Best Wishes for Happy New Year 2002

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J.T.R.I. JOURNAL

SEVENTH YEAR JANUARY 2002 ISSUE XVIII

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Hon'ble Mr. Justice S. K. Sen, Chief Justice, Allahabad High Court, addressing the newly appointed Civil Judges (JD) in special session during Foundation Training Programme on 27th July, 2001 at IJTR. Seen on right Hon'ble Mr. Justice S. H. A. Raza, the then Senior Judge, Allahabad High Court, Lucknow Bench and on left Mr. D. P. Gupta, Director, IJTR

JUDICIAL COLLOQUIA
ON
GENDER AND LAW
(13 - 15 OCT 2001)
ORGANISED BY: British Council Division, National Judicial Academy & Allahabad High Court,
AT I.J.T.R., LUCKNOW

Addressing the Participants:

Hon'ble Mr. Justice
Palok Basu, Judge,
Allahabad High Court

Hon'ble Mr. Justice
S.H.A. Raza, Sr. Judge,
Allahabad High Court,
Lucknow Bench

Hon'ble Mr. Justice
S.N. Agrawal, Judge,
Allahabad High Court

Hon'ble Mr. Justice
Jagdish Bhalla, Judge,
Allahabad High Court
Lucknow Bench

Hon'ble Mr. Justice
Bhanwar Singh, Judge,
Allahabad High Court,
Lucknow Bench

Hon'ble Mr. Justice
Sunil Ambwani, Judge,
Allahabad High Court

Hon'ble Mr. Justice
Samaresh Banerjea, Judge,
Calcutta High Court

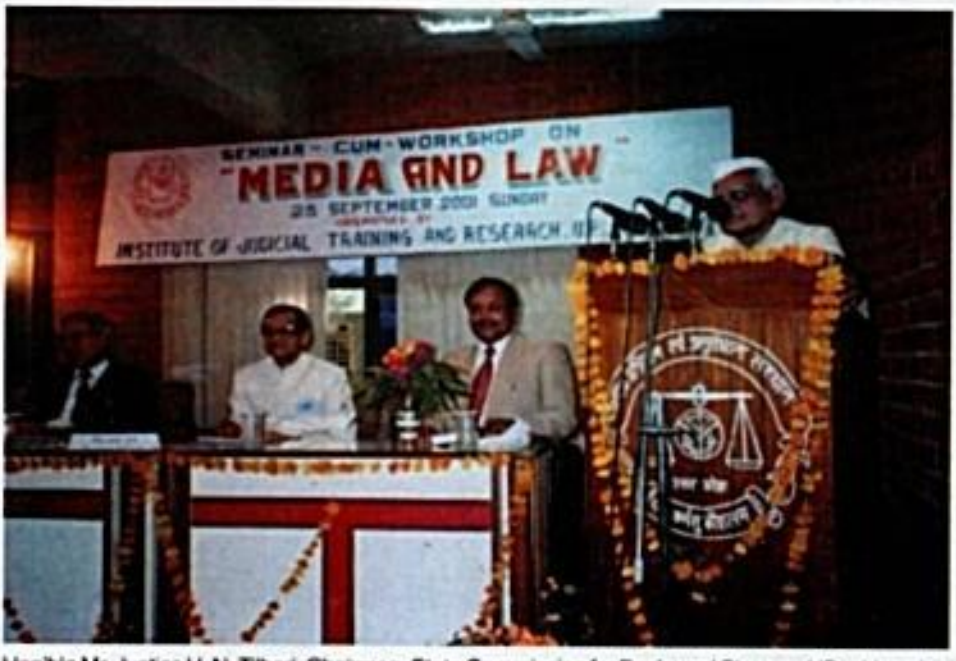
Sri D.P. Gupta
Director
I.J.T.R., Lucknow

Sri Alok K Singh
Registrar (Budget),
Allahabad High Court

Participants of National Level Training Course on "Cyber Laws and Crimes & Intellectual Property Rights" from Nagaland, Himachal Pradesh, Andhra Pradesh, Madhya Pradesh, Chhattisgarh, Orissa, Sikkim and U. P. in Lecture Theater.

Mr. Padam Singh, IAS,Principal Secretary (Prisons) in the middle alongwith Mr. S. P. S. Pundhir, Addl. DG (Prison) (second from right), Mr. D. P. Gupta, Director, IJTR (second from left) Mr. N. V. Gupta, Addl. Director, IJTR (left) Mr. Aditya N. Mittal, Addl. Director (Right) during inaugural session of Training Programme for Jail Officers of U. P. Tripura and Madhya Pradesh on 15th December, 2001.

Hon'ble Mr. Justice K. N. Goyal, Chairman, State Law Commission, U. P. Lighting the Lamp in the inaugural session of National Seminar on "Media and Law" at IJTR, UP on 23rd September, 2001. Seen in the middle Mr. Narendra Mohan, Editor-in-Chief "Jagran" and on left Mr. D. P. Gupta, Director, IJTR, UP.



Hon'ble Mr. Justice H. N. Tilhari, Chairman, State Commission for Backward Classes, UP addressing in the inaugural session of National Seminar - cum- Workshop on "Media and Law" at IJTR, UP on 23rd September, 2001. Seen on dias Hon'ble Mr. Justice S. H. A. Raza, the then Senior Judge, Allahabad High Court (Left), Mr. D. P. Gupta, Director, IJTR, UP, (Middle) and Mr. N. V. Gupta, Additional Director (Right).

I Row : (From left) - Hon'ble Mr. Justice A. N. Gupta, Former Chairman, IJTR, Hon'ble Mr. Justice Sri Nath Sahay, Hon'ble Mr. Justice S. C. Mathur (Former Chief Justice J & K), Hon'ble Mr. Justice H. N. Tilhari, Chairman, State Commission for Backward Classes,UP
II Row: (From Left) Hon'ble Mr. Justice P. K. Sarin, Member, State Commission for Backward Classess, UP, Mr. Prof (Dr.) S. K. Agarwal, Former VC Agra University, Mr. I. C. Diwedi, Former DG Police, UP, Mr. Sri Ram Arun, Former DG Police, UP, Mr. S. V. M. Tripathi, Former DG Police, UP and Special representative of NHRC and other distinguished guests attending National Seminar on "Media and Law" at IJTR, UP on 23rd September, 2001.

Sitting on Chair (From Left): Hon'ble (Dr.) Justice Simen Gelevski, President of Supreme Court of Macedonia, Hon'ble Law Minister, Tazakistan, Mrs. Eli Isely, Prof. Philip Dwely of Colorado, USA, Mr. S. W. W. Wambuzi, Retd. Chief Justice Uganda, Hon'ble Chief Justice, Tazakistan, Mr. D. P. Gupta, Director, IJTR alongwith other guests and faculty members of IJTR during special visit to Institute on 24th December, 2001.

Hon'ble Mr. Justice Brijesh Kumar, Judge, Supreme Court of India, (third from right) alongwith Hon'ble Mr. Justice Saghir Ahmad, Former Judge, SC and Chairman, State Human Rights Commission, Rajasthan (Second from left), Hon'ble Mr. Justice Virendra Saran, Senior Judge, Allahabad High Court, Lucknow Bench, (Third from Left), Hon'ble Mr. Justice D. K. Trivedi, Executive Chairman, U. P. State Legal Services Authority (Second from right), Mr. D. P. Gupta, Director, IJTR (First on left) and Mr. N. K. Mehrotra, Principal Secretary (Law) and LR (First on right) during workshop on sensitization of Judicial Officers in Legal Aid Programmes on 16th December, 2001 at IJTR.

Hon'ble Mr. Justice Saghir Ahmad, Former Judge, SC and Chairman, State Human Rights Commission, Rajasthan receiving bouquet from Mr. Aditya Nath Mittal, Additional Director, IJTR in the inaugural session of workshop on "Sensitising Judicial Officers for Legal Aid Programmes" at IJTR, UP on 16th December, 2001. Seen on dias Hon'ble Mr. Justice D. K. Trivedi, Executive Chairman, State Legal Services Authority, U. P. (second from right), Mr. N. K. Mehrotra, Principal Secretary (Law) and LR (first from right).

