न्यायपालिका की प्रतिष्ठा इससे निरन्तर गिर रही है, जिसके फलस्वरूप उसके प्रति जन सामान्य की आस्था डगमगा रही है। मेरे विचार से पूरा वकील वर्ग इसके लिये उत्तरदायी नहीं है। आज भी बहुसंख्यक वकील न्यायालयों को सुचारु रूप से काम करते देखना चाहते हैं, परन्तु बहुत से स्थानों पर उनमें एक ऐसा वर्ग उत्पन्न हो गया है, जिसे न्यायालय के काम-काज में कोई रुचि नहीं है। इस सम्बन्ध में सजग रहने की आवश्यकता है और यथासम्भव प्रयत्न इस बात की होना चाहिये कि उन परिस्थितियों का उत्पन्न होने से रोकने की चेष्टा की जावे, जिनसे हड़ताल के पक्षधारों को उसे करने का बहाना मिल जाता है, परन्तु न्यायालय में उच्छृंखलता अथवा उद्दण्डता के व्यवहार को सहन नहीं किया जा सकता । समुचित मानवीय दृष्टिकोण अपनाने और यथासम्भव यह प्रयत्न करने के बावजूद भी ऐसी स्थितियां न आने पावें, यदि कोई अन्य विकल्प शेष न रहे तो फिर सम्बन्धित विधिक कार्यवाही का विकल्प अमल में लाना ही होगा। यह अवश्य है कि यदि सद्भावी वकीलों के सद्प्रयास के फलस्वरूप यह घटनायें टाली जा सकें तो उनके इन प्रयासों को भी अवसर प्रदान किया जाना ठीक ही होगा। पीठासीन अधिकारियों का संवेदनशील होना और उदात्त दृष्टिकोण रखना अपने आप में एक गुण होता है। इन भटके हुओं को पश्चाताप करके सुधारने का अवसर देना भी न्यायसंगत है, परन्तु न्यायालय की गरिमा को बनाए रखना भी पीठासीन अधिकारी का ही दायित्व है। इस सन्दर्भ में यह भी विस्मृत

नहीं करना है कि न्यायिक अधिकारी को भी स्वयं न्यायालय में गरिमायुक्त आचारण करना तथा सन्तुलित रहना कम आवश्यक नहीं है। सन्तुलन खोकर न्यायिक अधिकारी भी अपने न्यायालय की अवमानना का दोषी हो सकता है। इस सन्दर्भ में समुचित सतर्कता बरतना आवश्यक है।

न्यायिक प्रशासन को सामान्य प्रशासन के अन्य अंगों से भी व्यवहारिक रूप से सामन्जस्य स्थापित रखना पड़ता है। प्रजातन्त्र के संरक्षण के लिये कार्यपालिका का भी अपना स्थान है, परन्तु सामन्जस्य रखने और प्रभावित होने में बड़ा अन्तर है। यह तालमेल न्यायिक कार्यों पर कोई भार पड़े बिना ही रखा जाना अभीष्ट होना चाहिये। न्यायिक अधिकारी के लिये यह भी आवश्यक है कि वह न्यायपालिका अथवा प्रशासन के किसी अंग से कोई अवांछित अपेक्षा न करे। कार्यपालिका की अपनी ही एक कार्यप्रणाली है और अपने ही सोचने का तरीका है, जो न्यायिक कार्यप्रणाली से सर्वथा भिन्न होता है। इस कारण सदैव सजग रहने की आवश्यकता है। उच्चतम न्यायालय ने अपने एक निर्णय में इस सम्बन्ध में समुचित दिशा निर्देशन भी दिया है। बड़े सन्तोष की बात है कि ऐसी स्थितियां उत्पन्न होने पर अधिकतर न्यायाधिकारी अपने कर्तव्यपथ से विचलित नहीं होते है।

कर्मचारियों की बढ़ती हुयी मांगे भी एक ज्वलन्त समस्या है। कर्मचारियों की उन उचित मांगों को जिनका व्यवहारिक रूप से समाधान किया जा सकता है, संवेदनशील दृष्टिकोण अपनाया जाना चाहिये, पर वास्तविक कठिनाईयाँ वहां उत्पन्न होती है, जहां ने केवल मांग ही अनुचित होती है, वरन् उसका समाधान असम्भाव्य अथवा अव्यवहारिक होता है। ऐसी दशा में उनकी बातों को ध्यानपूर्वक सुनकर उन्हें उसकी अव्यवहारिकता से परिचित कराकर वातावरण को सौहार्दपूर्ण बनाने की पूर्ण चेष्टा होनी चाहिये। सिविल कोर्ट के कर्मचारियों की परम्परागत अपनी शालीन संस्कृति रही है। दुर्भाग्य से कालचक्र से प्रभावित होकर उसमें भी शनैः-शनैः गिरावट आती जा रही है, परन्तु अब भी शालीन कर्मचारियों की सिविल कोर्ट में कमी नहीं है। उनकी सेवाओं का समुचित उपयोग किये जाने की चेष्टा होनी चाहिये। साथ अधिकारियों का भी कर्मचारियों के प्रति मानवीय, संवेदनशील एवं उदात्त दृष्टिकोण होना आवश्यक है। अनुशासनात्मक कार्यवाही के प्रयोग को हठवादिता की दिशा में तिलान्जलि नहीं दी जा सकती।

अपने ही सहयोगियों से असहयोग की समस्या भी यदाकदा अब देखने में आने लगी है। यह अति संवेदनशील स्थिति है। न्यायिक सेवा की परम्परा रही है कि वरिष्ठों को कनिष्ठों ने अत्याधिक आदर-सम्मान दिया है और बदले में कनिष्ठों को अपने वरिष्ठों से उतना ही प्रेम, स्नेह और मार्गदर्शन मिला है। आज भी बड़ी संख्या में इस परम्परा का निर्वहन हो रहा है, परन्तु कभी-कदार अपवाद देखने में आने लगे हैं। ऐसी स्थिति में सबसे पहले वरिष्ठ को अपने को टटोलना ही इष्टकर होता है और उसे स्वयं इस बात से आश्वस्त होना परम्

आवश्यक है कि जाने-अनजाने उसके कार्यकलापों से कहीं कोई विभेद तो परिलक्षित नहीं होने लगा है। निःसन्देह जिला जज एवं मुख्य न्यायिक मजिस्ट्रेट का पद शक्ति सम्पन्न होता है, परन्तु साथ ही साथ हमें यह नहीं भूलना चाहिये कि वह परिवार का संरक्षक अथवा अग्रज भी है। संवेदनशीलता उसका प्रमुख गुण होना चाहिये, जिससे वह अनुकूल वातावरण का सृजन कर सकता है। इस बात को ध्यान में रखने की आवश्यकता है कि अवांछित चाटुकारिता भी यह विभेद उत्पन्न कर देती है। दूसरी ओर अवांछित प्रकृति के अधीनस्थ न्यायिक अधिकारी भी कभी-कभी जनपद न्यायाधीश को आतंकित करने की चेष्टा करते हैं, जिससे सर्वथा उससे बचने का प्रयास करना चाहिये। सौहार्द का वातावरण स्थापित करना, सहयोगियों के हृदयों पर विजय प्राप्त करने द्वारा इस समस्या का निराकरण किया जा सकता है, परन्तु किसी लोभ भय और आतंक से ग्रसित होकर कार्य करना एक ओर अपने मनोबल को गिराना है, वहीं दूसरी ओर वातावरण को कटुताग्रस्त करने का निमन्त्रण देना है।

जिला न्यायाधीश जो जनपद न्यायालय का प्रमुख न्यायिक एवं प्रशासनिक अधिकारी है, से यह अपेक्षित है कि वह निष्ठापूर्वक संवेदनशीलता के साथ व्यावहारिक एवं मानवीय दृष्टिकोण अपनाकर न्यायिक सन्तुलन की कसौटी पर कस कर मुखिया के पद को सार्थकता प्रदान करने के लिये भारत के महान चिन्तक से प्रेरणा ग्रहण कर अपना कर्तव्य निर्वहन करने की चेष्टा करें।

"मुखिया मुख सो चाहिये खानपान महुं एक।
पलाइ पोषइ सकल अंग, तुलसी सहित विवेक।।"

NATIONAL SECURITY - TERRORISM - HUMAN RIGHTS

Justice R.K. Mahajan, Judge
Allahabad High Court

Human being is born with inalienable rights i.e. right to life, liberty and security. He created the society and ultimately through the instrumentality of society, State was created to look after their protection. These rights are essential for the enjoyment and development of human personality. They are basic rights which civilised state is supposed to ensure their guarantee. Now, the question which arises, is, that, is individual entitled or group of individuals entitled to destroy the apparatus of state and the very basis of these Human Rights? Human being has a right of self defence so the state has also right of self defence. Of late there is birth of evil phenomenon in our society i.e. terrorism which wants to destroy the very foundation of the state. Fissiparous and separatist forces are raising their head to achieve the separate sub-identity in the national polity. For example, there is the problem of Kashmir insurgency, previously there was problem of Punjab-autonomy, Bodoland problem, Jharkhand problem, and so on.

There are daily bomb blast, in the busy markets of national capital of India and other towns. Innocent lives are destroyed. There is also a loss of indescribable human properties. The bomb blasts are owned by some groups of insurgent movement which have the backing of neighbouring countries. There is/international propaganda from Amnesty International and other Organisations, regarding the loss of human lives, human torture by security forces or police forces and denial of human rights. There is also allegation of custodial deaths, tortures and deaths and violation of declaration of human rights of 1948 and Geneva Convention 1948. The Government of India in order to give transparency to what is happening in India allowed the foreign agencies to visit India to inquire into the alleged violation of human rights and even constituted National Human Rights Commission (and State Human Rights Commission) in 1994. Under Section 3 of the Protection of Human Rights Act, 1993, it has been given various powers and functions, but I would only deal regarding the aspects of national security and terrorism and enjoyment of human rights. The Human Rights figure in Chapter III of Indian Constitution and Article 21 is a pivotal article which has received pervasive interpretation from the Apex Court, in such a way that it covers custodial deaths etc. and compensation has been awarded against the state functionaries for the violation of Human Rights. The High Courts in some cases have granted compensation to the victims of rape, dependants of the murdered and to injured

persons adequately on being satisfied about the allegations that police had committed such acts. The defence of the police was that they were preventing the agitators at the behest of the Government. Some High Courts have also given interpretation that the prosecution can be launched without sanction by the Government as it was not their duty to commit rape etc. The police officials in genuine cases may not act according to law on apprehension that they would be prosecuted as they would not enjoy the protection of sanction before launching prosecution by the aggrieved person. The Commission may examine this question which has risen recently and is going to rise in future to avoid the misapprehension, in the interest of security of State and section 12 permits the Commission to intervene in such cases. The preamble of the Constitution also deals with the dignity of the human being which is to be protected by judicial remedies available to the citizen under article 226 and 32 of the Indian Constitution. At the same time under article 51-A of the Indian Constitution sub-clause (c) part IV-A fundamental duties, it shall be the duty of every citizen of India to uphold and protect sovereignty, unity and integrity of India. Under Article 51 of the Indian Constitution, the State is bound to give respect to international treaties with respect to human rights etc. The terrorist groups in the garb of human rights and to attain the autonomy and secession from the Indian State cannot take the plea that they can destroy the structure of the State. The Indian Parliament in order to combat terrorism had to enact so many laws right from 1950 i.e. Preventive Detention Act, Defence of India Act, COFEPOSA, National Security Act 1980, the Terrorists and Disruptive Activities Prevention Act, 1985 and 1987. These Acts contain procedural safeguard dealing with the liberty of the individual, so that the obligations under the Universal Declaration of Human Rights, 1948 adopted by the UN General Assembly are meted out. The detentions are subject to Judicial Review. These Acts were incorporated at different periods to meet the situations of public order. According to Lord Denning, personal freedom must match with social security. Social security is peace and good order of the community which is indeed the end-object of criminal justice.

The second aspect of state which puts fetters on individual rights has to be justified on the ground of necessity of existence of State. A modern State is a Welfare State enjoined to secure peace and promote progress in the society. If the society is to progress through the organ of the State a reasonable balance has to be struck to reconcile the social interests with individual's interest. Would the State tolerate the launching of terrorist activities of warlike by certain groups and killing of innocent children etc. in bomb blasts in train and buses etc. In case, it tolerates such activities it would be not protecting the human rights of the innocent victims. In such a situation, freedom of individual in form of human rights

has to take the second place and it cannot take first place. Individual interest is subordinate to society's interests. Lord Denning has again remarked, if our society is attacked by one or more who would destroy us and our freedoms, then we must have the means to defend ourselves. We must stop them at the very point of their attack-before they launch their offensive if we can-and after it is launched. If the danger is grave imminent we may have to detain them without trial, we may have to act on secret intelligence, and we may have to modify the rules of natural justice. All this may be necessary to protect ourselves, lest we ourselves be destroyed. (Landmarks in the Law by Denning-Security of State page-228) Terrorism is not prevalent in this country alone but is prevalent in other countries also. There is a chronic problem of terrorism in Northern Ireland. There is also terrorism of cleansing races. Everybody knows what is happening in Bosnia and other parts of the world. There is rise of fundamentalism. In such situation the existing State is to protect apparatus from the attack of the violators of human rights of innocent people. The liberty of the individual is not absolute and where there is a conflict in the individual's right and the protection of the State, the State has a duty to protect those whose freedom needs the protection.

The origin of terrorism is related to so many factors but mainly it is associated with Socio-economic-disequilibrium & fanatical/fundamentalist values, inefficiency of the executive, intellectual, skeptical attitude towards the political system.

The following steps can be suggested to combat terrorism :--

Politician should discourage the sectarian policies. At present in our polity the votes are garnered in the name of caste. Unless this aspect is eliminated secular society cannot be established and terrorism cannot be eliminated completely and violation of human rights would exist in groups to gain the power.

There should be proper orientation and training to the police with modern infrastructure facilities to combat the terrorism. At University level regular subject of human rights and research measures to resolve the conflicts in various groups and sub-groups of nation be made to achieve the social and economic equilibrium and then to disseminate those ideas in the society by giving a wide publicity.

Efforts should be made to stop the political patronage to anti-social elements. There should be at the international level one uniform anti-terrorist law so that the terrorist from different country may not operate against another country.

To conclude it may be pointed out that the Universal Declaration on Human

Rights in 1948, was the result of second & first World Wars. The Universal Declaration, 1948 is based on speech made by Roosevelt on 6th January, 1941. He said," In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms. The first is the freedom of speech and expression-every where in the world. The second is freedom of every person to worship god in his own way-everywhere in the world. The third is freedom from want. The fourth is freedom from fear. These freedoms may be destroyed unless the entire community of nations adopts rational approach to promote international peace. In this shrinking world the protection of human rights is not the responsibility of one nation only as it has assumed international dimensions." The National Human Rights Commission has been in fact, given wide power to recommend measures against the violation of human rights under section 12 of the Act which the State cannot afford to disregard as the National and State Commissions are headed by Chief Justice of India and Chief Justice of High Court and other members of eminence in their different fields. Who have the sanction of acceptability of the people. The people give as much respect to their recommendations as they give to the Court judgment. What is needed is that India lives in villages and majority of the population is illiterate and they do not know the importance of redressal forum under the Protection of Human Rights Act, 1993. I would suggest that the subject of human rights, be introduced at the level of Colleges and Schools and wide publicity on television in all local languages be given to inculcate respect of Human Rights and ultimately the reduction of violence and terrorism.

VALIDITY OF SUBORDINATE LEGISLATION

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Recent decades have demonstrated the practical importance of subordinate legislation. Its legal aspects require detailed study. This article deals with the validity of subordinate legislation, from the substantive angle.

Requirements for validity

In order that the exercise of delegated legislative power may be valid, certain conditions have to be satisfied. The principal conditions are the following :—

(a) The parent Act (under which the power is exercised) must be valid.

(b) The delegation clause in the parent Act must be valid.

(c) The statutory instrument made under the parent Act must be in conformity with the delegation clause, in point of—

  (i) substance,

  (ii) procedure, and

  (iii) form.

(d) The statutory instrument must not violate certain general norms laid down by judicial decisions, e.g., norms regarding ouster of court jurisdiction, imposing a penalty, imposing a tax, giving retrospective effect etc.

(e) The statutory instrument must not violate any of the fundamental rights guaranteed by Part III of the Constitution.[1]

Some of these requirements need detailed discussion.

Validity of Parent Act

It is elementary that if the parent Act is invalid, the statutory instrument made thereunder also becomes invalid. For, if the source of the power is legally defective, then the exercise of the power must also be defective. The main grounds on which the parent law can be challenged are —

(a) violating a fundamental right;

(b) violating any other provision of the Constitution (e.g. absence of legislative competence)

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1 **Narendra Kumar v. Union of India**, AIR 1960 S C 430; **Air India v. Nerghesh Meerza**, A I R 1981 S.C. 1829.

The question is primarily to be decided with reference to the text of the Constitution.

Validity of delegation clause

It is not only necessary that the parent Act must be valid, but it is also necessary that the clause delegating legislative power should be valid. This question is to be decided, not with reference to textual provisions of the Constitution, but with reference to certain principles of constitutional law, based on judicial decisions. The most convenient way of stating the position in this regard is that (a) legislative policy is to be laid down by the legislature and, therefore, essential legislative functions cannot be delegated; (b) matters of detail can, however, be left to be dealt with by the delegate.

Conformity with delegation clause in point of substance

The authority to which legislative power is delegated, must keep itself within the limits of the delegation. If the statutory instrument goes beyond the powers granted by the parent Act through the delegation clause, then it would be void by reason of "substantive ultra vires". This has at least two important aspects.

(a) The statutory instrument should not deal with matters not enumerated in the delegation clause. The delegate (who issues subordinate legislation) cannot make a rule on a matter on which no power is given to him by the parent Act.

(b) The statutory instrument must not be inconsistent with the general scheme and intendment of the parent Act.

In *S.T.O.* v. *Abraham*[2], a rule making power authorising the prescribing of particulars was held not to authorise fixing a time limit for the form.

The case of *Commissioners of Customs and Excise* v. *Cure and Deelay Ltd.*[3] also illustrates this aspect. A purchase tax regulation made under the authority of the Finance (No 2) Act, 1940 was challenged on several grounds, the major one being that the regulation conferred on the Commissioners a power to claim a sum as due, without the claim being related to the Act. It was held that the regulation was ultra vires, since (1) it purported to confer on the Commissioners the powers of a judge, (2) it substituted a sum which the Commissioners deemed to be due for the figure which fell to be assessed under the Act, and

2 **S.T.O. v. Abraham,** AIR 1967 SC 1823.

3 **Commissioners of Customs and Excise v. Cure and Deelay Ltd.,** (1961) 3 All ER 641: (1962) 1 QB 340.

(3) it attempted to oust the jurisdiction of the court.

Regina v. *St. AHE School*[4] holds that even the mention of a topic in the rule-making section is not enough, if that topic (recognition of schools) is not mentioned in the substantive sections of the Act.

Procedural ultra vires

Procedural ultra vires means that the challenge is directed to the formalities required to be observed in the making of the delegated legislation. For example, a failure to consult some authority as required by the parent statute, or a failure to have the statutory instrument issued as so required, might well lead to the instrument being held to be ultra vires.

Thus, in *Ratna Gopal* v. *Attorney General*[5], the Governor-General of Ceylon appointed a Commissioner to hold an inquiry and left it to the Commissioner to decide his own terms of reference. The relevant statute required the Governor-General to decide the ambit of the inquiry. The court decided that the appointment was ultra vires. But the context may allow a different construction.[6]

In India, provision for previous publication of a statutory instrument (if contained in the parent Act) is mandatory.[7] A statutory provision for publication is also mandatory.[8]

As if enacted

Sometimes, Parliament itself has attempted to prevent challenge to a statutory instrument by stipulating in the statute, that the delegated legislation, when made, "shall have effect as if enacted in this Act". In *Institute of Patent Agents* v. *Lockwood*[9], the House of Lords held that this expression meant that the delegated legislation was an unchallengeable as if it was actually incorporated in the Act itself. However, in the *Minister of Health* v. *Rex ex parte Yaffe*[10], the House of Lords, when examining this same phrase in relation to the minister confirming a housing scheme, decided that the phrase could take effect only if the scheme in question conformed to the Act. If it did not conform to the provisions in the Act, then the Minister was not able to confirm the scheme.

