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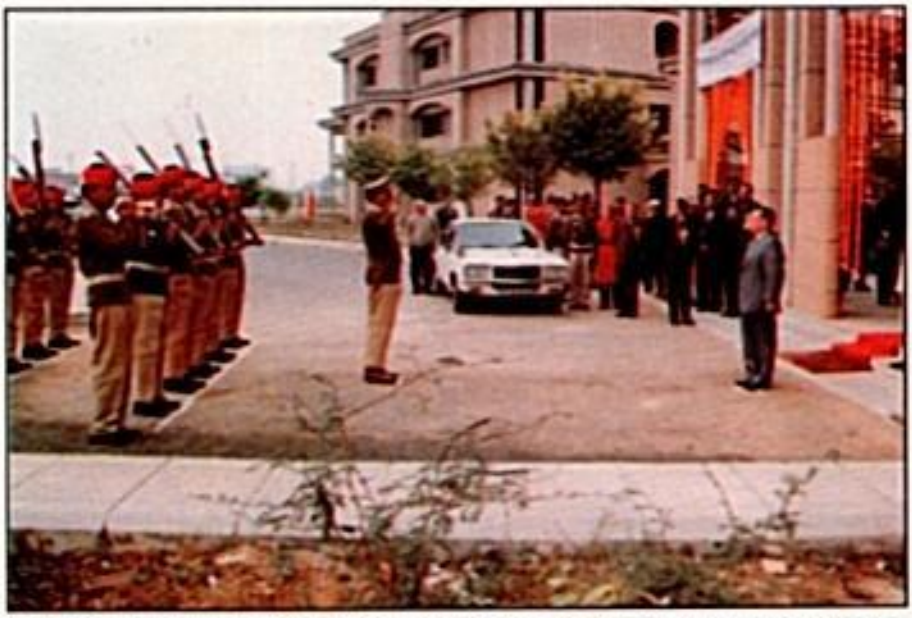

Hon'ble Mr. Justice B. N. Kirpal, Judge, Supreme Court of India, taking Guard of Honour.

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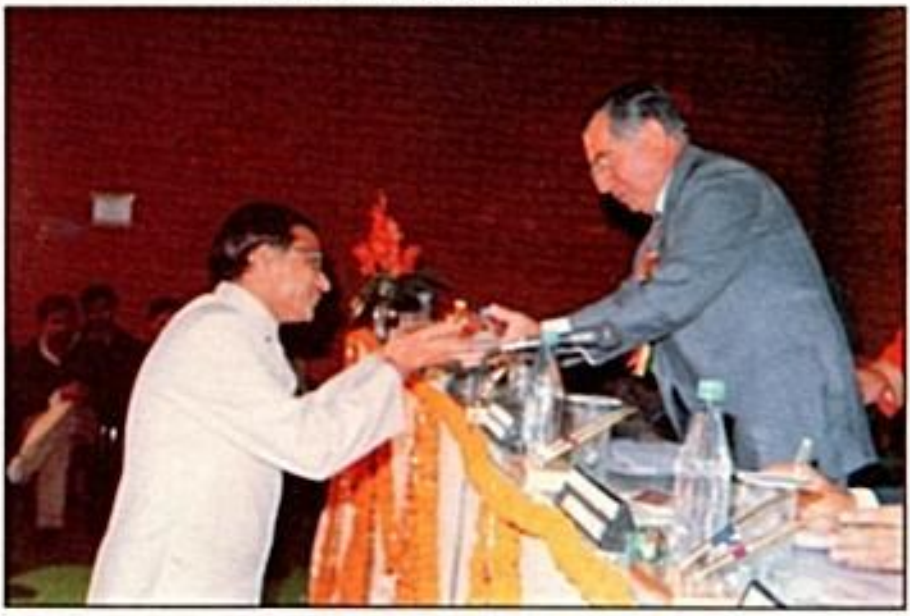

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On dais, Hon'ble Mr. Justice B. N. Kirpal, Judge, Supreme Court of India, (Fourth from right), Hon'ble Mr. Justice S. K. Sen, Chief Justice, Allahabad High Court (Fifth from right), Hon'ble Sri Radhey Shyam Gupta, Law Minister, UP (Third from right), Hon'ble Mr. Justice G. P.Mathur, Administrative Judge, Lucknow (Second from right), Hon'ble Mr. Justice A. N. Gupta, the then Chairman, UTR (First from right) and Mr. D.P.Gupta, Director, IJTR, UP (First from left).

Mr. D. P. Gupta, Director, IJTR addressing Inaugural Session. On dias seen, Hon'ble Mr. Justice B. N. Kirpal, Judge, Supreme Court of India, (Fourth from right), Hon'ble Mr. Justice S. K. Sen, Chief Justice, Allahabad High Court (Fifth from right), Hon'ble Mr. Justice S.H.A. Raza, Senior Judge, Allahabad High Court, Lucknow Bench (Sixth from right), Hon'ble Sri Radhey Shyam Gupta, Law Minister, UP (Third from right), Hon'ble Mr. Justice G. P.Mathur, Administrative Judge, Lucknow (Second from right), Hon'ble Mr. Justice A. N. Gupta, the then Chairman, UTR, UP. (First from right).

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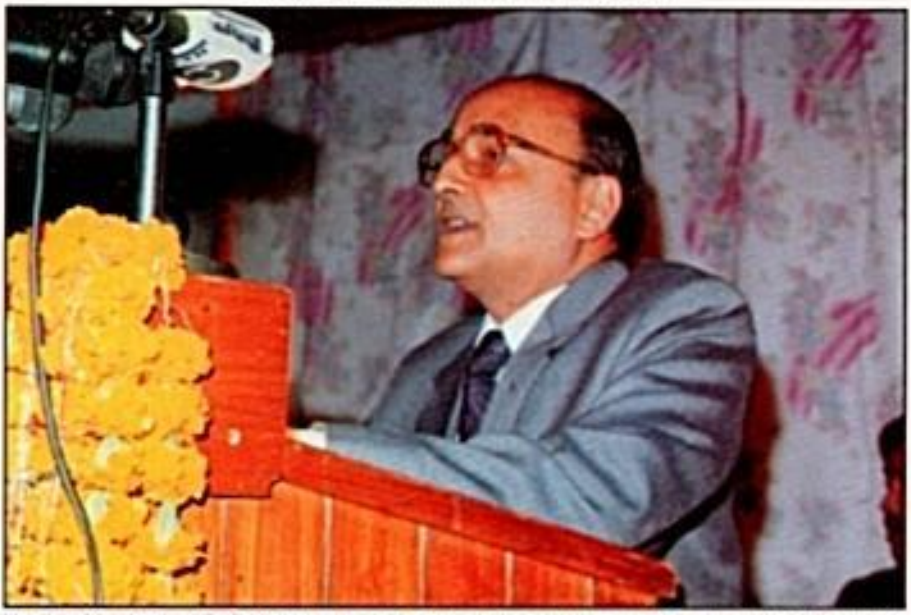

Hon'ble Mr. Justice G. P.Mathur, Administrative Judge, Lucknow addressing in the inaugural session.

Hon'ble Mr. Justice B. N. Kirpal, Judge, Supreme Court of India, releasing special Issue of JTRI Journal on Cyber Laws & Crimes in the Inaugural Session.

Hon'ble Mr. Justice B. N. Kirpal, Judge, Supreme Court of India, alongwith Hon'ble Mr. Justice S. K. Sen, Chief Justice, Allahabad High Court, Hon'ble Mr. Justice S.H.A. Raza, Senior Judge, Allahabad High Court, Lucknow Bench, Hon'ble Mr. Justice A. N. Gupta, the then chairman, IJTR and Mr. D. P.Gupta, Director, IJTR during visit to Library of the Institute.

Hon'ble Lady B. N. Kirpal, Hon'ble Lady S. K. Sen, Hon'ble Lady G. P. Mathur, during visit to IJTR, UP.

His Excellency Sri Vishnu Kant Shastri, Governor of UP, addressing the participants of Training Programme on Cyber Laws & Crimes & Intellectual Property Rights, at Raj Bhawan, Lucknow alongwith Hon'ble Mr. Justice A. N. Gupta, the then Chairman, IJTR, (Second from right), Mr. D. P. Gupta, Director, IJTR (extreme left) and Mr. Shambhu Nath, Principal Secretary, to His Excellency (extreme left).

His Excellency Sri Vishnu Kant Shastri, Governor of UP receiving memento from Sri D. P. Gupta, Director IJTR. Seen Mr. N. V.Gupta, Additional Director, IJTR, Mr. Raghvendra Kumar, Addl. Director, IJTR and Mr. Roslan Bin Abu Bakar , Pragramme Director, (Civil Litigation) ILKAP, Malaysia during visit to Raj Bhawan.

His Excellency Sri Vishnu Kant Shastri, Governor of UP alongwith Faculty Members of IJTR and Trainees on visit to Raj Bhawan.

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Hon'ble Mr. Justice S. K. Sen, Chief Justice, Allahabad High Court, arriving in the Institute for inauguration of newly constructed Hostel on 17 April, 2001. alongwith seen Mr. D. P. Gupta, Director, IJTR, Mr. Aditya N. Mittal, Addl. Director, IJTR.

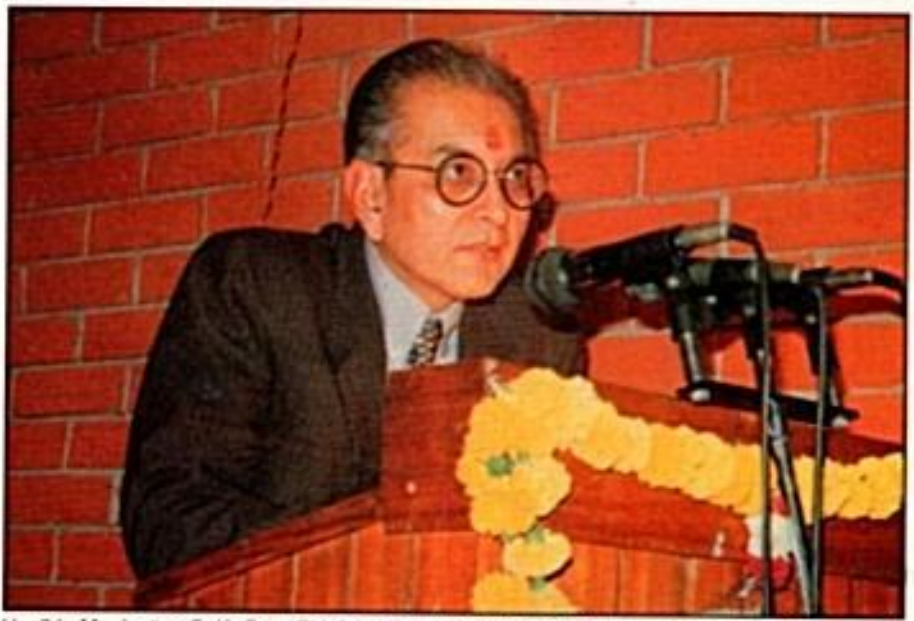
Hon'ble Lady S. K. Sen receiving bouquet from Lady D. P. Gupta, in the inaugural ceremony of newly constructed hostel of IJTR on 17th April, 2001.

Hon'ble Mr. Justice S. K. Sen, Chief Justice, Allahabad High Court, unveiling the inauguration Stone of Newly Constructed Hostel of IJTR on 17th April, 2001, alongwith Hon'ble Lady S. K. Sen, Hon'ble Mr. Justice A. N. Gupta, the then Chairman, IJTR, Mr. D.S. Bhui, Chief Architect, UPRNN and Mr. H. K. Abidi, Addl. Project Manager, UPRNN.

Hon'ble Mr. Justice S. K. Sen, Chief Justice, Allahabad High Court, cutting the ribbon of newly constructed hostel of IJTR alongwith Hon'ble Lady S. K. Sen, Hon'ble Mr. Justice A. N. Gupta, the then Chairman, IJTR, Mr. D. P.Gupta, Director, IJTR and Mr. T. Ram, Managing Director, UPRNN, on 17th April, 2001.

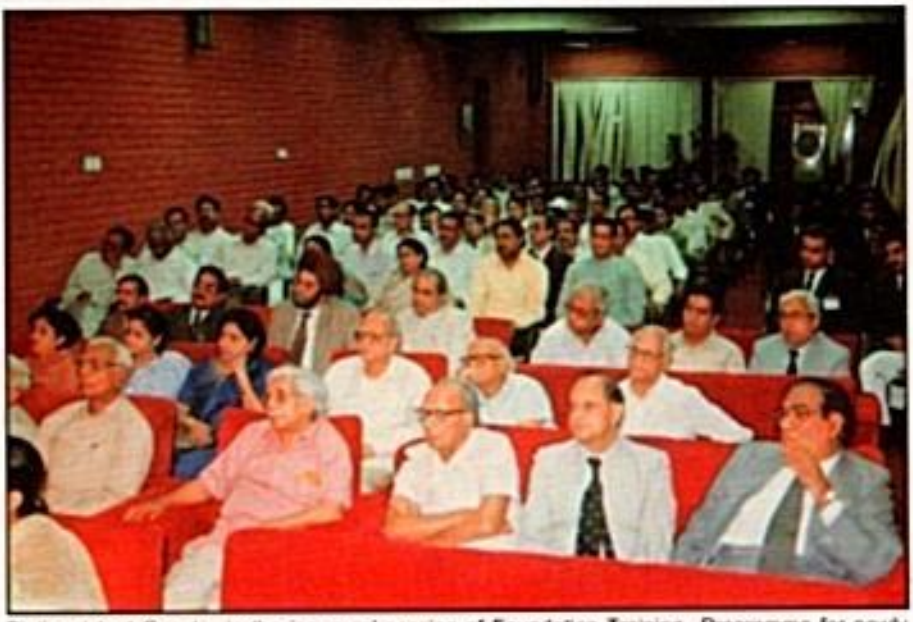
Hon'ble Mr. Justice S. K. Sen, Chief Justice, Allahabad High Court, (middle), Hon'ble Mr. Justice S.H. A. Raza, Senior Judge, Allahabad High Court, Lucknow Bench (Second from left), Hon'ble Mr. Justice A. N. Gupta, the then Chairman, IJTR (Second from right), Mr. N. K. Mehrotra, Principal Secretary, Law and LR, (First from left) and Mr. D. P. Gupta, Director, IJTR (first from right) in the inaugural session of Foundation Training Programme for newly appointed Civil Judges (Junior Division) on 17th April, 2001.

Hon'ble Mr. Justice S. K. Sen, Chief Justice, Allahabad High Court, lightening the lamp in the inaugural session of Foundation Training Programme for newly appointed Civil Judges (Junior Division), alongwith Hon'ble Mr. Justice S.H. A. Raza, Senior Judge, Allahabad High Court, Lucknow Bench, Hon'ble Mr. Justice A. N. Gupta, the then Chairman, IJTR Mr. D. P.Gupta, Director, IJTR, on 17th April, 2001.



Hon'ble Mr. Justice S. K. Sen, Chief Justice, Allahabad High Court, addressing in the inaugural session of Foundation Training Programme for newly appointed Civil Judges (Junior Division), on 17th April, 2001.

Hon'ble Mr. Justice S.H. A. Raza, Senior Judge, Allahabad High Court, Lucknow Bench, addressing in the inaugural session of Foundation Training Programme for newly appointed Civil Judges (Junior Division), on 17th April, 2001.

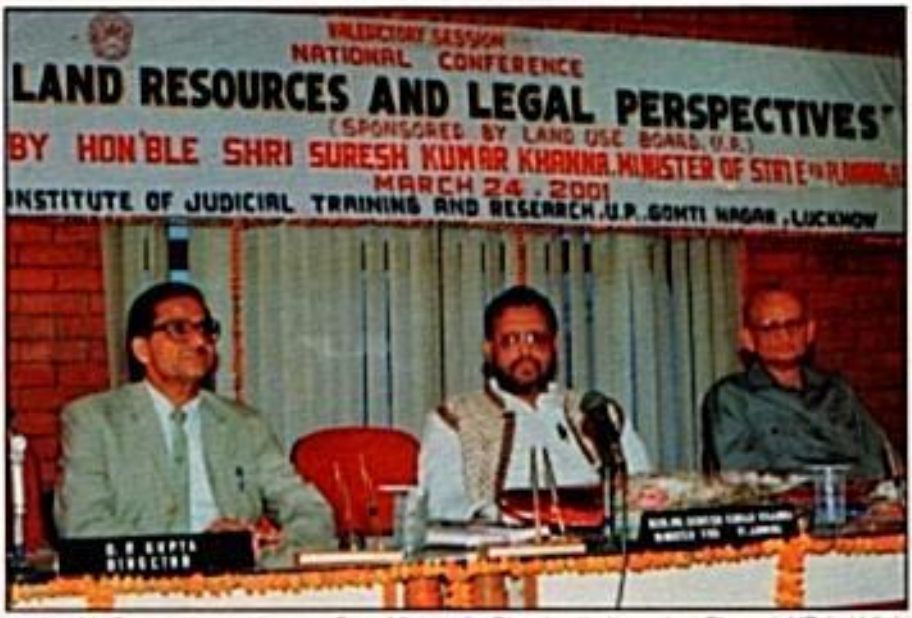


Distinguished Guests in the inaugural session of Foundation Training Programme for newly appointed Civil Judges (Junior Division), on 17th April, 2001.

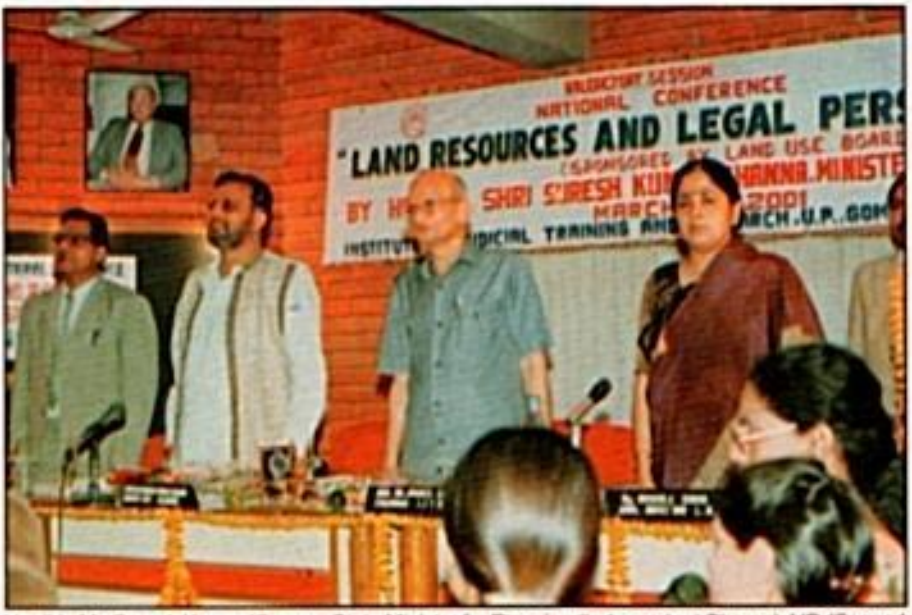
Hon'ble Mr. Justice S. K. Sen, Chief Justice, Allahabad High Court, alongwith Hon'ble Mr. Justice S.H. A. Raza, Senior Judge, Allahabad High Court, Lucknow Bench, Mr. D. P.Gupta, Director, IJTR, and Mr. Raghvendra Kumar,Addl.Director, IJTR,UP with trainees of Foundation Training Programme C[illegible] Judges (Junior Division).

Hon'ble Sri Radhey Shyam Gupta, Law Minister, UP lightening the lamp alongwith Hon'ble Mr. Justice A. N. Gupta, the then Chairman, IJTR, Mr. D. P.Gupta, Director, IJTR, Mr. N. K. Mehrotra, Principal Secretary, Law and LR, Mr. A.N. Mittal, Addl. Director, IJTR and Mr. Raghvendra Kumar, Addl. Director, IJTR,UP, in the inaugural session of National Conference on "Land Resources and Legal Perspectives" on March 23, 2001 at IJTR.

Hon'ble Sri Radhey Shyam Gupta, Law Minister, UP addressing delegates of National Conference on Land Resources and Legal Perspectives on March 23, 2001. Seen on dias Hon'ble Mr. Justice A. N. Gupta, the then Chairman, IJTR, Mr. D. P.Gupta, Director, IJTR, Mr. N. K. Mehrotra, Principal Secretary, Law and LR and Mr. Satish Kumar, Secretary (Planning) Govt. of UP.



Hon'ble Mr. Suresh Kumar Khanna, State Minister for Planning (Independent Charge), UP, (middle), Hon'ble Mr. Justice A. N. Gupta, the then Chairman, IJTR (Right), Mr. D. P. Gupta, Director, IJTR (Left) in the Valedictory Session of National Conference on Land Resources and Legal Perspectives on March 24, 2001 at IJTR.

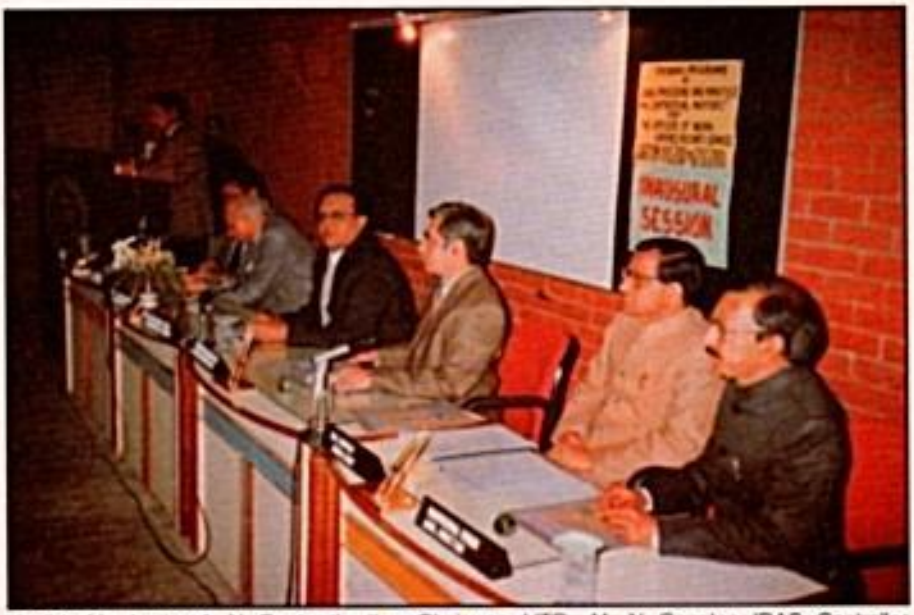


Hon'ble Mr. Suresh Kumar Khanna, State Minister for Planning (Independent Charge), UP, (Second from Left), Hon'ble Mr. Justice A. N. Gupta, the then Chairman, IJTR (Second from right), Mr. D. P. Gupta, Director, IJTR (extreme left) and Mrs. Mridula Singh, Additional Director, Land Use Board, During National Anthem in Valedictory Session of National Conference on "Land Resources and Legal Perspectives" on March 24, 2001 at IJTR.