Hon'ble Union Minister for Law, Justice and Company affairs Sri Arun Jaitely addressing newly appointed Civil Judges (JD) undergoing Foundation Training Programme at IJTR, UP on 31 October, 2001. Seen on dias Hon'ble Mr. Justice S. H. A. Raza, the then Senior Judge, Allahabad High Court, Lucknow Bench (Middle), Mr. D. P. Gupta, Director, IJTR. (Right) and Mr. N. V. Gupta, Additional Director, IJTR (left).

Hon'ble Mr. Justice Samaresh Banerjea, Judge, Calcutta High Court during visit to Library of IJTR alongwith Mr. D. P. Gupta, Director, IJTR, Mr. Alok K. Singh, Registrar (Budget), Allahabad High Court, Mr. Aditya N. Mittal, Additional Director, IJTR on 15th October, 2001

Hon'ble Mr. Justice T. S. Mishra, Former Chief Justice, Gauhati High Court, accepting bouquet from Mr. D. P. Gupta, Director, IJTR during valedictory session of Foundation Training Programme for Civil Judges (JD) second phase on 29th November, 2001 at IJTR, UP.

Participants of Foundation Training Programme for newly appointed Civil Judges (JD) in the Lecture Theater of IJTR, UP.

Qualities of a Judge♦

Arun Jaitely
Union Minister for Law,
Justice & Company Affairs

Hon'ble Mr. Justice Raza, Sri Mehrotra, Sri Gupta.

Dear friends, you all are on the threshold of entering and commencing a judicial career of yourselves. A judicial career and a responsibility is, in fact, much more than mere a job. It is much more than mere a vocation. It is believed that normally the destiny and fate of humans is to be decided by the divine. This is one exception to that belief. When there are issues arising between individuals, human beings and societies etc. conflicts are actually delegated by the system to a judicial officer. So in a strict constitutional sense it is a legal, judicial, constitutional function that a judge performs but in terms of an element of ethics and morality. It is almost a divine function that a judge is expected to perform and therefore when a judge is expected to perform a function which is of such a great significance to the society what is the quality of a judge directly impinges upon the quality of justice that a judge is capable of imparting and I can tell you that each of you embarks upon this career, you have a very long road map ahead of you and it is a road map which you yourself have to draw out. About lawyers I always maintain that it is a very large legal community, it is a fraternity of all kinds of people, people who are successful people who are very competent and people who are very ethical. You also have occasionally a black fish in the basket. The stale one, the far one and some of you have embarked upon that course. But if there is one profession where the few principles have to be kept into mind, I think it is a judicial career. When a judge is appointed and once the judge pronounces judgement, conducts his court what is the greatest strength that a judge has? The greatest

♦ Address to the newly appointed Civil Judges (Junior Division) in their Foundation Training Programme by Hon'ble Minister for Law Justice and Company Affairs, Government of India, Sri Arun Jaitely,During his Visit in the Institute of Judicial Training & Research, UP,Lucknow on 31st October, 2001 .

strength, if you ask me, a judge has and I should put it in the order of preference which he must have, what is the first quality a judge must have. The first quality that a judge must have is credibility. How the judge shapes himself as an individual, how he conducts himself, how the litigant views him, how the Bar views him, how his colleagues view him, how in terms of progression of his career his superiors view him. All this actually stand for just one word 'Credibility' and I can tell you if there is one profession or one job where its face to be very, very ethical, it is Judicial Career. Those who do not follow the ethical route virtually have nothing to offer. Their judgments command no respect and those who follow the same course perhaps not only excel in themselves but also leave their memories behind. Their height, their stature, every thing depends upon what kind of credibility a judge is able to command. I can only tell you to keep the basic principle in mind whenever you are in doubt, whenever you are deciding a case, whenever you are faced with various kinds of your own thought processes as to what route to adopt in a given situation. The first principle has to be when you are in doubt, go straight and if you go straight it always take you straight, not only that fact whether you go straight. The fact that you are always at the comfort level with your conscience, gives you the moral height, to set your own agenda with the course of your own road map and I say that those who fall short of it they will have very little to offer to the system, they will have very little to offer to themselves. They have very little to leave behind in terms of memory. So, please do remember the greatest strength of a judge is his credibility.

The second strength of a judge is a 'sense of justice'.

Legalisms are very important, but legalisms are occasionally capable of clouding a sense of justice and ultimately great laws are laid down only in an occasional case. In every case, there is a pendulum, and a judicially trained mind is always able to determine which side the equity lies, which side the fairness lies, relating to the justice of a particular case lies, it is not difficult to a judge provided his mind is judicially trained, the mind is free from many kinds of collateral motivations.

We may make errors. The system is always prepared to accept the honest errors. The system forgets honest errors but whether the errors are honest or the errors are deliberate depends upon the first point that I told you; what is the credibility of the person who erred and therefore it is extremely important for every judge to have a very deep sense of conscience which determines which side the scale of justice lies. I of course have no experience, Justice Raza is a very senior and experienced judge and I am sure that he has fished it out. When some body asked me how the judgments are written I have coined a phrase that judges normally have what I call a teleological style of writing judgments. They hear arguments, they make assessment, their conscience says which side the justice is. They decide therefore the tail of Judgment and then the logic is perceived to reach that tail and that is what a judge with the conscience normally he does because he knows where the ends of justice are and where he is going to try and reach and occasionally good and clever judges even when they find that to reach the ends of justice there are some legal road blocks, they possess the acumen to get over them and this is extremely important for any person aspiring for great judicial career really to conceive of.

The third quality, that a judge must have is a very high level of scholarship. Scholarship, because, there is not only one area that you are going to dig into. Particularly, for those who joined the judicial service have to make aware from various branches of law. You must know what the Land Revenue lays, what the procedures lays, what the civil procedure lays, what the medical jurisprudence lays, so that, all areas you must know and as you grow, the kinds of law will change. You may actually have to go and work on matters dealing with specialized subject, Taxation and ultimately if the mind is clear with directions, the mind is tuned into a logic. You are always able to pick up any new branch of law because ultimately the principles of interpreting law, the principles of co-relating the evidence the principles of finding out what really should be the perception and this is going to achieve the sense of logic and a judge must also be very conscious of what his behaviour is going to be. The last subject is, in

fact, the most difficult one. Why I say that it is the most difficult one because we are a society, now, which in some matters is not changing for the better. A judge's job is very difficult. It is used to be said that the Bar is the greatest judge of all judges but the Bar also has double standard in judging judges. Who is a good judge. A judge who says please argue your case and I will immediately deliver judgment. A judge who says that I shall strictly go by the law. Your client is entitled or not entitled for a bail. You are or are not entitled to an interim order. A business like, well-meaning, straight-line judge, may not be a popular judge. A judge who adjourns cases. A judge who gives relief even the relief is not called for is now the measure as a popular judge. These definitions have to change. But the great quality of a judge is that judges are not looking for a popularity pole. We do not have elected judges. Judges are not looking for the popularity rating. Judges are not supposed to be affected by comments. Judges are not supposed to look at which way the ballots have been cast and what the electoral voting are and thereafter I will decide accordingly. Judges do not go to follow the ballot box, judges do not follow the trend. Judges owe a commitment only to the rule of law and therefore the judge must in terms of his behaviour be a man who must actually be able to capture and control the weakness of his own temperament. There are always lines in your own character. Some of which come by natural course how you have developed and it is extremely important for judges to have a temperament. Judges, for instance, never answer debate, judges never answer a criticism in a newspaper, judges do not get into occasional arguments even if a case is being argued. Their job is to ask relevant questions, their job is to deliver judgments. They speak only through their judgments. Judges do not get provoked. Judges have been restored so much power that it is occasionally argued at a very superficial level that his sole power is of contempt. The power of contempt is mere a weapon to be preserved rather than a weapon to be used. If you overuse the weapon, the weapon looses its significance and sharpness. There must be no arrogance in the matter of use of that power. An arrogant judge actually has to overcome the fault line in his own character. He must have humility, he must not be

obsessed with the powers that he possesses. He must be willing, he must be a great listener, a judge must be a great listener rather than a good talker and a judge must also, as I said, try to keep himself away from the controversies.