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4 **Regina v. St. AHE School**, AIR 1971 SC 1920.
5 **Ratna Gopal v. Attorney General**, (1970) A C 1974 (P C).
6 See **Provident Mutual Life Ass. v. Deputy CC**, (1981) 1 WLR 173.
7 **Govindlal v. Agriculture Produce Market Committee**, A I R 1976 S C 263..
8 **State of M.P. v. Ram Raghubir Prasad**, AIR 1979 SC 888.
9 **Institute of Patent Agents v. Lockwood**, (1894) AC 347.
10 **Minister of Health v. Rex ex parte Yaffe**, (1931) AC 494 (H L).

The Donoughmore Committee on Ministers' Powers in England (1932) recommended that the "as if enacted" clause should go out of use, and this seems now to have happened.

Current opinion in India is that notwithstanding such a provision, the validity of a rule can be challenged.[11]

General norms for statutory instruments

(a) Apart from the principle that the statutory instrument must be in conformity with the parent Act (particularly with the delegation clause) in point of substance and in point of procedural formality, it should also be borne in mind that every statutory instrument is subject to certain general norms which are laid down in the case law. The most important are the following limitations, which apply unless the parent Act expressly gives a wide power on the particular point :–

(i) A statutory instrument must not make a provision ousting the jurisdiction of ordinary courts. (This is the legal position. Rule 320, item 4 of the Lok Sabha Rules also requires the Committee on Subordinate Legislation to examine whether a rule directly or indirectly bars jurisdiction of the courts).

(ii) A statutory instrument cannot impose a penalty for violation therof.

(iii) A statutory instrument cannot impose a tax or fee.[12]

(iv) A statutory instrument cannot be given retrospective effect (i.e., it cannot be made to be effective from a date earlier than its making)[13].

It follows, that the validating amendment of a rule by a rule is itself invalid,[14] Nor can a retrospective amendment of rule nullify the effect of a writ issued by the court earlier.[15]

(v) A statutory instrument cannot make a provision amending or repugnant to the parent Act[16].

(vi) A statutory instrument cannot purport to define a word used, but not

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11 **State of Kerala** v. **Abdulla & Co.**, AIR 1965 SC 1585, 1589; **K. Rama Rao** v. **R.A. Mundkar**, AIR 1960 Mys. 313.

12 **Benerjee** v. **State of M.P.**, AIR 1971 S C 517.

13 **Hukam Chand** v. **Union of India**, A I R 1972 S.C. 2427; **R.T.O. Chittoor** v. **Associated Transport**, A I R. 1980 S C 1872; **Union of India** v. **Krishnamurthy** 1989 4 SCC 689. **Bakul Co.** v. **S.T.O.**, 1986 2 S C C 365.

14 **Gurcharan Singh** v. **State**, AIR 1974 P & H 223.

15 **A.V. Nachanae** v. **Union of India**, AIR 1982 SC 1126.

16 **Baban Naik** v. **Union of India**, AIR 1979 Goa 1.

defined, in the parent Act. For example, if a law is passed to regulate aircraft, an order issued thereunder cannot provide that "aircraft shall include hovercraft". This must be achieved by amending the parent Act.

(b) These restrictions are, of course, subject to an express provision to the contrary, contained in the parent Act and conferring an express power to deal with any of the matters mentioned above. The theory of the law is that the legislature ordinarily does not intend to give to the delegate a wide power to deal with the matters mentioned above. That presumption can be displaced by a contrary provision in the parent Act.

Fundamental rights and other constitutional provisions

It is also necessary to ensure that a statutory instrument does not come into conflict with any of the fundamental rights guaranteed by Part III of the Constitution. [17] Same principle applies to a statutory instrument violating any other constitutional provision. [18]

Sub-delegated legislation

It is not uncommon for a person or body to receive delegated powers indirectly under a statute. The legislation which is then produced is known as sub-delegated legislation.

This state of affairs would appear to be in conflict with the general principle of law that a delegate is not empowered to delegate-*delegatus non potest* delegare. This view is borne out by the general rule that where Parliament gives a power to make law for some specified purpose to a person or body, then that power can only be exercised by that person or body.

In *Allingham* v. *Minister of Agriculture and Fisheries* [19], the Minister delegated to a County Agricultural Executive Committee the power to direct farmers in the cultivation and use of their land. In the particular instance, the Committee permitted one of its executive officers to give a direction. It was held that the direction was invalid. The Committee, being a delegate, could not delegate. But it is possible that Parliament may foresee the need for, and may expressly approve, the sub-delegation of certain powers.

In England, the courts have held that it is possible for a Ministry circular to

17 **Narendra v. Union of India**, AIR 1960 SC 430.

18 **Harnam Singh v. R.T.A.**, AIR 1954 SC 190; Madhubhai v. Union of India, A.I.R. 1961 S.C. 21; D.S. Mills v. Union of India, AIR 1959 SC 626.

19 **Allingham v. Minister of Agriculture and fisheries**, (1948) 1 All ER 780.

contain instructions which go further than being administrative guidance and are, in law, delegated legislation. Consequently, the conditions set out in the circular can be binding on the local authority operating under it.[20] The Minister of Health, as permitted by Act of Parliament, appointed certain local authorities to be his delegates for the purpose of requisitioning property. The delegation was done by a Ministry circular which also set out the conditions under which the authorities were to operate. One of these instructions was that no furniture was to be requisitioned and another was that premises were not to be requisitioned if the owner wanted them for his own residence. Blackpool Corporation purported to requisition premises in contravention of these two conditions. The court decided that the requisition was invalid. The circular, with its conditions, was sub-delegated legislation.[21]

The rule against sub-delegation turns upon statutory construction. "If Parliament confers power upon A, the evident intention is that it shall be exercised by A and not by B."[22]

In India, sub-delegation of delegated legislative power without express authority would be regarded as invalid.[23] In any case, the sub-delegate cannot go beyond his authority.[24]

Unreasonableness

In general, statutory powers have to be exercised in a reasonable manner.[25] This doctrine is of particular importance for bye-laws of local authorities.[26] The theory is that Parliament could not have intended powers of delegated legislation to be exercised unreasonably. This principle is well-established in relation to bye-laws of local authorities. As regards other types of statutory instruments, reasonableness may be demanded by constitutional

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20 **Blackpool Corporation** v. **Locker,** (1948) 1 KB 349.

21 **Blackpool Corporation** v. **Locker,** (1948) 1 KB 349.

22 Wade, Administrative Law (1982), page 319; New Zealand Milk Products Co-operative Ltd. v. **N.Z.Milk Board,** (1961) NZLR 218; **K.E.** v. **Banoari Lal Sarma,** (1945) AC 14,24 (PC); Vine v. **National Dock Labour Board,** (1957) AC 488 (Dismissal of board employee).

23 **State of Punjab** v. **Amir Chand,** AIR 1953 Punj. 1; **Pritam Bus Ltd.** v. **State** of Punjab, A I R 1957 Punj. 145.

24 **Radha Kishan** v. **State,** AIR 1952 Nag. 387; **Bennett Coleman** v. **Union of India,** A I R 1973 SC 106.

25 **Westminister Corporation** v. **L. & N.W. Rly.,** (1905) A.C. 426, 430; **Roberts** v. **Hopewood,** (1925) AC 578; **Wade, Administrative Law** (1982), pages 353-354, 752-753.

26 **Kruse** v. **Johnson,** (1889) 2 Q.B. 91 (Lord Russel, CJ); **Repton School Governors** v. **R.D.C.,** (1981) 2 KB 138; AG v Denby, (1925) Ch. 596; **London Passenger Transport Board** v. **Summer,** (1935) 154 L. T. 108. (Bye-law penalising non-payment of fare unreasonable); **Townsend (Builders) Ltd.** v. **Cinema News and Property Management Ltd.,** (1959) 1 WLR 1191; **Cinnamond** v. **British Airports Authority,** (1980) 1 WLR 582. See Alan Wharam, "Judicial Control of Delegated Legislation: The Test of Reasonableness" (1973) 36 Modern Law Rev. 611.

provisions as to fundamental rights.

Even where the parent Act says that the specified authority may make regulations if "he is satisfied" that they are required, the court can examine whether that authority could reasonably have been satisfied in the circumstances.[27] Mala fide subordinate legislation-particularly, bye-laws of corporation would be void if the power is exercised for a wrong purpose. The matter is discussed at length by Dixon, J. in Yates (Arthur) & Co. Pvt. Ltd. v. Vegetable Seeds Committee.[28]

In India, the test of reasonableness is applicable to delegated legislation both on general principles and under fundamental rights, such as Article 14 or 19 of the Constitution.

Natural justice

Making of statutory instruments is not subject to natural justice.[29] The general principle is that natural justice is not a requirement of legislation or quasi-legislation.[30]

Procedural errors: consultation or sanction

Duty to consult a particular body or group of persons before making subordinate legislation is usually regarded as mandatory.[31] So is a requirement to obtain prior approval of the prescribed authority before making or issuing

(a) a rule or order,[32] or

(b) a notice.[33]

Partial invalidity

In England, it has been held that a statutory instrument may be partly bad and partly valid. In *Agricultural etc. Training Board* v. *Aylesbury Mushrooms Ltd.*[34], the parent Act required the Minister to consult certain representative associations before passing an industrial training order. It was held that the order

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27 Wade, Administrative Law (1982), pages 397, 402, 754.

28 **Yates (Arthur) & Co. Pvt. Ltd.** v. **Vegetable Seeds Committee,** (1945) 72 CLRm 37, 80, 81.

29 **Bates** v. **Lord Hailsham,** (1972) 1 WLR 1373, 1378: (1972) 3 All E.R. 1019 (Megarry, J.).

30 **Tulsipur Sugar** v. **Notified Area Committee**, AIR 1980 SC 683; **Lakshmi Khandsari** v. **State of U.P.,** A I R. 1981 S.C. 873.

31 **Agriculture etc. Training Board** v. **Aylesbury Mushrooms Ltd.,** (1972) 1 W.L.R 190.

32 **Jeo Rai** v. **State,** A.I.R. 1959 Raj. 73 ; **Bhikam Chand** v. **State,** AIR 1966 Raj. 142.

33 **Lt. Commissioner** v. **Pratap Singh**, AIR 1961 SC 1026; **Secretary of State** v. **Ananta,** A.I.R. 1934 P.C. 9.

34 **Agricultural etc. Training Board** v. **Aylesbury Mushrooms Ltd.,** (1972) 1 WLR 190.

was valid as regards the organisations consulted and was bad as regards others.

Similarly, an order prohibiting herring-fishery, which purported to extend slightly beyond the waters covered was held ultra vires as to the excess, but enforceable in respect of the remainder.[35]

35 Dunkley v. Evans, (1981) 1 W.L.P. 1522. For further references, see – (i) Halsbury, 4th Ed., Vol. 1, para 26. (ii) Wade, Administrative Law (1982), page 755. (iii) **Daymond v. Plymouth City Council,** (1976) AC 609.

MEDICAL EVIDENCE- DETERMINATION OF TIME OF DEATH

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In trials relating to manslaughter, the often mooted point is the time of occurrence. Closely related question is the time of death of the deceased. For determination of time of death, assistance is taken from the medical evidence apropos the state of digestion and presence of faecal matter in the intestines of the deceased. The accepted position is that in normal course, complete digestion of food takes place within six hours from the time the man takes his food. The stage of semi-digestion reaches within three hours. It may be said as observed by the Hon'ble Supreme Court in *P.Venkaiah* v. *State of A.P.*, AIR 1985 SC 1715 : 1985(2) Crimes 746: 1985 Cr LJ 2012, medical science is not yet so perfect as to determine the exact time of death nor can the same be determined in a computerised or mathematical fashion so as to be accurate to the last second.

The state of the contents of the stomach found at the time of medical examination is not a safe guide for determining the time of the occurrence because that would be a matter of speculation in the absence of reliable evidence on the question as to when the deceased had his last meal and what that meal consisted of. [*Masjit Tato Rawool* v. *State of Maharashtra*, 1971 SCC 416: 1971 SCC (Cri) 732; *Puran Singh* v. *State of Punjab*, 1995 SCC (Cri) 1143]. The presence of faecal matter in the intestines is not conclusive, as the deceased might be suffering from constipation. Where there is positive direct evidence about the time of occurrence, it is not open to the Court to speculate about the time of occurrence by the presence of faecal matter in the intestines. [*Sheo Darshan* v. *State of U.P.*, AIR 1971 SC 1794: 1971 Cr LJ 1326: 1972 SCC (Cri) 394]. The question of time of death of the victim should not be decided only by taking into consideration the fact that the faecal matter was found in the intestines of the deceased. That may be a factor which should be considered along with other evidence but that fact alone cannot be decisive. [*R. Prakash* v. *State of U.P.*, (1969) 1 SCC 48, 50].

In villages rural people usually go to answer the call of nature before sun-rise, no such generalisation is possible. It all depends on the habit of the individual, the state of his health, particularly on his digestive system, weather and several other factors. (*State of U.P.* v. *Shanker*, AIR 1981 SC 897, 901, 902: 1981 Cr LJ 23: 1981 All LJ 9).

In some cases the evidence itself may not be sufficient to establish as to when the last meal and what article of food if any, was taken by the deceased. Thus, where semi-digested food was found in the stomach, the contention was not accepted that it must be inferred from it that the occurrence must have taken place after the deceased had taken his evening meal. (*Lachman Singh* v. *State*, 1952 SC 167: 1952 Cr LJ 863), or that it could not have taken place at 5.30 p.m. as alleged. [*Nihal Singh* v. *State*, 1965 SC 26: 1965 (1) Cr L J 105], as there was nothing to show when the deceased had taken his last meal.

So also the "sluggish chronometric sense of the country-side community of India is notorious since time is hardly of the essence of their slow life and even urban folk make mistakes about time, when there is no particular reason to observe and remember the hour of a minor event like taking a morning meal. [Shivaji v. *State*, AIR 1973 SC 2622: 1973 Cr LJ 1783].

The time required for digestion may depend upon the nature of food. [*Nihal Singh* v. *State*, AIR 1965 SC 26: 1964 SCC 853]. The process of digestion is very greatly delayed in the case of vegetable food consumed by Indians. [*Ganga* v. *Emperor*, AIR 1930 Oudh 60:31 Cr LJ 689: I LR 4 Lack. 726; *Shivaji* v. *State*, AIR 1973 SC 2622: 1973 Cr LJ 1783]. Time varies according to digestive capacity [*Nihal Singh* v. *State*, AIR 1965 SC 26: 1965(1) Cr LJ 105]. The process of digestion is not uniform. It varies from individual to individual [*Aziz Khan* v. *State*, AIR 1964 Pat. 158: 1964(1) Cr LJ 426). Digestion varies with the state of the gastric mucosa. [*Nanak Chand* v. Emperor, AIR 1932 Lah. 73: 32 Cr LJ 103]. It also depends on the health of a person at the particular time. [*Nihal Singh* v. *State*, AIR 1965 SC 26: 1965(1) Cr LJ 105].

The power of digestibility may be held in abeyance for various reasons. This may be due to the deceased having been in a state of privation, shock and coma. Food consisting of rice and pulse was found to remain in the stomach for about 40 hours without under-going digestion (*Dhanna* v. *State*, AIR 1951 Raj 37: 52 Cr LJ 201).

Death does not at once cause the process of digestion to stop. The stomach can even digest itself after that. (*Nanak Chand* v. *Emperor*, AIR 1932 Lah 73 : 32 Cr L J 1036). Where eye witnesses are distrusted and it is not possible to reconcile their evidence with medical report (based on contents of the deceased's stomach) as to the time of death, the benefit of doubt would be given to the accused. (*Chenchal Singh* v. *Emperor*, AIR 1933 Lah 714: 35 Cr LJ 381). If however the report is based only on a surmise and not on any scientific data a bald opinion could not outweigh the evidence in the case. (*Nihal Singh* v. *State*,

1965 (1) Cr LJ 105: AIR 1965 SC 26). If there is positive evidence of witnesses, the medical evidence as to the time of death cannot be taken to contradict it, the report of the medical officer being at best an opinion. [*B.B. Boodamaniv* v. *State*, AIR 1961 Mys 21: 1961(1) Cr LJ 120].

In the under-mentioned case [*Shivaji* v. *State of Maharashtra*, AIR 1973 SC 2622: 1973 Cr LJ 1783], the prosecution case was that the deceased was killed around 5.30 p.m. In the post-mortem examination "semi-digested solid food particles" were observed in the deceased's stomach. It was contended on behalf of the accused that the deceased must have come by his end (and that the digestive process must also have come to a halt with it) 2 to 3 hours after his last lunch, according to one of the prosecution witnesses was at 10.00 a.m. The complete digestion takes place in 4 to 5 hours. The death of the deceased must have occurred before 2 p.m., and as such the prosecution version that the occurrence took place around 5.30 p.m. was false. The Supreme Court took into consideration the various factors viz., a vegetable diet containing mostly farinaceous food unsually consumed by Indian does not leave the stomach completely within 6 to 7 hours, after its ingestion; the power of digestibility may remain in abeyance for a long time in state of profound shock and coma" and vary with diabetry habits, believed the prosecution version and held that the medical evidence in the case was not inconsistent with the post-mortem findings. The accused were found guilty and convicted of murder .

In the post-mortem examination, the stomach of each one of the two deceased was found empty. The time of the occurrence according to the prosecution was 5 p.m. It was suggested on behalf of the accused that the occurrence took place not at 5 p.m. but much earlier. The Supreme Court repelled this suggestion observing that normally a vegetable diet containing mostly farinaceous food as usually taken by an Indian does not leave the stomach completely empty within six to seven hours after its ingestion. If the occurrence would have taken place at 2 or 3 p.m. as suggested on behalf of the accused, the mid-day meals unusually taken by the villagers at about 11 a.m. would still be in their stomach and the same would not have been empty at the time of the post-mortem examination. The fact that the stomach of each of the deceased was empty lent assurance to the prosecution version that the occurrence took place at about 5 p.m. (*Charan Singh* v. *State of Punjab*, AIR 1975 S.C. 246: 1974 Cr L J 1253: 1974 SCC (Cri) (735).

From the above discussion the following propositions emerge:

(1) The medical evidence is not perfect as yet so as to determinte the exact time of death of the deceased.

(2) Before an inference as to the time of death can be drawn from the presence/absence of digested/semi-digested food in the stomach and presence/absence of faecal matter in the large/small intestines, there must be definite evidence as to when the deceased had his last meal and what meal consisted of .

(3) Normally food is fully digested within six-seven hours and partially digested within three hours from the time when the deceased took food. However, no such generalisation is possible. It varies from person to person, depends upon the dieting habit, digestion and the state of health of the deceased.

ROLE AND RELEVANCE OF RIGHT TO PERSONAL LIBERTY IN DISTRICT COURTS

Bhanwar Singh, H.J. S.
District Judge

धर्म एव हतो हन्ति धर्मो रक्षति रक्षितः।
तस्माद्धर्मो न हन्तव्यो मा नो धर्मो हतो वधीत।।

Destruction of law and justice brings about the destruction of society; the protection of law and justice has a protective influence. Therefore, law and justice should not be destroyed.

The ideals and aspirations of the people of India have been enshrined in the preamble of our Constitution. It receives to all its citizens, justice, liberty, equality and fraternity. There are three functions of the State namely executive, the legislative and the judicial. The principle of separation of powers has been accepted in our Constitution. The legislative function consists in the enactment of laws which regulates the conduct of the members of the society. The working of the machinery of the government in accordance with these laws falls within the province of the executive. The judicial function consists in determining whether the conduct of the various members of the society and state authorities conform to the law of the land or not. The primary object of the administration of justice is to establish a Rule of law and to create a sense of security among the people by assuring them that the wrong doer will not go unpunished and all just grievances will be redressed so that they may not be tempted to self-help. In order to maintain peace and tranquillity in the society the law established or prescribed by the state has be to followed only then the justice can be imparted to everyone in the society. Equality and fairness are the pillars of the justice.