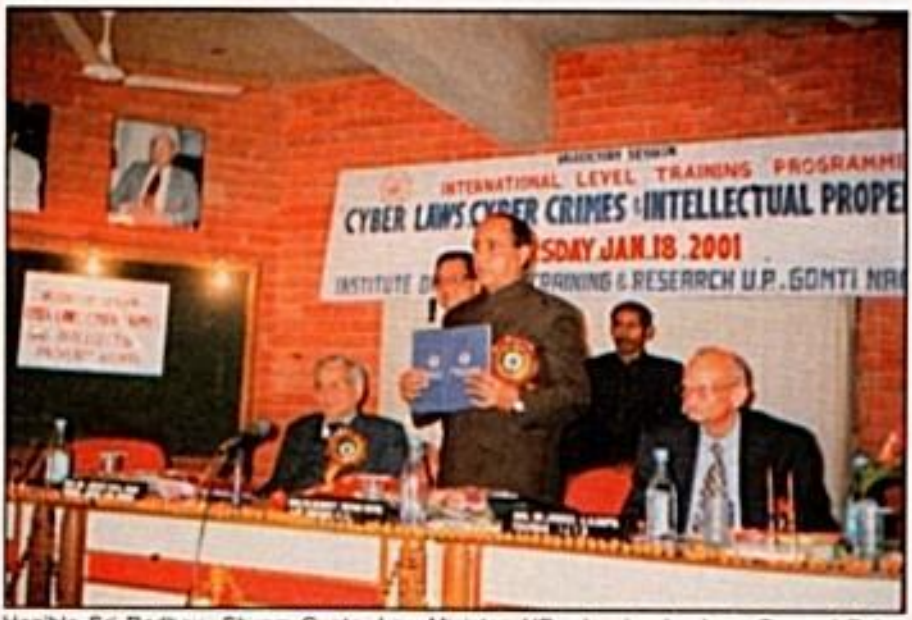
Hon'ble Mr.Justice S. C. Verma, Lok-Ayukta, UP (Third from right) alongwith Mr.D.P. Gupta, Director, IJTR, Mr. N. V. Gupta, Addl. Director, IJTR, Dr. Rakesh Goyal, Technical Director, NIC in the inaugural session of Training Programme on Computer Application and Information Technology. Mr. Aditya N. Mittal, Addl. Director, IJTR compering the session.

Hon'ble Mr.Justice M. M.Husain, Former Lok-Ayukta, UP in the inaugural session of Refresher Training Programme (13.02.2001 to 24.02.2001) for Additional District Judges of U.P. alongwith Hon'ble Mr. Justice A. N. Gupta, the then Chairman, IJTR, Mr. D. P. Gupta, Director, IJTR and Mr. Raghvendra Kumar, Addl. Director, IJTR, UP.

Additional District & Sessions Judges of UP in the Refresher Training Programme in Lecture Theater of IJTR, UP.



Hon'ble Mr. Justice A. N. Gupta, the then Chairman, IJTR, Mr. N. Gopalan, IDAS, Controller General of Defence Accounts (fourth from right), Mr. Arun Sedwal, Principal CDA (Third from right), Mr. D. P. Gupta, Director, IJTR and Mr. Raghvendra Kumar, Addl. Director, IJTR,UP in the Inaugural Session of Legal Training Programme for officers of National Defence Accounts Services on 18th December, 2000



Hon'ble Sri Radhey Shyam Gupta, Law Minister, UP releasing book on General Rules "Criminal", published by IJTR in the valedictory session of International Level Training Programme on "Cyber Laws and Cyber Crimes and Intellectual Property Rights, seen on dias Hon'ble Mr.Justice S.H.A.Raza, Senior Judge, Allahabad High Court, Lucknow Bench (extreme left), Hon'ble Mr. Justice A. N. Gupta, the then Chairman, IJTR, UP, (extreme right) and Mr. D. P. Gupta, Director, IJTR, UP (middle with Hon'ble Law Minister).

Officers of National Defence Accounts Services in Lecture Theater of IJTR, UP.

EMERGENCE OF NEW LAWS AND JUDICIARY

Justice B. N. Kirpal,
Judge,
Supreme Court of India

Hon'ble The Chief Justice Mr. Justice Sen, Hon'ble the Law Minister Sri R. S. Gupta, Justice Raza, Justice Mathur and Justice Gupta, Mr. D.P. Gupta, Brother Judges, past and present, members of faculty and trainees.

First of all on my own behalf and on behalf of my wife I would like to thank the Chief Justice Mr. Justice Sen as well as Mr. Justice Gupta for having invited us to come to Lucknow and inaugurate this programme. This first of all gives us an opportunity and I let out the secret that it has given us an opportunity of visiting this great city for the first time. We are indeed very happy and glad to be here in the city of the "Kababs and Nawabs" as justice Raza rightly quoted but what has given us greater happiness is to see this Institute. I heard a lot about it but today I have seen myself as to how good the Institute is, how efficiently it is working and as to how modern it acts and futuristic it is in its thinking. Cyber Laws is a thing of the present and of the future.

We are now in the 21st Century. In the last 20 Centuries, the last one century has done maximum and has progressed the most in which there are much scientific achievements and as such that one Century by itself achieved more than all the earlier 19 Centuries. This obviously shows the rapid progress, the rapid change which is taking place and unfortunately as far as we are concerned the laws which we have, enacted in the 19th century and when you see the Evidence Act, the Criminal Procedure Code and most of the basic laws what we have of 19th Century. So finally we have now awaken up to the fact that the world is changing very fast and we have to keep pace with it. This is the second model law of UNCITRAL, which has been adopted in the country

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* Excerpts of speech delivered by Hon'ble Mr. Justice B. N. Kirpal, Judge, Supreme Court of India on 06th January, 2001 at Institute of Judicial Training & Research, U.P. Lucknow, in the inaugural session of International Level Training Programme for Judges on "Cyber Laws & Crimes and Intellectual Property Rights".

by the enactment of the Information Technology Act of 2000. The first of model law of UNCITRAL, which we adopted, was the Arbitration Act 1996. When that Act was passed by the Parliament and became a law here, it revolutionalised the law of arbitration in India and at that point of time, I remember, I have attended a large number of seminars to educate the people about the new law and now we have the I.T.Act of 2000, which is again based on UNCITRAL and I am very happy and I must congratulate Justice Gupta and members of Faculty for having arranged this seminar and training programme on this law which is very complex. It is a thing, about which I personally know nothing, I do not know how to operate a computer, but this is a thing, which we are going to face; the problems are going to arise.

The society is becoming a paperless society for us brought up in a world of paper for us to comprehend that you will soon have possibly a library with no books in it. You will have offices where there are no papers and you will have written contracts, you will have binding contracts without there being signature in the ordinary sense, for us to comprehend that is to be very difficult, but we have to keep pace with the society and it is therefore very necessary firstly, for the judicial officers to do the work properly that each one of them must be made computer literate. We have to keep pace with that and we must know what is about and I am quite sure that this seminar which I am inaugurating today is going to educate you at least on some aspects of the cyber laws, not all the aspects which will help you in discharging your duties. Justice Gupta has mentioned in his opening remarks that we need to have good judicial officers. He has mentioned that there is need to do away with the three years period, which is required as an eligibility condition. I agree with him whole-heartedly but that is my personal opinion. It is very necessary today that we should do some soul searching. Today for a common man, for a common citizen judiciary, which is at a very high pedestal, which is to be put on a higher pedestal is a last resort for looking into the redressals. We cannot fail the common man. We have to live up to the aspirations of the people. There are various constraints in which we work but we must make a good beginning and the beginning is made by correct recruitment of the judicial officers. Why the greatest importance is given to the subordinate judiciary? , is deemed to come into the contact with the common man, not to Supreme Court nor the high Court but it is the Munsif and the Magistrates. They are the foundation of the edifice of the judiciary, which we have. It is of utmost importance that the foundation should be strong. That foundation has to be firm and that can be done only with a good mixture of cement and sand.

Only three days ago I was dealing with a case in Supreme Court when I was told that out of forty vacancies, which were advertised for recruitment as a subordinate judge, only eight people could be selected. Now that cause some serious thought. If out of hundred vacancies only forty are advertised and out of forty only eight are selected what is going to happen? I think there is some thing wrong somewhere. If we expect, I personally believe that if we expect a candidate to know all the law and he fails because he does not know the law that possibly may not be a proper approach in making selection. What we have to see while recruiting a judicial officer is that what is the type of raw material we have. If the raw material is good, the quality of cement is good, mixing is proper then it will lay a strong foundation. What is his background, what is his integrity, what is his education, how intelligent is he, what is his IQ level. What is his awareness about the problems of the public, what is the general knowledge that possibly may be more important at the time of recruitment. Then to see how much law he knows. Because once you recruit, you have such a very good, such a wonderful judicial Institute here where the law will be taught to him here but what you have recruited is a rough diamond of good quality, which you will chisel and sparkle in this Institute. The mistake, which we ordinarily may commit in making a recruitment at a subordinate level is, apart from any thing else, how much law does he know, that approach is not good from different point of view. If we see that what we get and what we may recruit a people of integrity, honesty, hard work, reasonable amount of intelligence and basic knowledge of law, there is no reason as to why you should have any vacancy in the subordinate service and why your judicial service should not be amongst the best in the world. That is one aspect, which I have mentioned with regard to the requirement of three years eligibility condition that depends on the law, which you made. If your statutory rules do not do away with this, there is Supreme Court to reconsider what it has said earlier but in this side there is a lot of merit in doing away with this, three years eligibility condition.

A judicial service, which is so higher, should at least be at par with the Indian Administrative Service, having all India Competition. Recruit the best people in the country and your standard will go up. With regard to the Cyber Law I have already pleaded a lot about my ignorance. Ignorance in the sense that I do not know even how to operate the computer, but one thing is there with regard to the extent of fines. My brother justice Mathur mentioned that fine is one crore in one case, fifty thousand or ten thousand in another case. I do believe that we tend to have a misplaced sympathy for the wrong doer.

Why should we say that a fine of one crore is too high, fine of ten thousand or fifty thousand is too high? Why should we have sympathy with the wrong doers? If you do not commit any sin, if you do not commit any crime you should not be bothered about the fines. Today in a city where you locked your doors, you bolt your windows, you are afraid of a thief but in other parts of the world where the fines are deterrent, really deterrent, you can go out of the house without locking any doors or you may say that the punishment of cutting hand is inhuman but you may give trouble yourself because you committed theft. If you do not commit a theft you may not be punished. Result is that you will have a most peaceful and lawful society. These fines are meant to be deterrent. In Singapore I remember, long ago if you crossed the road at the wrong place you immediately have to pay a fine of fifty dollars. If you parked your car at the wrong place you will pay five hundred dollars as fine. Here, what is a challan you have, fifty rupees which even cheaper than a cup of tea somewhere, so people do not mind breaking law because they can afford and get away with it. You are having a law less society. Therefore, in this I.T.Act of 2000 you have heavy fines. I think that is called for, in any case with the extent of devolution, which took place today the fine may be very heavy but in due course of time it would be light. I do hope that keep on changing by adding, increasing the figure, so that if you hack on some body else's computer, it destroys that system. If you are able to decipher somebody else's signature and take away his money from his Bank, you should really be punished. There is no question of having any sympathy for him, as he is a wrong doer. I do not believe in having sympathy for a wrong doer. We have misplaced sympathy for him. I think, something, which we should reflect, think and consider even when we are dealing with cases under other branches of law.

As far as Intellectual Property is concerned, I can only say that it is a very complex law but looks very simple one. I had an occasion to deal with a number of cases of Intellectual Property not only as a layperson but also as a judge on the original side and one principle, which I followed, and which I believe it was this we sometimes tend to forget is that what is Intellectual property. Intellectual property is what the words really convey. It is the property of a intellect. It is a property belonging to the person who has produced it. Dealing with some matters, which tend to think an ordinary matter. It is a business matter and nothing very serious. If somebody else's has used a trademark, somebody else has used a copyright, what difference does it mean? But if you view it from a different angle that it is a property of the intellect

produced by an intellectual person and somebody else is using it, it is nothing short of theft; be it like I have worked hard earned wages put it in my pocket and somebody else has stolen it or taken away from my pocket.

Now in a matter like this where you feel as a judicial officer that there has been a deliberate attempt by a person to infringe it, or infringe a trademark or a copyright, then you have to come down heavily on that. There is a large number of cases, a catena of authorities which show that there is violation of trade marks or not, there is infringement of copy right or not, that apart, keeping the basics in mind, in the case of Intellectual property if you regard this as a property, as a theft, theft of somebody's valuable commodity, approach it like that. There is no reason as to why this extent of infringement, which is taking place, should not come down. I would ask myself this question why this particular word is being used by new manufacturer. Is it not trying to take advantage of somebody else's established business? If he has come down heavily on it. 'Capstan' or 'Capsten'. You change it slightly. If they have different meaning but the fact remains that this is a person infringing, is encroching on somebody else's territory. There will be a lot of instances during this training programme which will be taught to you but basically basic underlying principle of all the Intellectual Property is this and nothing else but it is a law which is important. We are having seminars on Intellectual Property for a number of years and this is combined with the seminar on Cyber Law which is a new law. I again say that Intellectual Property seminar or the training course is not going to be the last one nor is the cyber law going to be the last but it is the first, but it is certainly not going to be the last one.

With these few words I have a great pleasure in inaugurating this training and research programme. I wish the trainees a lot of success. I am quite sure with the efficiency with which every thing has been done in this Training Institute, and all of you have come here to participate in this programme will benefit immensely by it. Group discussions are being held. To my mind there is no better way of teaching or learning than by having Group discussions and by writing papers thereof.

With these few words I once again like to thank Chief Justice and Justice Gupta for inviting both my wife and myself to come here and to be with you.

Thank you very much.

★★★★★

VOYAGE OF INDIAN JUDICIARY

Justice Brijesh Kumar,
Judge,
Supreme Court of India

50 years, i.e. half a century is no doubt a very long period, but in context with building of a nation and its history, it may not be that long. Past 50 years of Indian Judiciary have been very significant for the beginning of judiciary of independent India as this period also included the formative and foundational period of its judiciary. India got independence in 1947 and our Constitution came into force in January, 1950 under which our Supreme Court was established on January 28, 1950. The citizens of the free country started breathing fresh air, free from numbness of slavery and colonial laws. Privy Council was replaced by the Supreme Court as highest Appellate Court and more power, and the High Courts though existing since long before, were vested with new powers to break and tread into new fields, to reach the new destinations of Rule of Law and freedom from many wants and bondages. People had new hopes, expecting better quality of life, better education, better bringing up of their children and better opportunities for self-development and achievement of excellence. The burden of oppressive laws was being shed and freshness of breeze was felt in the atmosphere. This is how the Indian Judiciary started its voyage, as judiciary of a free country 50 years ago. The contents of the new hopes and aspiration of people are to be found in Part-III of the Constitution as Fundamental Rights and the goal set to be achieved by the States in Part-IV of the Constitution, namely, the Directive Principles of the State Policy. These two chapters played a very significant role in the last 50 years. The medium through which the goals were to be achieved and rights of the people in general were to be protected and enforced are mainly the

powers vested in the High Courts and the Supreme Court under Article 226 and 32 of the Constitution respectively. The burden on the shoulder of the judiciary in context with reconstruction of a free and independent society was heavy. What was sought to be achieved was nothing so small, it was tremendous task of transformation and bringing about a social change altogether. With the above background, a change in the judicial scenario was but natural. In a society governed by Rule of Law, transformation and changes are brought about through laws and legislations which have to pass through the test on the Constitutional touch stones set for the purpose.

In many States old land laws were abolished and new agrarian reforms were introduced., eliminating the intermediary class to bring about a social change to ensure benefit to the tillers of the land whose interest was undermined for long. A number of social welfare legislations were promulgated for the benefit of weaker or ignored sections of the society, more transparency was brought about in the administrative actions. People became more conscious of their rights and started asserting the same in respect of which earlier they had even not dared to protest. Public authorities were sought to be made more accountable through legal actions. The individual disputes started taking a back seat and the rights of the people in general vis-à-vis the State or instrumentalities of the State became more prominent. It changed the whole scenario of judicial panorama.

Realising the onerous role of the judiciary, the first Chief Justice of the Supreme Court Hon'ble Mr. Justice H. J. Kania on the occasion of its establishment had expressed the hope that the Court would be able to perform its duties without fear and favour and if it succeeds, it would contribute its share to the progress of Republic of India and render a service to the country which none else can render. The testing period of the Indian Judiciary started right from the inception of the Supreme Court and investing the High Courts with new powers. In the Year 1950 itself in the case of A. K. Gopalan (AIR 1950 SC 27) the Hon'ble Supreme Court of India was called upon to examine

the validity of law relating to preventive detention and a particular legislative provision relating to non-disclosure of the reason for detention of the detenu was struck down being unconstitutional. Again in the same year, precensorship of publication by the Press was deprecated in the background of Freedom of Speech. Things started shaping and later the laws relating to agragarian reforms were upheld and rights of workmen were better recognized. Undue pressure on newspapers was disapproved in Newsprint case. Such decisions in the initial period of half a century placed a lead role and to put the rail on the right track and decision by decision, the law developed from case to case and Judicial Review of Administrative Actions was well established with a view to ensure protection from arbitrariness and mala fide actions. Meaning assigned to the expression "Life and Liberty" under Article 21 of the Constitution introduced a new concept about dignity and quality of human life. Right to education to the children, pollution free environment, protection against custodial atrocities and protection to women in their workplaces were also recognized. It look long 50 years to the Indian Judiciary to reach the present day stage by interpreting the laws and the Constitutional provisions giving meaning to freedom attained by this country and making the society to realize their free existence and their rights. The principle of 'locus standi' was also relaxed to a great extent so that public causes and causes of those for whom it would be difficult to approach the Courts, could be considered without hindrance of technicalities and whatever is due could be given to a person or a particular section of the society even on the basis of a letter petition in an appropriate and suitable case. The impact of the role of the judiciary has been felt almost in every sphere of human activity.

★★★★★

CYBER LAWS & INTELLECTUAL PROPERTY RIGHTS AND OUR JUDICIAL SYSTEM

Justice S. K. Sen,
Chief Justice
High Court, Allahabad

My Lord Mr. Justice Kirpal, Mrs. Kirpal, Hon. Radhey Shyam Gupta, Law Minister of U. P., Justice S.H.A.Raza, Senior Judge of the Lucknow Bench of Allahabad High Court, Justice G. P. Mathur, Justice S.C. Mathur, Former Chief Justice, other eminent former Judges, Justice A. N. Gupta, Chairman, Judicial Training & Research Institute, my esteemed colleagues and other brother Judges, Judicial officers from different parts of our country and from Malasia and other distinguished guests, Ladies and Gentlemen.

It is indeed a great pleasure and privilege to be associated with the inauguration function of the Judicial Training Programme on 'Cyber Laws and Crimes and Intellectual Rights'. We are particularly happy that Hon'ble Mr. Justice Kirpal inspite of His Lordship's busy schedule along with Mrs. Kirpal managed to find out some time for us for this very important Training Programme in which not only the Judicial Officers of the different States of our country, but also from other foreign countries like Malasia are participating on a topic which is of wide ranging values and significance in the context of globalization.

In recent era, developments in the areas of Science and Technology particularly Information Technology and Biotechnology have dramatically changed our civilization. Such development has unwittingly changed the social structure and values and in particular the legal system in ways that are beyond our grasp. There is no doubt that Information Technology and the synchronized progress of other technologies can elevate the quality of life of the people.

Address by Hon'ble Mr. Justice S. K. Sen, Chief Justice, Allahabad High Court in the Inaugural Session on International Level Training Programme on "Cyber Laws & Crimes and Intellectual Property Rights" at Institute of Judicial Training & Research, U.P., Lucknow on 6th January, 2001.

However, the beliefs that 'technology is supreme' and 'information offers a competitive edge' have gradually brought about instrumentalism of the media & technology. Consequently, the inherent humanity of society is eroding.

Both media and technology know no boundaries, while there may be tension between the two, as well as with the national legal systems, that rely on sovereignty to delineate their borders. Developments in technology have advanced broadcasting techniques to the point that the media industry is now able to transmit information not only via newsprint but through satellites and Internet sites, which operate transnationally. With technological developments emphasizing universal applications, the expeditious transmission of information enables instant worldwide discussions on crucial topics. The rapid advance of scientific bio-technology aided by almost daily advances in computer science technology have enabled scientists to enter the provinces of DNA studies and genetic engineering manipulation as with 'Dolly', the cloned sheep, and the media immediately disseminate this controversial type of information. For better or for worse, society is confronted with the domination of technology and media over human life; consequently religion, ethics, philosophical ideas and all moral disciplines have become secondary. Hence, Law, operating as the last bulwark of human society, may also be swamped by emerging problems which cause it to lose its value and function as a regulatory discipline if it continues to be confined by national boundaries and operates passively.

Since two-dimensional and electronic media have proliferated rapidly and the flow of information has become increasingly more versatile, the broadcasting media aided by technology can instantly provide transnational information and consequently make real the vision of a global village. The positive aspects and instantaneous and abundant coverage of news and information to the public are countered by negative by-products including data protection, invasion of privacy, defamation and an overflow of morally offensive information. Moreover, the various legal problems generated from the newly-risen Internet operations seem to give rise to an illusion that the Law of the real world can no longer cope with developments in cyberspace. Not surprisingly, there is even an overture that there is little place for law in the Internet world. Take the morally offensive information on the Internet, as an example, sites

containing morally offensive information deemed as illegal by India, may not be so recognized in other countries. Therefore, if such sites are situated outside our jurisdiction, problems concerning practical enforcement manifest themselves. Transnational influence caused by hi-tech media broadcasting is obviously beyond the domain of legal regulation by a singly country. An effective solution would be coordination among international legal regulations via proper guidance of technological developments.

With the advancement of science and technology, Cyberlaws and laws relating to Intellectual Property Rights have assumed considerable significance and the existing regime of laws has become inadequate to cope up with the on going developments in technology and media which cannot be confined by any national boundaries.

Following the synchronized progress of technology and media, many policy subjects originally requiring only domestic considerations have gradually become transnational subjects. If domestic legal regulations cannot be reviewed and adapted through cooperation and integration with international organizations and with macro and dynamic global points of view, they will shut themselves off from the international community and may even lose their enforceability. The regulations enacted by the International Atomic Energy Administration (IAEA) are an important example of regulating the development of atomic energy development by international law developed through international cooperation. Consequently, improving our transnational legal knowledge and paying increasing attention to the dynamic development in worldwide affairs is the India's key to opening its door to the international community.

Law is not an Almighty tool, but with the gap between technology and humanism enlarging, the comparatively impartial nature of law justly plays an essential and suitable role as a facilitator to advance the interfusion of technology and humanism and to enhance the competitive power of a nation. Certainly, technology is characterized by its high specialization and complexity, while media as a whole is also characterized by its autonomy, balancing and supervising functions. But when law (s) is used to serve as the basic rule for regulating the impact of technology and media. it is not only capable of guiding

the positive development of both technology and media, but also plays that role of preventing any improper administrative policy from dampening or otherwise interfering with the R & D of technology. In addition, it can provide information to the media and in its administrative capacity, oversee the function of medial.

In short technology and information have created a society completely different from the traditional one. People as a whole must try their best to adapt themselves to the new era from the formation of concepts to the enforcement of law; otherwise we may likely lose the freedom and justice that have been acquired by civilization through the persistent endeavors of mankind. To find and maintain a dynamic balance between technology, media and law will be the crucial turning point that enables us to create a new civilization in the twenty first century.

Lawyering will change in India as in other countries. Technology will advance. Our successors will know the future, which we can but see as through a glass darkly. They will see it face to face. But the abiding principles will continue to govern our counts. And that the judges and lawyers of India will never lose sight of the hole in the wall.