I tell you a very interesting incident of about three four years ago, I was a part of a delegation of some Supreme Court Judges and Lawyers that every year interact with their British counterparts, Judges and Lawyers and once in India and once in England which is called the Indo-British Legal Forum. A very interesting situation arose that some British newspapers wrote editorials against judgments and Lord Templemen was the judge, who was leading the British delegation and the editorial against one of those judgments written by the House of Lords, was in a well known newspaper 'The Times' in London titled "Those Old Fools". So one of our Indian delegates asked Lord Templemen, when this editorial was written why did you not move for contempt to which he smiled and said 'well Old I am and my wisdom is always a matter of some body's opinion, how is it contempt'. He laughed over. When Lord Denning wrote one of his judgments in Ronata Television case again the editorials were written against him and he had the broadmindedness to accept what the criticisms could be. Recently, in the U.S.A. in Presidential election, Algore v. George Bush, the American society was virtually divided and the U.S. court was ready to decide the voting procedure etc. and to decide who would be the President. Editorials and articles appeared in some of the newspapers friendly to Algore and the language used was the judges has stolen the verdicts which should have been this way and turned that way. When we asked some scholars in U.S.A. as to was it fair to use this language? They said well if some judges are aggrieved they can file a defamation. We do not want a public remedy of contempt of such cases. That is how the world is moving and the public institutions are also, therefore, responsible because the Institution itself is very responsible. A judge, therefore, in his relationship with his colleagues, in his relationship with the litigants, in his relationship with bar, can actually deliver more if he is able to control which I call the zone of temperament. Shouting at the litigant, who is un-represented, is actually a very uneven relationship. So

there are some very great text books on contempt. They always tell us one factor that judges must keep in mind that there is a very uneven relationship between the judge and the contemnor. It is exception to the principle because a judge is being a judge of his own cause, if the court's order or court which has been attacked and therefore he himself is going to decide and the litigant is at the disadvantage because the litigant says that I justified the contempt that the judgment got offended and if he says I am sorry, I committed contempt and I apologize then he leaves himself to the mercy of the judge and then the author says the test is not of the litigant but the test is of the judge. How he emerges while upholding the dignity of the Institution from this uneven relationship and that is where temperament of a judge, the desire not to use the power for your own self in fact, let me tell you I have always regarded public interest litigation. It is a great instrument in the hands of judiciary in areas such as elimination of or abuse of discretion, environment protection. In these all areas the Public Interest Litigation has a great contribution but one area where it should never be used, this is, what leading commentators say, when it comes to use in to improve one's own service conditions. The moment it is used for that purpose, the instrument itself loses its efficacy and therefore it is extremely important that when we embark upon and enter in judicial career these are all factors which we have to keep in mind and lastly I am coming to the point which I have already made. A number of laws in which you are today trained in, over the years, will become irrelevant. Some laws have already become irrelevant. Wait for another decade or so. There will be very little place of laws like Rent Laws. The marked forces will neutralize themselves. There used to be a great potential for family litigations, when we joined the Bar, Land related litigations, matrimony related litigations. Now the tendency in all these cases is to settle the disputes. You have altogether new branches of law which are emerging. Today, those branches may look a little alien to some of us but in the months and years to come each one of those branches will become extremely relevant. We have to train ourselves in Fiscal Laws, I. T. Related laws. Laws relating to modern management of the economy, the whole concept of cooperative

governance. These are all laws in which we have to train ourselves and I think an Institution of this kind which keeps you up to date with all these laws, its relevance and role will have to increase. I, in fact, always maintain that it is not only necessary to have these training courses in the beginning of the career. The way the laws are changing, ways the techniques are changing, it is extremely important that not only judges at the entry stage but judges when they are functioning and even the advocates should have these fortnightly and monthly courses once a year.

CEOs. of companies, if we go to some of the best universities of the world where fifteen days or one month's courses are, CEOs. of companies go there from world over and try to learn modern management techniques. When, no body can claim to be perfect in the matter of knowledge, the more you accumulate the greater it has been an asset and therefore it is extremely important that we also think in terms of training. Academy is expanded because you have a potential for a great infrastructure that even for serving people, senior people, the courses of specialized nature must come in. Recently, a colleague of mine in the government, could not go but wanted to go and showed me papers that there is the best university in USA in Harvard has a fortnightly course every year where they invite Ministers of Governments from all over the world to come and undergo training as to the art how do you lead departments. These are all areas where modern techniques are required. This would be a great asset and I am sure as the Institute develops, the academy develops, it will make further advancement.

I am extremely grateful to Mr. D. P. Gupta, the Director, for affording this opportunity to me and I wish you all the very best and I am sure that while determining the road map ahead you for the next three – four decades, you will probably bear some of these fundamentals in mind that would be some of the greatest assets for each of you.

Thank you!

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ROLE, RESPONSIBILITY AND CHALLENGES FOR LEGAL PROFESSION

Justice Brijesh Kumar,
Judge, Supreme Court of India

In a democratic polity governed by Rule of Law, judiciary has heavy responsibility to discharge. To keep the balance even a strong judiciary is a must – strong intellectually as well in its moral fabric. Courts are said to be performing divine functions. No one, who is weak should be denied whatever is due to him nor any one, who is strong, should get unduly enriched or be allowed to subdue the weak. To achieve this object, much is required to be done by all those who are concerned with it. The judiciary, namely, the Bench is directly and ultimately concerned with it, but at the same time, the Bar is also very much and integrally involved. When we talk of judiciary, Bar inevitably comes in one's mind as an inseparable part of the system, responsible for delivery of justice. Bench and Bar both have important Roles to play. They may be two streams of the same system, but they conjoin at one and the same point. Pursuit of truth and to assist in upholding of Rule of Law, should broadly be the guiding factor, for the Role which the legal profession has to discharge in the system. Adherence to the professional ethics provides strength and moral ground to the profession, which enables it to firmly discharge its duty and perform its Role.

It is though true, interest of the client is one of the main concerns of his counsel, but it does not mean that there can possibly by any deviation from the principles set for professional ethics or any scope for suppression of truth resulting in pollution of the purity of stream of justice. So as to be true to the Role and responsibility, the characteristic of profession has to be maintained at all cost. One of the challenges to the profession is its commercialization. Difference between the profession and commercial activity needs no emphasis. Profession denotes sense of service and sacrifice for the needy and for the good of the society, at least sans commercial considerations. Aim

and object of commercial activity is just the other way round. The core of commercial activity is to generate financial returns as high as possible, other considerations, quit unimportant or secondary besides some other implications. If the nature of the activity of legal profession is changed, the goal set for it shifts. Sense of justice takes a back seat. If the sense of service is gone, it no more remains a profession. Nobility of profession lies in it being service-oriented avocation taking care of social ills and ailments. The danger of commercialization of the profession is looming large, it is a great challenge for the members of the profession.

Successful working of the judicial system is as much responsibility of the members of the legal profession as that of any one else. It is equally the responsibility of the legal profession, while playing its Role, to come out with innovation and suggestions to help out the impasse of colossal arrears of cases in the country. It is no doubt true that co-operation from the members of the legal profession is definitely there, as a result of which, alternative forum of settlement of disputes, e.g. Lok Adalat is functioning and also bringing results, but perhaps, much more will have to be thought out and put into practice. This problem of arrears is a major problem which is causing concern to the people. Some more active and positive role must be played by the members of the legal profession to combat this menace of arrears of cases.

Judiciary is one of the Wings of the State. Members of the legal profession are governed by statutory laws, namely, the Advocates Act. I was just cursorily going through it to find out if any chapter or provision is there indicating the Role and responsibility of the lawyers as members of the profession. I could not find any such provision. Perhaps the broader aspects of the judicial system and the goal which is sought to be achieved and in pursuance whereof the conduct and responsibility which befalls upon the members of the profession may better be indicated in one form or the other in the statute. Merely a provision for penalty for professional misconduct plays a negative role to indicate as to when a lawyer has faulted or committed any misconduct in conducting a case. But achievement of broad social goals sought to be achieved by establishment of a judicial system is nowhere to be found. There is no oath prescribed, nor

anything for commitment to serve or strive to achieve the goal of the system.