The principal theme of the Book 'Law, Judges and Justice' written by Hon'ble Mr.Justice S.M.N. Raina (Retd. Judge of High Court of M.P.) is 'Life of law is justice and it is for the judge to breathe the life into law'. While dealing with the spirit of Constitution, Hon'ble Mr.Justice Raina opined that if we carefully examine the various provisions of the Constitution to discover its true spirit, we shall notice distinct aspirations of the people and one for liberty, another for justice and the third for socialism. According to Palkhiwala, civil liberty is the very stone of the Constitution. In my view, justice is the key-stone, Justice for the individual as well as justice for the masses, that is social justice. It assures justice to individual by declaring the basic human rights as fundamental in Part III and justice for the masses by giving directives regarding the policies of the State.

Articles 19, 20, 21 and 22 form one group entitled Right to Freedom. Article 21 guarantees the most essential of all rights the right to life and personal liberty. It runs as follow :

Art. 21 PROTECTION OF LIFE AND PERSONAL LIBERTY

No person shall be deprived of his life or personal liberty except according to procedure established by law.

The object of Article 21 is to prevent encroachment upon a personal liberty by the Executive save in accordance with law. Right to life means something more than survival or animal existence (State of Maharashtra *v.* Chandrabhan, AIR 1983 Supreme Court 803, para I, 20). It would include the right to live with human dignity (Olga *v* Bombay Corporation, AIR 1986 Supreme Court 180 paras 33, 34). It would include all those aspects of life which go to make man's life meaningful complete and worth living (Maneka *v* Union of India, AIR 1978 Supreme Court 597). Prior to the decision of Maneka Gandhi's case, Article 21 was construed narrowly only as a guarantee against executive action unsupported by law. But Maneka's case opened up a new dimension and laid down that it imposed a limitation upon law making as well namely that while prescribing a procedure for providing a person of his life or personal liberty, it must prescribe a procedure which is reasonable, fair and just (Frances *v* Union Territory, AIR 1981 Supreme Court 746, para 3).

Personal Liberty

In Unni Krishnana *v.* State of A.P. [1993 (1) Supreme Court Cases 1234] the Hon'ble Supreme Court has stated that several un-enumerated rights fall within Article 21 since the expression 'personal liberty' is of the widest amplitude. The Hon'ble Court gave the following list –

(1) Right to go abroad, (2) Right to privacy, (3) Right against solitary confinement, (4) Right against Bar Flatters, (5) Legal aid, (6) Speedy trial, (7) Right against hand-cuffing, (8) Right against delayed execution, (9) Right against custodial violence, (10) Right against public hanging, (11) Doctors' assistance and (12) Shelter.

Public interest petitions have also expanded the scope of Article 21. They touch diverse aspects such as children in jail, being entitled to special treatment, health hazard due to pollution, beggers interest in housing, health hazards from harmful drugs, immediate medical aid to injured persons, starvation deaths right to know, right to open trial, inhuman conditions in after care-homes etc.

The word 'law' has been used in the sense of state made or enacted law. The expression procedure established by law means the procedure prescribed by law.

Although the Constitution of India or any other law thereunder does not authorise a district court to implement a law of personal liberty as envisaged under Articles 21 and 22 yet indirectly all the district courts are under a bounden constitutional obligation to see and ensure that the principles of personal liberty are followed in day to day trial of the persons/criminals appearing before the district court.

The subject of study in this Article is to throw light on the relevance and reference to this Article 21 in the day to day working of the trial court. The trial court form the base of judiciary and the bulk judicial work is handled by them. In the application of law and procedure we travel in the arena of Article 21 which can broadly be discussed under following heads :-

1. Fair trial
2. Speedy trial
3. Bail
4. Legal Aid
5. Prisoners
6. Civil prison
7. Hand-cuffing

1. Fair trial

The procedure as established by law under Article 21 of the Constitution must stand the test of 'reasonableness'. The mandate of Article 21 of the Constitution is whether it is an investigation or trial for criminal offence, it should be an open affair. Reasonable and fair procedure is to be followed by the courts. Fairness is ingredient of Article 21 of the Constitution.

Article 22(1) of the Constitution contemplates that no arrested person shall be detained in custody without being informed of the grounds for such arrest. So the Section 50 of Criminal Procedure Code contemplates about the communication of full particulars of the offence for which he is arrested or other grounds for such arrest.

Article 22(1) of the Constitution provides further that a detained person shall not be denied the right to consult and to be defended by a legal practitioner

AIR 1983 Supreme Court 465 (para 11). An undue delay in the execution of sentence of death after its confirmation (413 and 415 Cr. P.C.) for which the accused himself is not responsible, renders the sentence of death harsh and unjust as it causes additional torture and inhuman treatment. It violates Article 21 and accused may approach Hon'ble Supreme Court under Article 32 (Javed *v.* State of Maharashtra, AIR 1985 Supreme Court 231). If the Hon'ble Supreme Court finds the delay to be undue the Hon'ble Court would quash the sentence of death and substitute for it the sentence of imprisonment for life to that accused (Triveni Ben *v.* State of Gujarat, AIR 1989 Supreme Court 870). The District Courts follow in letter and spirit these guidelines to ensure the right of personal liberty.

The principle of speedy trial is no less important in disposal of mercy petitions. Inordinate delay in disposing of mercy petitions by President of India attracts Article 21(AIR 1989 SC 2299(2304).

The principle of speedy trial is not only applicable to the trials but it equally applies to police investigation (AIR 1987 Supreme Court 149). The Sessions and Magisterial Courts from time to time issue instructions in this regard to the investigating agency.

In cases against children for offences punishable with less than 7 years imprisonment the investigation should be completed within three months and trial within six months and when these limits are exceeded the trial is liable to be quashed (1990 (1) Allahabad Criminal Law Journal 178, 179 P & H]. The Courts are always alive of this legal position so as to extend its advantage to the beneficiaries.

3. Bail

The protection of Article 21 is available to all persons arrested or detained, be he a citizen or a non-citizen. Such freedom is also extended even to persons convicted only to the limitations imposed by his conviction under the law. The new Code of Criminal Procedure, 1973 including the provisions of bail have been enacted regard being had to the new dimensions which the Hon'ble Supreme Court has given to the expressions 'Deprived', 'Personal Liberty', and 'procedure established by law' in Article 21 of the Constitution. Article 22(2) of the Constitution requires a person arrested and detained, to be produced before nearest Magistrate within a period of 24 hrs. of such arrest and no such person shall be detained in custody beyond the said period without any authority of the Magistrate. Section 57 of Cr. PC contemplates that a person arrested, cannot be detained for more than 24 hrs. without a special order of the Magistrate under

Section 167 Cr. P.C. Section 167(1) and (2) prescribe the mode of exercise to detain the arrested person beyond 24 hrs. for term not exceeding 15 days but in no case beyond 90 days where the investigation relates to an offence punishable with death, imprisonment for life, or for a term not less than 10 years, and beyond 60 days where investigation relates to any other offence. Sections 209(b) and 309(2) deal with the detention pending enquiry or trial. If there is no valid order of detention under Section 167(2), 209(b) and 309(2), his detention would be in contravention of Articles 21 and 22(2) of the Constitution and accused would be entitled to be released on bail. In bailable offences the accused has a right to be released on bail under Section 436 Cr PC but in non-bailable offences under Section 437 Cr PC, it is the discretion of the court to grant bail. Bail would ordinarily be refused if it appears that there are reasonable grounds for believing that the person has been guilty of an offence punishable with death or life imprisonment. But in such cases also the court has discretion to grant bail to a person under 16 years woman, sick or infirm person for any other special reason. Section 438 Cr PC deals with the anticipatory bails but it has not been applicable in State of Uttar Pradesh. This provision of anticipatory bail has not been made applicable in certain special Acts like Terrorist and Disruptive Activities (Prevention) Act, 1985 and the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

As regards the children, the Juvenile Justice Act, 1986 was passed to achieve a uniform juvenile justice system throughout the country as the judicial system available for adults was not considered suitable to them. Under this Act it has been ensured that no child in any circumstance is lodged in jail or police lock-up by establishing juvenile welfare boards and juvenile courts. The provisions of Article 21 of the Constitution have been invoked as regards the bail and custody of juveniles. Section 18 of the Act provides that when a juvenile is arrested and detained in a bailable and non-bailable offence he shall be released on bail with or without surety. He shall not be so released if his release is likely to bring him into association with any known criminal or expose him to moral danger or that his release would defeat the ends of justice. In case the bail is not granted then he shall be sent to observation home instead of being sent to jail.

Keeping in view the age and circumstances of Juvenile, a special protection has been given to them under the Juvenile Justice Act, such as not awarding them death sentence, or imprisonment or committing to prison in default of payment of fine or in default of furnishing security (Section 22) not proceeding against them under Chapter VIII of Criminal Procedure Code (Section 23) or not charging or trying them for any offence together with a person who is not a juvenile. (Section 24). The District Courts, the Juvenile Courts in particular keep

a strict vigil to carry out these fundamental principles.

4. Legal Aid

This is the constitutional obligation of State Government to provide free legal aid to an indigent accused at the very first stage when the accused is produced before the Magistrate or Sessions Judge for trial. The Presiding Officers of criminal courts appoint amicus curiae to represent the accused who are unable to engage a lawyer on account of their poverty. Even if accused pleads guilty, the Magistrate is still under obligation to inform him about free legal services.

Under the new Criminal Procedure Code, 1973, Section 304 provides for legal aids to the accused at State expenses where an accused has no sufficient means to engage a pleader. This fundamental right arises in every case (before a Magistrate or Sessions Judge) that involves a jeopardy to the life of personal liberty of the accused-person, hence it imposes a legal duty upon the court before whom accused appears to inform him that if he is unable to engage the services of a lawyer, on account of poverty, or indigence, he is entitled to obtain free legal service at the cost of the State. This is not dependent upon an application being made by the accused for free legal assistance. This also amounts to fairness of trial as enshrined in Article 21 of the Constitution.

5. Prisoners

Prisoners are also human beings and they do not deserve an inhuman treatment as regards their diet, medical treatment, cleanliness and teaching of useful trade etc. at the hands of jail authorities. The jail inspections are made by the Chief Judicial Magistrate quite often to see the condition of under-trials and prisoners. Prisons are built with stones of law, and so it behoves the court to insist that in the eye of law the prisoners are persons, not animals. They are entitled to human dignity. It is not necessary to take them to court in hand-cuffs or taking back in hand-cuffs unless the prisoner being so dangerous and desperate character and the circumstances being hostile to safe keeping. The prisoner like other person, is entitled to invoke Article 21 for protection of his rights. A convict can make an appeal under Section 383 of Cr. P.C. through Jail authorities. He has a constitutional right to get free legal aid at the expenses of State, denial of such rights will contravene the provisions of Article 21 of the Constitution. An amicus curiae is appointed by Criminal courts where the undertrial goes unrepresented by any Advocate, representing the accused in trial. This is very much in consonance with his right under Article 22 of the Constitution.

The period of detention of an accused is also adjusted with the period of

imprisonment awarded by the courts. Keeping any person in custody beyond legally permitted time violates Article 21 and it entitles him for compensation for such period.

6. Civil Prison

In civil cases where the liberty of the person is curtailed by way of arrest and detention, in execution of decree judgment debtor can be detained in civil prison only for a certain period as specified in Section 58 of C.P.C. and may also be released on the grounds of illness (Section 59). Section 56 C.P.C. provides that the court shall not order the arrest of detention in the civil prison of a woman in execution of decree for payment of money.

An order of arrest and detention of judgment debtor to civil prison, is only made under exceptional circumstances where it is alleged that he is willfully, with malafide intention, refusing to pay the decretal amount in spite of having sufficient means, otherwise as long as there is no dishonesty and malafides on the part of judgment debtor to discharge his obligation committing him to civil prison will amount to violation of Article 21 of the Constitution.

This, in civil matters also, Article 21 is invoked where there is a curtailment of personal liberty by way of arrest and detention of judgment-debtor under C.P.C. in execution matters.

7. Hand-cuffing

The scope of Article 21 is very wide. It is applicable even in cases where the accused person is arrested and produced in the court in custody. The manner in which he is produced in custody before the court is also relevant, whether he be produced hand cuffed or without it. Various decisions of Hon'ble High Court and Hon'ble Supreme Court have condemned the practice of police officer hand cuffing accused when such hand-cuffing is not necessary in the circumstances of case. Any such procedure will be unfair and bad in law under Article 21 of the Constitution of India.

In Prova Narain *v.* State of Madhya Pradesh, 1987, Cr L J 339, (M.P.), the learned Magistrate condemned the police for not producing accused hand-cuffed in the court. However, police thereafter produced them in hand cuffs and then ultimately the learned Magistrate granted their bail in non-bailable offences. This order of Magistrate directing accused persons to be produced hand cuffed was challenged before Hon'ble High Court of Madhya Pradesh. The Hon'ble Court observed that there is nothing in Section 437 Cr. P.C. even remotely to suggest

that unless a person is hand-cuffed he is not entitled to be heard on the question of his release on bail. The learned Judge pointed out rightly that it is fallacious to equate the question of custody or restraint with the hand-cuffing of the person concerned. Section 46 Cr. P.C. provided that unless there may be submission to the custody by words or action, person making arrest may touch or confine the body of the person to be arrested. Section 49 of the Code lays down that a person arrested shall not be subjected to more restraint than is necessary to prevent his escape. A person may himself surrender and this would entitle him to move an application for grant of bail.

The criminal courts at the district level daily come across with such situation where the accused wanted in any case during investigation or where there is a non-bailable warrant against him pending trial surrenders before the court and is taken into custody and sent to jail. But under these circumstances the court never directs the police to hand cuff them immediately.

In State of U.P. *v.* Deonan AIR 1969 S C 1125, the Hon'ble Supreme Court while considering whether a person may be held in custody of a police officer, without being hand cuffed within the meaning of the expression used in Section 27 of Evidence Act has held that without being in hand-cuffs, a person can be held in custody. Therefore, to be in custody of a police officer, and to be produced before the Magistrate, the hand-cuffing is not necessary.

In Prem Shankar *v.*. Delhi Administration, AIR 1980 Supreme Court 1535, the Hon'ble Supreme Court observed that putting of hand-cuffs to the accused are nothing but summary punishment vicariously imposed at police level which is obnoxious and irreversible. Hon'ble Supreme Court further observed that 'Even in cases where in extreme circumstances hand-cuffs had to be put on the prisoner, the escorting authority must record contemporaneously, the reasons for doing so. Otherwise under Article 21, the procedure will be unfair and bad in law .... Once the court directs that hand-cuffs shall be off, no escorting authority can over-rule judicial direction. This is implicit in Article 21 which insists upon fairness, reasonableness and justice in the procedure which authorises stringent deprivation of life and liberty'. The Hon'ble Supreme Court directed the State government to frame appropriate rules as regards the circumstances in which it will be necessary for the police to hand-cuff on accused while producing him before the court. This direction again came up before Hon'ble Supreme Court in connection with the alleged hand-cuffing of a Delhi Advocate contrary to law, while he was being taken to court of Metropolitan Magistrate of Delhi, after he had been arrested in connection with criminal offence. Hon'ble Supreme Court directed Union of India to frame rules of guidelines as regards the circumstances in which

the hand-cuffing of accused should be resorted to in the light of the directions in Prem Shankar Shukla's case, and circulate them amongst all the State governments and the governments of Union Territories (AIR 1988 Supreme Court 1768 Aeltemesh Rein Advocate Supreme Court of India *v.* Union of India).

In Delhi Judicial Service Association, Tis Hazari Courts *v.* State of Gujarat, 1991 Cr LJ 3086, the Hon'ble Supreme Court, on considering the finding recorded by Commissioner appointed by it, held that there was no justification for extraordinary and unusual behaviour of police officer justifying the hand-cuffs and ropes on the body of N.L. Patel, Chief Judicial Magistrate, that the justification given by them is flimsy and preposterous and that they acted in utter disregard of court's direction in Prem Shankar Shukla's case. The Hon'ble Supreme Court has condemned such action of hand-cuffing of a senior judicial officer.

On the basis of above-discussion and decisions of the Hon'ble Supreme Court, it is clear that the criminal courts at District level adhere to the directions of Hon'ble Supreme Court in their daily routine work of hearing bails of accused-persons produced in custody or surrendering themselves before the court. The court further is to see that ordinarily the accused should not be produced in hand-cuffs and only in exceptional cases, it can be permitted where the prisoner is a man of dangerous and desperate character and the circumstances being hostile to safe-keeping. If the prisoner has been produced in hand-cuffs, the escorting authority must record contemporaneously, the reasons for doing so. Under these circumstances, the Magistrate should insist the escorting party producing any accused in hand-cuffs as to whether he has recorded any reason or not.

Thus the courts are the carriers of message of life and personal liberty as enshrined in Article 21 of the Constitution. The Presiding Officers of the Sessions and Magisterial Courts are true torch bearers of personal liberty of human beings - who crave before them for justice in accordance with the principles laid down in our Constitution. In other words while imparting justice Judges and Magistrates of District Courts fulfil their constitutional obligation on the basis of enacted law and prescribed by law and in the words of Woodrow Wilson also 'Justice is rooted and grounded in the fundamental instincts of humanity'.

ADMINISTRATIVE DISCRETION

P. D. Kaushik

H. J. S.

DISCRETION IS ANTITHESIS OF JUDICIOUSNESS and has theoretically no room in the Rule of law. No authority has liberty of acting or deciding in arbitrary or discriminative manner.

In the year 1950, Supreme Court emphasised on necessity of distinguishing judicial and quasi judicial acts from an administrative or purely ministerial act, for the purpose of deciding whether the executive action was justiciable.[1].

The apex Court observed ; "The question is where to draw a line which demarcates the executive or purely administrative acts from a judicial or quasi judicial acts", and on consideration of large number of authority ultimately held, that "there is an indefinable, yet an appreciable, difference between the doing of an executive or administrative act and a judicial or a quasi-judicial act. The question, however, whether an act is a purely ministerial or a judicial one depends on the facts and circumstances of each case. The question whether an act is a judicial or a quasi-judicial one or a purely executive act depends on the terms of the particular rule, the nature, scope and effect or the particular power in exercise of which the act may be done." The basic question therefore for decision is whether the Government is a body of persons having legal authority to determine questions affecting the rights of subjects and secondly, to the extent to which it has and in performing that duty has it the DUTY TO ACT JUDICIALLY.[2]

The aforementioned distinction was maintained in England as well between judicial and administrative actions. If an authority was acting judicially its conduct was subject to the control by the court by means of certiorari and mandamus. But if the authority was acting administratively its decision were exempted from any control by the courts. However in case reported in 1968 AC 997 (famous padfield case) it was observed- "It is said that the decision of the Minister is administrative and not judicial, but that does not mean that he can do as he likes, regardless of right or wrong. Nor does it mean that the courts are powerless to correct him. Good administration requires that complaints should be investigated and that grievances should be remedied. "It was also observed by Lord Parker, CJ in case reported in 1967 2QB 6.7 "Good administration and an honest or bonafide decision must, as it seems to me, require not merely impartiality, nor

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1. A.I.R.1952 S.C. 222 **Province of Bombay v. Kaushal Das**
2. A.I.R.1962 S.C. 1622 (1647) **Ujjam Bai v. State of U.P.**

merely bringing one's mind to bear on the problem, but acting fairly;"

As a result of these cases the distinction between 'judicial' and 'administrative' has been diminished, before Courts in England and 'administrative' decision is not exempt from review simply because it is administrative decision, and it is settled that even administrative body has the DUTY TO ACT FAIRLY.