In the aforesaid backdrop the birth of Cyber law need for know-how on Cyberlaw have become important. Since the beginning of civilization, man has always been motivated by the need to make progress and better the existing technologies. This had led to tremendous development and progress which has been a launching pad for further development. Of all the significant advances made by mankind from the beginning till date, probably the important of them is development of Internet. To put in a common man's language, Internet is a global network of computers, all of them speaking the same language. In 1969, America's Department of Defence commissioned the construction of a super network called ARPANET, the Advance Research Projects Agency Network (ARPANET), basically intended as a military network of 40 computers connected by a web of links & lines. This networks slowly grew and the internet was born. By 1981, over 200 computers were connected from all around the world. Now the figure runs into millions.

When Internet was developed, the founding fathers of Internet hardly had any inclination that Internet could transform itself into an all-pervading revolution which could be misused for criminal activities and which required regulation. Today, there are many disturbing things happening in cyberspace. Due to the anonymous nature of the Internet, it is possible to engage into a variety of criminal activities with impunity and people with intelligence, have been grossly misusing this aspect of the Internet to perpetuate criminal activities in cyberspace. Hence the need for cyberlaws. Also our existing laws have deficiencies in dealing with crimes in cyberspace.

Criminal Laws in most countries have not been extended into cyberspace yet, potentially making prosecution difficult on computer related crimes such as hacking and distributing viruses on the Internet.

Internet is believed to be full of anarchy system of law and regulation therein seems contradictory. However, cyberspace is being governed by a system of law and regulation called Cyber law, There is no one exhaustive definition of the term "Cyberlaw". Simply speaking, Cyberlaw is a generic term which refers to all the legal and regulatory aspects of Internet and the World Wide Web. Anything concerned with or related to or emanating from any legal aspects or issues concerning any activity of netizens and others, in Cyberspace comes within the ambit of Cyberlaw. The growth of Electronic Commerce has propelled the need for vibrant and effective regulatory mechanisms which would further strengthen the legal infrastructure, so crucial to the success of Electronic Commerce. All these regulatory mechanisms and legal infrastructures come within the domain of Cyberlaw.

The Cybercrimes includes hacking into a computer network, creation of viruses and forcibly taking over a computer network. Standard crimes like fraud, sabotage, pornography, copyrights piracy, etc. have been redefined to include the aspects of the Internet.

In view of above background and with the fast advancement of Information Technology, there are new ways of crime in Cyber-space, for which there are no National boundaries. Also there are no proper provisions in our existing legal systems to help judiciary for arresting such crimes.

Recently, Government of India has passed the Information Technology Act which is presumed to take partial major law enforcing agencies to curb Cyber crimes.

This needs a different type of Education which combines Technology & Law and Information Systems. In view of this, it is apparent to establish a new school of law where all aspects of Technology and Law including Cyberlaws are required to be taught together. This type of School/Institution does not exist in the present Educational Systems in India.

Cyber crimes have already affected our society through Internet Chatroom.

A meaningful computer regulatory law should be a single comprehensive framework which would deal with civil and criminal laws. The legislation should address computers and computer material as unique objects and cover all computer related aspects in the categories of crimes by means of computers and crimes against computers.

Cyber laws would require further development in the courts. Both the substantive laws and procedural laws will require new exposition in the light of the experience arising from technological complexities not envisioned hitherto. The challenge before the courts would be to evolve a cyber jurisprudence consistent with our Constitutional guarantees. The controls imposed will be tested on the anvil of rights. Courts will oversee the exercise of powers of search and seizures, data penetration and material collection and permit it for legitimate purposes of crime control, national security, public safety or economic well being of the country. Other than that, the courts will have to enforce Article 21 of the Constitution for protection of right to respect for private and family life and Article 19 (l)(a) for free use of computer related activity if legitimate concerns of law are not breached.

Under our Constitutional regime of rights, it would not be possible to injunct the internet user in view of his fundamental right of freedom of speech and expression under Article 19 (1)(a) but it may be possible to incorporate standard conditions in the orders of reasonable restrictions.

In the judicial work and activities, we will have a great change in view of Cyberlaw and Cyber crimes as well as in Intellectual Property Rights since more and more development of Patent activities due to scientific inventions and improvement in technology have taken place along with globalization. New inventions have given new shape and dimension to the Intellectual Property Rights like Video Piracy. A part from the infringement of copyright and violation of patent and Trade Mark with the growth of software technology, violations in the new Intellectual Property Rights concept have emerged as growing problems.

Our country and judicial system must keep pace with the tremendous development in the Technology and Science and the world has become small place today with the help of Internet. It is, therefore, necessary that the Judicial Officers should be adequately trained to deal with the problems arising out of Cyberlaws and Crimes relating to the said law and they should also be made aware of the development which have taken place particularly in the field of Cyberlaws alongwith the law of Intellectual Property Rights like Patent Trade Marks and other different branches of Intellectual Property Rights.

We are happy that the Institute of Judicial Training & Research has organized the Training Programme for the Judicial Officers not only for those who are working in different countries but at the International level for other Judicial Officers of other countries, like Malaysia and others. I hope the Training Programme will be of great assistance to the Judicial Officers in discharging their functions effectively in the context of the modern development of Science and Technology. This Institute is one of the biggest in India and perhaps Asia. The Institute requires guidance from eminent jurists. We have the opportunity to have with us Hon"ble Mr. Justice Kirpal, who is not only a great Judge, Jurist but also takes keen interest in the development of educational institutions in our country. He is actively associated with the National University of Juridical Science, Calcutta and I understand that he is taking active interest in the development of the said Institution. We expect his guidance shall be available to the State of Uttar Pradesh for such institutional development as and when required.

Thank you !

DIRECTIVE PRINCIPLE OF STATE POLICY : CONCEPTION AND PERCEPTION

Justice A.K Yog
Judge
High Court, Allahabad

Introduction

With the end of LAISSEZ FAIRE and growth of concept of Welfare State towards the end of 19th Century, several constitutions in different parts of the world, enunciated social and economical policies, either mixed up with the fundamental right or separately stated.

Constitutions of LEICHTENSTEIN (1921), Philippines (1935) and Spain (1945) incorporated economic and social obligations of the State, very akin to the Directive principles of our Constitution.

Despite earlier practice, Irish Constitution (1937) is recalled as the 'inspiration' and the 'genesis' of Directive Principles in the Indian Constitution. Articles 37, 38, 39 and 46 of Indian Constitution are virtual reproduction of most of Articles 45 of Irish Constitution.

Leaders of Indian freedom movement, particularly Pandit Nehru, had close affinity with Irish freedom movement and were deeply influenced by it – which proved to them as an expression of their ideals, hopes and aspirations.

It is generally referred that makers of our Constitution borrowed theme of 'Directive principles' from Irish Constitution. Sir B. N. Rau, however, attempted to locate its, 'origin' by referring to the duties of the king in Kautilya's Arthashastra. He suggested that the concept by no means, can be said to be foreign to the genesis of India.

Way back in 4th Century B. C. - Kautilya's Arthashastra mandated – "King shall provide the orphan, the dying, the infirm, the afflicted and the

helpless with maintenance, he shall also provide subsistence to helpless, expectant mothers and also to the children they give birth to."

GENESIS :

During freedom struggle, an idea to have Constitution was mooted out for 'Model India' in future.

In numerous reports and resolutions of several committees of Indian National Congress, one can trace the expression to include a chapter on Fundamental Right but with no distinction between personal and political rights on one side and economic and social rights on the other or between "justiceable" and 'nonjusticeable" rights, by far, not an appropriate expression or rather an expression not properly appreciated. These resolutions were naturally expression of 'hopes' and 'aspirations' of the people envisioning 'future society' that they conceived and wanted to create.

The first such proposal was made by All Parties Conference of 1928 – which, inter alia, introduced the right to free elementary education and directive to parliament to enact laws for health and fitness for work of all citizens, a living wage for every worker, protection of motherhood and protection against infirmity and unemployment.

Resolution at Karachi, - 1931 session on Fundamental Right, was modified and ultimately adopted in 1933 at Calcutta Session under the title- "Fundamental Right and Duties and Economic Programme". With the preamble recognising – "In order to end the exploitation of masses, political freedom must include real economic freedom of the starving million."

After general elections in 1937, Pandit Jawahar Lal Nehru, expressed that the objective of freedom, as birthright of the nation, inhered itself the responsibility of free India to bring about a just, social and economic order, to remove poverty and ignorance and generally a better lot of the common man- with no scope for exploitation and all sections of the society co-operating for common good and advancement of the people.

He said:

"We went to the people and spoke to them of freedom and ending of their exploitation..... and remembered that his poverty was the basic problem of India; we identified ourselves with him in his sufferings and talked to them of how to get rid of it through political and social freedom."

Congress outlined its objectives as immediate independence and the opening out avenues leading to the rapid advance of the masses economically and socially, so that poverty, malnutrition, famine and lack of necessities in life might be ended and the people in the country could have freedom and the opportunity to grow and develop according to their genus.

Constitution of United States proclaimed "establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare and secure the blessings of liberty to ourselves and our posterity." The Irish Constitution also embodied national goals in Irish Preamble.

The Experts Committee opted by the Congress in July 1946 to prepare material for Constituent Assembly, set its mind to formulate the "objectives". Committee drew up "declaration of the objectives" and they were considered by the Congress in its Session of November, 1946.

On December 13, 1946, Pandit Jawahar Lal Nehru moved classic Objective Resolution on Constituent Assembly's aims and objects. Sri B. N. Rau, Constitutional Advisor to the Government of India, suggested that for embodying the aspiration projected in the said resolution, the best course was to put them in two categories – viz. "Fundamental Right" and "Fundamental principles of State Policy".

In the 'Sub Committee on Fundamental Rights', initially there was an opposition of 'non-justiceable' rights in the Constitution, since they would remain ineffective as mere percepts. The opposition died out and members of Sub-Committee came round to the view that it was not practicable to categories declarations of social and economic policies as justiceable rights.

Sub-Committee framed first set of Directive Principles of State Policy on March 30, 1947. On April 15, 1947 Sub-Committee decided to call them

– "FUNDAMENTAL PRINCIPLES OF GOVERNANCE". Raj Kumari Amrit Kaur, Mrs. Hansa Mehta and Prof. K. J. Shah, felt that though non-justiceable they are nonetheless fundamental in the governance of the country.

Subsequently B. N. Rau's draft of 7th October, 1947 came to be titled as "Directive Principles of State Policy".

By providing that these principles are "fundamental in the governance of the country" and that it shall be the duty of the State to apply these principles in making laws, the Indian Constitution definitely moved ahead of its Irish counterpart.

The Courts in India, though cannot enforce them, but there is, for certain, a constitutional obligation to notice them.

After various deliberations, considering several amendments, the Draft Committee, ultimately on 26th November 1949, finalized the Preamble – to read –

"We the people of India, having solemnly resolved to constitute India into a Sovereign, Democratic, and Republic and to Secure to all citizens:-

Justice Social, economic and political

Liberty of thought, expression, belief, faith and worship,

Equality of status and of opportunity; and to promote among all;

Fraternity assuring the dignity of the individual and the unity of the Nation.....". Strikingly a vedic concept of "वसुधैव कुटुम्बकम्" Which is the theme of Hindu Philosophy and Indian culture.

Because of "Directive Principles" one can claim that our Constitution cannot be said to be a "Structure of fossils like a coral reef".

AIM AND OBJECT

Having unearthed the factors which influenced the making of the Constitution and which formed its back bone, it cannot be doubted that preamble and the Directive principles contain spirit of the people and their

legitimate expectations and aspirations, translated by the founding fathers who intended these to be transmitted to successive generations.

Prof. K. J. Shah, compared the 'Directive Principles' in the present form – "to a cheque on a bank payable when able viz., only if the resources of the Bank permit."

"Directive Principles" determine with certainty the direction, the parameters and the Goals before our legislature. They are like 'map' and 'Compass' in the hands of magnators, namely, the Legislators and the Administrators – responsible for executing laws of the land. They are to be used as 'touch-stone' by the Judiciary to test the substance while called upon to apply and fathom its depth while interpreting a law before it.

They are, the 'Soul' of the Constitution- They may not be tangible but pervade the entire "Constitution'.

Preamble and the "Directive principles' thus acquaint, oneself with the 'pious wish' set forth by the "Torch Bearers' of National Freedom Movement – so that the 'people' taking reign in their hands with 'solemn pledge and conviction' at that moment and those taking charge from them in future, may not loose sight of the ultimate objective.

Chapter on Directive Principles of State-Policy is thus the 'Pedastal' on which the edifice of Constitution and Government is to stand. The philosophy of which is the under current flowing all through beneath the sub stratum – not generally exposed and not perceived on surface.

The Legislature, The Executive and the Judiciary are expected to join and work in harmony, make continuing co-operative endeavour, not in an atmosphere of mutual hostility but expected to be jointly-responsible to ensure that this dynamic process continues for all time to come. Founding fathers envisaged a system where "Legislature', 'Executive' and "Judiciary' generally work out among themselves, keeping constant check, and review the 'structure and institutions' best suited for giving effect to their philosophy, achieving maximum welfare for maximum numbers.

DIRECTIVE PRINCIPLES – BRIEF SKETCH

Article 37- lays down that Directive Principles contained in Part III of the Constitution are not enforceable by Court but it mandates that they are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.

Article 38- stresses upon promoting welfare of the people by securing and protecting social order in which Justice – social, economic and political shall inform all the institutions of national life, to minimize inequalities in the matters of status, facilities and opportunities. Our ancient RISHIS teaches-

सर्वे भवन्तु सुखिनः सर्वे सन्तु निरामयाः, सर्वे भद्राणि पश्यन्तु मॉ कश्चिद् दुखे भवाग्वेत।
Comfort, free from decease, welfare of all and no one shall be unhappy. Great Scholar Vidur says "Do not have enemity with your brother" if you with to have your welfare.

Article 39- says State policies shall be directed to seek adequate means of livelihood to all, distribution of material resources to best subserve common good, to avoid concentration of wealth, equal pay for equal work, to safeguard and promote health, check exploitation of weak etc.

Article 40 - puts an obligation upon the State to organize village Panchayats with powers to work as unit of local self-Government.

Article 41 and 45 – require State to protect 'old', 'sick' and 'disabled' to provide education free and compulsory – for children up to 14 years.

Article 42 – obliges State to make provision for just and humane conditions of work and for maternity relief.

Article 43- casts a duty upon the State to promote cottage industries on individual or co-operative basis.

Article 44 - envisages a common Civil Code for all the citizen.

"In Shah Bano's case (AIR 1985 SC 945) the Chief Justice Y.V. Chandrachud reminded the Government to fulfil its obligation to enact uniform Civil Code – irrespective of religion with respect to marriage, divorce, succession, maintenance adoption etc.

Article 46 to 49 - require State – to take care of weaker sections like Scheduled Castes and Scheduled Tribe, protection from social injustice and all form of exploitations, to raise level of nutrition and standard of living, to ensure public health, to prohibit consumption of intoxicating drinks and drugs injurious to health, to organize Agriculture and animal husbandry, prohibition of slaughter of Cows etc., to save forest and wild life.

Our Rishis – acknowledge 'Trees' as the most 'ancient' friend of the mankind. Jambhoji Maharaj – the propounder of Bishoni Samaj, in Rajasthan laid great stress upon protection of 'forest and wild life' – way back in seventeenth Century – history records sacrifice of 'Vishnoi's for protecting Trees- in Ramasadi, Tilasami, Pollwas, and Khajdali villages in Rajasthan. It was a sin to cut green tree in villages. Our Rishis placed religious sanctity to refrain people from cutting green trees. Decline. in religious conviction - calls for other preventive measures along with educating people and making them conscious of the benefit of the Tree.' Article 48A – of our constitution reaffirms the Century old teaching one can find – emphasis on Agri in UPNISHADS- Which give us the message. "अन्नं बहु कुर्वीत तद व्रतम". Produce lot of grain- (e.g. raise production of all commodities – Good for mankind. Article 48- relates to 'Agrarian Reform'. UPZA &LR, Act UPCH Act, are the steps in that direction. But mere distribution of land and re-organising one's holding is not enough- Probably it is because of ignoring the importance – to lay stress on duty- but later attempting to cure it vide Part IV A – by adding Article 51 A. Sutra 1 – of the POORVA MINAMSA – Sutras of Jainini reads – "अथातो धर्म जिज्ञासा" means- Now therefore, desire to know – duty. Sri M. L. Upadhyaya in his book – Law on Agrarian Report on page 311 says – we would not be surprised to know that the 'tenant' elevated to the 'owner' is still tilling the same land even today merely as a hired landless labourer, under the new masters..... One may call it an aberration.....or unanticipated side effect of beneficial legislation. Serious effort is called for to plug this and other loopholes in the legislation. Article 49- requires protection of Monuments and places and objects of National Importance.

Article 50 – mandate the state to take steps to separate Judiciary from Executive in the public services.

Reference may be made to the controversy – at the time of supersession of three Judges is Supreme Court. Keeping in spirit we find Apex Court Judgment in the matter Judges appointment in S.C. and H. C.

Article 51 – says - state shall endeavour to promote international peace and security, honourable relations between nations and encourage international disputes by arbitration.

Now concept of National comity is an established concept and its realization can be seen in formation of U.N.O.

Legislative Endeavour : to name a few only-

Nationalisation of Banks

Small Industries Development Bank of India Act, 1989

Industrial Law :	1.	Child Labour (Prohibition and Regulation Act)
	2.	EPF & Misc. Act
	3.	Workmen's Compensation Act
	4.	Minimum Wages Act
Distributive measures-	1.	UPZA AND LR Act
	2.	U. P. Imposition on Land Holdings Act
	3.	U. P. Urban Land (Ceiling and Regulation) Act
Co-operative –	1.	U. P. Co-operative Societies Act and other Co-operative laws
	2.	Indian Fertilizers Act
Rent Control -		Rent Control Act
Legal Aid -		Legal Services Authorities Act
Local Self Court-		U. P. Panchayat Raj Act
Environment-	1.	Forest Act – U. P. Protection of Trees in Rural and Hill Areas Act, 1976
	2.	Laws on Protection of Environment and Prevention of Pollution – e.g.

3. Air Pollution Act
4. Water Pollution Act

Law of Press
Consumer Protection Act
Maternity Laws
Family Laws – Family Courts Act

SOCIAL AND ECONOMICAL MEASURES :-

CONTROL ORDERS - Like Sugar, Coal, Kerosene, etc. under Essential Commodities Act

Insurance Laws

and Compensation Laws.

RELATIONSHIP BETWEEN FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES:

There can be three possible views:

First: Fundamental Rights are superior to Directive Principles. (H.M.Seervai – Constitution Law of India – Vol. II – P 1033 IInd Edition 1976).

Two: Fundamental Rights are on equal footing.

Third: Directive Principle are superior to Fundamental Rights because the constitution provides that Directive Principles are "fundamental in the governance of the country" and that it shall be the duty of the state "to apply these principles in making laws".

Supreme Court and different judges have expressed views and held differently at different times.

Das, J in State of Madras Vs. C Darairajan (AIR 1951 SC 226) held that Directive Principles are subordinate to Fundamental Principles, and were merely aid to constitutional interpretation.

Similar view taken by the Supreme Court in AIR1958 SC 731 (Mohd. Hanif Qureshi's case) and AIR 1958 SC 956 (The Kerala Education Bill case).

In later decision, in the case of Laxmi Khandsari versus State of U.P., challenging Sugar Cane Control Order 1966 issued under Essential Commodities Act, aiming to reduce shortage of Sugar- Can supply to mills and ensure its equitable distribution, Supreme Court emphasized that Fundamental Rights should not infringe upon Directive Principles.

In Sonia Bhatia Vs. State of U. P. (AIR 1987 SC 1274) Ceiling on Land Holding, Act 1961, which sought to exclude transfer by gift as a social reform in agriculture, was challenged. – Court held that a social legislation will over-ride such objection – in the wider interest of the community even if it caused hardship to an individual. Vidur – in his Neetishastra – says –" त्यजते कुलार्थ पुरुष ग्राम स्यार्थे कुलम् त्याजेत ग्रामं जनपद स्यार्थे पृथ्वी त्यजते".

Article 36- uses the expression 'State' which includes judiciary as observed in AIR 1973 SC 1461 – Keshwanand Bharti's case and AIR 1976 SC 496 – State of Kerala case.

Courts will, therefore, fail in their duty if they ignore the existence of Directive Principles

Eminent Author of Constitution – Dr. D. D. Basu – in his commentary opines that Directive Principles are "Aid to interpret statues" and it is obligatory upon Courts to interpret mandatory provisions of Constitution in the light of the Directive Principles.

The different approaches are perhaps best illustrated through constitutional amendment and judicial pronouncements in the area of property rights.

This subject has created more controversy, than any other area under the constitution and has three inter-related aspects (a) the meaning of the constitutional requirements of compensation in the context of compulsory acquisition of property by the state under Article 31(2) in pursuance of the objectives contained in directive principles; (b) the doctrine of prospective

overruling where a law or a constituent act of Parliament, seeking to amend the Constitution in pursuance of directive principles is held unconstitutional by the Supreme Court; and (c) the nature and scope of the amending power of Parliament under Article 368 when such a power is exercised with a view to implementing directive principles

In State of West Bengal vs. Bella Banerjee, the petitioner, whose property was compulsorily taken over by the State of West Bengal under a law providing for some compensation in such cases, challenged the constitutional validity of that law on the ground that the compensation provided was illusory and hence was inadequate, while the argument proceeded Article 31 (2) provided, in effect, for full compensation at market value in cases of compulsory acquisition of property. The Supreme Court, acting apparently contrary to the intention and philosophy behind the property provisions of the Constitution, held that the guarantee of compensation in Article 31 (2) meant a "just equivalent of what the owner had been deprived of".

An example of judicial creativity and of law making in the right sense is furnished by the doctrine of prospective overruling propounded by the Supreme Court in the Golak Nath v. State of Punjab where the validity of three Constitutional Amendments – the first, fourth and seventeenth – by Parliament under Article 368 came for consideration. The petitioners were sought to be deprived of their property (in certain surplus lands) by the State with a view to vesting the ownership of such lands in tenants/peasants. The petitioner challenged the validity of such laws and amendments as a violation of fundamental rights relating to property.

The first amendment protected law providing for nationalization of private property, compulsory acquisition of agricultural estates and rights by the state, and certain law of agrarian reform, against any challenge based on infringement of fundamental rights. The fourth amendment excluded judicial review of adequacy of compensation in cases of compulsory acquisition of property. And the Seventeenth Amendment protected against any challenge of certain additional forms of land tenure and specified laws for agrarian reform.

These amendments clearly sought to implement social and economic justice, to redistribute material resources and to prevent concentration of wealth and the means of production contemplated by directive principles (Articles 38 and 39) but they were held by the court (by a majority of six to five) to be unconstitutional on the ground that an amendment of the Constitution amounted to making a law by Parliament, even though Article 368 nowhere treats such amendments as a law, and hence it could not take away or abridge fundamental rights, in particular the right of property which were transcendental in nature.

In 'Golak Nath's' case Court held that Parliament was incompetent to affect fundamental rights through its amending power under Article 368 on the ground that an exercise of such power constituted a law, not a constituent act and that these rights were transcendental in nature.