Lord Denning in "What Next in Law" writes – "Jurisprudence is the knowledge of things divine as well as human – the science of the just as well as the unjust. The percepts of the law are to live honestly, not to injure your neighbour or render each man his due". Ruskin in "Unto the Last" includes the profession of law as one of the five intellectual professions and that the function of the lawyers is to "enforce justice". According to him, the duty of the members of the profession is even to offer high sacrifice for it on due occasions and "due occasions" have been described as "Countenance of injustice". He has placed the profession on a very high pedestal, but it is not imaginary. All that he perhaps wanted to say was that there may come occasions when members of the legal profession may have to discharge their duties at some great personal sacrifice. Such occasions, in our country, have not been unknown. Whenever such occasions came, members of the profession stood up and discharged their high professional duties unmindful of any kind of personal risk involved.

Bar is nursery of the Bench. Members of the Bench at whatever level, at one stage or the other, have been in the Bar, may be for different durations. It is, therefore, of utmost importance that there may be a healthy Bar in all respects. Role of Bar may be different from that of the Bench, but its responsibility in having a sound judicial system can in no way be undermined or under-estimated. A healthy and sound Bar having its edifice on sound, moral and ethical foundation is an asset, so essential for any democratic country, for proving justice in disputes between individuals as well as to provide protection to the people in general and the society as a whole. It would go a long way to enhance the faith of the people in the system and in achieving the goal of having a judicial system as a Wing of the Government in consonance with the provisions of the Constitution. It was said by Addison' "Perfect justice is attribute of the divine, but to do so to the best of out ability, is the glory of man." The challenges to the judicial system are also challenges for the legal profession as well.

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ROLE OF LOKAYUKTA IN COMBATING CORRUPTION AND MAL-ADMINISTRATION AND MEASURES FOR STRENGTHENING THESE INSTITUTIONS.

Justice Sudhir Chandra Verma
Lokayukta, Uttar Pradesh

Nowadays, corruption is internationally recognized as a major problem in society, one capable of endangering the stability and security of societies, threatening social, economic and political development and undermining the values of democracy and morality. International cooperation is indispensable to combat corruption and promote accountability, transparency and the rule of law.

In its widest connotation, corruption includes improper or selfish exercise of power and influence attached to a public office due to the special position one occupies in public life. The developing countries like India face this problem. Throughout the fabric of public life in the developing countries runs the scarlet thread of bribery and corruption.

Corruption hurts the public directly and tragically, particularly as it penalizes the honest and rewards the dishonest among them.

Corruption and mal-administration impose a great strain on democracy and we all know that corruption is the end product of a process of administration and is preceded by mal-administration.

To live in a society which pursues good governance practices is today a basic human right. The quality of an individual citizen's life is materially affected by both the decisions taken by government and the manner in which those decisions are implemented.

A just and civil society requires a system of government which whilst operating within the rule of law provides for a wider recognition of the need for accountability to citizens on whose behalf government undertakes its responsibility. The traditional role of Ombudsman provides an effective accountability mechanism. which

is now in place in more than 100 countries. The role of Lokayukta is necessary in providing a mechanism which can balance the fundamental requirement that government must be able to govern but with appropriate accountability.

"Good Government" – is expected to contain a number of key components; political legitimacy for the state through democratic elections and transfer of power, and an effective political opposition and representative government; accountability through transparency and the provision of information; separation of powers; effective internal and external audit; effective means of combating corruption and nepotism; official competency, such as trained public servants; realistic policies and low defence expenditure; human right as indicated by freedom of religion and movement; impartial and accessible criminal justice system; and the absence of arbitrary government power. Good government is also seen as an essential condition toward the wider goal of good governance. Described as the "use of political authority and the exercise of control over society and the management of its resources for social and economic development", good governance encompasses the "nature of functioning of a state's institutional and structural arrangements, decision-making processes, policy formulation, implementation capacity, information flows, effectiveness of leadership, and the nature of the relationship between ruler and the ruled."

Those who have tried to live as moral men in an immoral society have generally given way, sooner or later, under agonizing pressures of legitimate ambition which can only be achieved through illegitimate means – the pressure from family obligations, the slow insidious pressures of society in which material success is adulated and where material failure is ruthlessly mocked, the pressure of increasing defeatism, or realization that public opinion stigmatizes the transgressor so lightly, and that so little seems to be gained by trying to swim against the tide.

In view of the cumbersome and curious procedures and practices in the Government departments the anxiety on the part of the common man to avoid delay has encouraged practice of paying speed money.

This has become a fairly common type of corrupt practice particularly in matters relating to the grant of licensees and permits. Very often the bribe giver does not wish to get anything done unlawfully, but just wants to speed up the movement of files and communications from department to department. Certain sections of the staff have got into the habit of not doing anything in the matter till they are suitably rewarded.

Besides being a most objectionable corrupt practice, this custom of 'speed money' has become one of the most serious causes of delay and inefficiency and no work culture. Deliberate delay in the movement of papers by petty officers in Government offices in the hope of collecting 'speed money' is one way of frustrating honest citizens.

Frequently enough the dishonest contractors and suppliers who, having obtained the contract by undercutting, want to deliver inferior goods or get the approval for sub-standard work, and for this purpose are prepared to spend a portion of their ill-earned profits. Tax evasion, malpractices in the share market and in the administration of companies, monopolistic controls, under invoicing or over-invoicing, hoarding, profiteering, substandard performance of contracts of constructions and supplies, evasion of economic laws, bribe, election offences, malpractices, are some examples of while collar crime. Behind this sordid picture of conditions is a fine network of details about the techniques adopted in the process of corruption, while small people might give bribes to get small favours there are large contractors and other anti-social sharks who consciously follow corrupt practices to further their greedy designs.

Thus the honest taxpayers pay their legitimate dues, pay the extra taxes to make up for the tax-evader, and also pay interest on tax-evader's investment in loans. It amounts to penalizing honesty and rewarding dishonesty.

There is yet another temptation to which some officials succumb, namely, to use their public office as a means of making money in an allied private business in which they are engaged. Doctrinaire attempts to regulate public morals is yet another root of

corruption. Prohibition is one source which provides the police with immense opportunity for corruption. The more the laws the greater the opportunities for making easy money.

A second set of social causes of corruption can broadly be described as lack of personal virtue or a sense of morality. Corruption is a consequence of the way of life of our acquisitive society, where people are judged by what they have rather than what they are,. The possession of material goods seems to have become the sine qua non of life. There inevitably results a scramble for acquisition of glittering prizes, irrespective of the means adopted. The lack of vigilance by the people has also contributed to the growth of corruption.

The best means to combat corruption, even in terms of the cost for society, is prevention. Effective prevention can thus reduce the extent and the costs of penal action.

Public awareness and tolerance and the effective role of the mass media would be of great help. The role of the mass media in uncovering corruption cases and in building anti-corruption awareness is important for both the prevention and the investigation and control of corruption.

Good governance cannot be said to be the exercise of power without accountability. The exercise of power should never be absolute in any system, that will lead inevitably to corruption. What is needed is balance between the ability to govern effectively and the processes by which those who govern are held to account. Good governance requires having confidence in the system by which we are governed and trust in those to whom as individual citizens we delegate through the ballot box the responsibilities and burdens of governing.

The unlimited, unbridled and unchannelized powers exercised by political leaders in democratic setup as Heads of the department is also responsible to a very great extent for mal-administration and corruption. The said powers should be curtained and political intervention be reduced in public administration.

The so called red tapeism in bureaucracy requires proper tapering. The rules and procedure of administration should be

simplified and made transparent. The administrative processes in all matters in which citizens are directly involved should be simplified and classified.

The most important element in combating corruption is effective and speedy punishment. The judicial system has failed and we will have to think of alternative methods by which effective punishment could be achieved. It has been realized that the departments are slow in efficiency or with the desire to protect corrupt officials in going slow in departmental action.

In this information age where information is so readily available to, and shared with the world. we may be witnessing growing pressure upon the historical contract between a nation state and its citizens, particularly in countries with democratic traditions or moving towards democratisation.

Increasing accessibility to information and at greater speed, coupled with a powerful and free news media, is extending the expectation of what that historical contract entails. The power relationship in most states- the power balance between governor and governed – is perceived to be shifting dramatically away from those seeking to wield authority in the name of the state and in favour of the individual citizen.

Codes of ethics and integrity testing are of great importance in developing a civil sense of respect for institutions and human rights. Procedures for auditing by independent internal as well as external bodies is of paramount importance in preventing corruption. The prime need is a common standard of morality – by for the most important corruptive.