In UJJAM BAI'S case the Supreme Court of India has observed that "a mere declaration of the fundamental rights would not be enough, so our constitution entrusted the duty of enforcing them to the Supreme Court, the highest judicial authority in the country. Constitution in effect promises to usher in a welfare state for our country ; and in such a state the legislature has necessarily to create innumerable administrative tribunals, and entrust them with multifarious functions. They will have powers to interfere with every aspect of human activity. If their existence or necessary for the progress of power by them the abuse of power by them may bring about an authoritarian or totalitarian state. The existence of the aforesaid power in this Court and the exercise of the same effectively when the occasion arises is a necessary safeguard against the abuse of the power by the administrative tribunals."[3]

A civil surgeon who was granted leave preparatory to retirement was ordered by the state, revoking his leave, recalling him on his duty, simultaneously placing him under suspension and directing departmental inquiries. The surgeon challenged the order on the ground that the Chief Minister of Punjab was personally hostile to him and the orders were passed on the behest of Chief Minister to seek personal vengeance. The Supreme Court observed, "In considering the evidence we have kept in view the high position which the Chief Minister holds in the State and are conscious of the fact that charges of personal nature made against such a dignitary are not to be lightly accepted." However, the Court further observed, "The Constitution enshrines and guarantees the rule of law and Art. 226 is designed to ensure that each and every authority in the state, including the Government acts bonafide and within the limits of its power and we consider that when a Court is satisfied that there is an abuse or misuse of power and its jurisdiction is invoked, it is incumbent on the Court to afford justice to the individual." Ultimately the executive action was set aside by apex Court holding that the Court was satisfied that dominant motive which induced the Government to take action against the appellant was not to take disciplinary proceedings against him for misconduct which is bonafide believed he had committed, but to

3. A.I.R.1964 S.C. 72 (81) **Pratap Singh Kairon v. State of Punjab.**

wreak vengence on him, since he had made serious allegations against Chief Minister in the Article which appeared in the news magazine BLITZ in its issue dt. January 15, 1961 followed by the communication to the same newspaper by the appellant's wife, in which those allegations were affirmed.

Where powers are conferred on public authorities to exercise the same when "they are satisfied" or when "it appears to them", or when in their opinion "a certain state of affairs exists ; or when powers enable public authorities to take "such action as they think fit" in relation to a subject-matter, the Courts will not readily defer to the conclusiveness of an executive authority's opinion as to the existence of a matter of law or fact upon which the validity of the exercise of the power is predicated. However, administrative decisions in exercise of powers even conferred in subjective terms are to be made in good faith on relevant considerations.[4]

At one time it was considered that principles of natural justice apply only to judicial proceedings and not to administrative proceedings. In Meneka Gandhi's case, the apex Court was dealing with the controversy whether before impounding the passport it was necessary to give an opportunity of being heard to the person concerned under the provision of passports Act 1967. The apex Court held, "Although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature. The principle of audi alteram partem, which mandates that no one shall be condemned unheard is part of the rules of natural justice. Natural justice is a great humanising principle intended to invest law with fairness and to secure justice and over the years it has grown into a sidely pervasive rule affecting large areas of administrative action." The Supreme Court of India ultimately concluded, "The law must now be taken to be well settled that even in an administrative proceeding, which involves civil consequences, the doctrine of natural justice must be held to be applicable."[5]

Hon'ble Justice Krishna Iyer has in case of M/s Avon Services Production Agencies (P) Ltd., held that under the provision of Section 10, Industrial Disputes Act the Government exercises the administrative power and the action of the Government in making the reference is an administrative act, and the adequacy or sufficiency of the material on which the opinion was formed was beyond the pale of judicial scrutiny.[6] However, in case of *Baldev Raj* v. *Union of India* Justice Krishna Iyer opined that although judges cannot substitute their judgment for

4. 1974 (2) S.C.C. 687 **M.A. Rasheed v. State of Kerala.**
5. A.I.R. 1978 SC 599 **Meneka Gandhi v. Union of India.**
6. A.I.R. 1979 S C 170 M/s Avon Services Production Agencies (P) Ltd.

that of the Administrator but they are not absolved from the minimal review well settled in administrative law and founded on constitutional obligations. It was observed further that the court is confined to an examination of the material merely to see whether a rational mind may conceivably be satisfied that the compulsory retirement of the officer concerned is necessary in public interest. Justice Krishna Iyer ultimately held that "Absolute power is anathema under our constitutional order. 'Absolute' merely means wide not more, naked and arbitrary exercise of power is bad in law.[7]

In famous S.R.Bommai's case, an important controversy arose before apex Court. It was contended by Sri Parasaran appearing for the Union of India that while in the field of administrative law, the Court's power extends to legal control of public authorities in exercise of their statutory power and therefore not only to preventing excess and abuse of power but also irregular exercise of power, the scope of judicial review in the constitutional law extends only to preventing actions which are unconstitutional or ultra vires the Constitution.

The contention of Sri Parasaran mentioned above was not accepted by the apex court. The apex Court observed, "We also find that many of the parameters of judicial review developed in the field of administrative law are not antithetical to the field of constitutional law, and they can equally apply to the domain covered by the constitutional law. The validity of the proclamation issued by the President under Article 356(1) is judicially reviewable to the extent of examining whether it was issued on the basis of any material at all or whether the material was relevant or whether the Proclamation was issued in the malafide exercise of the power."[8]

Life Insurance Corpn. of India framed various kinds of life insurance policies based on economic criteria. A controversy arose before apex Court whether the life insurance corporation is free to incorporate as a part of its business principles, any term of its choice. A particular type of policy was restricted to only employees of government, quasi-government or reputed commercial firms. It was argued on behalf of life insurance corporation that the matter was not justiciable.

However, the apex Court held, "Life Insurance Corporatin owe a public duty to evolve their policies subject to such reasonable, just and fair terms and conditions accessible to all the segments of the society for insuring the lives of eligible persons. The offending clause extending the benefit only to the salaried class in Government, semi-government and reputed firms is unconstitutional.

7. A.I.R.1981 S.C. 70 **Baldev Raj v. Union of India**.
8. Judgment Today 1994(2) SC 215 **S.R. Bommai & Ors. v. U.O.I.**

The apex Court in its judgment held that the distinction between public law and private law remedy is now narrowed down. Inviting the public to enter into contract of life insurance, is not a pure and simple private law dispute. The judgment delivered by the apex court is the ultimate conclusion on the subject.

"Every action of the public authority or the person acting in public interest or its acts give rise to public element, should be guided by public interest. It is the exercise of the public power or action hedged with public element becomes open to challenge, if it is shown that the exercise of the power is arbitrary, unjust and unfair, it should be no answer for the State, its instrumentality, public authority or person whose acts have the insignia of public element to say that their actions are in the field of private law and they are free to prescribe any conditions or limitations in their actions as private citizens, simplicitor, do in the field of private law, its actions must be based on some rational and relevant principles. It must not be guided by irrational or irrelevant considerations. EVERY ADMINISTRATIVE DECISION MUST BE HEDGED BY REASONS."[9]

Administrative action can not escape the sweep of Articles 14 and 16 of the Constitution of India. If power to relax the educational qualification of a certain post has been exercised in some cases, the same cannot be refused in favour of others. The state acts must not only be non-discriminatory but should also be free from arbitrariness, unreasonableness and unfairness.[10]

Recently saving Taj Mahal from polluting industries, monitoring allotment of Government houses, supervising the probes of C.B.I. from HAWALA to HILL MOVEMENT whereever administrative action or inaction has batrayed the people. Judicial review have demanded accountability in administrative actions. To maintain democracy, rule of law, commitment to justice, arbitrary and discretionary exercise of power in the administration need judicial review, to give people a sign of relief and to fulfil the aspirations of makers of the constitution.

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9. Judgment Today 1995(4) SC 366 Inre **Life Insurance Corpn. of India.**
10. Smt. Mandavi Gupta v. **State.** 1994 (2) U.P. Local Bodies & Educational cases page 1034 at 1040.

INJUNCTION AGAINST RECOVERY OF PUBLIC DUES

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There are more than one enactment dealing with recovery of public dues These enactments also contain provisions regarding grant of injunctions against proceedings to recover such dues. The purpose of this article is to examine these provisions.

Public dues are of various kinds, like land revenue, taxes, loans advanced by the government or financial institutions etc. There are general laws for recovery of public dues and there are also special laws dealing with the dues of a particular kind or nature. These special laws prescribe their own procedure for recovery of the dues. Some of these laws put restrictions on the power of the court to grant injunction against proceedings to recover the dues. It is intended to deal herein with the general laws and the special laws so far as they put fetters on the powers of the Court.

The general law of injunctions is contained in Order 39 of the Code of Civil Procedure, 1908, (Code). This provision, as originally enacted, did not put any fetters on the powers of the court to grant injunctions against proceedings to recover public dues. In the course of time it was noticed that unscrupulous persons had obtained injunctions on false or concocted facts. This affected not only the government and the public institutions but the public itself, as governments and public institutions exist to serve public interest, and to serve this interest they require money. When recovery of public money is stalled, the pace of progress of welfare schemes may slow down. It was therefore considered necessary by the U.P. Legislature to put restrictions on the power of the court to grant injunctions. This was done by effecting a local amendment, which it was competent to make as the subject falls in the concurrent list, through U.P. Act No. 57 of 1976.

By this amendment a proviso was added to Order 39, Rule 2 putting fetters on the grant of injunction in respect of all the matters enumerated in its clauses (a) to (h). Its relevant portion runs as under :

> "Provided that no such injunction shall be granted
>
> .....
>
> (g) to stay the proceedings for the recovery of any dues recoverable as land revenue unless adequate security is furnished.
>
> .....

and any order for injunction granted in contravention of these provisions shall be void."

This provision does not completely take away the power of the civil court to grant injunction staying the proceedings for recovery of the dues. It only puts a fetter and the fetter is that the court has to obtain security from the person seeking the injunctions of stay of recovery. The failure of the court to observe this precaution renders the injunction order non-est or void. The consequence is that the violator of the order will not be liable to be punished for contempt or to be proceeded against under Rule 2-A. It is therefore in the interest of the applicant to ensure that the order passed in his favour required him to furnish adequate security. He should not feel happy when the court either deliberately or inadvertently does not require him to furnish security while granting the injunction. His happiness will soon turn into remorse when the person to whom the injunction is addressed does not follow it and his application for action under Rule 2-A or under the Contempt of Courts Act is rejected. He should realize that it is a statutory burden which even the court is not competent to relieve him of.

It may however be noted that the above amendment of the C.P.C. is not an enabling provision conferring power upon the Civil Court to grant injunction against recovery of any dues recoverable as land revenue after taking the security. It simply puts fetters on the power of the Court to grant injunction and the real impact of this provision is that even in those cases where the Civil Court could otherwise grant injunction restraining recovery of any amount recoverable as land revenue under other laws, the same cannot be granted after this amendment unless adequate security is taken.

Let me now consider the laws on the point as to what sums are recoverable as land revenue and what is the law relating to their recovery and whether the jurisdiction of the Civil Court has been barred in such matters.

The U.P. Zamindari Abolition and Land Reforms Act, 1950 (ZA Act) contains provisions relating to recovery of land revenue. These provisions apply to recovery of the land revenue and also to recovery of other dues declared by the statute to be recoverable as land revenue. Chapter X deals with both assessment of land revenue and recovery thereof.

Section 330 of the Z.A. Act bars jurisdiction of the Civil Courts in certain matters. Its relevant portion runs as under :

"Save as otherwise provided by or under this Act, no suit or other proceeding shall lie in any Civil Court in respect of

.....

(c) the assessment or collection of land revenue under Chapter X or the recovery

of any sum of money recoverable as arrears of land revenue."

Thus this section bars the jurisdiction of the Civil Court in the matter of recovery of land revenue and any sum recoverable as land revenue and the only mode to challenge the recovery is to follow the procedure provided in the Act itself ("save as otherwise provided by or under this Act . . . . . ")

The next question is what is "otherwise provided."? The reply is contained in Section. 287 A of the Z.A. Act which was inserted by the U.P. Act No. 34 of 1974 in the principal Act. This section as amended up to date runs as under :

> "**Payment under protest and suit for recovery.**--(1) Whenever proceedings are taken under this Chapter against any person for the recovery of any arrear of land revenue or for the recovery of any sum of money recoverable as arrear of land revenue he may pay the amount claimed under protest to the officer taking such proceedings, and upon such payment, the proceedings shall be stayed and the person against whom such proceedings were taken may sue the State Government in the Civil Court for the amount so paid and in such suit the plaintiff may, notwithstanding anything contained in Section 278, give evidence of the amount, if any, which he alleges to be due from him.
>
> (2) No protest under this section shall enable the person making the same to sue in the Civil Court, unless it is made at the time of payment in writing and signed by the person or by an agent duly authorised in this behalf."

Thus the only mode permissible under law to challenge the recovery of an amount recoverable as arrears of land revenue is to deposit the amount under protest and then sue the Government for the amount. The protest as provided under sub-section (2) must be in writing, signed by the party or his duly authorized agent, and must have been made at the time of payment.

The Code is a procedural enactment while Z.A. Act is a substantive statute which contains certain matters of procedure also. It is a special enactment and therefore the provisions of the Code will apply only to the extent they are not inconsistent with the provisions of the Z.A. Act. Z.A. Act does not bar the filing of civil suit in respect of proceedings for recovery of land revenue. However the stage for filing the suit is reached only after the amount sought to be recovered has been deposited with the officer proceeding with the recovery. Since the stage for filing civil suit is reached only after deposit or payment of the amount under protest, it is obvious that the court will have no occasion to grant interim injunction

restraining the authority from recovering the amount. In this manner, the bar to pass an order of injunction is imposed indirectly and not directly ; but it, in fact, amounts to a complete bar on the powers of the Court to grant an injunction restraining recovery of an amount recoverable as land revenue.

Section 3 of the U.P. Public Moneys (Recovery of Dues) Act, 1972 (as amended by the U.P. Act No. 17 of 1975) also provides for recovery of certain dues as arrears of land revenue. It provides that

(i) where any person is a party to any agreement relating to a loan, advance or grant given to him or relating to a credit in respect of, or relating to hire purchase of goods sold to him,

(a) by the State Govt. or the Corporation by way of financial assistance, or

(b) by a Banking Co. or a Govt. Co. under a State sponsored scheme, or

(ii) Where any person is a party to any agreement relating

to a guarantee given by the state Govt. or the Corporation in respect of a loan raised by an industrial concern, or

(iii) Where any person is a party to any agreement providing that money payable thereunder to the State Govt. or the Corporation shall be recoverable as arrears of land revenue

And if any such person commits default in payment in accordance with the terms of the agreement, the amount may be recovered from him as arrears of land revenue after issuing a recovery certificate to the Collector.

The terms 'Corporation', 'financial assistance', 'Banking Company', 'Govt. Company', 'State-sponsored scheme' and 'industrial concern' have been defined in Section. 2(a), (b), (f), (c), (g) and (d) respectively.

The following persons have been authorised to issue the recovery certificate under this Act :

(i) In case of the State Govt., the officer authorised by the State by a notification in the Official Gazette.

(ii) In case of a Corporation or a Govt. Co., the Managing Director or where there is no Managing Director, the Chairman.

(iii) In case of a Banking Co., the local agent.

Where the party disputes his liability to pay the amount, or disputes the correctness of the amount, he has to deposit the amount under protest and then

he can make a reference for arbitration under the proviso to sub-clause (4) of Section 3. This provision is similar to that contained in Section 287-A of the U.P.Z.A. & L.R. Act.

Sub-section (5) of Section 3 puts a complete bar on the jurisdiction of the Civil Court to call in question the recovery certificate issued under sub-section (1) and it also prohibits the court from granting any injunction to restrain any action taken or intended to be taken under this Act. It runs as under:

> "Save as otherwise expressly provided in the proviso to sub-section (4) of this section or in Section 183 of the U.P. Land Revenue Act, 1901 or Section 287-A of the U.P. Zamindari Abolition and Land Reforms Act, 1950 every certificate sent to the Collector under sub-section (1) shall be final and shall not be called in question in any original suit, application (including any application under the Arbitration Act, 1940) or in any reference to arbitration, and no injunction shall be granted by any court or other authority in respect of any action taken or intended to be taken in pursuance of any power conferred by or under this Act."

It will be useful to go through some case law also on the point. In *Dr. Aziz Haider* v. *State of U.P.*[1] where the petitioner had challenged the proceedings for recovery of the amount of loan of a Bank which was being realised as the arrears of land revenue, their lordships, dismissing the petition, observed that when the alternative remedy to deposit the amount under protest and then file a civil suit for its refund was available u/s. 287-A of the UPZA & LR Act, there were no grounds for exercising discretionary jurisdiction under Art. 226 of the Constitution of India. The petitioner also made a prayer for grant of instalments to repay the amount, but their Lordships observed that the petitioner should approach the concerned Bank, whose amount was due from him, for this relief and refused to make any order in this regard also.

As regards maintainability of a suit seeking injunction to restrain recovery of an amount being recovered as arrears of land revenue, a Division Bench of the Hon'ble Allahabad High Court has in *M/s. Comet Filament India Ltd.* v. *Pradeshiya Industrial and Investment Corporation of U.P. Ltd.*,[2] where the amount of loan given by the PICUP to M/s. Comet Filament India Ltd. was being realised as arrears of land revenue, laid down that such a suit for injunction to stay recovery proceedings of that loan amount was not maintainable. Their Lordships observed:

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1 1987 (1) AWC 750 (DB).
2 1988 ALJ 1246 (DB).

> "In our opinion sub-section (5) of Section 3 of the Recovery Act (U.P. Public Moneys Recovery of Dues Act) creates an absolute bar against granting injunction by any Court or Authority in respect of any action taken under the Recovery Act for recovery of the amount which shall be recovered as arrears of land revenue."

However in *Himalaya Textile Corporation* v. *U.P. State Finance Corporation U.P., Kanpur,*[3] another Division Bench of Hon'ble High Court of Allahabad took a different view and observed :

> "There is no provision express or implied in State Finance Corporation Act, 1951 which prohibits the filing of a suit. There is no such provision also in the U.P. Public Moneys (Recovery of Dues) Act, 1972 read with U.P. Public Moneys (Recovery of Dues) Amendment Act, 1975."

It was held in this ruling that an injunction could be issued under Order 39, Rule 2 C.P.C. to stay proceedings for recovery of any dues recoverable as Land Revenue after taking adequate security from the plaintiff as provided in Clause (g) of the proviso to Rule 2.

There is, thus, a conflict between the aforesaid ruling in *Himalaya Textile Corporation* v. *U.P. State Finance Corporation Kanpur,*[3] and the earlier ruling in *M/s. Comet Filament India Limited* v. *PICUP Ltd.,*[2] It appears that sub-section (5) of Section 3 of the U.P. Public Moneys (Recovery of Dues) Act quoted above was not brought to the notice of the Bench which heard the case of *M/s. Himalaya Textile Corporation.*[3] The earlier Division Bench decision also does not appear to have been cited.

A Full Bench of the Hon'ble Allahabad High Court has laid down in *Ganga Saran* v. *Civil Judge, Hapur,*[4] that whenever there is a conflict between two rulings given by the Benches of equal strength, that ruling which lays down the law more accurately should be followed. In view of the fact that Section 3(5) of the U.P. Public Moneys (Recovery of Dues) Act, was considered in *Comet Filament*[2] but not in Himalaya Textile,[3] it is possible to say that the former ruling lays down the law more accurately and therefore deserves to be followed.

The view taken in the case of *Comet Filament* [2] has been followed in the subsequent decision in *Gharam Singh* v. *S.D.O., Badaun*[5] where the petitioner had challenged the recovery proceedings of the loan amount of a Bank which was being recovered as arrears of land revenue. His lordship, referring to a ruling

3 AIR 1989 All. 85 (DB) : 1989 ALJ 823.
4 AIR 1991 All. 114 (FB).
5 1992 (2) A.W.C. 1175.

of the Hon'ble Supreme Court in *Asstt. Collector C.E.* v. *Dunlop India Ltd.*[6] in which the practice of interfering in the matter of recovery proceedings has been deprecated, held that the proper procedure for the petitioner was to deposit the amount under protest and then to file a civil suit for its refund under Section 287-A of the UPZA and LR Act and the writ was dismissed. However, in this case the Hon'ble Court permitted the petitioner to deposit the amount in instalments on compassionate grounds.