This decision was, however, later overruled in the case of Kesavananda Bharati where the Apex Court was considering issues similar to those which had arisen in Golak Nath's case. The Supreme Court held that Golak Nath was wrongly decided. However, it did not held that the amending power of Parliament was unlimited.

It was of Course right that the twenty – fifth amendment introduced Article 31 C and provided, inter-alia, that a declaration in a law that the state policy was to give effect to the provisions of Article 39 (b) or (c) dealing with social and economic justice could not be questioned in any Court. It was based on the need to have safeguards in the light of the Supreme Court's past attitude to questions of social justice and against indulgence in semantics or in literal constructions.

Kesavananda Bharti approach was virtually followed by the Supreme Court (Bhagwati J. dissenting) in case of Minerva Mills Limited v.Union of India.

The net effect of the decisions of the Apex Court after Minerva Mills was to recognise in varying degrees judicial responsibility towards the people with economic need or insecurity, and therefore discovering 'a study and follow up' by the other two organs of the society and philosophy based on

judicial activism and creativity. It is ultimately based on some doctrine of "preferred freedoms" and "preferred justice", which is yet not in sight. Nor is there a serious recognition of judicial role in case of possible misuse or abuse of power in the matter of personal liberty.

The opinions of Justice Bhagawati and Justice Krishna Iyer, who have emphasised the overall importance of directive principles, are still the exception and not the general rule.

There is need – to have a provision for the establishment of a permanent council in the Constitution to perform functions of re-organising and suggesting the ways and means to improve upon by adopting meaningful laws and schemes.

The Court must not, in order to be able to discharge that trust, act in a spirit of confrontation with its partners. Such a confrontation is justified however, when the legislature or executive abdicates its constitutional obligation and function and imports wholesale ideologies – whether capitalism or communism – which are alien to Constitution. In such exceptional situations, of course, the partnership loses its very essence and hence becomes a dead entity. The abdication argument will equally apply where there has been an abuse of power by the executive or by Parliament in cases of personal liberty.

In Shah Bano's case- Chief Justice Chandrachud reminded and suggested to the Government to fulfil its obligation to enact a common Civil Code.

For judges engaged in law making, it is, thus important to recognize that it is the dignity of the human being in the overall philosophy of the Constitution which constitutes the core of our constitutional law.

DIRECTIVE PRINCIPLES AND JUDICIAL LAW MAKING

With this purpose in mind, let us examine judicial law making in relation to the Directive Principles of State Policy.

Judges in India have an onerous task and must take a creative and pragmatic view of their function – First by viewing the law or executive action

in the light of the philosophy, values and objectives of the Constitution; second by granting greater degree of freedom through adoption of liberal view of their duties, powers and functions to act in pursuance of the philosophy of the Constitution and to have the realization of the values and objectives enshrined in it.

What is thus, needed is a Teleo-contextual approach to constitutional interpretation, a teleological view influenced by the context – including historical context.

The Constitution does not, expressly or even impliedly; confer upon the judiciary the task of determining the soundness or wisdom of the legislative action.

Significantly there is nothing to prevent Supreme Court or High Court from declaring on its own whether a law or even executive action conforms to the Directive Principles even though they are not judicially enforceable.

The substantive values and objective, which ought to guide the courts, are contained in the preamble, Directive Principles and Fundamental Principles including fundamental duties laid down in the Constitution.

The main values and objectives are – Preservation of sovereign, social, secular, democratic and republican nature of the society. Social political and economic justice, liberty of thought, expression, faith and worship, equality of status and of opportunity, promotion of fraternity (Human brotherhood), dignity of individual, right to adequate means of livelihood, distribution of material resources, to subserve common good, to prevent concentration of wealth and resources, prevention of abuse of health, exploitation of Labour, disabled and oppressed, protection of children and youth against exploitation, free legal aid to poor, promotion of local – self Government through village Panchayats, cottage industries, securing right to work, education, social security for un-employed, elderly people sick infirm and disabled persons, securing just and honorable living wage and human conditions – workers participation in the management, free and compulsory education (Primary and Secondary) to promote standard of nutrition, public health, protection of environment, forests and wild –life, promotion of international peace and security.

The important notions are – (a) Peace, and non – violence to promote national and international harmony, (b) dignity of human being and (c) distributive justice on equitable basis.

India's concept of Government, its ideals and goals – have been recorded diligently in the said chapter. Directives are the charter of freedom. These are the commandments of the Constitution to the Government.

Our apathy to the task highlighted by the ' Directives', would stuck the Government and the Constitution to a meaningless deal.

We have no option, to avoid chaos, disaster, collapse of the systems, but to engage ourselves to the gigantic task that the Constitution has imposed on us by means of the Directives.

Directive Principles provide acid test for all those involved in the Governance of the teeming millions of this nation and also work as bacon light for the judiciary. Application of the Directive Principles in formulating laws is an example intellectual compromise. This is also the basis of faith for multitude sinking in ignorance, abject poverty that the sacrifice in achieving freedom shall not be misused and they would not be treated by making a mockery of popular democracy nation will merge with dignity registering mass participation in the Government.

Political groups and ruling Government shall stop thinking in terms of personal gains against essential necessities underlines in the 'Directives' by our sincere and devoted efforts to materialize the Directives, we can hope to live in freedom from serfdom, exploitation to meaningful exploitation, in justice to justice, statelessness to the statehoodness and from extinction to elevation.

Fortunately, there is a bright ray of hope, which could be seen in the judgments of the Supreme Court in recent past . The Apex Court has now approved cause of 'Directive Principles' and judiciary as the guardian and interpreter of the Constitution. People of the nation have more hopes and desires it to assert more authoritatively when the legislature and the executive are showing tendency to merge into a chorus and dictate terms according to their interest. Sanctity of the Directive have to be preserved after more than

50 years of independence and coming close of heel at the end of millennium we can see one finds enough of legislation but lack of conviction and real desire to implement the Directives, thus the above can be seen to name a few legislation for illustration only one will find that the legislation like Panchayat Raj Act and Urban Land Ceiling Act failed because to achieve the object.

Indeed we have to strive together for creating congenial conditions with our limited resources but never half- hearted attitude, corruption, disposition, dishonesty, selfish interest should be allowed to blur our vision enshrined in the Directive Principles. It would be wrong to conclude that the Government is not making efforts towards the materialization of the aspirations of people embodied in the Directives, what is in fact lacking is the pace and proper direction.

Dr. Ambedkar said defending the Directive Principles – "I am not prepared to admit that they have no sort of binding force at all..... But whoever captures power will not be free to do what he likes with it. In the exercise of it, he will have to respect these instruments of instructions which are called Directive Principle. He cannot ignore them. He may not have to answer for their breach in a Court of Law. But he will certainly have to answer for them before the Electorate at election time. What great value these Directive Principles possess will be realized better when the forces of right contrive to capture power."

Wisdom Wilson said ".....freedom and free institutions cannot long be maintained by any people who do not understand the nature of their own government."

Our VED – say - "उद्यानं ते पुरुष नावयानम्" - I have made 'man' to rise – above – High and High.

CONCLUSION

With these sentiments, I conclude that I do not entirely approve of the opinion that Directive Principles are only ornamental.

Sri J. P. Narayan in the News Item published in Indian Express, May 16, 1973 wrote – "Like millions of those who had fought and suffered for the

country's freedom, I too have a golden vision of Independent India." Today when I compare the reality with that vision – I am filled with sadness. And when I ponder over the future..... my heart sinks."

Directive Principles lay down basic tenets of Democratic temper and provide the requisite essentials – required for nurturing Democracy. They are like 'Commandments of the People' who secured freedom to succeeding generation in posterity ensuring that Constitution remains a living Code of Governance. Directive Principles have to be communized, commove and subjected to communion.

I wish, Annie Besant's words –to came true – ".....India shall soon be seen proud and self reliant, strong and free, the radiant, splendour of Asia as the light and blessing of the worlds". Let as pledge to fulfill the dream and take pride to handover our generation a 'Model India'.

It is to be assimilated in our thoughts and not only in actions. It's philosophy should become fact of Judicial Culture.

In the end, may I take the liberty to say that it is too late for Senior Judges, rather will neigh impossible, to change attitude and get re-oriented over-night. Nonetheless it is a good sign of awakening and being conscious of this important aspect of the Constitutional Law. Above all it marks a beginning for people to get reassured that the 'Courts' are not merely to interpret and enforce law, they are alive to reality and they shall perform their tasks in true spirit of the Constitution.

I would suggest such symposiums on such subjects – a little more frequent for Judicial Officers – particularly in their initial period of services.

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HUMAN DIGNITY : A BASIC FEATURE-ITS VIOLATION BY RESERVATION IN PROMOTIONS

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1. Of the various fundamentals of the Constitution of India, the basic guarantees contemplated by its Preamble, include 'Justice', 'Equality', and 'Fraternity assuring the Dignity of the individual'. 'Untouchability' was abolished by Art. 17; begar was abolished by Art. 23, Art. 42 contains the Directive Principle of State Policy that 'the State shall make provision for securing just and humane conditions of work.' Clause (j) of Art. 51A of Fundamental Duties, requires every citizen 'to strive towards excellence in all spheres of individual and collective activity'. Clause (f) of Art. 39 even speaks of development of children 'in conditions of freedom and dignity'. Unfortunately, the concept of 'dignity' qua public services has escaped notice totally.

2. Let me point out that the Protection of Human Rights Act, 1993, has provided in express terms in Section 2 (d) that 'human rights' mean the rights relating to life, liberty, equality and *dignity of the individual* guaranteed by the Constitution or embodied in the International Covenants enforceable by Courts in India. One of such Covenants is the International Covenant on Civil and Political Rights. Section 12 (a) authorises the National Human Rights

Commission to inquire *suo motu* or on petition into a complaint of violation of human rights or abetment thereof.

3. The Preamble to the International Covenant on Civil and Political Rights records as follows.

"Considering that in accordance with the principles proclaimed in the Charter of the United Nations of the inherent dignity and of the equal and inalienable rights of all members of human family is the foundation of freedom, justice and peace in the world;

Recognising that these rights derive from *inherent dignity of human person....*"

4. Art. 7 of the Covenant declares that "no one shall be subjected to torture or *to cruel, inhuman or degrading treatment or.....*" Art. 17(1) lays down that "no one shall be subjected.....to unlawful attacks on his *honour and reputation*", and Clause (2) provides that "every one has the right to the *protection of the law against .....such attacks.*"

5. The Universal Declaration of Human Rights opens with the Preamble as follows:

"Whereas recognition of the *inherent dignity* and of equal and inalienable rights of all members of human family is the foundation of freedom, justice and peace in the world."

In Art. 1 the Declaration provides that "all human beings are born free and *equal in dignity* and rights". Art. 5 requires that "no one shall be subjected to torture or to *cruel, inhuman or degrading treatment* or punishment."

6. All these principles have been recognised and reiterated more than once by our Supreme Court. In the case of *Consumer Education & Research Centre*[1], the Court remarked that the Preamble &

[1] AIR, 1995 Supreme Court page 922.

Art. 38 of the Constitution 'envision social justice as its arch to ensure life to be meaningful and liveable with human dignity'. The Court observed that social security, just and humane conditions of work and leisure to workmen are part of his meaningful right to life; and to achieve self-expression of his personality and to enjoy life with dignity the State should provide facilities and opportunities to reach, inter alia, at least minimum standard of civilised living. The Court referred to Art. 1 of Universal Declaration of Human Rights to show that every State has a responsibility to ensure that all human beings are equal in dignity and rights, and added that 'the Charter of United Nations, thus reinforces the faith in fundamental human rights and in the dignity and worth of human person envisaged in the Directive Principles of State Policy as a Part of the Constitution'. The Court also laid emphasis on the International Convention of Political, Social; & Cultural Rights to require that the right of the worker to enjoy just and favourable conditions of work must be protected.

7. In *Charles Sobraj Vs. Supdt. Central Jail*[2] the Supreme Court held that the right to life under Art. 21 includes the right to human dignity. In *Bandhua Mukti Morcha Vs. Union of India*[3], the Court held that the right to live with human dignity in Art. 14, derives its life breath from Directive Principles of State Policy.

8. It is not necessary to set out a list of a number of other decisions of the Supreme Court which have emphasised the constitutional mandate of protecting human dignity not only as a citizen but also at work place; a short synopsis thereof may be found in the case of *Unni Krishna Vs. State of Andhra Pradesh*[4]. Even the right of a person's reputation has been recognised by the Patna High

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[2] AIR, 1978 Supreme Court page 1514
[3] AIR 1984 Supreme Court page 802
[4] (1993) Vol. I Supreme Court Cases Page 645

Court in the case of *Lal Krishna Advani Vs. State of Bihar*[3] as a part of Fundamental Rights and personal liberty guaranteed under Art. 21

9. The Civil Law relating to Libel & Slander (Torts) and the Criminal Law relating to Defamation (Sections 499 & 500 Indian Penal Code) are facets of human dignity. If the Constitution and the Laws did not protect human dignity, life would have been miserable and no better than the Medieval Ages when 'might' reigned over 'right'. Evolved through at least two centuries turmoil in search of philosophies to ennoble and sublimate the Human Spirit and Mind, the modern society resolved to ensure Liberty, Equality & Fraternity among all Peoples and Climes which found expression in the Universal Declaration of Human Rights, the various International Conventions which came to be adopted by various developed countries, and several developing countries too. In USA and certain European countries, the concept of protection of human rights and human dignity has been advanced to such an extent that even children have liberty to complain against unduly harsh behaviour of their parents, and the Police takes cognizance!

10. India, which suffered foreign domination for centuries, took a leap forward during the freedom movement and, in the midst of untold sufferings of its great leaders and patriots, resolved to ensure these natural freedoms and human rights to its people whose expression is found in our Constitution as pointed out by the Supreme Court as mentioned above. If the guarantee of human dignity is withdrawn from the Constitution, the very foundation of Liberty, Equality, and Fraternity would stand abolished. It is not very many years ago when, in the wake of Proclamation of Emergency under Part XVIII of the Constitution in 1975, enforcement of Fundamental Rights in Part III of the Constitution (except Arts. 20 & 21, since the Constitution 44th Amendment 1978) through

[3] AIR 1997 Patna page 15

Courts was suspended under Art. 359; the people who raised their voice against injustices by the Govt. in power were dealt with in a manner not so civilised !

11. I maintain, therefore, that protection of *'human dignity'* is a part of the *'basic structure of our Constitution'*, and any legislative or executive measure which violates human dignity would be unconstitutional and ultra vires as laid down in the case of *Keshavanand Bharati Vs. State of Kerala* [6]. One of the instances of such violation is the provision for reservation in promotions in public services. What actually happens by virtue of such reservation, may be appreciated. The Supreme Court examined this question in great depth in the famous *Mandal* case of *Indra Sawhney Vs. Union of India*[7]. The Court held that reservation in promotion "would mean creation of a permanent separate category apart from the mainstream-a vertical division of the administrative apparatus. The members of reserved category need not have to compete with others but only among themselves. There would be no will to work, compete and excel among them. Whether they work or not, they tend to think, their promotion is assured. This, in turn, is bound to generate a feeling of despondence and 'heart burning' among open competition members. All this is bound to affect the efficiency of administration." The Court went on to observe that "the inevitable result, in all fields of administration of this phenomenon is natural resentment, heart burning, frustration, *lack of interest in work and indifference to duties, disrespect to the superiors, dishonour of the authority* and an atmosphere of constant bickering and hostility in administration. *When further the erstwhile subordinate becomes the present superior, the vitiation of the atmosphere has only to be imagined.*" While making these observations, the Court was considering only the effect of Art. 335 of the Constitution, and judged in the light of

[6] (1973) Supplement Supreme Court Reports page 1
[7] AIR 1993 Supreme Court page 477

Art. 16 (4), held that the latter covers only initial appointment and not promotion, and went on to say that it would not be permissible to prescribe lower qualifying marks or a lesser evaluation for members of reserved categories since that would compromise the efficiency of administration.

12. It will be noticed that the Supreme Court brought home an obvious truth, a natural phenomenon in the ordinary course of human conduct, when they held that promotion of a reserved category subordinate of a comparatively less competence (-that is what a gradation list in a service cadre signifies-) over a superior would not only inculcate 'lack of interest in work and indifference to duties' but also lead to '*disrespect to superiors, dishonour of the authority, and vitiation of the atmosphere which has only to be imagined*'. The result is not merely a violation of the rule of efficiency contained in Art. 335, but also a *violation of human dignity at work place* which would plainly infringe the right to human dignity enshrined in the Preamble and Art. 42, and various other provisions referred to in the decisions of the Supreme Court as indicated above. It constitutes violation of *human rights* as mentioned in Section 2 (d) of Protection of Human Rights Act, 1993, besides the International Conventions adopted by the Govt. of India.

13. I would also like to mention that in *Indra Sawhney's* case the Supreme Court had observed that Fraternity assuring Dignity of the individual has a special relevance in the Indian context (see page 502 of the report), but while saying so their attention was mainly focussed upon the social conditions of the weaker sections of the society qua the better placed ones in a general perspective. The question of human dignity being a basic feature of the Constitution did not figure for consideration; the result at which the Court arrived, on the question of promotions, flowed from the consideration of Art. 335, which was enough. The political

considerations of the powers that be, however, induced the making of the Constitution 77th Amendment 1995, by which clause 4A was inserted in Art. 16. The amendment provided for reservation in promotion for Scheduled Castes and Scheduled Tribes in services under the State; consequently when a promotion of a Schedule Caste person by reservation came up for consideration, and the High Court struck down the promotion on the basis of *Indra Sawhney*, the Supreme Court upheld the promotion in the case of *Commissioner of Commercial Taxes Vs. G. Sethumadhav Rao*[8] on the basis of 77th Constitution Amendment which came into force between the Administrative Tribunal and Supreme Court Judgments. An important fact to be noticed is that the Respondent, who had won in the Tribunal, did not make appearance with the result that the concept of human dignity as a basic feature of the Constitution did not come up for consideration. That aspect of the case therefore is still open for consideration of Parliament as well as Supreme Court.

14. It is well settled that public service employment is *not a mere Contract but also one of Status*. A public servant is not a mere employee, but also shares some portion, howsoever infinitesimal, of State's Sovereign Power in discharge of his official functions; that is why he is given a protection from criminal prosecution for commission of an offence during the course of discharge of his duties. The holder of a public office, therefore, has a dignity of his own which is not shared by the common man. This dignity flows from the nature of his office as also from his position (called, 'Rank') in the hierarchy of the service to which he belongs. In common parlance, it is known as his *seniority in the cadre* to which he belongs. This seniority is not liable to be affected adversely (called, 'reduction in rank') by an authority lower in rank than the

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[8] AIR 1996 Supreme Court page 1915, (1996) 7 SCC 512.

authority by which he was appointed, nor without appropriate reason within the four corners of his conditions of service, for which he must be given a reasonable opportunity to show cause in accordance with Art. 311 of the Constitution. Whenever his reduction in rank is done in contravention of the law, his *human dignity is violated*, because his prestige is lowered and an atmosphere as stated by the Supreme Court in *Indra Sawhney's* case (supra) is created. This loss of dignity extends to his social status; he becomes a subject of ridicule and derision in society no less than at his work place. No civilised law can countenance such indignity of human person, nor does our Constitution. A scheme of reservation in promotion, leading to the supersession of a public servant for no fault of his, despite his superiority in rank, competence and ability, by a person in subordinate position with lesser competence and ability, amounts to a degradation of his human personality and dignity. I, therefore, gather from an over-all view of the laws and human rights, that the provisions contained clause 4(A) of Art. 16, and a contemplated amendment to Art. 335 to lower the qualifying marks or lesser level of evaluation for members of reserved categories for the purposes of promotion in public services would violate a part of the basic structure of the Constitution and therefore would be beyond the competence of the Parliament to enact.

15. Our Parliament has vast powers to make laws and to amend the Constitution subject to the limits of the basic structure of the Constitution. Instances are not unknown when the Parliament did transgress the limits, the worst of them being the insertion of Art. 329A by the Constitution 39th Amendment by which Smt. Indira Gandhi, then Prime Minister, persuaded the Parliament to enact a total immunity from challenge to her election as a member of the Lok Sabha. The provision had to be struck down by the Supreme Court and was ultimately repealed by Constitution 44th Amendment

Act, 1978. One only hopes that history will not repeat itself in the matters relating to protection of human rights and human dignity in all spheres of life, and in particular in the matter of reservation in promotions to public services. Indeed one hopes that the Parliament may like to repeal Clause 4(A) of Art. 16 of the Constitution and not force the aggrieved persons to approach the Supreme Court to redress a wrong which constitutes violation of human dignity in the Public Services through which the Executive Power of the State is exercised. I am afraid that if the Govt. succumbs to the lure of power by carrying out the Cabinet decision to provide also for relaxation of qualifying marks or for reduction of the level of evaluation for members of reserved categories for the purposes of promotions in public services, over and above the existing evil of reservation in promotion itself (which in fact ought to be done away with for reasons indicated), the words of Jefferson – spoken during formation of the Constitution of United States of America– that 'the tyranny of the Legislatures is the most formidable dread' and that the Nation must guard against 'the despotism of the Parliament' – may come true in India!

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DIFFERENCE BETWEEN TAX & FEE AND GUIDELINES FOR DRAFTING OF FISCAL LEGISLATION

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The tax is an imposition made for the public purpose, without reference to any services rendered by the State or any specific benefit to be conferred upon the tax payer. The object of levy of tax is to raise the general revenue. On the other hand, a fee is a payment levied by the State in respect of services performed by it for the benefit of the individual. It is levied on a principle just opposite to that of tax while a tax is paid for the common benefit conferred by the Government on all tax payers, a fee is a payment made for some special benefit enjoyed by the payer and the payment is shown proportionately to the special benefit.

The money raised by a fee is set apart and appropriated specifically for the purpose of the services for which it has been imposed and it is not merged in the general revenue of the State. If the special service rendered is distinctly and primarily meant for the benefit of a specific class or area, the fact that in benefiting the specific class or area, the State as a whole may ultimately and indirectly be benefited would not detract from the character of the levy as a fee. In such a case it is necessary to see what is the primary object of the levy and the essential purpose which is intended to achieve. Its primary object and essential purpose must be distinct from its ultimate or incidental results or consequences. On the other hand, if there is no strict and clear nexus between some special service and the levy it cannot be said to be a fee.

While in the case of tax there is no quid pro quo between the tax payer and the state, There is a necessary correlation between the fee collected and the service intended to be rendered as held by the Hon'ble Supreme Court in the case of State of Rajasthan vs. Sajjan Lal , AIR 1975 (Supreme Court) page 706, (Para 40 and 41), which has agiain been reiterated in Kishan Lal vs. State of Haryana (1993) Supplement 4 SCC page 461.

The amount of fee is based upon the expenses incurred by the State in rendering the services, though in the case of particular fee the amount may not be arithmetically commensurate with the expenses.

A tax is compulsory extraction of money by public authority for public purpose enforceable by law and is not a payment for services rendered. On the other hand, fee is charged for special services rendered to individuals by some governmental agency.