Re-organization of vigilance departments is required. This department is mainly intended to investigate and punish corruption and the misuse of authority by individual members of the services under the Government. However, there is no organic relation between the Administration Vigilance Division and the Vigilance Officers of various departments.

The press has played a significant role in uncovering the cause of corruption and in mobilizing public opinion against such practices

Elsewhere too, it has done a great deal to publicize cases of proved corruption or allegation of corruption. But is has not played its legitimate role of probing administration.

Voluntary organizations in this country have not yet come into the field of helping people with their complaints. We have to mobilize ultimately public opinion and public involvement in the fight against corruption. That is where the NGOs can play an effective role. The NGOs should take each department and find out that what are the rules and regulations which breed corruptions and come up with suggestions.

Mal-administration is root cause of every wrong in governance. There appearance to be no justification why even routine matters are not disposed of especially when, there is no consideration of any discrimination or any legal impediment involved.

Providing channels for ventilation of grievances is bound to have a very sobering effect on an erratic administration. It lies with the public, which should be prepared to put up a stiff fight against it. For every corrupt official, there are hundred of members of the public wanting to make use of him and to feed him. A society that does not attach any stigma to the corrupt man can hardly be rid of such ignoble men.

Ombudsmen throughout the world, by whatever name they are described , have established themselves as an effective instrument of public accountability. We can be proud of the part we and our predecessors have had in meeting that purpose and should endeavour to make this authority more meaningful and effective.

Effectiveness of Lokayukta is related to his primary objective: to ensure that the constitutional state is maintained, that public authorities respect citizens' rights and laws and that administrative problems are corrected (eliminate formalities, reduce delays, revise discretionary decision – making processes....). Consequently, this mission is divided in to two parts : monitoring and correcting, if necessary, public authorities' behaviour. This is why the Lokayuktas effectiveness, or his success in getting his recommendations implemented by public authorities, relies on his ability to make public

authorities accept and understand his recommendations. His purpose is to resolve conflicts, which he must make public authorities aware of. This is why he ensures that public authorities are aware of his intervention criteria, the general scale according to which he evaluates the government's administrative behaviour. He makes his general intervention policies public, the population, public authorities and media are better able to understand the rationale for any possible recommendations that he could make in a case under his scrutiny, no matter the nature of the investigation.

Suggestions which would go long way in achieving the said goal.

1. Public awareness
2. Media/press play significant role in covering the cases of corruption and in mobilizing public opinion against such practices as also creates awareness for preventive measures.
3. Deterrent, effective and speedy punishment.
4. Re-organization of vigilance departments and to be attached with Lokayukta organization
5. Empowering public through transparency in administration.
6. Accountability – speedy fixation of
7. Reducing political intervention in public administration
8. Mechanization of offices – Computerization and Automating of procedures to provide citizen related information as also eliminate opportunities of corruption.
9. Public officials – disclosures of assets, liabilities and income returns.
10. Mobilize public opinion and public involvement and NGOs may play a vital role.
11. Simplification of Rules and procedures.
12. Simplifying a classifying of administrative procedure in all matters in which citizens are directly involved.
13. Enacting a freedom of information law.
14. Identical powers and functioning of Lakayuktas in all states.

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"VALUES, ETHICS AND INTEGRITY IN PUBLIC SERVICE"

Justice R.R.Yadav,
Judge, Allahabad High Court.

Values, Ethics and Integrity in Public service, is summum bonum of living independent, private and public life, leading to interdependence of peaceful co-existence of mankind, with other animate and inanimate entities. From time immemorial, the human races of this globe are in search of happiness and a perfect relationship with other entities of this cosmological order. Principles of living a decent, dignified and happy life on our mother planet was comprehended in pre-historic period by disciplined minds, capable to see everything with clarity, objectivity not emotionally, not sentimentally. Disciplined minds have created society, and inturn, the society has conditioned our outlook towards happiness and relationship with others, giving recognition to primacy in life.

In pre-historic period, Brithari, a great Indian sage, wrote, 'Vidya' (knowledge) should be honoured by the rulers, and not wealth. Without 'Vidya', one is a beast. He went on to say that 'Vidya', is humility personified. All of us pose a question to ourselves whether the persons, who are manning the administrative functioning of the machinery at the Centre or at the States, are giving honour to public morality, or giving honour to wealth? The answer is not far to seek. Judicial restraint does not permit me to elaborate the answer. Suffice it to say in this regard that those who have amassed wealth, are respected in our society, but those who stick to moral values, are either ignored or de-tested. The might of polarised evil forces, is discouraging few moralist people from fighting those evil forces, who have upper hand these days, in society.

Let us begin to realise from today that if we wanted to change the prevailing chaotic situation in social and institutional order, we first had to change ourselves and before changing ourselves effectively, we first had to change our perceptions to the problems,

instead of raising accusing fingers at the doors of others. We are to realise that duplicity will breed distrust amongst the people, and everything we do, even good relationship techniques, with emphasis on values and ethics will be perceived by the people, as manipulative. Thus, the problem before us, is not just good versus evil, prevailing in our social and institutional order today, but it is about us, which can be moulded by shifting old negative paradigm, by a new paradigm, in positive direction.

The concept of paradigm shift was discovered by Thomas Kuhn, in his classic book "The Structure of Scientific Revolutions", wherein, he establishes how every significant breakthrough in the field of scientific endeavour is first a break with ways of thinking with old paradigm. To my mind, what is true is in the field of science, it is equally true in the field of social and institutional functional change, with an exception that only those paradigms are required to be changed, which are in negative direction, but old paradigms, based on values, ethics and integrity, befitting to scientific temper, which are in positive direction are to be maintained. The old paradigms, which are to be maintained, are also required to be tested on the anvil of compassion, honesty and moral uprightness, which are essential qualities of strong character of men and women and are helpful to create foundation of trust for long-term personal and inter-personal relationship. It is to be imbibed that Character Ethic and Personality Ethic both are examples of social and institutional paradigms. These two social and institutional paradigms work as a map to reach on the desired destination. When values, ethics and integrity are internalised into habits, then, such people can deal with the obstacles in the way, effectively, to give leadership to the society, in every walk of life.

Aristotle had aptly said that we are what we repeatedly do. He went on to say that "excellence then is not an act but a habit".

It is well to remember that habits are built on self-paradigm, therefore, self-paradigm is more important than the aforesaid two paradigms, to create change in social and institutional functioning. Our self-paradigm characterises our personalities into two groups: one is called reactive personality; and the other is called proactive personality. It is psychologically noticed that reactive people are affected by social weather and such people, if treated well, they feel well, otherwise, they become aggressive to protect themselves

empowering the weaknesses of other people, over which, they have no control, whereas, proactive people are driven by ethics carefully thought about selected and internalised values. Proactive people used to develop habits to recognise their responsibilities, instead of raising accusing fingers at the doors of others. It is only proactive people, who can make to happen changes in social and institutional order, on the strength of their strong character build on human values. A psychologist, named Victor Frankl, suggests that there are only three central values in life : experiential, or that which happens to us, the creative, or that which we bring into existence by our own actions; and the attitudinal or our response in difficult circumstances. In a poetic composition, in 'Brihadaranyaka Upnishad', an Indian Sage has said :

"You are what your deep, driving desire is.
As your desire is, so is your will.
As your will is, so is your deed.
As your deed is, so is your destiny."

What had been said by the great Indian Rishi in 'Brihadaranyaka Upnishad', quoted herein above, the same statement of fact had been re-stated by a western author, Samuel Jhonson, who said "The fountain of content must spring up in the mind and he who hath so little knowledge of human nature, as to seek happiness by changing anything but his own disposition, will waste his life in fruitless efforts and multiply the grief he proposes to remove." From tile aforesaid two learned personalities, one of them of prehistoric period and the other of historic period, it is crystal clear that man is mind and his-personality is the very composition of his mind. Thus, when an officer of public service purified his motives and thoughts in his mind, his Character Ethic and Personality Ethic empower him to take on the wrong doers with courage and conviction, under his circle of moral influence and force them to change their ways. The pro-active officers in public service, with their deep driving, desire to remove pains and sufferings of masses, with honesty and integrity are capable to do so, with endurance, to combat evil forces, who are playing as role model in our social and institutional order. It is true that the battle may be prolonged, but such public officers are bound to succeed.