Recetly in *Sri Gopal ji* v. *Krishi Utpadan Mandi Samiti*[7] where the dues of the Mandi Samiti were being relized as arrears of land revenue u/s. 20 of the U.P. Krishi Utpadan Mandi Adhiniyam 1964, the Hon'ble High Court Allahabad reiterated the view that no injunction could be granted in a civil suit to restrain recovery of the above amount in view of the bar provided in sections 287-A and 330(c) of the U.P.Z.A. & L.R. Act and confirmed the order refusing injunction.

It may also be noted that where it has been provided in the agreement that the amount would be recoverable as arrears of land revenue, the same can be recovered as such ; and it is immaterial that it was not specifically mentioned that the provisions of the U.P. Public Moneys (Recovery of Dues) Act, 1972 shall be applicable to the recovery proceedings. The provisions of the above Act would apply to the case in spite of this omission.[8]

However, where the recovery certificate has not been issued by a competent authority, it is invalid, and in that case it is open to the Court to grant appropriate relief in the matter.[9] But the mere wrong mention of the section in the recovery certificate would not invalidate it, if it has been signed by a competent authority and is otherwise valid. In that case, it is not open to the Court to grant any relief.[10]

As regards the recoveries being made under the provisions of the Income Tax Act, 1961, the provisions relating to it are contained in Chapter XVII Part D (Sections 220 to 232) under which the Tax Recovery Officer has been authorised to recover the amount by taking resort to various methods provided therein. The jurisdiction of the Civil Court has been barred u/s. 293 of the Act which runs as under :

> "No suit shall be brought in any Civil Court to set aside or modify any proceeding taken or order made under this Act . . . . ."

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6 AIR 1985 SC 330.
7 1996 R.D. 206 (HC)
8 M/s. Jaishree Poultry Feed Industries v. State of U.P., 1991 (1) AWC 13 (DB).
9 Veer Traders v. Auto Tractors Ltd., 1988 A.L.R. 17 (DB).
10 Pawan Cold Storage v. State of U.P., 1993 (2) A.W.C. 892.

It has been laid down by the Hon'ble Supreme Court in *Kalwa Devadattam v. Union of India*. that section 67 of the Income Tax Act, 1922 bars jurisdiction of the Civil Court to set aside or modify any assessment or to pass any such order which has got the similar effect of setting aside or modifying the assessment. This ruling applies with full force to Section 293 of the Income Tax Act, 1961 also which is similar in terms to Section 67 of the old Act.

A suit for declaration to the effect that the plaintiff was benamidar of defendants No. 1 to 4 in respect of suit properties and for injunction to restrain the Income Tax Authorities from including those properties in his personal assessment has been held to be barred.[12] Similarly a suit for declaration that the assessment against the joint family represented by the father of the plaintiffs did not bind them and that their properties could not be sold for realization of the income tax amount is also barred.[13]

The position is almost the same in respect of Trade Tax dues also. Under Section 8(8) of the U.P. Trade Tax Act, 1948 the trade tax arrears are to be recovered as arrears of land revenue. This sub-section runs as under :

> "Any tax or other dues payable to the State Government under this Act, or any amount of money which a person is required to pay to the assessing authority under sub-section (3) or for which he is personally liable to the assessing authority under sub-section (6) shall, notwithstanding anything contained in any other law for the time being in force and subject to any special or general order of the State Government, be recoverable as arrears of land revenue, or in the prescribed manner by the assessing authority or any other officer authorised by the State Government in that behalf and such authority or officer shall, for the purposes of such recovery -
>
> (i) have all the powers which a civil court has under the Code of Civil Procedure, 1908 for the purpose of recovery of an amount due under a decree,
>
> (ii) have the power to require the assessing authority or such authorised officer, having jurisdiction in any other area to make such recovery if the defaulter is or has property within the area of such other assessing authority or officer, and thereupon such other assessing authority or officer shall proceed to make

11 AIR 1964 SC 80.
12 Lalji Haridas Vs. Mulji Manilal AIR 1966 Guj. 159. (DB).
13 K. **Devadattam Vs. Union of India**, AIR 1958 A.P. 131. (DB).

recovery in the prescribed manner."

Section 17 of the Act bars jurisdiction of the Court in respect of assessments made and orders passed under the Act. It is to the following effect :

> "**Bar to certain proceedings.**—Save as is provided in Section 11, no assessment made and no order passed under this Act or the Rules made thereunder by the assessing authority shall be called into question in any Court, and save as is provided in Sections 9 to 10, no appeal or application of revision or review shall lie against any such assessment or order."

In *Smt. Deepak Bhalla* v. *State of U.P.*[14] the arrears of sales-tax were being recovered as arrears of land revenue. The plaintiff filed a suit in the Civil Court for declaration that the assessment order passed against her was null and void and for injunction to restrain the defendants from recovering the sales-tax dues as arrears of land revenue. It was held that the suit was barred under Section 17 of the U.P. Sales Tax Act and no injunction to stay the recovery proceedings could be granted. Their Lordships also relied upon the ruling of the Hon'ble Supreme Court in *H.S. Shah* v. *Abdul Saheb*[15] in which it was held that for obtaining interim injunction the plaintiff has to prove not only prima facie case and balance of convenience but also that if injunction is not granted, he would suffer an injury which cannot be compensated by way of damages. It was further held that if any amount is being recovered, there is no question of such irreparable loss and the plaintiff can be compensated in terms of money and so there is absolutely no ground for grant of temporary injunction order.

The electricity dues of the State electrical undertakings are also recoverable as arrears of land revenue. Section 5 of the U.P. Government Electrical Undertakings (Dues Recovery) Act, 1958 provides to the same effect. It runs as under :

> "**Recovery of dues.**—If the dues for which notice of demand has been served are not deposited with the prescribed authority within thirty days from the date of service, or such extended period as the prescribed authority may allow, the same together with cost of recovery as may be prescribed shall be recoverable as arrears of land revenue, anything contained in any other law or instrument or agreement to the contrary notwithstanding."

If any consumer from whom the amount is being claimed, denies his liability

14 1991(2) A.W.C. 1362 (D.B.).
15 1988 A.W.C. 1485 : 1988 (5) S.L.R. 768 : 1988 (4) J.T. 232 (S.C.).

to pay the amount, he has to deposit the amount under protest, and then he can file a suit for its refund in the Civil Court as provided in its Section 4 running as under :

> "**Suit to challenge the liability to pay dues.**—(1) Where a notice of demand has been served on the consumer, or his authorized agent under Section 3, he may, if he denies his liability to pay the dues or any part thereof, and upon deposit thereof with the prescribed authority under protest in writing, institute a suit for the refund of the dues or part thereof so deposited.

(2) The suit referred to in sub-section (1) may be instituted at any time within six months from the date of deposit with the prescribed authority in the Court having jurisdiction, but subject to the result of the suit the notice of demand shall be conclusive proof of the dues mentioned therein."

The cumulative effect of both those provisions read with Section 330(c) of the U.P.Z.A. & L.R. Act is that a suit for injunction to restrain recovery of electricity dues which are being recovered as arrears of land revenue is barred.

In *Doodhnath Pandey* v. *District Judge, Azamgarh*,[16] the plaintiff had challenged the recovery of electricity dues, which were being recovered as arrears of land revenue, by filing a suit under Section 20 of the Arbitration Act. The Hon'ble Allahabad High Court referring to the provisions of Section 287-A and 330(c) of the UPZA and LR Act and Section 3(4) of the U.P. Public Moneys (Recovery of Dues) Act, 1972 held that since the amount was being recovered as arrears of land revenue, no injunction could be granted to stay the recovery proceedings and the suit was not maintainable, and the only remedy open to the plaintiff was that he should deposit the amount under protest and then file a suit for its refund.

The above view was reiterated by a Division Bench of the Hon'ble Allahabad High Court in *Shadi Lal Enterprizes Ltd.* v. *State of U.P.*[17] where a suit for prohibitory injunction was filed to restrain the defendants from recovering the electricity dues as arrears of land revenue without making any deposit u/s. 287-A of the UPZA & LR Act, it was held that the suit was not maintainable and no injunction could be granted. Their Lordships observed :

> "Legislature has in its intelligence provided in Section 4 of the Revenue Recovery Act that a person who denies his liability when a proceeding for recovery is initiated under a certificate can institute a suit for

16 1986 R.D. 301 : 1986 A.L.J. 1257.
17 1995 ALJ 1517 (D.B.).

repayment of the amount after paying the amount under certificate under protest made in writing at the time of payment and signed by him or his agent. Under Section 287-A of the U.P. Zamindari Abolition and Land Reforms Act similar provision has been made. Since electricity duty is to be recovered when the same remains unpaid, under the Revenue Recoveries Act following the provisions of U.P. Zamindari Abolition and Land Reforms Act, it can safely be concluded that public policy is that a person denying liability has to pay the amount sought to be recovered for which he denies liability under protest in writing and then file a suit for repayment. Section 330 of the U.P. Zamindari Abolition and Land Reforms Act in that context provides for bar of suit save as otherwise provided under the Act. Hence, in view of the legal provision no suit for injunction would be filed where an amount is to be recovered as Land Revenue.

Granting relief of perpetual injunction would have the effect of restraining the Collector who is not subordinate to Court from initiating a proceeding for recovery which is prohibited under Section 41(b). On this ground also relief sought cannot be granted. Clauses (c) to (g) and (i) are not attracted. Under clause (h) also an equally efficacious remedy is available by filing a regular suit after complying with the condition of protest payment. Hence no relief of injunction can be granted on this ground."

The position is almost the same in respect of municipal taxes also. In U.P., the U.P. Nagar Mahapalika Adhiniyam, 1959 is applicable to the cities of Lucknow, Kanpur, Allahabad, Varanasi, Agra, Meerut, Bareilly and Gorakhpur. In other cities, having a population of 1,00,000 or more, the U.P. Municipalities Act 1916 is applicable. Section 226 of the Nagar Mahapalika Adhiniyam bars the jurisdiction of the civil and criminal courts, in matters of taxation. It runs as under :

> **"Bar to jurisdiction of civil and criminal courts in matters of taxations.**--No objection shall be taken to a valuation or assessment nor shall the liability of a person to be assessed or taxed be questioned in any other manner or before any other authority than is provided in the Act."

The only procedure prescribed in the Act, to challenge the valuation or assessment or the liability to be assessed or taxed is to file an appeal before the Judge Small Causes Court u/s. 472 of the Act and that appeal can be heard only after deposit of the claimed tax. A second appeal shall also lie to the District Judge

against the order of the Judge Small Causes Court u/s. 476 of the Act, and the order of the District Judge is final. The aggrieved person has to follow this procedure and he cannot file a civil suit challenging the valuation, assessment or liability to be assessed or taxed, nor can seek injunction restraining recovery of the amount in such a suit.

Similarly Section 164 of the U.P. Municipalities Act bars the Jurisdiction of Civil and Criminal Courts in matters of taxation.

It provides :

"**Bar to jurisdiction of civil and criminal courts in matter of taxation-** (1) No objection shall be taken to a valuation or assessment, nor shall the liabilityof a person to be assessed or taxed be questioned in any other manner or by any other authority than provided in this Act.

(2) The order of the appellate authority confirming, setting aside or modifying an order in respect of valuation or assessment or liability to assessment of taxation shall be final : provided that it shall be lawful for the appellate authority, upon application made within three months from the date of its original order or on its own motion, to review an order passed by it in appeal by a further order ; provided further that no order shall be reviewed by the appellate authority on its own motion beyond three months from its date.

It may be mentioned that under this Act, an appeal against tax assessed upon annual value of the building or land shall lie to the District Magistrate u/s. 160 and the appeal shall be heard only after doposit of the claimed amount as provided in Section 161.

Section 173-A, added by the U.P. Act No. 27 of 1964, further provides that these taxes can be recovered as arrears of land revenue. It runs as under :

"**Recovery of taxes as arrears of land revenue.**--(1) Where any sum is due on account of a tax, other than octroi or toll or any similar tax payable upon immediate demand, from a person to a board, the board may, without prejudice to any other mode of recovery, apply to the Collector to recover such sum together with costs of the proceedings as if it were any arrear of land revenue.

(2) The Collector on being satisfied that the sum is due shall proceed to recover it as an arrear of land revenue."

The matter of grant of injunction in cases of recovery of Municipal taxes

and of the jurisdiction of civil courts came up for consideration before the Hon'ble Supreme Court in *Municipal Corportation of Delhi* V. *C.L. Batra* [18] and in *Srikant K. Jaturi* V. *Corporation of the City of Belgaum.* [19] The former was a case under the Delhi Municipal Corporation Act, 1957. Section 170 of this Act : Provided for hearing of the appeal against assessment by the District Judge on the deposit of the claimed tax. The plaintiff instead of adopting this procedure filed a civil suit and obtained interim injunction from the Court staying recovery of tax of nearly one crore of rupees. The Supreme Court holding that the interim order granted by the Court was an abuse of the process of Law and that the grant of such interim injunction order would paralyse the entire working of the Municipality and would render it unable to meet its financial obligations, vocated the injunction order.

The latter case was under the Karnataka Municipal Corporation Act, 1976. Rule 18 of the Rules framed under the Act provided an appeal against the assessment before the Taxation Appeals Committee and Rule 20 provided a second appeal to the District Court which could be heard only on doposit of the claimed property tax. Rule 25 barred the jurisdiction of the Civil Court in the matter. The Plaintiffs instead of following the above procedure of filing appeal, filed a civil suit challenging enhancement of tax. The suit was dismissed holding it not maintainable in view of the bar of Rule 25 and this order was confirmed by the Supreme Court.

Thus the Legal position on the point can summed up as under :

(i) where any amount is being realized as arrears of land revenue, the Civil Courts have got no jurisdiction to grant injunction restraining such recovery in view of sections 287-A and 330(c) of the U.P.Z.A. & L.R. Act and sub-section (5) of section 3 of the U.P. Public Money (Recovery of Dues) Act.

(ii) Injunction to stay recovery of public money can be granted under clause (g) of the proviso to rule 2 of order 39 C.P.C. after taking security in those cases only where issuance of the injunction is not barred under the provisions of the substantive law.

(iii) Where the recovery certificate has not been issued by a competent authority the certificate is invalid ; and in that case also injunction can be granted to stay recovery proceedings.

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18 (1994) 5 SCC 355.
19 (1994) 6 SCC 573.

CONCEPT OF ECOLOGY IN ANCIENT INDIA AND ENVIRONMENTAL JURISPRUDENCE

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1. Since development of human history we have sought may thinks. Above all the most important desired of human being has been that "HAPPINESS AND PERFECT SOUND HEALTH". If we have achieved either one or both of these things, there has been a constant struggle to keep them. We have been offering prayer to the Almighty :

"TEJOASI TEJO MAI DHEHI VEERYAMASI VEERYAM MAI DHEHI,

BALMASI BALAM MAI DHEHI, OJOASIOJO MAI DHEHI,"

SAHOASI SAHO MAI DHEHI."

Even Catholics have faith in this theory and pray to the Lord, Lord Jesus, we bless you that while you walked this earth you had compassion on the sick and you healed them. And we thank you, Lord, that you commissioned your disciples to do likewise in your name, we ask you to send healing spirit into our weak bodies, free us Lord, from all pains and sickness and grant us health of body, mind, spirit, so that we may rejoice in your service.

(The healing power of Sacraments, p. 98)

In the similar way in the ancient Indian culture, prayers have been made :

"OM VISHWANIDEV SAVITURDURITANI PARASUV

YADBHADRAM TANNA AA SUV."

(Yajurved 30-3)

In view of the aforesaid Mantras it is very much clear that since beginning human being prayed. The Almighty God for sound mind and sound body. Health was considered to be that best wealth throughout in the cultural concept of India. It has been realised throughout that most of diseases and evils can be prevented and checked if our behaviour towards the nature and surrounding environment is natural and respectful. It is seriously felt that the race to rapid industrialization have left with us the polluted rivers, contained soil, depleted wildlife and exhausted natural resources. In every culture and religion in the world natural means have been provided for the promotion of environmental protect.

2. Man is facing an ecological crisis of his own making. For centuries he

thought little about the consequences of the pressures menkind was placing upon nature. Today the byo-products of man's activity can be compared to the results of global geological processes. It has been estimated every where that every year about 16,000 million tons of oxygen are burned up and that between 21,000 and 24,000 million tons of carbon dioxide are discharged into the atmosphere. The pollution of rivers, lakes, seas and oceans has reached a dangerous level, with about 50 percent of all the pollution of the biosphere being caused by the United States which has less that six percent of the world's population. A recent survey reveals that "every day millions of gallons of trade wastes and effluents are discharged into the rivers, streams, lakes and seas etc." Indiscriminate water pollution is a problem all over the world but is now acute in densely populated industrial cities. Air pollution has further added to the intensity and extent of problem. Like water pollution, every year millions of tons of gaseous and particulate pollutants are injected into the atmosphere both through natural and as a direct result of human activities. Scientists have pointed out that the earth atmosphere cannot absorb unlimited amount of pollutant materials without undergoing changes which may be of an adverse nature with respect of human welfare. Noise is another problem of industrialization and extensive use of machinery. Continuous noise seriously affects structural and functional integrity of the ear. Broadly speaking the more intense the noise the greater is the hearing loss ; the degree of hearing loss and its position in the tonal spectrum is related to the frequency value noise. The duration of the period to which the subject is exposed to the noise influences the hearing loss.

3. The pollution of soil and water reservoirs is also increasing. This creates a situation where no more trees, shrubs even grow in large cities. The damage, and the consequent loss, inflicted upon farming and the timber and fishing industries are truly tremendous. The word 'Environment' has been defined in Section (2) (a) of the Environment (Protection) Act 1986 means "Environment" includes Water, Air and Land and the interrelation, which exist among between Air and Land and human being, other living creatures, plants, micro organism and property. The environment is every thing that is not me. The Environment Law has been changed rapidly in the last few years and further change can be expected in the future to reflect the wastely increased, prominences of environmental issue.

4. Since ancient period Indian system of living, rituals and worship has always been respectful to nature and alert for environmental stewardship. The practice of religion is interrelated with human life cycle. Nature and sanctity of surroundings is the most important factor in all the Hindu rituals, sanskaras and

worship. The Sun, Moon, Air, Water and fire, the earth, mountains, rivers, plants and trees all are practically connected with one or the other activity. That is why plants and trees like Banana, Mango, Tulsi, Vata, Peepal, Amla etc, their fruits, flowers and leaves are used in the devotional activities of Hindus not only in India, but the religions that emerged on Indian soul, like Buddhism have the similar traditions. Considering such importance of almost all the entities of nature for individual protection and broader welfare, we had every respect for nature. For individual protection, we performed Trikal-Sandhya in which Pranayam, Dhyan and Prayer through Mantras were offered, Yajnas and other devotional activities were performed for individual as well as social welfare. All these are performed with the help of pious water, agni, samidha alongwith various natural products and vedic Mantras. While offering such a prayer from Yajurved, it is said, May there be peace in the celestial religions, peace in mid region, peace on earth, peace in waters, peace in medicines and in herbs. May the God brings us peace, may the Supreme Soul and the triple Vedas also give us peace. May there be the peace everywhere and may that peace come to us. (Yajurved, 36-17)

5. In view of the aforesaid facts it is very much clear that in Ancient Hindu religion, nature was calculated always for the welfare of humanity. Till the functioning of seasons would remain proper, nature does not create any harm to human beings, but as soon as there is a disturbance in the seasonal cycle of nature it looses its virtues and becomes polluted causing anti-effects for creatures. That is why Hindus have always been environmental stewards and their relation with the ecology and nature has been eternal. In view of the aforesaid facts ancient Indian people always keep them with the ecology and nature. It was very deeply considered by the ancient Indian Rishies and Munies that unless environment is peaceful the human life cannot be peaceful and prosperous. In ancient India the peoples were very much active in respect of pollution and that is why forecasting of environmental pollution was made in Charak Sanhita. It seems that all stars, planets, moon, sun, air, agni and nature or directions have been polluted. Seasons also appear to work against the nature. Prithvi inspite of being full of its virtue has lost its rasa in all medicinal plants. Medicinal plants are also without original qualities and have been polluted. When such pollution will occur humanbeing will suffers from diseases. Due to pollution of weather, several types of diseases will crop up and they will ruin the country. Therefore collect the medicinal plants before the beginning of terrible diseases and change in the nature of Prithvi. (Charak Sanhita, Vimanasthan, 3-2). In Charak Sanhita it has been further pointed out that Vikriti (Pollution) Ayurveda has warned against the side effects of seasons, foul air and polluted waters. It is stated in Charak

Sanhita that the polluted air is mixed with bad elements. The air which is against the virtue of season, with full of moisture, speedy hard, icy cool, hot dry, harmful terribly rearing, cooling from two or three sides, bad smelling, oily, full of dirt, smoke, sand and steam creates diseases in body and is polluted.