Ever, the traditional view of quid pro quo that undergone a transformation in recent years. The Hon'ble Apex Court has held that what is to be seen for a fee is whether there is a fair correspondence between the fee charged and the cost of services rendered to the fee payers as a class; a broad co-relationship is all that is necessary. Such relationship need not be strict and even a casual relation may be enough. Neither the incidence of fee nor the service rendered need be uniform. Merely because other are also getting benefited will not detract the character of the fee as held by Hon'ble the Supreme Court of India in the case of Delhi Municipality vs. Yasin, (AIR 1983), Supreme Court 617, (Para 9) and S.G.T. vs. State of Andhra Pradesh, (AIR 1983 Supreme Court 1246) (Para 33 & 38). The same view has been reiterated in the case of M/s Kishan Lal Lakhmi Chand & Ors. vs. State of Harayana (1993 Supplement 4 SCC page 461). However, the quid pro quo would not necessarily be lost merely because the statute prescribes a minimum rate, the fee such as market fee is levied in respect of public properties for example public road. The benefit to be derived from fee is not simultaneous but is deferred and the amount collected by way of fee is a result for future services. Where the fee is levied for special services the fact that others besides

those paying the fee are also benefited did not detract the character of the fee, as held by Hon'ble the Apex Court in the case of ITC vs. State of Karnataka (1985 Supplement SCC 476 para 3).

The cases may arise where under the garb of levying a fee the Legislature may attempt to impose a tax. In the case of such colorable exercise of legislative power, the courts would have to scrutinizes the scheme of the levy very carefully and determine whether in fact there is a co-relation between the services and the levy or whether the levy is excessive to such an extent as to be pretence to a fee and not a fee in reality.

Even though it is said that there is no generic difference between the tax and a fee and the taxing power of a state may manifest itself in different forms known respectively as special assessments, fees and tax. Our Constitution has, for legislative purposes, made a distinction between the tax and fee. Hence while drafting the Bill or making the legislation, one has to keep in mind the relevant entries of the Constitution of India.

The distribution of the power to levy a tax in not identical, with that of the power to levy a fee. Taxes are specifically distributed as between the Union and the State Legislation by various entries in List I and List II and residuary power to levy a tax which is not enumerated in any of the entries under Entry 97 of List I exclusively for the Parliament. On the other hand, entry relating to fee has been specifically mentioned in the end of the 3 List I, II and III.

Every legislature has the power to levy fee which is co-extensive with power to legislate with respect to substantive matters and legislature may while making law relating to a subject matter within its competence, levy a fee with reference to the services that would be rendered by the State under such Law. Taxes are specifically divided between List I Entries 82 to 92A and in List II Entries 46 to 63. The fees are however, not mentioned specifically. There is a general entry towards the end of each list which empowers the legislature to

levy a fee in respect of any matter over which it has legislative power according to the relevant List. The power to levy fee is thus distributed in Entry 96 of List I, 66 of List II and 46 of List III.

The result is that power of legislature to levy a fee or tax is to be determined by complying different test. If a fee is levied on the capacity of the payer, then it shall not be treated as fee and will be held to be a tax. Similarly, a fee cannot be levied for increasing the general revenue. In such a case it cannot be justified under any of the Entries of the Constitution of India.

In the case of Sri Jagnath Ramanuj Das and another vs. State of Orissa, (AIR 1964 SC p. 400, para 9), the earliest leading case of the Supreme Court, in para 9 Hon'ble Apex Court clearly held :

"A tax is undoubtedly in the nature of a compulsory extraction of money by a public authority for public purposes, the payment of which is enforced by law. But the essential thing in a tax is that the imposition is made for public purposes of the State without reference to any special benefit to be conferred upon the payers of the tax. The taxes collected are all merged in the general revenue of the State to be applied in the general revenue public purposes. Thus, tax is a common burden and the only return which the tax-payer gets is the participation in the common benefits of the State. Fees, on the other hand, are payments primarily in the public into but for some special service rendered or some special work done for the benefits of those from whom payments are demanded. Thus, in fees there is always an elements of 'quid pro quo' which is absent in a tax. Two elements are thus essential in order that a payment may be regarded, as fee. In the first place, it must be levied in consideration of certain services, which the individuals accepted either willingly or unwillingly. But this by itself is not enough to make the imposition of a fee. If the payments are demanded for rendering of such services are not se a part are specifically appropriated for the purposes, but are merged in the general revenue of the State to be spent for general public purposes." {para 9}

As mentioned by me earlier, that the traditional view that there must be actual quid pro quo for a fee has undergone a sea change. In this connection I may refer to and rely upon the decision of Hon'ble The Apex Court In M/s Kishan Lal Lakhmi Chand & Ors. vs State of Harayana & ors. (Judgements Today) 1993 (4) SC page 426 (para 5): where it was held by Hon'ble The Supreme Court :

> "The traditional view that there must be actual quid pro quo for a fee has undergone a sea change. The distinction between a tax and fee lies primarily in the fact that a tax is levied as part of a common burden, while a fee is for payment of a specific benefit or privilege although the special advantage is secondary to the primary purposes of regulation in public interest, if the element of revenue for general purposes of the State predominates, the levy becomes a tax. In regard to fee, there is, and must always be, co-relation between the fee collected and the service intended to be rendered. In determining whether a levy is a fee, the true test must be whether its primary and essential purposes it to render specific services to a specified area or class; it may be of no consequence that the State may ultimately and indirectly be benefited by it. The power of any legislature to levy a fee is conditioned by the fact that is must be "by and large" a quid pro quo for the services rendered. However, co-relationship between the levy and the services rendered/expected is one of general character and not of mathematical exactitude. All that is necessary is that there should be a "reasonable relationship" between the levy of the fee and the services rendered. There is no genetic difference between a tax and a fee. Both are compulsory extractions of money by public authorities. Compulsion lies in the fact that payment is enforceable bylaw against a person in spite of his unwillingness or want of consent. A levy in the nature of a fee does not cease to be of that character merely because there is an element of compulsion or coerciveness present in it, not is it a postulate of a fee that it must have direct relation to the actual service rendered by the authority to each individual nor that each should obtain the benefit of the service."

FEE	TAX
Primarily	
(1) There must be actual quid pro quo for a fee has undergone a sea change.	(1) A tax is levied as a part of a common burden.
(2) While a fee is for payment of a specific benefit or privilege although the special to the primary purpose of regulation in public interest.	(2) If the element of revenue for general purpose of the State predominates, the levy becomes a tax.
(3) In regard to fee, there is and must always be, correlation between the fee collected and the service intended to be rendered.	

(iv) In case of licence fee, condition of quid pro quo for a fee is not necessary. There is no generic difference between a tax and fee. Both are compulsory extractions of money by public authorities. Compulsion lies in the fact that payment is enforceable by law against a person in spite of his unwillingness or want of consent.

In view of the aforesaid law laid down by Hon'ble Apex Court in **M/s Kishan Lal Lakhmi Chand vs. State of Harayana,** there may be a regulatory fee and a compensatory fee. In the cases of licence fee, which is a regulatory fee, the condition of quid pro quo is not necessary.

> ***"(f) Corporation of Calcutta and Anr. vs. Liberty Cinema (AIR 1965 SC 1107).*** *Fee for licences and fee for services rendered are contemplated as different kinds of levy. The former is not intended to be a fee for service rendered. This is apparent*

from a consideration of Article 110 (2) and Article 199 (2) where both the expression are used indicating thereby that they are not the same. It has further been held that:

It would, therefore, appear that a provision for the imposition of licence fee does not necessarily lead to the conclusion that the fee must be only for services rendered."

Same view was taken :

(g) P Kannadsan etc. vs. State of Tamilnadu & other etc. J.T. 1996 (7) SC 16. *It has been observed that :*

"Even in the matter of fees, it is not necessary that element of quid pro quo should be established in each and every case, for it is well settled that fees can be both regulatory and compensatory and that in the case of regulatory fees, the element of quid pro quo is totally irrelevant."

(h) Vam Organic Chemicals Limited and Anr. Vs. State of U.P. & Ors. (JT 1997 (1) SC 625)-

".....has approved that there is a distinction between the fees charged for licence. i.e. regulatory fees and the fees for the services rendered as compensatory. It approved the view that in case of regulatory fees like the licence fees, existence of quid pro quo is not neeessary."

In the connection I may also refer to the recent decision of Hon'ble The Apex Court in **(1999) 2 Supreme Court Cases 274 – Secunderabad Hyderabad Hotel Owners Association & Ors. vs. Hyderabad Municipal Corporation, Hyderabad & another,** (relevant paras 9, 10, 11 and 12, page 282, 283 & 284).

"9. It is, by now, well settled that a licence fee may be either regulatory or compensatory. When a fee is charged for rendering

specific services, a certain element of quit pro quo must be there between the services rendered and the fee charged so that the licence fee is commensurate with the cost of rendering the service although exact arithmetical equivalence is not expected. However, this is not the only kind of fee which can be charged. Licence fee can also be regulatory when the activities for which a licence is given required to be regulated or controlled. The fee which is charged for regulation for such activity would be validly classifiable as a fee and not a tax although no service is rendered. An element of quid pro quo for the levy of such fees is not required although such fees cannot be excessive.

10. In the case of ***Commr. H.R.E. Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirir Mutt*** *one of the earliest cases dealing with the question whether the levy is a fee or a tax, this Court held that the Constitution and, in particular, the legislative entries in Schedule VII of the Constitution make a clear distinction between a tax and a fee. This Court reproduced the definition of what "tax" means, given by Latham, C.J. of the High Court of Australia in* ***Matthews vs. Chicory Marketing Board (CLR at p 276) (See at p.1040).*** *"A tax" according to the learned Chief Justice, "is a compulsory extraction of money by public authority for public purposes enforceable by law and is not payment for services rendered". A fee, on the other hand, is generally defined to be a charge for a special services rendered to individuals by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service, though is many cases, the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay. These are undoubtedly some of the general characteristics, as far may be, of various kinds of fees. It is not possible to formulate a definition that would be applicable to all cases. The Court then observed : (at page 1042)*

"The distinction between a tax an a fee lies primarily in the fact that a tax is levied as a part of the common burden, while a fee is a payment for a special advantage, as for example, in the case of registration fees for documents or marriage licences, is secondary to the primary motive of regulation in the public interest.

There is really no generic difference between a tax and a fee and as said by Seligman, the taxing power of a State may manifest itself in a three different forms known respectively as special assessments, fees and taxes. Our Constitution has, for legislative purposes, made a distinction between a tax and a fee.

11. In the case of ***Corpn of Calcutta vs. Liberty Cinema (SCR at p. 483),*** *this court after referring to the constitutional provisions making a distinction between a fee and a tax also went on to say that in our Constitution, fees for licence and fees for services rendered are contemplated as different kinds of levy. The former is not intended to be a fee for services rendered. This is apparent from a consideration of Article 110 (2) and Article 199 (2) where both the expressions are used indicating thereby that they are not the same. In other words, a distinction was made between fees for services rendered and fees which are regulatory. In* ***India Mica Micanite Industries vs. State of Bihar (SCC at p. 241 : SCR at p. 324) Om Prakash Agarwal vs. Giri Raj Kishore and Municipal Council, Madurai vs. R. Narayanan (SCC pp. 503 to 505: SCR at pp. 339 to 340),*** *The court had considered a fee which was charged for services rendered. In all these cases, the Court observed that when a fee is charged for services rendered, an element of quid pro quo is necessary and there has to be a co-relationship of a general character between the cost of rendering such service and the fee charged. A number of other decisions were also cited in this connection. The position in respect of fees for services rendered is summed up in the case of*

Krishi Upaj Mandi Samiti vs. Orient Paper & Industries Ltd. (SCC in para 21).

12. In the present case, however, the fees charged are not just for services rendered but they also have a large element of a regulatory fee levied for the purpose of monitoring the activity of the licensees to ensure that they comply with the terms and conditions of the licence. Dealing with such regulatory fees, this Court in ***Vam organic Chemicals Ltd. vs. State of U.P. (SCC at p. 726),*** *observed that in the case of regulatory fee, no quid pro quo was necessary but such fee should not be excessive. The same distinction between regulatory and compensatory fees has been made in the case of* ***P. Kannadasan vs. State of T. N. (SCC in para 36)*** *as well as* ***State of Tripura vs. Sudhir Ranjan Nath (SCC at p. 673).***"

In this connection, for drafting the legislative Bills regarding fiscal legislation for imposition of tax, one has to keep in mind the provisions of Article 110 and Article 199 of the Constitution of India which was interpreted by Hon'ble Apex Court in **Kewal Krishan Puri and another vs. State of Punjab, AIR 1980 SC 1008 (at page 1015, para 7).**

> *"7. Clause (2) of Article 110 and clause (2) of Article 199 of the Constitution, the former occurring in the Chapter of Parliament and the latter in relation to the State Legislature are in identical terms as follows:-*
>
> "A bill shall not be deemed to be a Money Bill by reason only that it provides.....for the demand or payment of fees for.....licences or fees for services rendered....."

The Constitution, therefore, clearly draws a distinction between the imposition of a tax by a Money bill and the impost of fees by way of other kind of Bill. So also in the Seventh Schedule both in the List I and List II a distinction has been maintained in relation to the

entries of tax and fees. In the Union List entries 82 to 92A relate to taxes and duties and entry 96 carves out the legislative field for fees in respect of any of the matters in the said list except the fees taken in any court. Similarly in the State List entries relating to taxes are entries 46 to 63 and entry 66 provides for fees in respect of any of the matters in List II but not including fees taken in any Court. Entry relating to fees in List III in entry 97. Our Constitution, therefore, recognizes a different and distinct connotation between taxes and fees."

The Constitution Bench decision of the Supreme Court in the case of **Synthetics and Chemicals Ltd. and others vs. State of U.P. and others (1990) I SCC 109 (at Page 165, para 109),** has considered the legislative competence of the State legislature regarding levy of fee in respect of denatured spirit unfit for human consumption. Even though the State has the exclusive privilege in dealing with the alcoholic liquor but if the revenue earned a substantial , it will not be justifiable as fee which is levied for carrying on the business of such alcoholic liquor.

In para 109 it has been held that –

"These questions about the privilege and the doctrine of police powers in fact would be material to be considered when the question about the various levies imposed by the State in respect of alcoholic beverages is considered and so far as the present cases are concerned which pertain to only alcoholic liquors which are not for human consumption that is which are meant for industrial use, the only question will be as to whether the State could justify the respective levies under any of the entries in List II. The main theme of the arguments on behalf of the States has been that they have imposed levies because the alcohol which is not for human consumption is a commodity which could be easily converted into alcoholic liquors for human consumption and therefore the levies have been imposed assuming that it is for human consumption or in other words the

contention has been that these levies have been imposed in order to prevent the conversion of alcoholic liquors which are not for human consumption to those which are for human consumption. A contention therefore was suggested that these levies could be justified as regulatory fees although it was frankly conceded that although the revenue earned out of it is substantial and may not be justifiable as fees but have been imposed and it was therefore that the main themes on behalf of the respondents has been based on the doctrine of the privilege of the State to trade in these commodities as that trade is considered to be obnoxious and injurious to public health."

Hon'ble The Apex Court was pleased to hold that such levy must find a justification as tax under any of the taxing entries in the legislative list.

In view of the legal position that the fee is compensatory in nature and not regulatory as in the case of market fee levied by various Mandi Samitis etc. the element of quid pro quo will still be required. In this connection, I may refer to para 36 of the judgment of the Hon"ble Supreme Court in the case of **Bhagwan Das Sood vs. State of Himanchal Pradesh (1997) I Supreme Court Cases 227 at page 239 and 240:**

"36. Levy of market fee being essentially a fee and not a tax, such imposition of levy of market fee necessarily inheres in it the essence of quid pro quo between the fees levied and services returned to the payer of such fees. What should be extent of services returned to the payers of levy of market fees so as to keep such levy of fees within the bounds of accepted principle of fee involving existence of reasonable quid pro quo has been a vexed question agitated before various High Courts including this Court from time to time. Some of the decisions of this Court on this question have been indicated. The legal position regarding constitutional validity of levy of market fee may be summarised as follows:

(i) *Existence of quid pro quo is essential for retaining the character of 'fee' in the matter of levy of market fee.*

(ii) *Such quid pro quo is not to be reckoned with any mathematical precision with reference to quantum of fees realized by imposition of levy and the percentage of such fees spend for establishing market yards, construction of various infrastructures etc. and providing various amenities as envisage under the Marketing Act and the Rules framed there under for effective implementation of aims and objectives under the Act.*

(iii) *The service to the rendered to the payers of market fee must be real and not illusory.*

(iv) *Such service must have an objective basis and have a direct link and not be remote its effect.*

(v) *It is not necessary that imposition of levy is to be effected only on establishment of principal and sub market yards by completing the infrastructures required for such establishment of market and sub market yards. Such construction being time consuming and expenditure-oriented. It will be sufficient to justify valid imposition of levy if it is demonstrable that after notifying market area, effective steps not in contemplation but in reality have been taken to identify market and sub-market yards and schemes for establishment of such market or sub-market yards have in fact been put to action and the market fees levies and realized are being ploughed back for the advancement of the purpose for which market fees have been levied and realized.*

(vi) *In deciding the question of rendering of a real and not illusory services in discharging the obligation emanating from quid pro quo, to levy of market fee, no strait-jacket formula can be evolved. Fact situation in the matter of establishment of principal and sub-market yards and the practical feasibility of construction of infrastructures, roads, pathways etc. for establishment of such market yards within a time frame and in the light of financial constraints is bound to vary depending on various factors including imponderables. It is therefore, essentially necessary to take a pragmatic approach to the problems associated with establishing market and sub-market yards with necessary infrastructures etc. and accompanying facilities and amenities to be made available to traders and producers coming to such yards, in order to decide whether concrete steps have been translated into action with reasonable sincerity in implementing the schemes envisaged under the Marketing Act and the Rules framed thereunder."*

In view of Article 265 of the Constitution of India no tax can be levied or collected except by authority of law. Law in this context means an Act of legislature and not an executive order or a rule without express statutory authority. An executive order, executive instruction or custom cannot justify an imposition of tax. Where the legislature has a power to levy a tax, it may with retrospective effect validate an illegal assessment of tax made by the executive without proper legislative sanction but it cannot give retrospective operation to a tax in respect of an area over with it had no territorial jurisdiction during the period of retrospective operation.

In the end, I will repeat the words of Hon'ble The Apex Court while classifying the distinction between the tax an the fee in para 21 of the judgment

in the case of **Krishi Upaj Mandi Samiti vs. Orient Paper & Industries Ltd., (1995) 1 Supreme Court Cases 265,** subject to what has been said above.

"21. Thus what emerges from the conspectus of the aforesaid decisions is as follows:

(1) Though leving of fee is only a particular form of the exercise of the taxing power of the State, our Constitution has placed fee under a separate category for purposes of legislation. At the end of each one of the three Legislative Lists, it has given power to the particular legislature to legislate on the imposition of fee in respect of everyone of the items dealt with in the list itself, except fees taken in Court.

(2) The tax is a compulsory extraction of money by public authority for public purposes enforceable by laws and is not payment for services rendered. There is no quid pro quo between the tax payer and the public authority. It is a part of the common burden and the quantum of imposition upon the tax payer depends generally upon his capacity to pay.

(3) Fee is a charge for a special service rendered to individuals or a class by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service though in some cases the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay. These are various kinds of fees and it is not possible to formulate a definition that would be applicable to all cases.

(4) *The element of compulsion or coerciveness is present in all kinds of impositions though in different degrees and it is not totally absent in fees. Hence it cannot be the sole or even a material criterion for distinguishing a tax from fee. Compulsion lies in the fact that payment is enforceable bylaw against an individual in spite of his unwillingness or want of consent and this element is present in taxes as well as in fees.*

(5) *The distinction between a tax and fee lies primarily in the fact that a tax is levied as a part of the common burden while a fee is a payment for a special benefit or privilege. Fees confer a special capacity although the special advantage is secondary to the primary motive of regulation in the public interest. Public interest seems to be at the basis of all imposition but in a fee it is some special benefit which is conferred and accruing which is the reason for imposition of the levy. In the case of a tax, the particular advantage it is exists at all, is an incidental result of State action. A fee is a sort of return or consideration for services rendered and hence it is primarily necessary that the levy of fee should on the face of the legislative provision be correlated to the expenses incurred by Government in rendering the services. As indicated in Article 110 (2) of the Constitution ordinarily there are two classes of cases where Government imposes fees upon persons. The first is of grant of permission or and the second for services rendered. In the first class of cases, the cost incurred by the Government for granting of permission or privilege may be very small and the amount of imposition levied is based not necessarily upon the costs incurred by the Government but upon the benefit that the individual receives. In such cases, the tax element is predominant. It the money paid by privilege-holders*

goes entirely for the expenses of matters of general public utility, the fee cannot but be regarded as a tax. In the other class of cases, the government does some positive work for the benefit of persons and the money is taken as the return for the work done or services rendered.

(6) *There is really no generic difference between tax and fee and the taxing power of the State may manifest itself in three different forms, viz. special assessments, fees and taxes. Whether a cases is tax or fee, would depend upon the facts of each cases. If in the guise of fee, the legislature impose a tax it is for the Court on a scrutiny of the scheme of the levy, to determine its real character. In determining whether the levy is a fee, the true test must be whether it primary and essential purpose is to render specific services to a specific area or classes. It is of no consequence that the State may ultimately and indirectly be benefited by it. The amount of the levy must depend upon the extent of the services sought to be rendered and if they are proportionate, it would be unreasonable to say that since the impost is high it must be a tax. Nor can be method prescribed by the legislature for recovering the levy by itself alter its character. The method is a matter of convenience and though relevant, has to be tests in the light of other relevant circumstances.*

(7) *It is not a postulate of a fee that it must have relation to the actual service rendered. However, the rendering of service has to be established. The service, further, cannot be remote. The test of quid pro quo is not to be satisfied with close or proximate relationship in all kinds If fees, A good and substantial portion of the fee must, however, be shown to be expended for the purpose for which the fee is levied. It is not necessary to confer the whole of the benefit on the payers of the fee but some special benefit must be*

conferred on them which has a direct and reasonable correlation to the fee. While conferring some special benefits on the payers of the fees, it is permissible to render service in the general interest of all concerned. The element of quid pro quo is not possible or even necessary to be established with arithmetical exactitude. But it must be established broadly and reasonably that the amount is being spent for rendering services to those on whom the burden of the fee falls. There is no postulate of a fee that it must have a direct relation to the actual services rendered by the authorities to each individual to obtain the benefit of the service. The element of quid pro quo in the strict sense is not always a sine quo non for a fee. The element of quid pro quo is not necessarily absent in every tax. It is enough if there is a broad, reasonable and general co-relationship between the levy and the resultant benefit to the class of people on which the fee is levied though no single payer of the fee receives direct or personal benefit from those services. It is immaterial that the general public may also be benefited from some of the services if the primary service intended is for the payers of the fees.

(8) Absence of uniformity is not a criterion on which alone it can be said that the levy is of the nature of a tax. The legislature has power to enact appropriate retrospective legislation declaring levies as fees by denuding them of the characteristics of tax.

(9) It is not necessary that the amount of fees collected by the Government should be kept separately. In view of the provisions of Article 266, all amounts received by the Governments have to be credited to the Consolidated Funds and to the public accounts of the respective Governments."

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COURT MANAGEMENT: POLICY, PLANNING AND STRATEGY

D. P. Gupta,
H.J.S.[1]

INTRODUCTION

Law is an instrument of society, having its own object – The dispensation of Justice.[2] The judicial system is a process to protect a social order commanding the Rule of Law. As such, the judiciary is entrusted with the task to ensure actualization of the rights granted to the citizens[3] and further seeing that limbs of the Government function within the constitutionally ordained parameters[4]. For a successful Justice Delivery system, therefore, it becomes imperative that it remains effective and efficient, adheres to its policies and also strives to achieve its aims and objectives.