All of us are to imbibe that enduring qualities of honesty, integrity, humility, moral values and strong character, with commitments, are capable to ameliorate the sufferings of masses in the midst of crisis of confidence. In this regard, there are three old theories, which explain the nature of an individual man and woman, the first is genetic determinism, which believes that our temper, habits, emotions, in a given situation and character structures are inherited from our forefathers, which are contained in our DNA. Although, it is not scientifically proved, but it is proclaimed by some of the scientists that if DNA code is decoded, it can give details of whole life, of any individual, man or woman. It is said that if DNA is properly decoded, at what age, one will suffer from a particular disease; at what age, his hairs will become grey; and when his teeth will fall from his gum, all can be known. The second theory that is popularly known as psychic determinism. Under this, one believes, our upbringing and our childhood experiences, essentially lay down our character structure. It is said that child experiences continue to influence an individual's life, till death. According to the third theory, which is known as environmental determinism believes that each environment is responsible for building our character, slowly and silently. The aforesaid old three theories are replaced by a new dynamic theory of three quotients. In psychology, up to 1960s, it was taught in schools and colleges that Intelligence Quotients (IQ) determines our Personality Ethic, on the strength of intelligence, possessed by each one of us. Up to 1990, another theory was theorised that Emotional Quotient (EQ) is another essential element, responsible for building our Personality Ethic, along with Intelligence Quotients. It is heartening to note that at the end of twentieth century and before advent of the twenty-first century, a book in America is under print, which proclaims that along with IQ and EQ, a very important role is played by Spiritual Quotients (SQ). We have to wait about the further details, when the aforesaid book is made available on sale in the market. Before the aforesaid book is made available in the market, we can satisfy our mental hunger, on this point, by reading the book, "The Seven Spiritual Laws of Success" written by Deepak Chopra, published by Excell Books; and the Seven Habits of Highly Effective People, written by Stephen R. Covey, and published by Simon & Schuster, from London, Sydney, New York, Tokyo and

Toronto. The aforesaid books present with spiritual flavour a holistic integrated principle-centred approach for private victory and public victory with penetrating insights.

We can classify personality of a man and a woman on three other relevant considerations grading them as first grade, second grade and third grade personalities. A man or a woman will be said to possess the first grade personality if there is perfect uniformity and complete harmony in his/her thought, speech and action. Such individuals speak only that much which they think and what they speak, they act strictly according to their speech; the second grade personality is possessed by those men and women who do not care what they think but at least what they speak, they strictly act according to their speech; and those people who possessed third grade personality, they think something else, but speak something else. Such people are found always acting against their thought and speech. I pray Almighty (in scientific terminology inertia source of infinite power and Chitta Shakti under Tantra Cult), to energize and bestow upon all mental strength to strive to possess first grade Personality Ethic in one's service career, empowering you all, to administer justice between man and man and between citizens and State, with divinity, integrity and profound efficiency, enhancing respectability of Courts, in the estimation of people, poor and rich, alike.

My discussion on the subject would remain inconclusive if I fail to include maintenance of decency and decorum in the Court proceedings, maintenance of dignity of Judicial office in public and private life, behaviour with superior and subordinate officers, members of the Bar, litigants, witnesses, public officers of other departments appearing in the Courts, etiquettes, manners and protocol norms within the fold of Values, Ethics and Integrity in public services.

The present justice system in our country is hierarchal in character, therefore, all the Judicial officers will have to follow strictly the decisions given by superior judicial officers with all seriousness and judicial pronouncements by High Courts and Supreme Court as precedents. I may suggest that while hearing ex-parte applications for temporary Injunctions, receiverships or passing such other interlocutory orders where the adversary party is not present it is expected that before such interlocutory orders are passed,

Judicial Officers will scrupulously cross-examine and investigate as to the facts and principles of law on which such applications are based, keeping in view that allowing such applications ex-parte, is a limitation imposed upon freedom of action of the adversaries, which should not be granted lightly. It is always to be remembered that hastening of justice is the step-mother of misfortune.

All of us know that delay in administration of justice is a common cause of complaint, which is to be remedied by all of us with courtesy to the members of the Bar, without being arbitrary or forcing cases unreasonably or unjustly. When a counsel is unprepared, as it would be anathema to the administration of justice which is to be avoided as far as possible. The private life of a Judicial Officer affects his public life and vice-versa. I expect the judicial officer will regulate their private life with care and caution. A great jurist Katyayana said, "A Judge should be austere and restrained, impartial in temperament, stead-fast, God-fearing assiduous in his duties, free from anger leading a righteous life and of good family."

It is further to be noted that the Courts of law are meant to protect the Lamb from lion where weak prevails over strong. Such decision-making process requires courage and conviction on the part of a judicial officer, who are charged with dispensation of administration of Justice. The Courts of law exist to promote justice and thus to serve the public interest. Since a Judicial officer in deciding a lis is entitled to over see the conduct of others, therefore, in order to make entitled to over see the conduct of others, he is to make periodical introspection of his own conduct. A Judicial officer while dispensing Justice is expected to be courteous, but firm to the counsel, especially to those who are young and inexperienced and also to others who are concerned in administration of justice in the Court. No person should be allowed by any Judge to give an impression that a person or a group of persons are capable to enjoy his favour.

It is true that it is not necessary to the proper performance of judicial duty that a judicial officer should live a secluded life like a hermit. It is desirable that he should continue to mingle in social intercourse and should not discontinue his interest in appearing at meeting of the members of the Bar. I may emphasise that kindly maintain the protocol norms rigorously, to make your judicial cadre steel-framed. It is not possible to make the judicial cadre steel-framed

unless etiquette's, manners and protocol norms are observed meticulously.

I have no doubt that flame of justice will burn brighter to the satisfaction of all poor and rich alike, while the torch of justice is placed in your care and custody, with spark of celestial fire called conscience in each and every heart of all the judicial officers.

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EXERCISE TO DISCRETION AND JUDICIAL REVIEW

Justice Pradeep Kant
Judge, Allahabad High Court

The resolution to constitute India into a Sovereign Socialist Democratic Republic and to secure to its citizens, justice, social, economic and political is deeply enshrined in the preamble of our Constitution.

From a wholly feudal exploited slave society to a vibrant, throbbing socialist welfare society is a long march but during this journey to the fulfillment of goal every State action whenever taken must be directed, and must be so interpreted, as to take the society one step towards the goal.[1]

The three organs of the State, namely, Legislature, Executive and Judiciary act independently in their own fields, calling into separation of power. One of the most essential basic feature of our Constitution is the independence of the judiciary. The role of judiciary assumes enormous importance and great responsibility as it has the power to check the actions of the Legislature as well as the Executive. It maintains equibalance in the exercise of powers and keeps within its bounds, the Legislature as well as the Executive. The independence of judiciary and supremacy of the Constitution are the indispensable characteristics of the parliamentary democracy. The judicial power has to be exercised with restraint and self imposed discipline and self restraint by judiciary keeps itself within the bounds or limits of its power. Thus, in the light of the law and well laid down norms, the judicial review is done with respect to any State action i.e. may be in the field of legislation or in the field of the issuing executive fiat or executive orders or actions otherwise permitted under law.

Judicial review is permissible even in exercise of discretionary powers by the State or Executive. What is discretion? Does it mean

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[1] D.S. Nakara vs. Union of India, (1983) 1 SCC 305.

that an authority or individual who is authorized to take a decision in a particular matter is entitled to take any decision that he likes because it is his discretion to take such decision or not. Does it mean that the decision or action which is taken by such authority or individual should be supported by some law, customs or usage.

"Concept of responsible Government and representative democracy signifies Government by the people. For parliamentary democracy to evolve and grow, certain principles and policies of ethics must form its functioning base" which necessarily mean "Constitution restrains must not be ignored or by passed if found inconvenient or bent to suit political expediency."[2]

There may be a discretion with the authority to exercise the powers and also the discretion with respect to the manner in which it is to be exercised. The discretion, said Coke, was sncire per legem quod sit justum. 'It was a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections.'[3] In 1647 it was laid down by the King's Bench that "whatsoever a Commissioner or other person hath power given to do a thing at his discretion, it is to be understood of sound discretion, and according to law, and that this Court hath power to redress things otherwise done by them."[4]

Defining discretion is a great task and no better definition can be given to the term as has been given by Coke.