(Charak Sanhita, Vinanasthan, 3-6(1))

It is further stated in Padmapurana, Bhumikhanda 96.7-8 that :

"PRANINAM PRANHINSAYAM YE NARAH NIRTE SADA,

PARNINDASA YE CHA TEVAI NIIRAYGAMINAH,

KAPARAMTA AGNAM PRAPANAM CHA BIDUSAKAH,

SARSAM CHAIV BHETTARO NARA NIRYGAMINAH."

It was firm considered view of Ancient Indian Rishies that we.human being are obligated to protect the environment and leave a healthy legacy for future generations. In order to leave such a legacy it is absolutely essential that the natural riches of mother earth are not destroyed and if used they must be replenished. Prithvi Sukta of Atharvaved says "O" mother Earth, do thou kindly set me down well established in concord with the heaven, "O" sage do thou set me in fortune, in prosperity." In view of the aforesaid Mantras of Atharvaved it is very much clear that our Rishies found that if we have to realize our moral obligation not to unduly harm or damage the earth and its natural riches.

6. Fresh water resources pose many other problems. And although there is a lot of water on our planet, fresh water constitutes a mere two per cent. Most of the fresh water is conserved in the glaciers. And it is precisely fresh water that industry and agriculture increasingly requires, a tremendous quantity of fresh water is used for irrigation : growing one ton of wheat requires 1,500 tons of water. The growth of cities and the development of industry changed the amount and composition of effluent, and created the most acute problem of our century, the problem of clean fresh water. In one degree or another this problem faces all countries.

7. Marine pollution is an imminent oceanic disaster, even as world- wide deforestation is a Himalayan blunder driving towards decertification, reduced rainfall and greenery. The oceans covering two third of the earth's surface are vital for life on land. They are a treasure of valuable resources, food, minerals, chemicals, petroleum, gas, pearls etc. From ancient times the oceans have been used for transportation. Oceans have rightly been called as our last frontiers. But not a days pollution have covered them also. Humanity and ecology are in-

divisible. Civilized man's uncivilized aggression on Nature has made us realize that, like humanity, ecology is indivisible. Peace and Salvation on earth are possible only if we are conscious ethics. We must forbid industrialist privateers and individualist technobuccaneers from piracy of Nature molesting the flora and fauna and polluting the biosphere. The source of life is largely oxygen and this human plannet of ours will perish if by pollution we destroy that fountain. And yet, our oceans which are basic to much needed oxygen are being poisoned continually by civilisation which is assiduously digging its own grave. Law is a means to an end. The primary end is assurance of human survival and so the first charge on the legal system is elimination of pollution of those vital sources without which life on earth may prove impossible. Principal growth in India is envisaged in the fields of power, petrochemicals, fertilisers, synthetic fibres, metallurgy, sulphuric acid, nitric acid, pharmaceutical industries and various other chemicals and ceramic industries. In addition to industries, the other important source of air pollution in India is the domestic consumption of low grade fuels, resulting in intensely smoky atmosphere. Contribution of the fine dust by the deserts and other open dry field and the unpaved streets is also considered. Auto-exhaust is yet another contribution to the environmental pollution in the cities. Eighty percent of the Indian automobiles are more than five years old. Because, of this and because of improper maintenance they emit large quantities of carbon monoxide, hydro-carbons, oxides of nitrogen and other pollutants. Studies of major cities show that automobile emissions alone account for 70% of carbon monoxide, 50% of hydro-carbons, 35% of particulars and oxides of nitrogen in the atmosphere.

8. Thus in India, air pollution is caused by industrial emissions, transport emissions, meteorological conditions and improper land use, without any planning for air pollution control. The industries in India have never considered pollution control equipment as an important component of their plant equipment or social obligation. Deforestation and denudation have been made lush Kerala brown and barren and Andamans an enemy of trees. At this rate, Kashmir may be a naked dawned before long. India's pollution problems are many. We suffer at once from too much primitivism and too much modernism. Primitivism can be conquered by adopting the Chinese, why Gandhianline. Chemical fertilizers are doubly injurious and violates Nature. In India also serious problem of pollution in respect of Air and Water has been realised and in consequence thereof, The Water (Prevention and Control of Pollution) Act ,1974 have been framed and similarly for control of Air pollution, Air (Prevention and Control) Act ,1981 has been framed alongwith rules. Apart from the aforesaid act The Environment (Protection) Act 1989 has been framed to control the growing pollution in

respect of Water, Air and Environment. It is humbly suggested that India with limited resources to control the problem of serious pollution should adopt the Gandhian philosphy of life and its traditional practices of ancient Indian life as laid down in our respective Vedas and Dharmshastras in which it was prayed :

"SARVE BHAWANTU SUKHINAH SARVE SANTU NIRAMAYAH,

SARVE BHADRANI PASHYANTU MA KASHCHID DUKH BHAG BHAVET."

SOME THOUGHTS ON THE DEATH AND THE LAW

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What is the meaning of death in legal terms? When was it defined? This is the first thought that comes to mind. Interestingly,the Indian Penal Code of 1860 does refer to the event of 'death' in Section 46 in stating that "Death denotes the death of a human being unless the contrary appears from the context." Perhaps, this is a good start in that the IPC does give some slight attention to the concept of death in the human.

The next statutory definition of 'death' appears 109 years later in the Registration of Births and Death Act, 1969 [RBDA]. It defined 'death' as the "permanent disappearance of all evidence of life at any time after live birth has taken place."Now comes the second inquiring thought !What is the meaning of 'all evidence of life'?Does it mean that all the organs of the human body must have ceased functioning irreversibly and irremediably; or put it colloquially, must all the human organs be truly dead and have no life in them at all ?

It is now well known that some five to twelve minutes after the heart has ceased to function, the brain is irreversibly damaged or 'dead'. About 45 minutes later, the kidney stops functioning. The skin, however, may be viable for 24 hours, the bones for 48 hours, arteries for some 72 hours and sperms it is said for perhaps 7 days after the heart the lungs have given up the 'spirit of life'. Clearly, the viability of these human tissues for varying periods after the heart has ceased functioning may represent the presence of *some* evidence of life. In view of this data does it mean that death may only be diagnosed, and be so registrable under the RBDA, after all the human organs have irreversibly ceased to function? If this were so, putrefaction of some body tissues will have commenced. I submit that 'death' as defined in the RBDA represents 'biological death' and not death as clinically understood by the medical profession for at least 150 years. What then does the law recognise as 'death' ?

The law in many countries of the world including India does not define 'death' as we know it. Common law, which has been well described by Lord Devlin of the United Kingdom as "common sense under a hat", does recognise that 'death' is an event which occurs when the medical practitioner proclaims that it has indeed occurred. This has for long been termed 'clinical death' or that state in the human which results when the heart and brain have stopped functioning irremediably and irreversibly for a prolonged period of time, estimated in the past to be five minutes. This understanding of death in the common law of the U.K.

was also accepted in our country for some considerable time.

The medical and legal literature of the world has influenced the public media. We read of a whole variety of deaths : clinical, biological, theological, heart and lung, respiratory, kidney, liver, brain, brainstem, cerebral, cortical, death of the 'persona' and so on. Rather confusing for even the well informed. In all this, two facts stand out : First, being 'dead' and 'almost dead' are two totally different situations which must be clearly distinguished. Second, there is only one form of death - that of the individual.

When reflecting on the phenomenon of death, three aspects must be considered : the *concept*, the operational *criteria* that may be used and the *tests* which have to be performed for a determination of death.

The *concept of death* refers to the meaning of death in the minds of thousands and millions of men; women and children. What does the idea of death convey to these people ? This is essentially a philosophical concern and not merely a scientific or legal issue. It is not a matter that doctors, judges, lawyers or philosophers can impose on the population.

For an appraisal of the concept or meaning of death, we need to study what was meant by 'death' in the various cultures and civilizations of humankind, the many religious traditions of the past two thousand years or more, and the scientific observations of bygone centuries. These considerations will surely give us a fair idea or meaning of death in the history of the world.

In the various *cultures and religious traditions* of the world, the departure of the 'soul' and the absence of the 'breath of life' represented death of the individual. The expression 'soul' has a variety of meanings but most would agree that the 'soul' represents the rational entity of the human being which is located in the brain. Some authorities equated the 'soul' with the breath of life. Whatever it be, for death to be determined an individual had to be quite still or immobile, unresponsive, uncommunicative and insensible i.e. unconscious, and the breath of life had to be undoubtedly absent.

Many writers often give the impression that, according to *medical and scientific thought*, a prolonged and irreversible standstill in the function of the heart and lungs *per* se indicated termination of human life or death of the individual. For them, functioning of the heart and lungs was paramount and that of the brain was of no consequence. This is an error. Physicians have asserted for centuries that a functioning brain was the dominant or chief organ of the human body which was necessary for life. In 1777, Dr. William Cullen elaborated

in the medical school of Edinburgh his *First Lines of the Practice of Physic* in which he described the causes of death in the following words :

"The causes of death, in general, are either direct or indirect."

"The first are, those which directly attack and destroy the vital principle, as lodged in the nervous system, or destroy the organs immediately connected with it."

"The second, or the indirect causes of death, are those which interrupt such functions as are necessary to the circulation of blood, and thereby necessary to the due continuance and support of the vital principle."

The role of the brain in life and death of an individual was amplified to a greater degree by the French physician. M. Bichat, in 1800. It was he who referred to the brain, heart and lungs forming the tripod of life which concept still appears in Indian forensic medicine literature.

A review of the scientific literature in all its aspects leads to the following salient conclusions :

1. Death in the human means the cessation of life.

2. Death represents the irreversible disintegration or cessation of the functions of the human organism as a whole rather than of the whole organism.

3. Death of the brain - the 'master-organ' of the human body - is an essential prerequisite for the determination of death.

If one were to construct a *synthesis of the cultural, religious and scientific aspects* in regard to the concept of death, the following would be the inescapable conclusion : In an unconscious or comatose person, death will have occurred when the brain has irreversibly stopped functioning and the spontaneous breath of life is no longer in evidence for a pronouncement of death.

We should now direct our attention to the *criteria of death* that may be applied to establish whether the requirements of the concept of death i.e. the absence of (1) brain function and (2) the breath of life, have been fulfilled.

In times past, no simple tests were available to check the functioning of a person's brain. One could only observe whether the individual was conscious or not. If unconscious, it was thought that some important part of the brain was not functioning. On the other hand, the existence or persistence of 'the breath of life' could be ascertained by the use of various methods such as holding a mirror in front of the mouth as in Shakespeare's King Lear (1606) :

"Lend me a looking glass ;

If that her breath will mist or stain the stone.

Why then she lives"

After an extensive search of the medical literature, it appears that until the nineteenth century, it was mainly the presence of respiration or the breath of life that determined whether life existed. The earliest reports that this writer has been able to locate referring to the pulse or heart beat for a determination of death were those of Dr. G. Cheyne in 1733 and that of Christian A. Struve in 1803. In this regard, it is noteworthy that Dr. John Gordon Smith, the eminent forensic medicine specialist of the nineteenth century, advised in his book entitled 'The Principles of Forensic Medicine' published in 1821 that it was necessary to check for pulsation in the arteries and stoppage of the circulation in the veins, in addition to the cessation of respiration, for a pronouncement of death.

Many were concerned at the lack of reliable tests for the diagnosis of death. In consequence, the Manni prize was founded in France for the discovery of an unequivocal sign of death. This was awarded to M. Bochut in 1846. His findings were confirmed by a specially appointed group of Commissioners and one of them, M. Rayer, stated : "If, therefore, no motion of the heart is perceived during an interval of five minutes, ... death may be regarded as certain. With the cessation of the pulsations of the heart, the usual cardiac sounds also cease. At the same time, their cessation furnishes a proof that respiration has ceased, and that the functions of the nervous system are not merely suspended, but destroyed." This statement clearly revealed that the cessation of the heart, and consequently of the lungs, results in the destruction of the nervous system and death. These views were subsequently accepted universally.

The realisation in the early part of the nineteenth century that the prolonged absence of respiration and pulsations of the heart would inevitably result in the death of the brain, and that of the individual, was important as both the pulse or pulsations of the heart and the respirations could be simply detected. It was for this reason that the heart-lung or cardio-respiratory criteria of death came into existence : and these continue to be used to this day. They were merely the simplest means of knowing that the brain *would be dead* if the pulse and breathing were absent for a prolonged period of time. Nevertheless, it was the death of the brain that was the real criterion of death.

Over the past 35 - 40 years, it has become possible for the activity of the heart and lungs to be maintained artificially by machines for varying periods of time. And, under these circumstances, methods are now available which can tell

us if the brain has ceased functioning irreversibly. The latter methods constitute the neurological criteria of brain death.

Basically, two schools of thought exist with respect to the diagnosis of brain death. The first, in the United States of America, insists that the entire brain or all its tissues must have ceased functioning irreversibly. The second, of the United Kingdom, requires that in the presence of certain medical pre-conditions and exclusions, the brainstem in its entirety, as opposed to the whole brain, should be irreversibly and irremediably destroyed. It would be right to emphasise for the non-medical reader that the brainstem represents the physiological core of life and contains the capacity for consciousness. The second essential requirement in the U.K. criteria is that the capacity for respiration, or the breath of life, must be absent and this must be actively demonstrated by the performance of a specified apnoea (absence of breathing) test. The data relating to the two varieties of neurological criteria of death are too technical and extensive to elaborate here. Readers keen on acquiring this information are referred to the author's book "The Determination of Death'.

It is a little over two years ago that the Indian Parliament adopted after wide consultation the criteria of brainstem death as the neurological criteria of death in the Transplantation of Human Organs Act, 1994. [THOA] and the Rules thereto of 1995 [THOAR]. This recognition of brainstem death is, however, applicable only when organ transplantation from a cadaver is intended. Whichever be the neurological criteria of death i.e. whole brain or brainstem, adopted in a country, a number of tests have to be performed by trained and skilled medical specialists to ascertain whether the brain or the brainstem is indeed dead. While I cannot go into the technical details in this article. I must say that the method of testing is exceedingly comprehensive and yet simple.

Some ask whether mistakes are possible in diagnosing death when the brain criteria are used. Fortunately, no mistakes have been detected internationally when the tests have been correctly applied and rightly performed. In fact, mistakes have certainly occurred when the traditional cardiorespiratory criteria have been used.

At this juncture, it will hopefully be clear that human death may be determined in India most often on the basis of the traditional, long standing, internationally recognised, cardio-respiratory criteria of death; and, on rare occasions, when heart and lung activity is artificially maintained by an application of the neurological criteria of brainstem death. This apparently simple statement has set in train a number of disturbing thoughts.

It is well known that on occasions some members of the public, as well as a few doctors and lawyers, want to express their fears that the concept of brain or brainstem death represents a state of being 'almost dead' rather than 'truly dead'. This is an understandable anxiety which merits consideration. But, does the Transplantation of Human Organs Act, 1994, and its Rules of 1995, allay those anxieties? Let us consider a few examples:

Case A. A young man, Arun, aged 25 years sustains severe head injuries in a motor car accident in Old Delhi. His head is smashed. Somehow, the Trauma Team at the nearby International Hospital of Old Delhi succeeds in maintaining his respirations and heart activity with state-of-the-art machines. Nevertheless., after a few hours the doctors conclude that Arun is brain dead.

Says Dr. A. to the parents, two brothers and a sister: "We are very sorry that young Arun could not be saved even though we did our best. Our condolences. Our team of neurologists, physicians and hospital administrator have now completed their examinations and have concluded that his brain is undoubtedly destroyed - indeed dead and, therefore, as an individual he is dead. I gather that Arun was a very socially conscious person and always keen on helping the poor and suffering. Would you please consider donating Arun's organs in a way that he would like, for some dying persons with chronic kidney failure ? This will enable them to live very well for many years. In this, you will be perpetuating his own ideas and desires." While the parents were trying to cope with their grief and pondering over the request for a donation of Arun's organs, the brother spoke up : "If you take the organs, what will happen to his body - will we get it for a funeral ?" "Sure" said Dr. A. "We will hand over the body as soon as the organs have been removed."

The parents intervened : "Is our son really dead, or almost dead?" Dr. A. replied without batting an eyelid : "Certainly, he is dead. We shall issue a brainstem death certificate as soon as possible and you can get on with the arrangements. If we start promptly with the procedures, you can have the body in about six hours from now." It appeared that the parents would consent to the organ donation but asked for time to discuss the matter with other members of the family and some older relatives.

Dr. A. again met the parents after a couple of hours. They said : "We are inclined to agree, but the children and an uncle do not ; and we cannot go against their wishes. We cannot, therefore, give our consent." "Dr. A. showed his disappointment. Arun's brothers and sister intervened : "Doctor, we would nevertheless like to take Arun's body for the funeral immediately. Please give us

the death certificate." "Sorry", said Dr. A. most apologetically. "If there is to be no organ donation, he cannot be said to be brainstem dead and, therefore, the death certificate cannot be given." The sister sprang up : "What doctor, you mean Arun is not dead now ?" "Yes" replied Dr. A. and continued "Yes, according to the law."

Arun's uncle who was standing and listening from outside the interviewing room said in a dejected voice : "This is another example of a man being declared dead at one time and alive a little later. A similar episode happened in our Parliament when a former Primer Minister in 1978 announced one morning that a highly respected person was dead, but later in the day retracted his statement and reported that he was alive !" What a devastating thought !

Case B. Sheila, aged 27, a charming social worker, was admitted to a Hospital with a haemorrhage in the brain due to a ruptured blood vessel. Despite all the medications and surgery, she remained unconscious and was declared brain dead by the medical team. The parents, in pursuance of Sheila's wishes, offered her heart as a donation to a middle aged man (Mr. X.), a friend of the family, who suffered from a most severe cardiomyopathy that prevented him moving about or doing any work. Sheila was declared 'brainstem dead' and her heart removed to be transplanted into Mr. X but he died suddenly before the transplant could be effected. The Hospital authorities were in a quandary. There was Sheila in the operation theatre minus her own heart which was to be donated to Mr. X who died earlier than expected. Consequently, no transplant operation was undertaken. Was Sheila legally dead as the Transplantation of Human Organs Act, 1994, and the Rules thereto of 1995, only recognises brainstem death if organ transplantation is undertaken ? Moreover, was her death due to manslaughter as her heart, a vital organ, was removed and life rendered extinct when she was not legally dead. In a sense, therefore, was her death procured by the 'transplant surgeons' ?

The Hospital's legal advisor assured the staff that they would be protected under the law by Paragraph 23(1) of Chapter 7 of the Transplantation of Human Organs Act, 1994, which reads : "No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done in pursuance of the provisions of this Act. Does the concept of 'good faith' really protect the surgical staff in this case ? Is 'good faith' an adequate defence in a matter relating to the certification of a person as being alive or dead?