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[1] Director, Institute of Judicial Training and researchy, U.P., Vineet Khand, Gomtinagar, Lucknow.

[2] Hart; "The concept of Law"-(Chapter VIII)

[3] Under Article 21 of the Constitution of India availability of rights to 'persons' is conceived in addition to 'citizens' as highlighted in a land mark judgment by Supreme Court in Chairman Railway Board v. Chandrima Das, (2000) 2 SCC 465=AIR 2000 SC 988 (By Hon'ble Mr. Justice S.Saghir Ahmad)

[4] The very existence of Article 50 of Constitution of India has been observed as the 'Conscience of the Constitution', and the judiciary, though taken as a part of the State, has to function as a guardian of Justice controlling to some extent the blatant violation by other two wings, namely, the Executive and the Legislature. See Union of India v. Sankarchand Himmatlal Sheth; AIR 1977 SC 2328 and also the expositions laid down in L. Chandra Kumar v. Union of India, AIR 1997 SC 1125.

The Justice Delivery/Dispensation System is the corner stone and not gravestone for justice. In order to remain developing and progressive, not as static or stagnant, the system is required to find out its 'working defects' and factors corroding the faith of the people in the system. Experiences of the past have proved that we are required to evolve a mechanism with definite policy, plan and strategy to successfully manage the ad judicatory process.

2. WHAT IS COURT MANAGEMENT

Court Management is managing the judicial process for facilitating access to justice, reducing adjudicatory delays and expenses besides having inbuilt mechanism to find out working defects, plugging loopholes and removing snags in the justice delivery system. It is a continuing process of introspection, assessment and improvement, thus managing the entire adjudicatory process.

3. AIMS AND OBJECTS OF COURT MANAGEMENT

The entire set of strategies and operating techniques of Court Management, chiefly aims to achieve the following objectives:-

- That every litigant has full and unhampered access to justice.[5]
- That judicial system is expedient, time bound and cost effective.[6]
- That the judicial system ensures 'Resolution of Disputes' rather than disposing of cases only.
- That the Justice Delivery System secures effective and quick implementation of its decisions.
- That the processes and procedures do operate in such a manner so as to advance 'substantial justice' to the parties instead of punishing them for coming to the court for the redressal of their grievances.

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[5] Accessible would mean capable of access without any 'reasonable' let or hindrances (Henaghan v. R. Forangirence (1936) 2 AUER iv 26)

[6] In levying Court Fee (list II-entry 3) a broad corelationship should be there with the fees collected and the cost of administration of Justice Om Prakash Agarwal v. Giriraj Kishor, AIR 1986 SC 726 (Para 12)

- And further to equip the actors in the Justice Delivery/ Dispensation System to acquire knowledge, skills and the attitude of promoting justice, encountering procedural snags by overcoming difficulties usually faced by the system.[7]

4. COURT MANAGEMENT AND POLICY STATEMENT

Fairly speaking, Court Management is a science for beneficial utilization of available resources in the Justice Delivery/Dispensation System. An elaborate definition of management is given by George R. Terry[8] who defines management as a process "consisting of planning, organizing, actuating and controlling, performed to determine and accomplish the objectives by use of people and resources". The business of the Court is multifaceted. It is not only the performance of a presiding officer (judge or magistrate) alone but also the performance of other officers of the Court, the officials, and all concerned human resources, which cumulatively reflects the court-administration. For effective court management, an analytical and well-coordinated approach is necessary. Managing all these resources for speedy justice would come within the ambit of court-management.

POLICY

In any organization, the policy is an integral fusion of principles, decisions and course of action for regulating the functions of the system so that the objectives of the organization are fully achieved. The policy statement should reflect uniformity and transparency of the policy, in synchronism with its underlying principles. Viewed as such, the policy of Court-Management envisages for improving the performance, quality and results in the Justice Delivery/Dispensation System.

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[7] See: Article 39(A), Part-IV read with Article 21 of Constitution of India. (For guidelines See Bandhuva Mukti Morcha v. Union of India, AIR 1984 SC 802 and for exposition of principles, Husainara Khatoon v. State of Bihar; AIR 1979 SC 1369.

[8] George R. Terry, "Principles of Management (Home Wood III Richard Irwin)

"The policy statement attempts to define and describe the scope of the field its methods and its purposes", observed Harold D. Lasswell[9] and referring to the policy sciences stressed that it "tries to integrate work that has always been done (i.e. the current practices adopted); the type of work is required to be done in future and the role which the policy scientist 'ought' to play and the 'methods' he can employ to enable him to more effectively play such a role."

Rudyard Kipling wrote, "He travels the fastest, who travels alone", yet the complexities of the Justice Delivery/Dispensation System, cannot be managed by one individual only. Rather it has to be managed by all concerned under some policy. For management of any organization, a policy has to be evolved for Managing Oneself, Managing Time (using it properly instead of wasting it), Managing Information, Effective Communication Between all Human Resources, Taking a Decision, and finally Evaluating Performance Periodically.

5. PLANNING COURT MANAGEMENT

For an effective and efficient court management selecting jobs must not be random. A plan of action has to be carved out keeping-in-mind the target.[10]

(i) **Planning case wise**:

According to the nature of the case and it's implications on the rights of the parties or questions to be considered therein viz., relating to titles, tenancy, money, service and rights in common etc.

(ii) **Planning courtwise**:

Managing the proceedings in court looking to the extent of the jurisdiction exercised by the court

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[9] Daniel Lerner and Harold D. Lasswell; "The Policy Sciences; Recent Development in Scope and Methods".

[10] The targets should be, however 'achievable targets'. Breakup of work should be in proportion of time. One should not allocate time out of proportion to the importance of job (for details see Tayor and Watling; "The Basic Arts of Management").

viz., trial (summary or small causes court or contested), appellate, revisional or otherwise.

(iii) **Time-plan:**

Planning disposal of cases, their appeals, and revisions according to a "fixed time plan." Separate time plan may be fixed for distinct stages/proceedings.

(iv) **Execution/Implementation plan:**

Fixed time management for implementation of court decisions, execution proceedings, delivery of possession in rent cases, payments in compensation cases etc. Ensuring quick implementation of final judgment/award.

(v) **Assessment plan:**

Periodical assessment of progress and results in cases, including rate of convictions, usual causes of acquittal etc. and finding out causes and factors for delays etc.

CASE MANAGEMENT:

In Civil cases and Criminal trials the most significant aspects of court management is enwrapped in 'case management'. With the ever-increasing docket explosion, mounting arrears of cases and growing criticism of the "endless litigation system," courts have been stressing for "time bound disposal of cases." This can be summarized as the case management strategy. There are provisions in Criminal Procedure Code and Civil Procedure Code for hearing cases on day-to-day basis. Similar cases may also be clubbed or taken together or by one court. There are directions of various courts to this effect[11] but inspite of that there is no effective case management.

We find judicial mandate by Allahabad High Court given in two important (Division Bench) cases whereby stringent directions have been issued

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[11] Quite recently Allahabad High Court has expressed its anguish on this left aspect of case management in Net Ram vs. State of U.P. (CMP 16879 of 99), Judgment at 5.2.2001.

for case management. Hon'ble Allahabad High Court has categorized these cases[12] according to their nature fixing priorities for their disposal.

The time bound proposition of case management in so far as criminal cases are concerned has been finally laid down by the court in common cause cases.[13]

The propositions of the time bound and expeditious disposal of cases has also been recently stressed by the Apex Court and directions issued.[14]

6. STRATEGIES IN COURT MANAGEMENT

Court Management primarily relates to managing the human resources, time resource, and financial resources.

In so far as human resources are concerned, we have to first concentrate on judicial officers. It is true that Judges are mere mortal but they are asked to perform a function that is truly divine.[15] True that a member of judicial service is no longer akin to a servant of the government or an employee of the state in the sense it is usually understood; true that the Judicial Officers' are officers of the court and appointed under the Constitution of India[16], yet the question, every judicial officer has to ask himself, is whether he is really performing his duties proving himself worthy of it.

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[12] (i) The decision of a Division Bench of Allahabad High Court in Ayodhya Sahai v. State of U.P., decised on 26.9.1997 in Criminal Misc. W.P. No.: 30219/97 by a Division bench consisting of Hon'ble Mr. Justice R.R.K. Trivedi and Hon'ble Mr. Justice M. Katju.

(ii) Another decision, giving categories of case and directions for their disposal were given by another Division Bench of Allahabad High Court in Siddhartha Kumar v. Upper Civil Judge (Ghazipur). (W.P. No.: 255505 of 1997, decided on 20.11.1997 by, Hon'ble Mr. Justice M. Katju and Hon'ble Mr. Justice O.P. Garg).

[13] The Hon'ble Supreme Court in Common Cause cases has given a scheme for finally disposing of those criminal cases in which no steps could be taken within the time scheme as given in these judgements for details see:

(i) Common Cause, a registered society v. Union of India; AIR 1996 SC 1619 and

(ii) Common Cause, a regd. Society v. Union of India; AIR 1997 SC 1539.

[14] Raj Deo Sharma v. State of Bihar; (1997) 7 SCC 604.

[15] Mathew. See : Judges by David Pannick (P. 17).

[16] All India Judges Association v. Union of India, AIR 1993 SC 2493

The whole emphasis of official conduct is founded on duty well performed. This proposition is beautifully versified in the following couplet:-

"I slept and dreamt that life was beauty;
I woke and found that life was duty."[17]

This would certainly require an introspection and acquiring abilities to perform as a good judicial officer. The subject of optimal utilization of human resources is quite lengthy, yet for our purposes, we may highlight some of those important requisites which are needed in the field of Court Management. The list of subjects is inclusive and not exhaustive.

A. MAKING GOOD JUGES:

Judges have a hallowed place in the judicial system and they should render justice according to law in a free and fair manner without exhibiting vanity, irascibility, narrowness, arrogance and other weakness to which human flesh is heir.

i. ATTITUDE AND BEHAVIOUR

Attitudinal change is required in Judicial Officers. Thoroughly harmonizing their behaviour within, towards litigants, Bar and his own colleagues is also essential. A judicial officer's prerequisite is that he must be good man and thus have full regard to the qualities of a man besides patience, politeness and perseverance to seek the truth.

ii. APTITUDE:

Court Management strives to inculcate an aptitude for learning amongst all the Judicial Officers. Learning is a continuing process and no one can claim perfection. One is fallible and to be the infallible is the prerogative of God. But one is required to improve upon one's performance. This requires continuous learning, a voracious reading, refining and reforming oneself in different qualities. We should strive for it.

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[17] Composed by E.S. Hooper.

iii. **SENSETIZATION TO PRACTICAL PROBLEMS:**

For making best utilization of human resources in judicial system, the judicial officer should be sensitized to the problem of the society and generally those, which are faced by litigants or a group of litigants in particular. Sensitization to problems would yield to better results. Thus improving their judicial performance.

iv. **O.L.Q:**

Time has come when a Judicial Officer must acquire, possess and utilize 'Officer Like Qualities' in the performance of his duties. This may include inculcation and building of 5 Cs and 5 Ds. These are briefly indicated below:

(a) Character; (b)Commitment to duty; (c)Convictions; (d) Courtesy, and (e) Courage

And Five D, are

(a) Desire; (b) Direction; (c) Dedication and (d) Discipline (e) Devotion

v. **RESPONSIVE AND ORIENTED:**

The art and science of Court Management is to ensure that judicial officers are responsive towards their task work and duties. They are also required to be oriented and thus have sufficient knowledge not only about Law, Act or Rules but also about Civics, Ethics, History and as having a perfect blend of rights with duties and obligations. There should be change in the vision by removing the pollution of thoughts and perception.

B. **JUDICIAL EDUCATION:**

It is seen that after initial study of law at college level and for some time at Bar, Judicial Officers have very little concern with judicial education. As a consequence they do not come across the developing theories, propositions and changing situations in law. They are not well versed with the development in Law[18], rapid changes in substantial and procedural inners and

[18] "Educating Judiciary";by Judge Ferm M. Smith (USA)

improved with judicial decision making processes. For effective Court Management, the Judicial Officer should have close interaction with Judicial Education and thus update themselves to render quality justice.

C. JUDICIAL TRAINING:

Training for Judicial Officers is a concern-, which has arisen serious, concerns much because of the recommendations of Law Commission of India, 1986 (117th Report), and subsequently by directions of the Supreme Court in All India Judges Association Case[19]. Now with a defined training policy in the State of U.P., Training for Judicial Officers' is much needed for developing "skills and expertise commensurate to their job while performing their judicial duties". The Institute of Judicial Training and research, U.P., Lucknow is one of such premier institute in the country rendering yeomen service in this field under the kind supervision and able directions of the Hon'ble Allahabad High Court. For efficient and effective Court Management the judicial Officer are required to sharpen their judicial skills and for this joining foundation and refresher training programmes at regular intervals is essential.

D. MANAGING DELAYS:

'Laws Delay' has become proverbial and is said to be the biggest evil of the system. In an adversarial system of Justice, some delay is bound to take place, as the adjudication is required to be on merits, i.e. after hearing both the sides, which includes right to produce evidence documentary and oral. However 'unreasonably gross delay' and retention of an under trial in Jail for a period equal to or half of the maximum sentence permissible in law deserves to be frowned unless the delays were on account of the conduct of the accused or for some "very special reasons like wise drastic changes in appellate/revision jurisdiction/procedure have to minimize delays.

Effectively managing the adjudicatory process or trial, unnecessary delays has to be reduced to a minimum and "endless adjournments" to be curtailed. Help can be taken from proposed initiatives by various Law

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[19] All India Judges Association v. Union of India; AIR 1992 SC 165

Commissions, reports of various Committees and recommendations in this behalf'.

E. IMPROVING PROCEDURAL PRACTICES:

For effective court management, the procedural laws and their practical applications in court may be managed to avoid delay and expedite justice. This may include pre-suit notices, fixed time for filing written statements and other papers, fixing period for recording of evidence and for the arguments. In given number of procedures for effective curtailing of undefined time slot, Court Management can effectively function in expediting adjudication.

(7) ROLE OF BAR, LINE MANAGERS AND OTHER ROLE PLAYERS:

As has been observed earlier, court Management can not be made effective unless all role players are vigilant. Role played by the members of the Bar is as much significant as any other's role. So is with other role players. Amongst the important role players would come –

(I) **Members of Bar;** which would include all counsel, Law Advisors, Prosecutors, Amicus Curiae, Advocates and Sr. Advocates.

(II) **Line Managers;** which include a pro-active approach and cooperative support from the Hon'ble High Court in administrative side for supervising and for effective implementation of court management strategy by issuing necessary directions and support.

(III) **Litigants and accused facing trials:** Unless litigants and the parties to the dispute and accused do not cooperate, there can be no effective case and court management. Policy

has to be evolved out for making them 'partners for development'.

(IV) **Management and witness;** which would include ensuring prompt & time bound service of notices, summons on witnesses, tendering of their evidence, the appearance of the witnesses in the court and their examination in court including their safety and security.

(V) **Officials and Staff:** For effective court management good staff is prerequisite. The officials (The office Superintendent, Munsarims, Readers, Clerks, Orderlies) should know the nature of their work and expectations their from. Likewise, managing the services of Amins, oath Commissioners, Administrative Commissioners, process Servers, Record keepers etc. has also to be very closely managed. Thus all the officials and members of the staff require special training programmes so that they may understand their rights, obligations, duties and may realize their contribution towards court management. [20]

(VI) **Other role players:** This would include managing the role of other role players which may include Arbitrator, Conciliators receivers, supurdars, prisons and jail officials, lockups incharge, officers managing the Malkhanas and experts. In so far as finance and monetory

[20] JTRI has initiated such a proposal for training all the officials etc. working in Courts of U.P.

allocation is concerned it would also be required to look after and supervise the infrastructural requirements besides adequate budget and financial resource empowerment of the system by Hon'ble High Court and the State.

8. ASSESSMENT, REVIEW AND MANAGEMENT OF PROBLEMS:

In any process of planning and implementation the success may vary with the process of assessment, review and revision. An inquisitive assessment of the past practices, and practices undertaken during the plan of court management have to be closely analyzed and reviewed in finding out the areas of success and failures. This may be termed 'performance review'. Taylor and Watling [21] have indicated points of review and the associated appraisal interview. This process to review should be managed to eliminate the causes of failure by supplanting newer strategies. In the ultimate analysis if some problems are found in working, then their management may include. This may include collection of data, managing information, and communication with all the role players for finding out areas of failure, managing financial resources and over all management of performance by all role players.[22]

9.EPLIOGUE

It is high time that all constituents in the Justice Delivery/Dispensation System must work under a policy and plan, with knowledge, skills and expertise

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[21] In their Book "The basic Arts of Management", W.J. Taylor and T.F. Watling have summarized these as; (i) to look systematically at how a person has performed;
(ii) to show the person how his manager views his performance;
(iii) to let the person give his own views on performance;
(iv) to identify the person's need for training and development in relation to his performance.

[22] For details see: "Management of organization; A system and Human Resources Approach:" by H.G. Hicks and "Managing in Turbulent Times:" by P. Druker.

in Court Management. The time has come, as observed by Hon'ble Mr. Justice Yatindra Singh in a recent decision in the case of Net Singh[23] that-

> "A training of Judicial Officer not for deciding cases but for Court Management is necessary."

Hon'ble Mr. Justice Singh has further stressed the need of Court Management as a compulsory part of Judicial Officer's training, prior to appointment as well as for promotion. The need is to create awareness of court management in judicial officer's, staff and officials and all other role players in the Justice Delivery/Dispensation System.

The plan and policies are further required to be constantly practiced so that the Justice Delivery/Dispensation System can successfully face the ongoing challenges. With a firm resolution, we all can effort to save the judicial system so that it may not creek under the weight of its arrears[24] and no longer be looked upon as a casino but a cathradel[25].

The time demands to strike a beginning, a beginning to strive for improvement, to rise to the occasion, remembering well, the exhortations of a great judge[26]

> "We should know where we come from and where we are going. We must sail sometimes with the waves and sometimes against them, but sail we must and not drift and drawn."

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[23] Net Singh v. State of U.P.;

[24] The observations of Chief Justice Bhagwati in his speech on the Law Day quoted in (1997) 2 SCC 10 by Shri Ashok H. Desai; Attorney General.

[25] Ref.:Speech of Shri K.R. Narayanan the President of India while making address on the eve of Republic Day" relating to expectations of the people from Courts. The expression was earlier used by Sri Nani A Palkiwala on 125th Anniversary celebrations of the Bombay High Cort, Nagpur, September 28, 1987.

[26] Justice Oliver Wendell Holmes

ARTICLE 227 OF OUR CONSTITUTION

G.C.Awasthi, HJS
Additional District Judge
Lucknow.

It is an attempt to give some though not complete information regarding the power of Hon'ble High Court of superintendence over all Courts and Tribunals through out the territories in relation to which it exercises jurisdiction.

Article 227 of the Constitution of India which confers power of superintendence over all Courts by the High Court reads as follows:

ARTICLE 227

Power of superintendence over all Courts by the High Court:

(1) Every High Court shall have superintendence over all Courts and Tribunals through out the territories in relation to which it exercises jurisdiction;

(2) Without prejudice to the generality of the forgoing provisions, the High Court may:

  (a) Call for returns from such Courts;

  (b) Make and issue general rules and prescribe forms for regulating the practice and proceedings of such Court; and

  (c) Prescribe forms in which books, entries and accounts shall be kept by the officers of any such Courts.

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and Officers of such Courts and to attorneys, Advocates and pleaders practicing therein;

Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provisions of any law for the time being in force, and shall require the previous approval of the Governor.

(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any Court or Tribunal constituted by or under any law relating to the Armed Forces.

The material part of Article 227 substantially reproduces the provisions of section 107 of the Government of India Act, 1915 except that the power of superintendence has been extended by the Article of Tribunals also. The preponderance of judicial opinion in India was that section 107, which was similar in terms to section 15 of High Courts Act 1861, gave power of judicial superintendence to the High Court apart from and independent of the provisions of law conferring revisional jurisdiction on the High Courts. This proposition of law was given in case Municipality vs. Tulja Ram, AIR 1931, Bombay 582 Sholapur.

Article 227 was firstly amended by the Constitution 42nd Amendment Act 1976. By this amendment original clause (1) was substituted and a new clause (5) was added. The effect of 42nd amendment was enumerated in Jagir Singh vs. Ranvir Singh, AIR 1979, SC 381. In this case, it was held that where the revision filed before the 42nd Amendment of the Constitution to the High Court could not be maintained under the provisions of New Criminal Procedure Code in under section 397 (3), the order of the High Court could not be sustained under Article 227 of the Constitution as amended by the 42nd amendment. The power of judicial superintendence under Article 227 could only be exercised sparingly to keep subordinate Courts and Tribunals within the bounds of their authority and not to correct mere errors. It is doubtful if the High Court could exercise any power of judicial superintendence on the date of its order as the Constitution 42nd Amendment Act had by then been passed. Clause 5 of Article 227 introduced by 42nd Amendment Act is a

verbatim reproduction of sub section (2) of section 224 of the government of Indian Act, 1935 which conferred power of administrative superintendence only and not the power of judicial superintendence.

The Constitution 44th Amendment Act restored the original clause (1) and deleted clause (5). Thus, Article 227 as it reads now is the same as it stood prior to 42nd Amendment.

This Article confers power of superintendence over the inferior Courts and Tribunals in the State. This power of superintendence conferred by Article 227 is in addition to the power conferred upon the High Court to control inferior Courts or Tribunals through writs under Article 226. The supervisory jurisdiction extends to keeping the subordinate Tribunals within the limits of their authority and ensuring that they obey the law (State of Gujrat vs. Wakhat Singh Ji Waje Ji Waghola, AIR 1968, SC 1487). There are no limits, fetters or restrictions placed on the power of superintendence in Article 227 and the purpose of this Article seems to be to make the High Court the custodian of justice within the territorial limits of its jurisdiction and to arm it with a weapon that would be wielded for the purpose of seeing that justice is meted out fairly and properly by the bodies mentioned there in (Jodhey vs. State through Ram Sahai, AIR 1952, All. 788 (792)). Article is not merely procedural but confers substantive right on litigant to move High Court. This view was taken by Bombay High Court in Sri Pat Rao Daji Saheb Ghatgey & others vs. State of Maharashtra, AIR 1977 Bombay 384 (399) Full Bench.

The Court's power of superintendence is primarily exercised through section 115 of the Civil Procedure Code and Articles 226 & 227 of the Constitution confer upon it supplementary power not differing substantially in content but exercisable in cases in which those provisions are not appropriate, State of U.P. v. Abdul Aziz, AIR 1955, All 673 (676) Division Bench.

The power of superintendence under Article 227 is of administrative as well as judicial nature. If necessary the High Court can interfere with the administrative orders of inferior Courts. This proposition of law was given by Allahabad High Court in the case of Ramrop & others vs. Bishwa Nath &

others, AIR 1958, All. 456. The same view was expressed in Hari Vishnu vs. Ahmad Ishaque, AIR, 1955 SC 233 (243). Judicial orders not only of Courts in the ordinary sense but also of Tribunals are amenable to the supervisory jurisdiction of the High Court and it is in regard to the orders of Tribunals that the power of High Court has very frequently been invoked.