Case C. A 76 year old man, had suffered for many years from severe heart disease and 'angina', diabetes and hypertension. He was admitted to a hospital

after sustaining a 'stroke' with loss of speech and a total paralysis of the right side of the body. He then developed pneumonia and the stroke extended to involve the brainstem. He stopped breathing spontaneously and was, therefore, attached to a respirator which maintained his lung and heart function. The decision to use a respirator was not easy for the family as it cost Rs. 500 a day in a public hospital. The old man had one married son, a sickly daughter-in-law and three grandchildren. Their total income was Rs. 2000 per month.

After a week, the doctors informed the family that the old patient was 'brain dead' or 'brainstem dead' and that his organs were diseased and could not therefore be utilised for transplantation. Accordingly, said the doctors, they could only certify the patient to be dead when his heart and lungs stopped functioning permanently. A social worker who was trying to help the family pleaded with the hospital administrators that they excise any of the man's tissues ostensibly for transplantation, even though the man's organs could not be utilised, so that he could be declared brainstem dead ! In so doing, she hoped to terminate the family's anguish, reduce the unnecessary expenditures which they could ill afford and stop their suffering. She went further and categorically stated that there was no legal difficulty in terms of inheritance or taxation if the patient was declared dead earlier rather than later.

"Regrettably", said the hospital administrator, "there was little that could be done to alleviate the suffering of relatives. The law had to be changed as there were many more whose brains were dead but had to wait until their hearts and lungs stopped working before they could be certified dead. If the law was changed", he also remarked, "the scarce resources such as respirators, ICU beds, staff, etc. could be better utilised to assist those who could recover from serious illnesses. What a waste !"

These three examples highlight the most critical deficiency of the Transplantation of Human Organs Act, 1994, and the Rules, 1995. The Act implies that human death may be of two types :

(a) brainstem death in those whose body organs are to be donated for transplantation.

(b) cardiorespiratory death for others not involved in organ transplantation.

Is this logical ? Is this defensible ? It is understandable that some individuals would under these circumstances consider brainstem death as being a state of being 'almost dead' rather than being 'truly dead'. This would be a travesty of modern scientific thought in the field of medicine.

Those conversant with the THOAR, 1995, are aware that in Form 8, under

the heading of "Findings of Board of Medical Experts', item (12) merely states "Apnoea Test as Specified". No details are provided even though these were discussed and international recommendations accepted. There are some medical authorities, however, who have advocated that a patient on a respirator be disconnected from the machine and observed for three minutes without any respiratory assistance whatever. If this is done, the patient who is in need of respiratory assistance will certainly die in the process. It would be fair to say in this matter that the omission of details of the 'apnoea test' in the Rules represents a printer's devil but one that may be utilised by some for some devilish deeds. A qualification of the apnoea test is long overdue.

It is common knowledge that those in the governmental corridors of power were afraid of possible abuse of legislation recognising brainstem death. To obviate such an occurrence, a formula was devised to have brainstem death certified by four individuals : (1) Medical Administrator incharge of the Hospital (2) Authorised specialist (3) Neurologist/Neurosurgeon (4) Medical Officer treating the Patient. The wording of the brainstem certificate in Form 8 clearly implies that all four signatories must have carefully examined the patient twice after an interval of about six hours and on the basis of their findings concluded that "Mr./Ms.....is declared brainstem dead." This formula is unique to India.

This writer like many others, without being disrespectful of heads of institutions, has indicated verbally and in writing on previous occasions that a medical administrator incharge of a hospital may be a skin or eye specialist and not one likely to be conversant on a daily basis with the examination of the nervous system. He or she may even be an outstanding basic medical scientist (biochemist, anatomist, geneticist), pathologist or even a public health expert and not a clinician by training. Furthermore, such an administrator may not ever have received any specialised training in neurology to be capable of diagnosing brain death. It is also possible, and not inconceivable, that the medical administrator may not even be qualified in the allopathic or western system of medicine. Yet, he or she will be required to certify the occurrence of brain death. Does then the THOA, 1994, and the THOAR, 1995, encourage medical administrators in charge of hospitals to merely rubber stamp the opinions of their colleagues on the 'death certification board' ?

Similar arguments may also apply to the fourth member of the certifying board i.e. the medical officer treating the patient thought to be brain dead. A patient may be under the care of a variety of medical specialists such as skin or eye specialists, ear-nose-throat surgeons or gynaecologists, genitourinary experts or geriatricians. These experts may all be eminent persons in their own right

but unequal to the task of determining brain death.

It is sad that in trying to prevent abuse of a system we often end up introducing impractical or ineffective procedures, and at times even encourage corrupt practices albeit unwittingly.

As I have said earlier, there is only one form of death in the human-death of the individual. Unfortunately, brainstem death is only recognised in India if the deceased is likely to be a donor in an organ transplant procedure. In other words, a person may be certified brainstem dead only if his or her organs are to be transplanted. On the other hand, a patient who does fulfill all the criteria and tests for a diagnosis of brainstem death cannot be certified dead if his or her organs are not to be donated for transplantation. This is indeed a paradox.

There are many in India who perish as a result of their brainstem failing irremediably and irreversibly, but whose general condition and state of organs preclude organ transplantation. Their bodies have to be maintained on respirators in intensive-care units at times for weeks. This causes much emotional disturbance in the family, frustration and despondence among the staff, considerable expense and unnecessary utilisation of scarce resources. The inconsistency is that these unfortunate individuals who are in fact dead according to the brainstem criteria cannot be law be declared to be dead. This is most unfortunate.

What is required is a consistent legal definition of death. Death is death, and is so understood by all. One cannot have a form of death for transplantation purposes and another for routine circumstances. It makes a mockery of the law and shakes public confidence.

Some ask whether it is possible to have a unitary definition of death which answers all the related questions. Yes, the following will suffice : An unconscious human being is dead when in the opinion of a registered medical practitioner based on the ordinary standards of medical practice there has been an irreversible cessation of spontaneous respiratory and circulatory functions ; and in the case of a human being, where the use of artificial means of support preclude the determination of irreversible cessation of spontaneous respiratory and circulatory functions, the unconscious human being is dead when in the opinion of two registered medical specialists based on the ordinary standards of medical practice there has been an irreversible cessation of brainstem functions. The two registered medical specialists shall not be directly, or indirectly, involved in organ transplantation procedures.

The moment of death is that when the death is announced to have occurred by the registered medical practitioner or medical specialists as the case may be.

Some members of Parliament and the governmental administration have in the past regretted the absence of a 'Draft Act' defining death and enabling its determination. This writer submitted some two years ago a Draft for this purpose which is contained in the volume entitled Determination of Death. It can at least serve as a first attempt which can be improved but will it be taken up ? Unlikely, in this day of short governmental life spans.

I appeal that our society recognises that for all individuals death is an inevitable event - the end of a finite life - which must be recognised for itself in all its aspects. Death is death. This was known from time immemorial and certainly well before organ transplantation was even conceived. These two issues are quite separate and should be so kept in the minds of all. The definition and determination of death in India are indeed matters calling for urgent attention at all levels. Let us resolve to do what is right for our society.

"If thou wilt not fight thy battle of life because in selfishness thou art afraid of the battle, thy resolution is in vain : nature will compel thee." (Bhagvad Gita, Chap. 18)

For further reading :

Vas. C J (1993) : Determination of Death. Macmillan, New Delhi.

India.

ENVIRONMENTAL TREASURE "EACH ONE'S OBLIGATION TO PROTECT"

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One of the most crucial challenges before mankind today is development of an environmentally sound planet, which is none-else but "Our earth". Unfortunately except for the hightened thinking the masses have not moved even one step forward in their approach to nature as well as at the level of actions.

Article 51(A)(i) of the Constitution of India casts upon every citizen of the country a duty to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for liveng creatures. It is most common characterstic in all of us that we pay much attention to our rights but seldom realise our duties.

At this juncture I am reminded of an excerpt from the speech of the Prime Minister of India on 5.6.1972 at stockholm in a conference on human environment that "Man is both creature and moulder of his environment which gives him physical sustenance and affords him the opportunity for intellectual, moral and spiritiual growth". Therefore, protection and improvement of human environment is a major issue. We see growing evidence around us of man made harm, for example dangerous levels of pollutions in Water, Air, Earth and undesirable disturbance to ecological balance of the biosphere, destruction and depletion of irreplaceable resources. Thus a point has been reached in our times when we must shape our action throughout the world with more prudent care for environmental consequences because our ignorance and indifference will cause irreparable harm and loss, but all is not lost because if we act with fuller and wiser knowledge we can achieve for ourselves and our posterity a better life.

There is an old proverb that the "Wish is father to the thought and thought applied is action." Consequently the underlying idea is that each one of us must have a philosophy about environment because it is only then that we can effectively contribute to a healthy and sound earth. Environmental concerns cannot be self-contained independent issues. Environment as a total human habitual cannot be treated in an isloated manner. We all must know about environment; know the result of its protection; know how laws deal with environment and thereafter give ourselves an action plan backed by honest and sincere intention.

Article 48-A of the Constitution of India provides that the State shall

endeavour to protect and improve the environment and to safegurard the forest and wild life of the country. Thereafter one of the major steps taken under Article 48-A was the making of the Environment Protection Act, 1986, which in its aims and objectives acknowledged tha decline in the environmental quality evidenced by increasing pollution; loss of vegetal cover; biological diversity, excessive concentrations of harmful chemicals in the ambient atmosphere and in food chains, growing risks of environmental accidents and threat to life support-systems. It further acknowledges, that because of a multiplicity of regulating agencies, there is need for an Authority which can assume the lead role for studying, planning and implementing long term requirements of environmental safety and to give direction to and cordinate a system of speedy and adequate response to emergency situations threatning the environment. Thus as a sequetor of the aforesaid problems identified in the aims and objectives, Section 3 of the Environment Protection Act of 1986 bestows upon the Central Government wide powers to take measures to protect and improve enviornment; under Section 5, the Central Government may issue direction in writing to any person, officer or authority and in turn they would be bound to comply with those directions. Section 6 confers rule making powers and Section 15 provides for imposition of heavy penalty upon any person or authority whosoever fails to comply with the provisions of the Act with an imprisonment extending up to five years and fine up to one lac rupees.

Apart from provisions of the Special Act such as the Environment Protection Act, 1986, The Air Prevention and Control Act, 1985, The Water (Prevention and Control Pollution) Act, 1974 there are some more provisions which take care of our environmental health, such as the U.P. Municipalties Act, 1916 contains provisions empowering the Municipality concerned by notice to require an owner or occupier to remove on whose land a drain privy, latrine, urinal, cesspool or other receptacle for filth exists near a public water resources vide (S. 227). Power and duty of inspection of drains, privies etc. and maintain them clean (S. 270). Duty of cleansing of filthy buildings of land (S. 271); Regulate for disposal of rubbish night soil etc. (S. 227). Impose penalty for improper disposal of rubbish or night-soil up to rupees two hundred and fifty (S. 274).

NOTE:- (I strongly recommend that this amount should be enhanced substantially because callous throwing of garbage on public streets is a common habbit and great environmental disaster in our country). Power to impose penalty for discharging sewage on public street etc.(S. 276); Power to enter and disinfect building (S. 277); Prohibitation of cultivation, use of manure or irrgation injurious to health (S.282); and so on. Further, the U.P. Nagar Mahapalika Adhinlyam, 1959

under Section 114 imposes obligatory duties on the Mahapalika quite similar to those provisions as contained in the U.P. Municipalities Act, 1916. And above all among the major pieces of legislation on environmental protection I would be making an incomplete treatise if I do not refer to the relevant provisions as contained in Lord Macaulay's classic work i.e. The Indian Penal Code, 1860, Chapter XIV of the Code deals with offences affecting public health safety, convenience, decency and morals. Thr notable features are : Six months imprisonment or fine or both for negligent act likely to spread infection of disease dangerous to life (S. 269) sale of noxious food or drink (S. 273); Adultration of drugs (S. 274) Three months imprisonment and five hundred rupees fine or both for fouling water of public spring or reservoir (S. 277). Five hundred rupees fine for making atmosphere noxious to health (S. 278) and above all the residurary provisions as contained in Section 290 takes care of punishment for public nuisance in cases not otherwise provided.

Thus we see that broadly there are constitutional provisions, special laws and general laws dealing with environmental hazards and pollution. But let us for a moment go back to the kernal of this article that "Action should be on part of each one of us" to prevent further degradation also of our environment and to help alleviate proverty, let me add "poverty" is not only the problem of hunger but it includes mental deprivation, which results from malnutrition, overcrowding, lack of essential physical amenities and of stimulating environment. I submit that the need to begin the process is so urgent and compelling that all common men should necessarily look upon the guradians of justice, liberty and basic human rights, namely, the courts of law in our country which under the Constitution of India are duty bound to preserve and protect the life and liberty of the people of the nation. A healthy and a clean environment is no doubt an integeral part of our right to life so well protected under Article 21 of the Constitution of India. It can also not be doubted that it is the courts which can translate laws and implement them into "Rules of Action".

The efforts in this article would be incomplete if it does not render a broad account as to how the Courts in India have treated Environmental jurisprudence. During the last two dacades the Courts, all over the country in various situtions, have been interfering effectively with any or every environmental mishaps. In a very recent decision rendered by the Hon'ble Supreme Court in the case of Indian Council for Environment *Action* v. *U.O.I.*, 1996 (3) SCC 212, the Supreme Court directed:- (A) for establishment of Environment Courts. (B) strengthening Environment protection machinary both at centre and states and providing them more teeth. (C) Personal accountability of industrial units for their lapses (D)

Environmental audit system.

This was a case where light was thrown on the woes of people living in the vicinity of chemical industrial plants in Bichhiva small village in Udaipur district of Rajasthan. Highly toxic effluents in particular iron based and gypsum based sludge was being disbursed in the village. It was held that the respondent was purely guilty for the damage and thus was held liable to defray the costs of remedial measures. Next as we all remember in the famous case of Ratlam Municipality reported in AIR 1980 Supreme Court 1622, where the residents were tormented by stench and stink caused by open drains and public excretion by slum dwelers, the issue of public nuisance and pollution was severly deprecated by the Supreme Court in the following words in paragraph 15:-

"Public nuisance because of pollutants being disbursed by big factories to the detriment of poorer sections is a challenge to the social justice componant of the rule of Law. ..... A responsible Municipal Council constituted for the precise purpose of preserving public health and providing amenities cannot run away from its principal duty due to financial inability. Decency and dignity are not negotiable facets of human rights and are a first charge on Local-self Governing body."

Similarly in the case of *T. Damodar Rao* v. *S.O. Municipal Corporation, Hyderabad*, AIR 1987 AP 171, The Andhra Pradesh High Court held in a case where land reserved for development of park was being used for housing construction, that such a misuse by the Government was violative of the right to enjoyment of life guaranteed under Article 21 of the Constitution of India and was pleased to observe in para 21 as follows:-

"Land reserved for development of park cannot be used for housing construction..... enjoyment of life guaranteed under Article 21 must be safeguarded as it embraces the protection and preservation of nature's gift without which life cannot be enjoyed. There can be no reason why practice of violent extinguishment of life alone should be regarded as violative of Article 21 of the Constitution. The slow poisioning on the pollution and spoilation should also be regarded as amounting to violation of Article 21 of the Constitution."

Recently in the case of *Ishawer Singh* v. *State of Harayana*, AIR 1996 P&H 30, the Punjab High Court directed closure and shifting of stone crushers and held that the citizens of the area were entitled to claim compensation from owners of stone crushers. Afforestation was directed in the famous case of Rural Litigation, AIR 1988 Supreme Court 2187, the issue of effluents discharge from tanneries in river Ganga was severly dealt with by the Supreme Court on a petition

filed by social activist M.C.Mehta.

Thus we see that there are laws to protect environment, the citizens of the country have an obligation under the Constitution to protect environment. The Courts in the country have been ensuring effective protection of enviornment. All that now we need is an iron will and catalyse the movement of environmental protection because conservation and preservation of environmental quality is the cry of the hour, as during the last few centuries with the growth of population the environment has been subject to harsh treatment by various activities based on development of scientific knowledge. The result is that man-kind has altered the characterstic features of this earth and its surroundings. In the end let me with all humility sound a word of caution that if the present course of environment degredation continues, then it will destroy the capability of our environment to support a reasonably civilised human society.

COURT OF LAW AND FORENSIC SCIENCE EXPERTS

C.K. Johari
Handwriting & Fingerprint Expert

In order to understand the work and nature of evidence that a **Forensic Science Expert** presents we must know about the experts, who generally appear in courts of law.

They are noted below :--

1. Pathologist of Medical Officer
2. Chemical Examiner
3. Serologist
4. Public Analyst
5. Superintendents of Narcotic Factories
6. Textile Experts
7. Finger Print Experts
8. Examiner of Questiond Documents
9. Mint Master
10. Superintendent, Security Printing Press, Nasik
11. Inspectors of Explosives
12. .Ballistics Expert
13. Physicist Performing physical examination like spectroscopy etc. and
14. Experts of different technological works of Engineering or any other industrial production.

There may be numerous other experts of **special technology or science of drugs** mainly the habit forming tranquillizers, heroin, marijuana and sleeping pills. Again, some Medical Officer by virtue of his holding a particular post may be chosen as a Medico-legal expert.

The **PATHOLOGIST** or the **DOCTOR** performs the following examination and gives expert evidence relating to them :

(a) Examination of injuries on the body of the victims, under sections 323, 324, 325, 326, 332, 337 or 338 of the Indian Penal Code Offences.

(b) Performance of post-mortem examinations or dead bodies in cases of murder, culpable homicide, accidents, negligent acts or in cases falling under Factory laws or Workmen's Compensation Act.

(c) Examination of victims of cases falling under Sections 376 or 377 IPC.

(d) Treatment of cases relating to poisoning and other problems of Toxicology ; and

(e) Determination of age in problems of minority, majority, puberty and proof of virginity.

The **CHEMICAL EXAMINER** performs all kinds of chemical and biological examinations, including examination of hair and fibres. His work overlaps in some matters with the examination of the Public Analyst, Inspector of Explosives and Narcotics Experts. The important feature of his work are blood and poisons.

The **SEROLOGIST** determines the origin of blood, that is, whether a given sample of blood is human or other manalian origin the group (A, B, AB, O-M, N, M-N, etc.) of blood and similar grouping of other human or animal secretions. The nature of examinations are mostly biological.

The **PUBLIC ANALYST'S** examinations are also partly chemical and partly biological **ANALOGOUS** to the work of the Chemical Examiner. In fact it is a sort of division of work to separate the examinations of food articles by an agency exclusively assigned for this purpose.

The experts dealing with **NARCOTICS** are attached to the Narcotics Factory of Ghazipur. The former name of this organisation was Government Opium Factory. The main work of the factory is to produce standard opium for general and medical use and the chemists of the factory are the experts who furnish opinion about the origin of the opium recovered from the possession of unauthorised persons under the NDPS Act or U.P. Opium Smoking Act.

Many persons do not know the difference between opium and its derivatives and cocaine. The later is quite a different Alkaloid obtained from coca leaves and tender twigs. It is used as local anaesthetic or stimulant. Coca plants grow as shrub in South America (Erythroxylon Coca). The leaves of this plant are also used directly in dried state for chewing with powdered lime as masticatory appear of hunger and nervous stimulant. It does not fall within the definition of narcotics and its examination is performed by the Chemical Examiner.

Cases referred to the **TEXTILES EXPERTS** are very rare. However they can furnish opinion about the design, kind of cotton used, thickness and twisting of strands of thread used in warp and weft and quality of a piece of cloth.

The actual problems which come across in crime investigation are whether a piece of cloth found with a suspect or victim had been or not the part of another piece, linking the accused person with the commission of crime. The solution of such questions lies in the domain of physical work which may consist of comparison of tear or shearing marks irregular functioning of machines or looms to insert a thick or double thread in warp or weft or continuation of some patches of colour or blood at relatively the same position in the two pieces. These examinations are made in Forensic Science Laboratories and do not require knowledge of textiles.