The object of the Article is to make the High Court responsible for the entire administration of Justice in the State and vest in the High Court an unlimited reserve of judicial power which could be brought into play at any time if the High Court considered it necessary to draw upon the same. ((Jodhey vs. State through Ram Sahai, AIR 1952, All. 788). Yet another view was taken in a case by High Court of Orrissa in Dand Pani Das vs. Mohan Nayak and others AIR 1954, Orrissa 67 (68 Full Bench). According to this view the power of superintendence is not intended to confer on the High Court an unlimited prerogative to interfere in every case where a wrong decision had been arrived at by a judicial or quassi-judicial tribunal either on fact or on law.

Apart from matters relating to jurisdiction the High Court may be moved to act under this Article when there has been no flagrant abuse of elementary principle of justice or manifest error of law patent on the face of the record or an outrageous miscarriage of justice calls for a remedy, Jodhey vs. State through Ram Sahai, AIR 1952, All. 788. The power is not to be exercised merely for the purposes of correcting errors of fact and law in the decision of inferior Courts and Tribunal, Dharangadhra Chemical Works Limited vs. State of Saurashtra, AIR 1957, SC 264 (268, 269, 270). The same view was taken by Allahabad High Court in, Mata Bhikh & another vs. Baij Nath 1955, Allahabad 249 (250). Yet another view was taken by their Lordships in, Thakur Jugal Kishore v. Sita Marhi Central Co-operative Bank Ltd. AIR 1967 SC 1494 (1504) that errors as to interpretation of Constitution are not out of the purview of Article 227 although the High Court can not under that Article withdraw a case itself from a Tribunal and dispose of the same or determine merely question of law as to interpretation of Constitution. Whereas Hon'ble Supreme Court has taken a view in Gopala Ganu Wagle vs. Shri Nageshwardeo Patan Abhishekh Anusthan Trust Potas, AIR 1978, SC 347 (348, 349) that

in the findings or Revenue Authorities Committing manifest error, High Court can interfere under Article 227.

If there are two modes of invoking the jurisdiction of the High Court and one of those modes has been exhausted, it would not be a proper and sound exercise of discretion to grant relief in the other set of proceedings in respect of the same or of the subordinate Courts. Shanker Ram Chandras Abhyankar vs. Krishnaji Dattatraya Bapat, AIR 1970 SC 1 (5). Even in cases of want of jurisdiction on the part of inferior Courts or Tribunal, it is not obligatory on the High Court to interfere in the exercise of its power of superintendence under this Article where such interference is not called for in the interest of Justice. Indra Narain Kundu vs. Girindra Nath Mitra, AIR 1952, Cal. 192.

As regards the finding of fact, there should not be interference under Article 227 or 226 unless finding is perverse or is based on no evidence to justify it or has resulted in manifest in-justice. The High Court should decline to interfere where question depends upon appreciation of evidence and two views are possible Chandavarkar Sitaratna Rao vs. Asha Lata AIR 1987 SC 117.

The jurisdiction conferred by Article 227 is not by any means appellate in its nature for correcting error in the decision of subordinate Court or Tribunal but is merely a power of superintendence to be used to keep them within the bounds of their authority. Jiya Bai Vithal Rao Gajre vs. Pathan Khan & others, AIR 1971 SC 315 (318). The same view has been taken by various High Courts.

As has been discussed above, the power of superintendence of High Court as provided under Article 227 is both judicial and administrative. Following principles with reference to the exercise of superintending power over judicial orders may be summarized:

(a) The power under the Article can be exercised even in those cases in which no appeal or revision lies to the High Court;

(b) The power should not ordinarily be exercised if any other remedy is available to the aggrieved party, even though the pursuing of that remedy may involve some inconvenience or delay;

(c) Under Article 227 the power of interference is limited to seeing that the Tribunal functions within the limits of its authority. Nagendra Nath Bora vs. Commander Hill Division, AIR 1958 SC 398.

The principal ground for interference, therefore would be:

(i) Want of excess of jurisdiction;

(ii) Failure to exercise jurisdiction;

(iii) Violation of procedure or disregard of principles of natural justice; and

(iv) The law declared by the High Court is binding on the subordinate Courts as well on administrative Tribunals in the State (East India Commercial Company vs. Collector), AIR 1962 SC, 1893.

The words "all Courts and Tribunals" occurring in Article 227 denotes that the administrative and judicial control of the High Court is not only over courts strictly so called but also over Tribunals which are not Courts in the strict sense of the term. What are to be regarded as Tribunals for the purposes of Articles 227 ? The word 'Tribunal' has been used in Article 136 also and it will be reasonable to suppose that the expression has the same meaning in both the articles. Under Article 136 a body dealing with matters affecting the rights of citizens will be regarded as a Tribunal if it is under the duty to act judicially and is invested with the trappings of a Court, such as authority to determine matters in cases initiated by parties sitting in public, power to compel attendance of witnesses, to examine them on oath, duty to follow fundamental rules of evidence (though not strict rules of the evidence), provision for imposing sanction by way of imprisonment, fine, damage or mandatory or prohibitory orders to enforce, obedience to their commands. Some though not necessarily all such trappings will, ordinarily make the authority which is

under duty to act judicially a 'Tribunal'. (Jaswant Singh Sugar Mills vs. Lakshmi Chand AIR 1963 SC 677.)

The power under Article 227 can also be exercised even suo moto by the Court as the custodian of justice within the limits of territorial jurisdiction and for the vindication of its position as such, Ranjit Kumar Ghosh vs. Secretary Indian Psyco Anialytical Society & others, AIR 1963Calcutta 261 (264). The same view has alos been taken by the Patna High Court in Ram Bahal Singh v. Chottey Narain Singh & others, AIR 1975 Patna 241 and Abdul Rahman vs. State of UP through Secretary Home Department Police & othes, AIR 1958, Allahabad 164 (Division Bench). Article 227 is of wider ambit and it does not limit the jurisdiction of the High Court to the hierarchy of Courts functioning directly under it under the Civil Procedure Code and Criminal Procedure Code but it gives the High Court power to correct errors of various kinds of all Courts and Tribunals in appropriate cases. This view was taken by their Lordships in a case reported in Thakur Jugal Kishore Sinha vs. Sita Marhi Central Cooperative Bank Limited, AIR 1967 SC 1494 at p. 1504. All agencies where courts are not performing the duty of deciding dispute between the parties on behalf of and under the sanction of State and in accordance with State made laws are placed under the Administrative and judicial control of the High Court, Haripad Dutta vs. Ananat Mandal AIR 1952 Calcutta 526. In a case reported in Associated Cement Companies Limited vs. P.N.Sharma & others AIR 1965 SC 1595 it was held that the State Government when exercising appellate jurisdiction under rule 6(5) and (6) of Punjab Welfare Officers Recruitments and Conditions of Services Rules, 1952 is a Tribunal. Though in the case of Jaisingh Rathi & others vs. State of Haryana, AIR 1970 Punjab, 379 (Full Bench), it was held that the High Court's power under Article 227 does not extend to exercising of jurisdiction by Court over Legislative Assembly as the proceedings of Legislative Assembly are immune from jurisdiction of High Court under clause (2), Article 212 of the Constitution. The crucial test to determine, whether a Tribunal is a Judicial Tribunal or not is whether the Statute which sets up the tribunal impressed upon it the duty to act judicially and if such a study is cast upon the tribunal,

the High Court is empowered to exercise its jurisdiction over that Tribunal under Article 227. This proposition of law was given in a case Hukum Singh Shiam Singh & another vs. Sardul Singh Kirpal Singh, AIR 1953, Punjab 373 (375 Full Bench). The similar view was taken by Delhi, Orissa and Madhya Pradesh High Court also.

Normally when there is another remedy open to the party which is efficacious and adequate to meet the needs of the case, High Court will not use its extra ordinary powers under Articles 227. (Miss Maneck Custodgi Surjarji vs. Sarafarazali Nawab Ali Mirza, AIR 1976 SC at p. 2446. It was also held that other adequate and comprehensive remedy by way of appeal to High Court itself was available but not availed of. The interference by the Court under Article 227 was held erroneous. The power of superintendence ordinarily is not to be exercised for a person who has failed to avail of remedy provided in relevant statutes, but in appropriate cases it can be exercised not withstanding such failure.

One of the considerations which will weigh with the High Court is the exercise of its jurisdiction under this Article is whether the party seeking its assistance has been diligent in pursuit of his remedy. If he has been guilty of undue delay in coming to the High Court for relief, the High Court may refuse to interfere at his instance, Durgashree Stores vs. Board of Revenue West Bengal, AIR 1963 Calcutta 409 (410). The same view has also been taken by High Courts of Mysore, Patna, Punjab, Goa, Rajasthan and Bombay.

As the supervisory power of High Court is a matter of Constitution and as it is embodied in a provision of the Constitution itself the power can not be affected by ordinary legislation and any legislation which proposes to do so will be ultravires. This proposition of law was propounded in the case of Ram Dubey vs. Government of the State of Madhya Bharat, AIR 1952, Madhya Bharat 57 (69- Full Bench). A provision in an act that no order passed under the Act shall be called in question in any case can not affect the power of superintendence of the High Court, under this Article and not withstanding,

such provision the High Court will be entitled to inquire if it is so minded, Kai Khusroo Phirozshah Doctor vs. State of Bombay, AIR 1955 Bombay 220 (222 Full Bench).

It has also been held in so many cases that the election disputes may also be interfered by the High Court under Article 227 as an election tribunal whether deciding disputes as to election to a Municipal or other local Board is a Tribunal within the meaning of this Article and is as such subject to the superintending jurisdiction of the High Court, Bampati Bhattacharya and others vs. Smt. Laxshmi Bibi, AIR 1953, Calcutta 781 (Division Bench), K. Meeakhi Sundaram vs. S. R. Radhakrishwami Pillai, AIR 1960, Madras 194. The word 'election' as used in article 329 (b) include the whole process by which a person is elected as a member of the Legislative Assembly, so that the acceptance or rejection of a nomination paper by Returning Officer is covered by the expression election in Article 329 (b). Article 329 (b) does not affect the supervising power of the High Court under this Article in respect of the proceedings of Election Tribunal on election petition, Jamna Prasad Mukhariya vs. Lacchi Ram Ratna Bial Jai & others, AIR 1953, M.B. 197 (Division Bench).

The power of superintendence conferred by this Article will include the power to punish for contempt of a Tribunal which is subject to the superintending power of the High Court. The Court which is subject to the superintending power of High Court under this Article is to be deemed to be a court subordinate to the High Court for the purposes of section 3 of the Contempt of Courts Act 1952. This view was taken in Sukh Deo Bais war vs. Brij Bhushan Mishra & others, AIR 1951, Allahabad 667 (Division Bench).

The Article is not retrospective in effect and judicial order which have become final before coming into force of the Constitution can not be challenged under this Article. The State vs. Judhbir Chetri, 1953 Criminal Law Journal, 395 (Full Bench). Yet another view was given in a case reported in Rajendra Kumar Puia vs. Government of West Bengal & another, AIR 1952, Calcutta, 573 at p. 576. According to this view where proceedings are impugned as ultra vires and void and as incapable of giving rise to any rights and application

under Article 226 or 227 can be made even though the impugned proceedings took place before the coming into force of the Constitution.

Writ petition under this Articles is not maintainable in absence of necessary parties. This view has been taken by almost all the High Courts. The rules of procedure of a High Court relating to Article 226 are not imso facto applicable to the application under this Article. In Ram Prasad & others vs. State Through Chhotey AIR 1952, All. 843, in Haripad Dutta vs. Anant Mandal, AIR 1952 Calcutta 526 (Division Bench) their Lordships opined that in the absence of any special rules of procedure regarding application under Article 227 any rule which may be in force with regard to application in reversion may be followed with regard to application under Article 227 also. Dismissal of application in limine is not proper where serious allegations were alleged in the application, Gyan Chand & others vs. State of Harayana & others, AIR 1971 SC 333.

Though according to settled law, no new plea can be taken in writ petition but a party can not be prevented from taking the question of jurisdiction for the first time in High Court although the party could have taken that point before the lower court if the point goes to the root of the jurisdiction and satisfies the court that the authority which has passed the order had no jurisdiction to pass the same, Ast. Arunachalam Pillai vs. M/S Southern Roadways Limited AIR 1960, SC 1191.

In a special appeal against an order of High Court which was moved for exercise of its power of superintendence under Article 227 it is open to the Supreme Court to exercise the same power. Baldeo Singh & others vs. State of Bihar & others, AIR 1957 SC 612.

The power of making gruel, regulating practice and procedure of subordinate courts under clause 2 (b) includes the power to require the payment of court fees on application, affidavit etc. The High Court is empowered under this Article to frame the rules and forms regulating the practice and procedure of subordinate courts.

Articles 227 differs from Article 226 on the ground that a writ of Certiorari will only quash the order of inferior court or tribunal but under Article 227, the High Court may quash the order as well as issue further direction in the matters. Hari Vishnu Kamath vs. Ahmad Ishaque, AIR 1955 SC 233. The second point of difference is that under Article 226, the power of interference may be extended to quashing an impugned order on the ground of a mistake apparent on the face of record but under Article 227, the power of interference is limited to seeing that the Tribunal functions within the limits of its authority. Nagendra Nath Gora vs. Commander of Hills Division, AIR 1958, SC 398. Thirdly, the power under Article 226 will only be exercised where the party affected moves the court while the superintending power under Article 227 can also be exercised at the instance of the High Court itself. Fourthly, that for the exercise of the power under Article 226, the Court has framed rules but there are no such rules for the exercise of power under Article 227 Aidel Singh & others vs. Karan Singh & others, AIR 1957, Allahabad 414 (433 Full Bench).

Clause (4) of the Article 227 shows that the only court exempted from the superintendence of the High Court are Courts and Tribunals constituted by or under any law relating to the Armed Forces. The mention of the solitatory exemption also emphasizes the clear field of superintendence which is left with the jurisdiction of High Court after exempting prohibited area covered by the Military Courts and Tribunals mentioned therein, Jodhey & others vs. State through Ram Sahai, AIR 1952 Allahabad 788 (792).

Rent Control Authority, Election, Tribunals set up under the representation of the of People Act 1951, the Commissioner acting as the appellate authority under the Motor Vehicle Act, Industrial Tribunals, Panchayat Courts, Custodian of Evacuee Property, Debt Conciliation Officer, Authority under the payment of Wages Act, 1936, Deputy Registrar under the Cooperative Societies Act are some of the authorities which have been held to be Courts or Tribunals for the purposes of Article 227.

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NEED FOR REVIEW OF THE INDIAN CONSTITUTION

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Before describing the need for review of the Indian Constitution, it is desirable that evolution of the Constituent Assembly should be briefly narrated. In 1922 Mahatma Gandhi first conceived the idea of a Constituent Assembly elected by the people. He observed that Swaraj will not be a free gift of the British Parliament. It will be a declaration of a India's full self-expression. Nevertheless it was not until 1935 that the idea was officially and seriously put forward by the Indian National Congress. The National Congress, wrote Pandit Jawaharlal Nehru in January 1938, stands for independence and democratic state. It has proposed that the Constitution of a free India must be framed, without outside interference, by a Constituent Assembly elected on the basis of adult franchise. Till World War II, the British Government resisted India's demand of a Constituent Assembly, but the war and the international situation created circumstances which opened the eyes of even the Churchill's Government. The Cripps Plan sought to set up immediately upon the cessation of hostilities an elected body in order to frame a new constitution for the country. This plan, however, proved abortive. On 15th of March 1946, Mr. Attle, the British Prime Minister announced that a Cabinet Mission consisting of Lord Pethic Lawrence, Sir Stafford Cripps and Mr. Alexander, would be going to India with the intention of using their utmost endeavour to help her to attain freedom as speedly and as fully possible. In pursuance of this announcement the British Mission arrived in India shortly afterwards and after prolonged negotiations it announced the convening of a Constituent Assembly. The Constituent Assembly met for the first time on 8th December, 1946. The Constituent Assembly of India proceeded to completion of the work which it

had started. The Constitution as it finally emerged after 2 years, 11 months and 18 days comprises 395 Articles and 8 Schedules. On November 26, 1949, the Constituent Assembly in the name of the people of India adopted the Constitution. The Constitution of India came into force, after it had been adopted by the Constituent Assembly, on January 26, 1950.

The Constitution of India is a comprehensive document. It makes detailed provisions to deal with the initial difficulties of an infant State. These measures will also ensure a harmonious working of the Constitution. Among others, the Constitution deals with the following : (1) the structure of the Government; (2) the functions and relationship between various organs; (3) citizenship; (4) fundamental rights; (5) Directive Principles of State policy; (6) the Services; (7) the federal Judiciary and the High Courts; (8) Official language; and (9) various other matters of basic importance.

A good constitution must be elastic enough to change in accordance with changed circumstances, meet eventualities without having to undergo the formal process of amendment. The Indian Constitution has all these qualities. The Constituent Assembly has refrained from putting a seal of finality and infallibility upon the Constitution. It has avoided the difficult and complicated process of convention and referendum. It has also eschewed the difficult and complicated process of the American and the Australian constitutions. It has adopted a simple and facile amending process instead.

The Indian Constitution divides the Constitutional provisions into two groups. In the one it includes articles relating to (1) the Central and the State Judiciary; (2) the extent of the executive authority of the Union; (3) relationship between the Union and the State; (4) the Union, State , and Concurrent Lists; (5) representatives of the States in Parliament; and (6) election of the President. The rest of the provisions are grouped in the second category. In relation to the latter the Constitution stands amended if a bill to that effect is passed in each House by a majority of the total membership of the house and by a majority of not less that 2/3rds of the members of than House present and voting. As regards the former the amendments need being ratified by the Legislatures of not less than half of the States specified in Parts A and B of the First Schedule. Elasticity is further introduced by enabling the federal structure

to be converted into a unitary one in an emergency. The Central Government can then assume control of all affairs of the nation and the Central Legislature can exercise legislative powers which are otherwise exclusively vested in the States. Even in peacetime Parliament can legislate on any of these subjects. provided that it is declared of national importance and adopted by a two-thirds majority. The adoption of a long list of the concurrent subjects not only makes the Constitution flexible but is also corrective of unnecessary legalism, the bane of federalism. Thus, it can be concluded that Indian Constitution is so flexible that amendments can easily be made in it. No change in the basic structure of the Constitution is required at all. Anomalies which arise from time to time can be corrected by making amendments in the Constitution. Already, more than eighty amendments in the Indian Constitution have been made. Dr. Rajendra Prasad in his foreword to a brochure on the Indian Constitution has said that the Constitution of India is a comprehensive document. Its success will depend on the good will and public spirit of the people of India and above all on the spirit of accommodation and compromise and the integrity and efficiency of those charged with working it.

The drafting of the Constitution of India was epock-making event (as described by Dr. B. R. Ambedkar, the Chairman of the Drafting Committee of the Indian Constitution), in the history of Indian sub-continent. The Constituent Assembly in the Objective Resolution declared its firm and solemn resolve to make India a Sovereign, Democratic, Republic. India declared herself as a secular, democratic, socialist, republic in the Preamble of its Constitution. The framers of the Constitution have drawn wisely upon the mature experience of the democratic countries. They have thus tried to avoid the defects of other Constitutions and to accept only those features from them which would suit Indian conditions. In making certain fundamental departures from the prevalent theories and practices, they have adopted provisions which besides being original avoid rigidity and legalism in copying with emergencies in peace and war. Moreover, they have given the Constitution a national character in as much as the panchayats, the most valuable of the surviving democratic institutions of ancient India, have found a place in the country's constitutional structure. In the final stages of the Constitution making Dr. B.R. Ambedkar

had said, it was one of the finest Constitutions in the world. If it ever failed it would be the failure of those who work it out and not that of the Constitution. Thus our Constitution is one of the best in the world.

It is regrettable that the unscrupulous elements have no respect for the Constitutional obligation. Persons holding highest decision-making positions behave irresponsibly. The objectives enshrined in the Indian Constitution have been defeated miserably. The democratic fabric of governance was damaged by the unprincipled coalitions. The functioning of the party system in India. as a whole, is normless and criminalized. Defections from various parties, free for all on the floor of the House, and scenes of violence taken together predicated an alarming and agonizing direction. All hypocritical assertions and talk of principled politics have been thoroughly exposed. The bold proclamations of the Indian Constitution have become meaningless. For nearly five decades now we are living under the present Constitution. During this period several amendments have been made in the Constitution. Now that we are on our way to celebrate fifty years, at the working of Indian Constitution, questions have also arisen as to whether major changes are called for in the Constitution.

The need is to look afresh on the Indian Constitution. There is thinking among intellectuals and sober-minded politicians, opinion-makers, Constitutional experts and analysts in the country that an Alternative Constitutional Framework for India is a need of the hour. There is need to review the Constitution of India.

Today when there is a much talk about revising the Constitution either in its entirely or in parts or even writing a new Constitution, We have to consider whether it is the Constitution that has failed us or whether it is we who have failed the Constitution. Thus the divergent views have surfaced in this regard. One group of people opines that it is the Constitution that has failed us and the other group of persons believes that the Constitution of India has not failed us but we the people who adopted the Constitution have failed the Constitution. They have given their own arguments in support of their views. These views are being discussed here. Arguments for redrafting the Constitution are given below.

A new Constitution has to be written. India has blindly borrowed her Constitution and her democratic institutions from the West. Jawaharlal Nehru

did not bother to adapt them to India's own particular needs, to the immense diversity of her people, who have shown throughout the ages that they are bound to India by something else, than mere petty nationalism. India's civilization is at least 5,000 years old and should have a Constitution framed after her own history. Not only that, but the whole democratic system of India has to be reshaped to suit that new, that true, nation India. And what is true democracy for India, but the law of Dharma. It is this law that has to be revived; it is this law that must be the foundation of a true democratic India. It has been said that democracy is based on the rights of man; it has been replied that it should rather take its stand on the duties of man; but both rights and duties are European ideas. Dharma is the Indian conception in which rights and duties lose the artificial antagonism created by a view of the world which makes selfishness the root of action and regain their deep and eternal unity. Dharma is the basis of democracy which India must recognize, for in this lies the distinction between the soul of India and the soul of Europe. And the most wonderful thing is that, practically, we have in India the seed of a new form of democracy. One should begin with the old Panchayat System in the villages and then work up to top. The Panchayat system and the guilds are more representative and they have a living contact with the people; they are part of the people's ideas. On the contrary, the parliamentary system with local bodies – the municipal councils – is not workable. The councils have no living contacts with the people. We had a spontaneous and a free growth of communities developing on their own lines. Each such communitarian form of life – the village, the town, etc. which formed the unit of national life, was left free in its own internal management. The central authority never interfered with it because its function was not so much to legislate as to harmonize and see that everything was going all right.