FINGER PRINT EXPERT is well known to the litigant public both in criminal and civil matters. Sir William Hershel introduced the use of Finger and palm prints in the middle of the last century in Bengal. The introduction of the use of thumb impressions on court documents has now become a deathblow to the nefarious activities and profession of forgers and dishonest litigants. Finger prints are the absolute means of identifications. The Finger Print Expert deals mainly with two questions :--

-- Whether the two finger prints have been or have not been made by the same finger and

-- Whether the finger prints in question contain sufficient number of ridge characteristics for purposes of comparison or not.

Science of Ballistics has made tremendous advances. A **BALLISTIC EXPERT** can state definitely whether a given cartridge or bullet found lodged in the body of a victim, has been fired or not from the firearm recovered subsequently from the culprit. The range of firing, the number and variety of arms can also be determined in a positive manner.

The **EXAMINER OF QUESTIONED DOCUMENTS** deals with the problems relating to handwriting, forgeries, obliterated documents and to some extent inks also. Scientific analysis of a piece of writing or signature depicts the individual characteristics of the writer and if enough specimen writing is available for comparison, a **DOCUMENT/HANDWRITING EXPERT** can give a definite opinion about the genuineness or otherwise with respect to it. He can also say whether the author has made an attempt to disguise or has tried to introduce artificial tremors to imitate the old age of writer of advanced years. He can also state if a given signature has been made by means or "Freehand" or "Traced" forgery. It is also possible to detect if some portion of a document has been removed by means of a chemical or mechanical erasure. Under favourable circumstances the nature and colour of inks can also be ascertained.

Although our Supreme Court has taken a different view, it is also possible to say for a **Document Expert,** whether the two scripts have been typed from one or different type-machines or from a given particular machine.

Identification of handwriting is a science and occupies an important place in the administration of justice, where the rights and liabilities of persons depend upon the genuineness or otherwise of questioned documents in **courts of law.**

We are well aware of the fact the **SCIENCE** has deeply intruded in all branches of **Crime Investigation** and the **SCIENTIFIC EVIDENCE** shall ever speak the **TRUTH,** it will not be **INFLUENCED** by any consideration and shall never turn **HOSTILE** or be **bribed.**

QUIZ No. 5

(Justice K.N. Goyal)

The correct solution to Quiz No. 4 is as follows :

1 (A) **State of Kerala** v. **M.K. Kunhikannan Nambiar,** (1996) 1 SCC 435.

(B) Mr. Justice Syed Murtaza Fazl Ali.

2 (A) The right of private defence.

(B) **State of U.P.** v. **Ram Swarup,** (1974) 4 SCC 764.

3 (A) Mathew & Beg JJ.

(B) **Himmatlal K. Shah** v. **Commr. of Police,** (1973)1 SCC 227.

4 (A) Postgraduate medical course.

(B) **Ajay Kumar Singh** v. **State of Bihar,** (1994) 4 SCC 401 : JT 1994(2) SC 662.

5 (1) - g

(2) - c

(3) - f

(4) - a

(5) - j

(6) - b

(7) - i

(8) - d

(9) - e

(10) - h

6 (1) Representation of the People Act, 1951 (No. 43 of 1951), Sec. 94

(2) Indian Penal Code (Act No. 45 of 1860), Sec. 171-C(1)

(3) Hindu Minority and Guardianship Act,1956 (No. 32 of 1956), Sec. 10

(4) Indian Contract Act, (No. 10 of 1872), Sec. 69.

(5) Revenue Recovery Act, 1890 (No. 1 of 1890), Sec. 3(1)

7 (1) U.P. Departmental Inquiries (Enforcement of Attendance of Witnesses and Production of Documents) Act, 1976 (No. 4 of 1976), Sec. 4(3).

(2) U.P. Regulation of Moneylnding Act, 1976 (No. 29 of 1976), Sec. 23(1).

(3) U.P. Intoxicating Liquor (Objectionable Advertisements) Act, 1976 (No. 3 of 1976), Sec. 3.

(4) U.P. Electric Wires and Transformers (Prevention and Punishment of Theft) Act, 1976 (No. 42 of 1976), Sec. 3(3).

(5) U.P. General Clauses Act, 1904 (No. 1 of 1904), Sec.9-A.

8 (a) **Secy. to Govt. of Madras** v. **P.R. Sriramulu**, (1996) 1 SCC 345

(b) **Gurmit Kaur** v. **Surjit Singh,** (1996) 1 SCC 39 or
Vanmala v. **H.M. Ranganatha Bhatia,** (1995) 5 SCC 299

(c) Mohd. Iqbal Madar Sheikh v. State of Maharashtra, (1996) 1 SCC 722; JT 1996(1) SC 114 or ;
Abdul Aziz v. **State of W.B.**, (1995) 6 SCC 47 : 1995 SCC (Cri) 1022.

(d) **Gurbachan Singh** v. **Bhag Singh,** (1996) 1 SCC 770: 1995(4) CCC 516 : AIR 1996 SC 1087.

(e) **Joginder Kumar** v. **State of U.P.,** (1994) 4 SCC 260 ; 1994 Cr LJ 1981.

The winners are :-

Ist Prize : Sarvasri S.K. Tripathi, Jt. L.R., V.K. Singh, Jt. L.R., Balveer Prasad, Civil Judge, Senior Division, each scoring cent per cent marks. Sri S.K. Tripathi and Sri Balveer Prasad had scored cen per cent marks in Quiz No. 2 as well, while Sri Balveer Prasad who had scored 76% marks in the first Quiz too, was the sole first prize winner in Quiz No. 3 For him it's a hat trick.Sri V.K. Singh had scored 88% in Quiz No. 2 also but could then get only 5th position. As a trainee in J.T.R.I. in 1988 he had stood first at an oral QUIZ. Later he served as Duputy Director too.

IInd Prize : Sri Jitendra Kumar, Civil Judge, Junior Division, with 98% marks.

3rd Prize : Sri Niraj Kumar Sangal, Civil Judge, Junior Division, with 97% marks. He had scored 94% marks in Quiz No. 2 also but could then get only 4th position.

Wonderful performance indeed ! Heartiest congratulations to each one of them.

Others who have passed are :

4th : Sri Shiva Nand Mishra, Addl. District Judge (who was among the top scorers of Quiz No. 2) and Sri R.P. Verma, Addl. C.J.M., with 94% marks each.

5th : Sri Rajvir Sharma, Civil Judge, Senior Division, with 88% marks.

6th : Surshri Kumkum Rani, Civil Judge, Junior Division, with 78% marks, who is first among women (she had passed jn Quiz No. 1 also)

7th : Sri Anoop Kumar Goel, Civil Judge, Junior Division with 52% marks.

They should suprely fare better next time.

What is most heratening is that the younger officers are taking considerable interest and scoring very well.

In order to ensure that the first prize winners do not get less than the runners up, the total prize money (Rs. 5000) has to be redistributed. So each first prize winner willget Rs. 1200 each (total Rs. 3600) the first runners up will get Rs. 800 and the second runner up will get Rs. 600.

The next Quiz will have same rules as Quiz Nos. 3 and 4. So the rules are not being repeated. But the prize money may have to be reduced as there is reported to have cropped up some unforeseen problem about it. I cannot therefore say what exactly the prizes will be. Even some earlier winners could not be paid prizes so far. But this should not put off the prospective participants. Participation should itself be a rewarding experience. Their photographs will also be published as usual. Answers may be sent by Jan. 15, 1997.

QUIZ No. 5

1. "It is common knowledge that currently in our country criminal courts excel in slow motion. The procedure is dilatory, the dockets are heavy, even the service of process is delayed and, still more exasperating, there are appeals upon appeals and revisions and supervisory jurisdictions, baffling and baulking speedy termination of prosecutions."

   These observations were made by a distinguished Supreme Court Judge more than ten years ago.

   (a) Identify the Judge and the case in which he made them. 5

   (b) In which case during the last two years have they been quoted with approval? 5

2. "Any declaration or conclusions arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent" - per R. M. Sahai J. in a concurring judgment.

What is this rule, carved out as an exception to the rule of precedents, called ? 10 marks

3. "On a number of occasions in the past this Court has expressed its disapproval of the use of strong and carping language by judges while criticising the conduct of parties and their witnesses before it. It has been said that judges must act with sobriety, moderation and restraint and must have the humility to recognise that they are not infallible. Emphasising the need for mutual respect it has been observed that in order to command respect there must be respect by the judiciary to those who come before the court as well as other co-ordinate branches of the State."

In which Supreme Court case and by whom were the above observations made. 10 marks

4. "The exaggerated adhereace to and insistence upon the establishment of proof beyond every reasonable doubt by the prosecution, ignoring the ground realities, the fact situations and the peculiar circumstance of a given case often results in miscarriage of justice and makes the justice delivery system a suspect. In the ultimate analysis the society suffers and a criminal gets encouraged."

Identify the Supreme Court judgment (with the name of the Judge) in which this passage occurs. 10 marks.

5. Let us not forget our proud heritage. Following are clues about the identity of some of the distinguished members of the U.P. judiciary and the bar., Identify them :-

(a) Earlier a barrister appointed direct as District Judge III grade (equivalent to Civil Judge, Senior Division), then became the first Indian Judge of our High Court.

(b) Earlier, Munsif, then Civil Judge, then High Court Judge for thirty years, also acted as Chief Justice.

(c) Starting as Munsif, later High Court Judge for eight years, also officiated as Chief Justice.

(d) Earlier, Chief Justice of our High Court, later Judge Federal Court of India.

(e) Earlier, Minister of Justice U.P. ; later Union Home Minister, also Governor

and Chief Minister in other States.

(f) Earlier, High Court Judge, later Union Law Minister; later Governor of a State, then Vice-President of India.

(g) Earlier, headed the U.P. Judicial Reforms Committee, later Chief Justice of India.

(h) Earlier Legal Remembrancer, U.P. Government; later Judge Supreme Court.

(i) Earlier, Advocate General, U.P., later Solicitor General of India, then Union Law Minister.

(j) Earlier, Chief Judge, Oudh Chief Court; later Judge Supreme Court.

-2 marks each, total 20 marks.

6(a) A suit was decreed ex parte by a court of Civil Judge in U.P. The defendant who belonged to Delhi filed a direct appeal before the Supreme Court. The Supreme Court found the judgment so shocking that it entertained and allowed the appeal and dismissed the suit with special costs, (Rs. 50,000), holding the institution of the suit to be an abuse of the process of the Court.

(b) A summary conviction on a charge u/s. 294 I.P.C. (obscene songs and acts in a public place) was held not to amount to conviction for an offence involving moral turpitude which may disqualify a person from appointment to government service.

(c) The screening of the film Bandit Queen was permitted, reversing the decision of the Delhi High Court.

(d) The promises and prayers uttered by the bride and the bridegroom in a Hindu marriage were cited.

(e) A homoeopath administering allopathic medicine was held to be a quack and a charlatan.

Identify the Supreme Court decisions

- 2 marks each, total 10 marks

7. The following passages have all been cited in a single case, which is a celebrated case of a Constitution Bench, identify that case :-

(a) "The system of free elections depends on a certain separation of powers between administrators (or policemen) and politicians : there must be some public sense that police and administration serve the public, not the party leaders" - W.J.M. Mackenzie.

(b) "An election is a politically sacred public act, not of one one person or of one official, but of the collective will of the whole constituency. Courts naturally must respect this public expression secretly written and show extreme reluctance to set aside or declare void an election which has already been held unless clear and cogent testimony compelling the Court to uphold the corrupt practice alleged against the returned candidate is adduced" - Krishna Iyer J.

(c) "Theory is the most important part of the dogma of law, as the architect is the most important man who takes part in the building of a house." - Holmes J.

(d) "Emotive words such as 'equality', 'dictatorship', 'elite' or even 'power' can often, by the very passions which they raise, obscure a proper understanding of the sense in which they are, or should be, or should not be, or have been used." - Leonard Schapiro - 10 marks

8. In Col. 1 below are set out ten legal maxims in Latin. Col. 2 gives the English equivalents, but in a jumbled fashion. Match them.

	Col. 1 Latin	Col. 2 English
1.	Nullus commodum capero potest de injuria sua propria	(a) A man shall not take advantage of his own wrong to gain the favourable interpretation of law.
2.	Ex turpi causa non oritur actio	(b) The court shall not assist a guilty party.
3.	Lex non cogit ad impossibilia	(c) An Act of the court shall prejudice no man.
4.	Salus populi est suprema lex	(d) The law does not concern itself about trifles.
5.	De minimis non curat lex	(e) No man can take advantage of his own wrong.
6.	Frustra legis auxilum invocat quaerit qui in legem committit	(f) The law does not compel a man to do that which he cannot possibly perform.
7.	Actus curiae neminem gravabit	(g) What is expressed makes what is silent cease.

8.	Expressio facit cessare tacitum	(h) Lapse of time does not bar the right of the Crown (Government).
9.	Vigilantibus et non dormintibus jura subveniunt.	(i) The laws assist those who are vigilant, not those who sleep over their rights.
10.	Nullum tempus occurit regi	(j) Regard for the public welfare is the highest law.

Try to give supporting Indian rulings also, but no marks will be deducted for your failure to do so. 20 marks

PROFORMA FOR ANSWERS TO QUIZ No. 5

QUESTION No. Answer Additional information if required

1. (a)
(b)
2.
3.
4.
5. (a)
(b)
(c)
(d)
(e)
(f)
(g)
(h)
(i)
(j)
6. (a)
(b)

(c)

(d)

(e)

7.

8 1.

2.

3.

4.

5.

6.

7.

8.

9.

10.

Signature

Name and Official Address

PHOTOGRAPHS OF THE WINNERS OF QUIZ No. 3

First Prize

Balveer Prasad Gupta
Addl. C.J.M.
Mathura

Second Prize

V.S. Bajpai
District Judge
Barabanki

Second Prize

D.K. Srivastava
Civil Judge
Allahabad

Second Prize

P. K. Singh
Civil Judge (J.D.)
Barabanki

Third Prize

Shiva Nand Misra
Addl. District Judge
Barabanki

VARYING JUDGEMENTS

Krishan Mahajan
Advocate, Supreme Court

The Supreme Court in the decision of Mukhtiar Singh and another v. State of Punjab has had to point out the unfortunate situation of a trial court not writing a proper judgement. Justices A.S. Anand and M.K. Mukherjee while dealing with the first and final appeal in a TADA case from the Special Court, Ferozpur, Punjab declared, "The judgement of the trial court is,truly speaking, not a judgement in the eye of law. The trial court appears to have been blissfully ignorant of all the requirements of Section 354 (1) (b) Cr.P.C." The consequence of this state of affairs was that the Supreme Court had to remand the case to the trial court for a fresh disposal by writing a fresh judgement in accordance with law even though the occurrence had taken place more than 10 years ago.

In order to prevent any repetition of what it had been faced with, the judges pointed out that the order of acquittal as well as the order of conviction of the accused had been made by the trial court in a most perfunctory manner. It had not considered and discussed the evidence led by the prosecution or their arguments raised at the Bar. The trial court noticed the prosecution case, medical evidence, the material collected during investigation, the arrest of different accused persons on different dates, the names of the prosecution witnesses and the fact that the accused had been examined under Section 313 Cr. P.C. After this it passed the order of acquittal and conviction.

The judges pointed out that the trial court was dealing with a serious case of murder. It was expected of it to notice and scrutinize the evidence and after considering the submissions raised at the Bar, arrive at appropriate findings. The judges declared that they had searched in vain through the cryptic judgement of the trial court, the reasons for passing the order of acquittal and conviction of the accused persons. The least that was expected "on the plainest requirement of justice and fair trial" was that the trial court would notice, consider and discuss even briefly the evidence of various witnesses as well as the arguments addressed at the Bar. By not doing so, the trial court had failed in the discharge of its essential duties. There was no mention in the judgement as to what various witnesses deposed at the trial court except of the evidence of the medical witnesses. The judgement did not disclose what was argued before it on behalf of the prosecution and the defence. Consequently, the judges could not ap-

preciate as to how the trial court arrived at its findings.

The judges laid down that a decision does not merely mean the conclusion. It embraces within its field the reasons which formed the basis for arriving at the conclusions. The judges had to remand the case back for re-hearing in the absence of any reasons given by the trial court for its conclusions. If the judges had analysed the evidence themselves and given a re- hearing, then the accused would have lost the only right of appeal that they would have had under TADA to the Supreme Court.

While keeping these lessons in mind, there will arise quite often one basic problem for trial court judges in writing their judgements. Every trial court judge must know what the High Court and the Supreme Court have said concerning the law which he would be applying in a judgement. There are two problems on this score. One problem is that there is no mechanism between the courts inter-se for keeping the trial court judges informed of the latest judgements of the superior courts. The counterpart of this is that there is no mechanism for a continuing analysis, even on a sampling basis, of trial court judgements concerning legal methodology or sentence variation. Thus, the necessary information input and the consequent re-learning process are both absent.

The second problem also requires serious consideration. This arises from the nature of the Supreme Court judgements themselves which under Article 141 of the Constitution are binding on all courts. The problem is of the judgements which express opinions on issues which never arose on the facts of the case in which judgement was given. Article 142 confers powers on Supreme Court to pass any order and issue directions in the interest of justice in any case pending before it. Two examples of this will suffice.

One is the question which affects the entire administration of Detention Law. The question is whether a detenu has a right under COFEPOSA or PIT-NDPS Acts to make a representation to the very officer who passed the detention order. The only case in which the question arose before the Supreme Court was that of Sushila Mafatlal Shah V. State of Maharashtra 1988(4) SCC 490. In this case the Bombay High Court quashed the order of detention under Section 3(1) of COFEPOSA on the ground that the officer who passed the detention order had only communicated that the detenu had a right of making a representation against his detention to the State and Central Government without mentioning that he also had a right to represent to the detaining authority itself.

The Supreme Court rejected this interpretation and reversed the order of the Bombay High Court.

However, the observations to the contrary were made by the Supreme Court in Ibraham Bachu Bafan V. State of Gujarat, 1985(2) SCC 24. There was no issue before the Supreme Court in this case regarding the right of making a representation to the detaining authority itself. The only issue before the Court in this case was the interpretation of Section 11(2) of COFEPOSA which had been brought in by the Amendment Act, 1984. The amending Section declared that revocation of a detention order shall not bar the making of another detention order under Section 3 against the same person. In this case all the three orders of detention were made successively on the same grounds, even after the High Court had quashed the detention order. The Supreme Court after a discussion of the meaning of the word "Revocation" held that Section 11(2) could not nullify the result of the exercise of power of the High Court under Article 226 of the Constitution by which the detention had been quashed.

After this judgement, a trial court judge would be in a dilemma as to whether to follow the judgement of the Supreme Court in Sushila Mafat Lal Shah V.State of Maharashtra or to follow the observations made by the Supreme Court in Ibrahimn Bachu Bafan V. State of Gujarat. The problem would arise because both judgements and observations are binding as far as the trial judge is concerned.

The problem has become somewhat complicated after the observations of the Supreme Court in Amir Shad Khan v. L. Himigliana 1991(4) SCC 39. Once again, on the facts of the case the question of right of a detenu to make a representation to the detaining authority never arose. This was so because the case concerned the refusal of the detaining authority and the State government to make xerox copies to forward the representation to the Central Government at the request of the detenu. However, once again for a trial court judge the problem is that both the judgements and the observations of the Supreme Court are binding on him.

But the problem is not limited to the trial court judges only. It extends right up to the Supreme Court itself in vital constitutional matters. One of the major issues confronting the Supreme Court has been the power of Parliament to amend the Constitution and especially the fundamental right with a view to implement the Directive Principles of the Constitution. The Constitution Bench in

Minerva Mill's case, AIR 1980, SC 178 had struck down the attempt of Parliament to empower itself to make a law for implementing any or all of the Directive Principles by immunising such a law from judicial review. However, in Sanjeev Coke & Company v. Bharat Cooking, AIR 1993, SC 239, Justice O. Chinnappa Reddy in his judgement questioned the soundness of the decision in the Minerva Mill's case.

While it is correct on the part of the Supreme Court to pull up trial court judges who violate the basic canons of judgement writing, it should also be realised that trial court judges sometimes find it difficult to apply the correct law in their judgement if, on the same issue, they have contrary opinions from the apex court.