The Constitution was born in the shadows of colonial rule. The Government of India Act (1935) – a British experiment at sharing power with the "natives" – left its deep impact on the Constitution we now have at present. Those statutes were intended to regulate the relation between ruler and ruled, between the imperial monarch and her "subjects". Our Constitution was expected to make the transition to regulating relations between citizen and State. The Indian Constitution fails to achieve the transition except in name. It still has the bureaucratic steel frame, which was meant to maintain law and

order with no concern for the needs of development. British India was divided into provinces for administrative purposes, unlike say in America where provinces formed a union preserving the autonomous indentity. At the centre was the powerful viceroy and his "eyes and ears" who sent him secret reports were the "governors" of the province. Our present Constitution has taken many things from the Government of India Act, 1935. The provision for the Rajya Sabha has been made in the Indian Constitution. The Rajya Sabha has been reduced to facing charges of rehabilitating the "also ran" and bringing in unelected ministers or politicians without a "mass base" through the "backdoor". The Council of States could be abolished without any loss to our democratic polity. It may be replaced by regional councils of states who have interests in common to protect such as the sharing of river waters. Our judiciary must be more sensitive to the needs of the people and must not be self appointed as at present but through a public process by a National Commission. Similarly the right to education must become a fundamental right. The only way to check the cancer of corruption in high places is to introduce mechanisms of transparency and accountability in governance. With the new wave of globalisation, privatization and liberalization, all that has changed. The Directive Principle of State Policy which were meant to be fundamental in governance, have been consigned to the dustbin of history. Decisions that affect the lives of our people in very vital way are no longer taken in the Lok Sabha, but by the World Bank and in institutions such as the World Trade Organisation (WTO). It is necessary to put in place new structures of governance to restore the decision-making power to the people. The power of the executive to enter into treaties must be taken away.

Nowadays , we continue to witness the sad spectacle of Governors engineering defections at midnight meetings at the Raj Bhawan. We will lose nothing by abolishing this post from our Constitution. The stringent rules are required to avoid horse trading, and defectors being rewarded. The Law Commission has already recommended that all defectors are required to resign and seek fresh mandate, if they wish to join or support another political party. It should not only be a case of legality but also self-imposed discipline on the part of political parties. They must respect the spirit of the Constitution. In the past few years, there has been much criticism regarding the use of Article 356

of the Indian Constitution. There is no doubt that it has been used by political parties in power at the Central Government against opposition-rules State Governments. It is significant to mention here that the heavy responsibility lies on the political parties as well. When in the opposition they take one stand and act to the contrary when they are in power. But a debate on Article 356 has been going on in the country for the last four decades, particularly since the dismissal of the duly elected E.M.S. Namboodiripad government in Kerala in 1959. Article 356 was brought into the Indian Constitution under the Emergency Provision with a warning by B.R. Ambedkar who said, "If at all they are brought into operation, I hope the President, who is endowed with these powers will take proper precautions before actually suspending the administration of the provinces." Subsequently, the Sarkaria Commission and the Supreme Court in its landmark judgment on the Bommai Case in 1994, have scathingly attacked the misuse of the article. While the Sarkaria Commission shortlisted the conditions in which Article 356 should be used, the Supreme Court observed that this provision meant to be used as the last resort, and it has been gravely abused and can therefore, be said to affect the working of the Constitution as a federal government. Article 356, in the present form, therefore, is liable more for misuse and abuse than for its invocation on a rare occasion. It should, hence be scrapped from the Constitution in the present form. The overriding reason, why Article 356 should be scrapped is that it vests the sole authority for recommendation of President's rule on the governor's assessment alone. Given the politicisation of the governor's appointment, this provision is fraught with, to quote Justice Sawant of The Supreme Court in the Bommai case. "potentiality to destabilize and subvert the entire Constitutional scheme." Beside Article 356, some people are of the opinion that Articles 73 and 74, Articles 163 to 167 and again Article 102 and Article 191 should also be reviewed and reconsidered.

Brushing aside opposition from some political parties and other organization, the Union Cabinet has decided to constitute a National Commission to review the working of the Constitution within the framework of parliamentary democracy. The arguments were given that people are impatient for faster socio-economic development. The country is also faced with pressing challenge to quickly remove regional and social inequalities by

reorienting the development process to benefit the poorest and the weakest. This is the purpose for which a Commission to review the Constitution is proposed to be set up. The National Commission would examine in the light of the experience of the past fifty years, as to how best the Constitution can respond to the changing needs of efficient, smooth, effective system of governance and the economic developments of modern India within the framework of parliamentary democracy. Government of India has also given the reason for setting up of a Commission in the light of experience and developments since Independence to undertake a review of the Constitution to meet the people's quest for stability both at the Centre and States and also to make suitable recommendations leading to far – reaching reforms.

By now, we were dealing with the arguments given in favour of reviewing or redrafting the Indian Constitution. In the forthcoming description the arguments given against the reviewing or redrafting of the Constitution are being discussed below. The proposed move to set up a Constitution Review Committee for a complete review of the Constitution is a retrograde step, initiated for political considerations and petty short-term gains. The Constitution has stood the test of time and properly enforced, it can ensure social justice, economic improvement and general well-being and welfare of the people of this country. Any attempt to tamper with the Constitution would be suicidal. The Constitution, itself, provides for amendments to be made from time to time. As a matter of fact, more that 80 amendments have already been made. Whenever the need to amend the Constitution was felt, it has been done in the past and it can be done in future without resorting to the extreme and unwarranted step of a complete or partial review of the Constitution. India's Constitution in now 50 years old. Originally it was deemed as an instrument of social transformation and a document with the help of which India's five thousand years old civilization will be able to revitalise and surge ahead to establish our place at the highest level among all the countries of the world. Today, when we look back on what has happened during the past 50 years we can take legitimate satisfaction and fair pride in saying that we are the greatest democracy in the world and while our neighbours and a number of other countries of the world have fallen prey to dictatorial regimes, we have been able to maintain oneness of the nation and change over from one political set up to another. Thus, we have been able to establish ourselves as a stable and vibrant

democracy, ready to reassert our identity as a great culture and civilization in the world. Our experiment as a democracy has been a fruitful one. The Constitution of India is the basic document which was formulated with a view to facilitate transformation, change and proper governance of Indian society. There is no harm to deliberate upon whether there is a need to rewrite India's Constitution, jettison it altogether and replace it by a new one, or to change it suitably so that it can fulfil the need of the hour. This can be discussed in good faith but not on the partisan and opportunistic outlooks. There should be no fear in the mind of the citizens of the country that people who talk about revision or review or redrafting of the Constitution have a sinister design to plunge the country into a chaos. There is a fear in the minds of the people that political parties and the leaders call for a national debate and desire and constitute a Commission or Committee on any issue whenever they choose to violate the spirit and the content of the Indian Constitution. For instance, a national debate on secularism has recently been called for in the country at the time of demolition of the Babri Masjid structure. People think that the tampering with the Indian Constitution will lead to destroying its basic structure. In fact, there is fundamentally nothing wrong with the Constitution of India. It is flexible enough and as and when need arises suitable amendments in the Constitution can be made to cope with the new challenges facing the Indian society in wake of globalised more competitive environment. To set up a Commission to review the Constitution under the pretext of political instability is not the remedy as the political instability today is due to socio- political dynamics of the Indian society. Democracy and democratic institutions have taken firm root in the past 50 years. Many peaceful general elections and smooth installation of governments at the Centre and in States, belonging to different political parties, are evidence of this. Moreover, one does not see the role for experts at this stage to reviews the Constitution. It has to be first ascertained if the people of the country want a complete or a partial review of the Constitution or they think that it should be left intact and not tampered with. The role of experts as a member of Commission or Committee comes later when the consensus has been evolved in the entire country in this context. India has survived as a democratic secular, socialist, sovereign republic because of the scheme the founding fathers of the Constitution gave us 50 years ago. The emergence of free and robust Press and an independent and credible judiciary owes a great deal to this document. The Constitution's inherent strength enabled the country

to keep its democratic institutions intact. The rule of law, minor aberrations apart, has been strengthened. Democracies in most of the developing countries and particularly in Asia and Africa have perished, but in India it is because of the Constitution we adopted that democracy has not only survived but thrived. It is true that the lot of the common man has not improved substantially but the glorious principles of democracy – life, liberty, Equality – have ensured an existence with dignity and self – respect which otherwise would not have been possible.

There does not seem to be major anomalies in the Constitution although there may be certain areas which have been called as zones of silence, vagueness and uncertainties. Here again, it would be preferable to retain these zones under reference because the Constitution has left it to the wisdom of the political leadership to develop healthy conventions and to evolve a code of conduct which would help in the proper governance of the country in conformity with the basic principles of the rule of law. There is no need to revise the Articles namely 73, 74, 163, 167, 191, 356 etc. mentioned in the preceding description which have been identified for this purpose. For instance, Article 356 needs to be retained in the Constitution. It should not be scrapped at all as has been said by the people who want to revise or rewrite the Constitution. A legitimate question arises as to how the Central Government would deal with extraordinary situations, which violate or undermine the country's unity and integrity. To deal with specific issues, special provisions need to be there in the Constitution. The issues could include internal rebellion, or the extreme case of an elected state assembly adopting a resolution for secession from India. It could also include cases of external aggression, particularly when the situation does not permit holding of elections in the scheduled time; or again, cases where the state government undermines the fundamental features of the Constitution, like in the case of four state governments dismissed in the wake of Babri Masjid demolition and upheld by the Supreme Court. Apart from these, there can also be situation, when following an election, no single party or a combination of parties are able to form a government with the majority support in the Assembly. Under such circumstances, the party or a set of parties closest to the majority may be asked to prove their majority on the floor of the House. If no such party or set of parties exists, Central rule may be invoked as a temporary measure, to be ratified by both the houses of Parliament. thus, Article 356 is very important and it should be remain part of

the Constitution. What we need to do is to ensure that the application of Article 356 is not politically biased, and its use severely limited. Article 356 should not be used to settle political scores. This should not be misused or abused in its application.

The review and redrafting of the Constitution will create its own problems as to the finding out the proper persons for the Review Commission or to the convening of the Constituent Assembly respectively. The constitutional intent of the founding fathers of the Constitution is very clear. It is because of political opportunism that vagueness and uncertainty is being attributed to some constitutional provisions. There is a controversy that parliamentary system should be changed and the presidential system should be established in the Country. It is not wise to discard the parliamentary system in favour of the presidential or any other system in the name of stability. The Constitution embodies a masterly balance between the rights of the individual and requirements of collective life, between the States and the Union and between providing a robust structure and flexibility. The parliamentary form of government was chosen by the architects of the Constitution after deep thought and debate. The parliamentary system was deliberate and well thought out choice of the Constituent Assembly.

Thus, there should be no aversion in amending the Constitution to cope with the new necessary situations. But we should ensure that the basic philosophy behind the Constitution and the fundamental socio-economic soul of the Constitution remain sacrosanct. In fact, it is not the Constitution but the "constitutional performers" who have failed and shown vulnerability to self-serving practices. The loss of individual character should not be attributed to the failure of the Constitution. It calls for a united and concerted effort to raise moral values and norms. The Constitution should not be blamed for our own failures. What is required is the collective and concerted political will to evolve conventions, norms, guidelines and code of conduct to make the disputed provisions of the Constitution work smoothly. There is no need to revise or redraft the Constitution of India. The amendments may continue from time to time. The solution of the problems of the people of India lies in the implementation of the Constitution of India rather than in over legislation and in making the rhetoric of revision and replacement.

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FROM THE PEN OF DIRECTOR

Rights and duties are the two sides of the same coin. In a democratic country like ours performance of duties is more significant then claiming the rights to build a strong nation based on the philosophy of "वसुधैव कुटुम्बकम". The mandate of the Constitution in Chapter IVA, Art. 51 (A) (g) – that it shall be duty of every citizen of India to strive towards excellence in individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement implies that level of excellence is not a point rather it is a process – a process of learning - it never stops. Every step in this direction opens new horizons – new vistas.

Rule of law is essence of any democracy. Law cannot be static be it substantive or procedural. If it does not change according to the needs of the society it cannot survive and cannot achieve the desired objective for which it was enacted. With the changing needs of the society, the responsiveness of the law courts too change, Lord Denning has said "I am not against the doctrine of precedent it is foundation of our system of case law. This has evolved by broadening down from precedent-to-precedent. All that I am against is its too rigid application a rigidity which insists that a bad precedent must necessarily be followed. I would treat it as you would a path through the woods. You must follow it certainly so as to reach your end. But you must not let the path become too overgrown. You must cut out the dead wood and trim off the side branches, else you will find yourself lost in thickest and brambles. My plea is simply to keep the path to justice clear of obstruction which would impede it".

Laws are enacted; legal principles are enunciated at different times differently. In a democratic welfare state the legislation reflect the wishes of people in general. If we look back we find that India was never considered a

developing country until industrial revolution sped up in the west. During that period India was sobbing under colonial rule. The policies of the then ruler were not tilted towards welfare of the state but they were formulated to facilitate the interest of the then ruler. That was the period when India lagged behind in the race of industrialization and development.

The Independence of India raised hopes of many. Hue and cry for the rights by those whose voice was earlier suppressed loaded the responsibilities of those in power. Rights were recognized. The Fountain of laws, The Constitution of India was adopted. The role of judiciary became significant as a Guardian of the Democracy. The history of judiciary of independent India witnessed that judiciary stood firmly with it's pious duty during this period. In the post Independence era the dawn of judicial activism has shown the shine of justice dispensation system in India, though initially some eyebrows were raised and the domain of judiciary has been discussed. In the present political environment and set-up the only ray of hope of the people lies with judiciary.

The subsistence and development of a democracy in a progressive manner depends upon a live and vibrant legal system. The development denotes in itself assessment and improvement in the Institutions and personnel. The justice dispensation system is also being assessed, trusted but still the expectations are high. Presently, people are feeling the crisis of faith and confidence in the system. The endeavour is to achieve excellence. Success is important but one should try not to become a person of success, try rather to become a person of value also. It is well said, "in the ultimate guarantee of justice in a court of law is the personality of a Judge". The role of a Judge becomes more significant i.e. man is significant.

Judiciary is equipping itself to meet the challenges posed by the changes and new trends emerging in the society. The Institute is marching ahead steadily and firmly to meet the challenges to make the Justice delivery and dispensation system more efficient and effective.

The first six-month of the year 2001 were full of hectic activities in the Institute. Plan – Performance - Accomplishment and Assessment left no space

for laxity but inherent joy kept the serene atmosphere vibrant and the enthusiasm gave the strength and warmth of marching ahead.

The year 2001 began with a jubilant note in the Institute. An International level training programme on Cyber Laws, Crimes and Intellectual Property Rights was inaugurated by Hon'ble Mr. Justice B.N. Kirpal, Judge, Supreme Court of India on 06.01.2001. Speaking on the occasion his Lordship reminded the judicial officers about their role and said "It is very necessary today that we should do some soul searching. Today for a common man, for a common citizen judiciary, which is at a very high pedestal. Which is to be, put on a higher pedestal is a last resort for looking into the redressals. We cannot fail the common man. We have to live up to the aspirations of the people. There are various constraints in which we work but we must make a good beginning and the beginning is made by correct recruitment of the judicial officers. Why is the greatest importance is given to the subordinate judiciary? Is deemed to come into the contact with the common man, not to Supreme Court nor the High Court but it is the Munsif and the Magistrates. They are the foundation of the edifice of the judiciary, which we have. It is of utmost importance that foundation should be strong. That foundation has to be firm and that can be done only with a good mixture of cement and sand."

His Lordship questioned the recruitment process of judicial officers when he said "I think there is some thing wrong somewhere. If we expect, I personally believe that if we expect a candidate to know all the law and he fails because he does not know the law that possibly may not be a proper approach in making selection. What we have to see while recruiting a judicial officer is that what is the type of raw material we have. If the raw material is good, the quality of cement is good, mixing is proper then it will make strong lay a strong foundation. What is his background? What is his integrity? What is his education? How intelligent is he? What is his IQ level? What is his awareness about the problems of the public? What is the general knowledge? These possibly may be more important at the time of recruitment than to see how much law he knows. Because once you recruit, you have such a very good, such a wonderful

judicial *Institute* here where the law will be taught to him here but what you have recruited is a rough diamond of good quality, which you will chisel and sparkle in this Institute."

Speaking on the occasion Hon'ble Mr. Justice S.K. Sen the Chief Justice of Allahabad High Court said, "Law is not an Almighty tool, but with the gap between technology and humanism enlarging, the comparatively impartial nature of law justly plays an essential and suitable role as a facilitator to advance the interfusion of technology and humanism and to enhance the competitive power of a nation. Cyber laws would require further development in the courts. Both the substantive laws and procedural laws will require new exposition in the light of the experience arising from technological complexities not envisioned hitherto. Our country and judicial system must keep pace with the tremendous development in the Technology and Science and the world has become small place today with the help of Internet. It is therefore, necessary that the Judicial Officers should be adequately trained to deal with the problems arising out of Cyber laws and Crimes relating to the said law and they should also be made aware of the development which have taken place particularly in the field of Cyber laws along with the law of Intellectual Property Rights like Patent Trade Marks and other difference branches of Intellectual Property Rights."

The participants of this training programme when visited Raj Bhawan His Excellency the Governor of Uttar Pradesh Sri Vishnu Kant Shastri has said that the quality of a tree is established by the fruit it bears and the level of teaching and training in any school or Institution is assessed by performance of it's students. True is that whatever is delivered during a training until the trainees performance is improved and applied at their place of working such a training can not be said to be effective. We in the Institute are watchful about the transfer of learning by the trainees at their work place and courses are being so designed so that transfer of learning could be achieved at optimum level.

During first six months the Institute conducted the following training programmes.

Sl. No.	Details of Training	Duration	No. of trainees partici-pated in the training
1.	International Level Training Programme on Cyber Law Crimes & Intellectual Property Rights	06.01.2001 to 18.01.2001	35
2.	Training programme on "Computer Application and Information Technology' for Judicial officers	22.01.2001 to 27.01.2001	19
3.	Training Programme on 'Computer Application and Information Technology' for Judicial Officers	12.02.2001 to 17.02.2001	24
4.	Refresher Training Programme for Addl. District and Sessions Judge	13.02.2001 to 24.02.2001	25
5.	Training programme on 'Computer Application and Information Technology' for Judicial Officers	19.02.2001 to 24.02.2001	19
6.	Training Programme on 'Computer Application and Information Technology' for Judicial Officers	26.02.2001 to 03.03.2001	18
7.	Training programme for the Secretaries of District Legal Services Authority, U.P.	01.03.2001 to 03.03.2001	32
8.	Training programme on 'Computer Application and Information Technology' for Judicial Officers	19.03.2001 to 24.03.2001	19
9.	First phase Foundation Training programme for newly appointed Civil Judges (JD) [First Group]	17.04.2001 to 30.05.2001	42

10.	Training Programme on 'Computer Application and Information Technology' for Judicial Officers	17.04.2001 to 21.04.2001	20
11.	Training programme on 'Computer application and Information Technology' for Judicial Officers	23.04.2001 to 28.04.2001	19
12.	Gender Sensitization for Police and Judiciary of U.P. in collaboration with NIPCD, New Delhi	04.05.2001 to 06.05.2001	35
13.	Training Programme on Cyber Laws and Crimes for Judicial Officers, U.P.	15.05.2001 to 19.05.2001	18
14.	Training Programme on Cyber Laws and Crimes for Judicial Officers, U.P.	22.05.2001 to 26.05.2001	18
15.	Training programme on 'Computer application and Information Technology' for judicial officers	11.06.2001 to 16.06.2001	10
16.	Training Programme for officers of Jail and Prison	11.06.2001 to 15.06.2001	49
17.	Foundation Training Programme for newly appointed Civil Judges (JD) [Second Group]	25.06.2001 to 06.08.2001	50 (on going)
18.	Training Programme on Computer Application and Information Technology for Judicial Officers	18.06.2001 to 23.06.2001	10
19.	Training Programme on Computer Application and Information Technology for Judicial Officers	25.06.2001 to 30.06.2001	14

The Foundation Training Programme for newly recruited Civil Judges (J.D.) is being conducted in two groups and in two phases. In first phase 45 days training is being imparted and thereafter the trainees are being sent back

to their place of posting for practical training and again they would be called for second phase of training. This design would have many advantages viz. after the training of 45 days when the officers will have to work independently in court for two months they may face problems and when again they join the Institute for second phase of training, their problems may be discussed, solved and training may be more practical oriented based on life like situation, case study and group discussion to sharpen further their skill and attitudes. During training programmes exercises, checklist, Group discussion and moot court made the training more effective and practical oriented.

Apart from training a two days "National Conference on Land Resources and Legal Perspectives" was also organized by the Institute in collaboration with the Land Use Board of Uttar Pradesh which was attended by large number of Scientists, Academicians, Lawyers, Judges and people from other walk of life. A Workshop on Gender Sensitization of Judiciary and Police Officer of U.P. was also the organized in the Institute in collaboration with National Institute of Public Co-operation and Child Development, Govt. of India, New Delhi.

The Institute proposes the other following training programmes for the last six months of the year 2001.

Sl. No.	Details of Training Programme	Duration
1.	Training Programme on Computer Application and Information Technology for Judicial Officers	02.07.2001 to 07.07.2001
2.	Refresher Training Programme for Addl. District and Sessions Judges	16.07.2001 to 26.07.2001
3.	Training Programme on Computer Application and Information Technology for Judicial Officers	16.07.2001 to 21.07.2001
4.	Training Programme on Computer Application and Information Technology for Judicial Officers	06.08.2001 to 10.08.2001

5.	Training Programme on Computer Application and Information Technology for Judicial Officers	13.08.2001 to 18.08.2001
6.	Second phase of Foundation Training Programme for Civil Judges (JD) [First Group]	17.08.2001 to 29.09.2001
7.	Refresher Training Programme for Civil Judges (Senior Division)	17.08.2001 to 28.08.2001
8.	Training Programme on Computer Application and Information Technology for Judicial Officers	20.08.2001 to 25.08.2001
9.	Training Programme on Computer Application and Information Technology for Judicial Officers	27.08.2001 to 01.09.2001
10.	Refresher Training Programme for Civil Judges (Junior Division)	10.09.2001 to 20.09.2001
11.	Training Programme on Computer Application and Information Technology or Judicial Officers	17.09.2001 to 22.09.2001
12.	Second phase of Foundation Training Programme for Civil Judges (JD) [Second Group]	08.10.2001 to 23.11.2001
13.	Special Training Programme on Court and Financial Management for Addl. District and Sessions Judge	08.10.2001 to 12.10.2001
14.	Training Programme on Computer Application and Information Technology for Judicial Officers	08.10.2001 to 12.10.2001
15.	Training Programme on Computer and Information Technology for Judicial Officers	15.10.2001 to 20.10.2001

16.	Training Programme for Officers of Jail & Prison	16.10.2001 to 20.10.2001
17.	Training Programme on Computer Application and Information Technology for Judicial Officers	05.11.2001 to 09.11.2001
18.	Special Training programme for Additional District and Sessions Judge on Compensation Laws	12.11.2001 to 17.11.2001
19.	Training Programme on Computer Application and Information Technology for Judicial Officers	19.11.2001 to 24.11.2001
20.	Training Programme on Computer Application and Information Technology for Judicial Officers	26.11.2001 to 01.12.2001
21.	Special Training Programme on Criminal Laws with special emphasis on Dowry Death, Rape Cases and Offences against Women for Additional District and Sessions Judge	03.12.2001 to 07.12.2001
22.	International Level Training Programme on Cyber Laws & Crimes and Intellectual Property Rights for SAARC nation Judicial officers	05.12.2001 to 15.12.2001
23.	Training Programme on Computer Application and Information Technology for Judicial Officers	10.12.2001 to 15.12.2001

Heights can be scaled by confronting those challenges, which could draw one's maximum potential or resources. George Bernard Shaw has aptly said - "we need men who can dream of things that never were and ask why not". The new millennium is turning to be Dot.com age . E-xcellence will be the pathfinder. With the beginning of this year we have re-iterated our determination to strive towards excellence.

With warm regards,

(D. P. GUPTA)
Director