So long the authority vested with the discretion exercises that discretion in accordance with law at a reasonable criteria no challenge can be made, but the moment there is a failure on the part of the authority in exercising the discretion which he is legally obliged to exercise or in a discretion he acts in excess of the powers which may amount to abuse of discretion, the role of judicial review comes into play. The prerogative writs like certiorari, or mandamus are the writs which are issued by the Court when it is found that there has been an abuse of power in exercise of discretion by the authority concerned. The abuse of powers may be by not discharging the legal obligation or by acting in excess with the authority conferred.

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[2] S. R. Chaudhari vs. State of Punjab (2001) 7 SCC 126.

[3] Keighley's case (1609) 10 Co. Rep. 139a 140a.

[4] Estiwick vs City of London (1647) Style 42, 43, 158-159.

The judicial review of discretionary powers encircle the major sphere of actions and exercise of power by Legislature and Executive. It extends from Legislative functions of enacting laws by Legislature to the State actions which are taken under the laws or otherwise. The Parliament or the State Legislature may be having an authority to enact the law but the validity of the same can be tested on the principle as to whether it infringes any fundamental right guaranteed under our Constitution or it is discriminatory, illegal or arbitrary. Of Course, the laws which are challenged on the ground of legislative competence raise different question, where judicial review is possible because of the attack on the legislative competence.

Judicial review is the backbone and armoury for upholding the Rule of Law. The rule of law has different meanings. Its primary meaning is that everything must be done according to law. Professor H.W.R. Wade says that every act, which includes the governmental act, which affects the legal rights, duties, liberty or a person must be shown to have a legal pedigree. The affected person may always resort to the courts of law, and if the legal pedigree is not found to be perfectly in order, the Court will invalidate the act which he can then safely disregard. That is the principle of legality but the rule of law demands something more. Since otherwise, it could be satisfied by giving the Government unrestricted discretionary powers, so that everything that they did was within the law. Quod Principi Placuit Legis Habet Vigorem (the soverign's will has the force of law) is perfectly legal principle. The secondary meaning of rule of law, therefore, is that Government should be conducted within a frame work or recognized rules and principles which restricts discretionary powers. Coke spoke in picturesque language about 'the crooked cord of discretion.'[1]

Various Rules are made for restricting the discretionary powers so that they may not lead to rule on whims and caprice.

Judicial review as is given in Grolier Encyclopedia is the power of Courts to decide the validity of the acts of the Legislative and Executive branches of Government. If the Courts decide that a legislative act is unconstitutional, it is nullified. The decisions of the executive and administrative agencies can also be overruled by the

[1] Diecy, the law of Constitution, Chapter IV

Courts as not conforming to the law of the Constitution. Unlike U. S. Constitution which does not explicitly mention judicial review, our Constitution provides for judicial review and reference to Article 32 and 226 of the Constitution of India would be appropriate. In the United States the power of judicial review was first asserted by Chief Justice John Marshall in 1803, in the case of MARBURY V. MADISON. Relying in part on Alexander Hamilton's writing in The Federalist, no. 789, Marshall asserted that the judiciary logically and of necessity had the power to review congressional and executive actions. This follows from the premise[6] that the Constitution is the supreme law of the land and that Courts in deciding cases, must be able to make final and binding interpretations of the law.

"Law is not an instrument to be used for inflicting sufferings on the people but for the process of justice dispensation."[7] "Obligation of the judiciary is to administer justice according to law but the law must be one that commands legitimacy with the people and legitimacy of the law itself would depend upon whether it accords with justice."[8]

Article 32 of the Constitution provides remedies for enforcement of rights conferred by Part III, namely, the Fundamental Rights, Supreme Court under this provision, has a power to issue writs or directions including the writs in the nature of hebeas corpus, mandamus etc, whichever may be appropriate for any of the enforcement of the rights conferred by Part III of the Constitution.

The Supreme Court in the case of A. K. Kaul v. Union of India (1995) 4 SCC 73 observed that:

> ***"the power of judicial review is, therefore, implicit in a written constitution and unless expressly excluded by a provision of the Constitution, the power of judicial review is available in respect of exercise of powers under any of the provisions of the Constitution."***

In the case of Election Commission of India vs. Union of India and others, (1995) Supp 3 SCC 643, the Supreme Court while considering jurisdiction of Election Commission held that there are no unreviewable discretion under the constitutional dispensation.

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[6] Article VI of U. S. Constitution.

[7] State of M. P. vs. Bhooraji, (2001) 7 SCC 679.

[8] S. R. Chaudhuri v.State of Punjab, (2001) 7 SCC 126.

The apex Court in the case of Delhi Science Forum and others vs. Union of India and others (1996) 2 SCC 405, while considering the question of grant of license to non Government companies including foreign collaborated companies, for establishing, maintaining and working of telecommunication system of the country pursuant to Government policy of privatization of telecommunications, held that Central Government has power under the first proviso to section 4(1) to do so. The Apex Court further observed..... Of course, there can be controversy in respect of the manner in which such right and privilege which has been vested in the Central Government has been parted with in favour of private bodies. In respect of grant of any right or license by the Central Government or an authority which can be held to be State within the meaning of Article 12 of the Constitution not only the source of the power has to be traced, but it has also to be found that whether the procedure adopted for such grant was reasonable, rational and in conformity with the conditions which had been announced. Statutory authorities have sometimes under their discretionary power to confer social or economic benefits on a particular section or group or community. The pleas raised is that the first proviso to section 4 (1) of the Telegraph Act vests power in them to be exercised as they "think fit" is misconceived, since such provisions while vesting powers in authorities including the Central Government also enjoin a fiduciary duty to act with due restraint, to avoid "misplaced philanthropy or ideology"..... It cannot be exercised in a manner which can be held to be unlawful and which is now known in administrative law as Wednesbury principle as stated in Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.[9] The aforesaid principle is attracted where it is shown that an authority exercising the discretion has taken a decision which is devoid of any plausible justification and any authority having reasonable prudence could not have taken the said decision.

But even in the absence of rules, the power to grant license on such conditions and for such considerations can be exercised by the Central Government but then such power should be exercised on well settled principle and norms which can satisfy the test of Article 14 of

[9] (1947) 2 All ER 680

the Constitution. It is necessary for the purpose of satisfying as to whether the grant of the license has been made strictly in terms of the proviso, complying and fulfilling the conditions prescribed, which can be held not only reasonable, rational, but also in the public interest, can be examined by Court.

Many administrative decisions including decisions relating to awarding of contracts are vested in a statutory authority or a body constituted under an administrative order. Any decision taken by such authority or a body can be questioned primarily on the grounds; (1) decision has been taken in bad faith; (2) decision is based on irrational or irrelevant considerations; (3) decision has been taken without following the prescribed procedure which is imperative in nature.

Discretionary power has to be exercised to advance the purpose to sub-serve which the power exists – Even a Minister, if he/she be the repository of discretionary power, cannot claim that either there is no discretion in the matter or the discretion is unfettered – Shive Sagar Tiwari vs. Union of India, (1997) 1 SCC 444.

Hansaria J. while speaking on behalf of the Court said that the Administrative Law has of late seen vast increase in discretionary powers. But then, the discretion conferred has to be exercised to advance the purpose to sub-serve for which the power exists. Even the Minister, if he/she be the repository of discretionary power, cannot claim that either there is no discretion in the matter or unfettered discretion. This position was rejected emphatically by the House of Lords in the landmark decision of Padfield vs. Minister of Agriculture, Fisheries and Food; 1968 (1) All. ER 694. This apart as pointed out in United States vs. Wunderlich; 342 US 98.

> ***"Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some..... official, some bureaucrat..... Absolute discretion is a ruthless master. It is more destructive of freedom that any of man's other inventions" :***

The High Court is empowered to exercise its power of judicial review under Article 226 of the Constitution for enforcement of any fundamental right or for other purpose. The Supreme Court in the case of Tata Cellular vs. Union of India (1994) 6 SCC 651 while considering the scope of judicial review observed:

"70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose, the exercise of that power will be struck down."

71. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.

72. Lord Scarman in Nottinghamshire County Council vs. Secretary of State for the Enviroment (1986 AC 240 251) proclaimed :

"Judicial review" is a great weapon in the hands of the judges; but the judges must observe the constitutional limits set by our parliamentary system upon the exercise of this beneficial power. Commenting upon this, Michael Supperstone and James Goudie in their work, Judicial Review (1992 Edn.) at p. 16 say:

"If any one were prompted to dismiss this sage warning as a mere obiter dictum from, the most radical member of the higher judiciary of recent times, and therefore, to be treated as an idiosyncratic oberration, it has received the endorsement of the law Lords generally. The words of Lord Scarman were echoed by Lord Bridge of Harwich, speaking on behalf of the Board when reversing

an interventionist decision of the New Zealand Court of Appeal in Butcher v. Petrocorp Exploration Ltd. 18.3.1991."

73. Observance of judicial restraint is currently the mood in England. The judicial power of review is exercised to reign in any unbridled executive functioning. The restraint has two contemporary manifestations. One if the ambit of judicial intervention; the other covers the scope of the Court's ability to quash an administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action.

74. Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

In the same case Lord Hailsham commented on the purpose of the remedy by way of judicial review under RSC, Ord. 53 in the following terms:

"This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practiced at the Bar, administrative. It is not intended to take away from those authorities the powers and discretion properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner (p. 1160)".

In R. V. Panel on Take-overs and Mergers, ex p Datafin Plc (1987) 1 All ER 564 Sir John Donaldson, M.R. commented :

"An application for judicial review is not an appeal."

In Lanrho Plc v. Secretary of State for Trade and Industry (1989) 2 All ER 609 Lord Keith said:

"Judicial review is a protection and not a weapon."

It is thus different from an appeal. When hearing an appeal the Court is concerned with the merits of the decision under appeal. In

Amin re Amin vs. Entry Clearance Officer (1983) 2 All ER 864 Lord Fraser observed that:

> ***"Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made..... Judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing the administrative decision without substituting its own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer."***

In the case of R. D. Shetty v. Airport Authority, AIR 1979 SC 1628, the Supreme Court while analyzing the challenge made by the petitioner that in the matter of grant of license for running a restaurant at the Airport while eligibility conditions were changed while granting the contract to the person concerned which deprived the petitioner from applying and participating in the contract as he was not made aware before hand that the eligibility condition can be relaxed. it was held that the action of the authority is unreasonable and arbitrary and that there is no power or discretion with the authority concerned to relax without making it known to the public or to those who are eligible and willing to participate in the contract about the provisions regarding relaxation of the eligibility conditions.

The Government has myriad functions to perform and the functions of the Government are carried out by the Executive. The executive consists of (a) Prime Minister and Ministers, who are members of Cabinet; (b) Ministers, who are not of Cabinet rank; (c) Civil Service.

For Achieving our constitutional goal of making the country Sovereign Socialist Secular Democratic Republic the Government demands wide discretionary powers.

"Modern Government demands discretionary power as they are numerous. Parliamentary draftsman strive to find new forms of words which will made discretion even wider, and Parliament all too readily enacts them. It is the attitude of the courts to such seemingly unbounded powers which is perhaps the most revealing feature of a system of administrative law."[10]

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[10] (Quoted from Galligan, Discretionary Power in Wade Administrative Law.)

The discretion so long it makes the rightful discretion would remain untouched by the Courts. It means a reasonable approach for exercising the authority or discretionary power and it is a sound judicious approach for the courts to find out as to whether the discretion has been exercised within the powers in public interest and according to law and in case it is found that the discretion has been exercised keeping in mind of duties imposed, the court would be hesitant in interfering in such discretion but if it is found that the authority has exceeded in exercise of its power or has exercised the powers against the law, the same can be taken care of by the courts. A balance is to be maintained between the executive efficiency and legal protection of the citizen or a person.

It is also common knowledge that the Legislature cannot provide while making a law for all contingencies which may occur later on in the enforcement of law or of such actions which may have to be taken in the various complex situations. At the time of framing of law for carrying out the effect and purpose of the Act and for meeting timely exigency and contingencies the powers are to be delegated to the subordinate authority and some times it is found that the action of the delegatee is not in consonance with either Article 14 of the Constitution or otherwise , it would not be a proper exercise of discretion which in other terms can be said to be an abuse of discretion. In such cases also the Courts would set the things right by judicial review.

The discretion is coupled with the duty and while exercising the power of judicial review the two questions would arise:

(1) Whether discretionary power has been abused and;

(2) At whose behest such action or law can be challenged viz. namely, locus standi of the person challenging the act, law or the action of the executive or legislature.

There is no dispute that a person or a party who is directly aggrieved can approach either the Apex Court or the High Court, as the case may be, under Article 32 or 226 of the Constitution but this doctrine of locus standi has been given a wider scope so as to allow even those persons or societies who may not be directly affected with the aforesaid actions, Act or law but espouse the cause of those who are directly affected. The later form of challenge is commonly known as public interest litigation.

Public interest litigation has become common in the modern times for various reasons including the one that in the society of ours there is lack of education, information and knowledge. The lack or resources and lack of guidance and also because of unawareness of the down trodden about their rights, the question of making a challenge by them is a dream which is yet to be materialized. Besides this, it has been held in the case of People Unions for Democratic Rights v. Union of India, AIR 1986 SC 1589 that in democracy public interest litigation is essential part of the rule of law. The rule of law provide equal justice for all persons of the society and in the case of Sri S. P. Gupta v. Union of India, AIR 1980 SC 1579, the Court held that any member of the public having sufficient interest can approach the Court for enforcement of constitutional rights of other persons.

Of course, a care has to be taken in public interest litigation that the challenge should not be by a merely busy body and it should not be a claim for personal gain. With the multifarious functions of the State, the responsibility of the courts is increasing day by day. The role of Parliament and the Legislature in the State is to frame law, the confer power on the executive to carry out the laws effectively. The right of Government is not confined only to the implementation of the Acts and the laws, but they are also dealing with the matters like granting of largesse licences and award of contract etc. The consistent view of the Supreme Court has been that the discretion has to be exercised by the authority concerned in the reasonable manner and within the bounds of law and not on the whim and caprice of any individual.

In the case of Common Cause, A Registered Society v. Union of India and others, Judgement Today, 1999 Vol. 5 SC 237, The Apex Court held that under Article 226 of the Constitution, the High Court has jurisdiction to issue appropriate writs in the nature of Mandamus, Certiorari. Prohibition, Quo Warranto and Habeas Corpus for enforcement of fundamental rights or for any other purpose. Thus the High Court has jurisdiction not only to issue orders for enforcement of fundamental rights but also for any other purpose which would include the enforcement of public duties by public bodies. So also, the Supreme Court under Article 32 has jurisdiction to issue prerogative writs for enforcement of fundamental rights guaranteed to a citizen under the Constitution.

"..... Every action of the Government or other public bodies including instrumentalities of the Government or those which can be legally treated as 'Authority' within the meaning of Article 12, if arbitrary, unreasonable or contrary to law, is now amenable to the writ jurisdiction of this court under Article 32 or the High Courts under Article 226 and can be validly scrutinized on the touchstone of the constitutional mandate."

In this case the Supreme Court was considering the review petition in respect of the order passed by Supreme Court where the concerned Minister was directed to deposit certain amount and certain directions were also issued to initiate criminal proceedings against him for misusing his discretion in the matter of allotment of petrol outlets. The Supreme Court while setting aside the order observed that the conduct of the petitioner making allotment of petrol outlets was atrocious, specially those made in favour of the Members, Oil Selection Board or their son etc. and reflect a wanton exercise of power damages or to lodge prosecution against the petitioner, as the conduct of the petitioner though was wholly unjustified, it fell short of "misfeasance in public office". The Judgement sets an example of judicial review with judicial essence which lays down the foundation of judicial discipline.

"At same stage, particularly between the 1920s and 1960s, it was thought that prerogative orders of Certiorari, Prohibition and Mandamus only lay against persons or bodies with judicial or quasi-judicial functions and did not apply to an authority exercising administrative powers. But this distinction between judicial and administrative activities was obliterated by the decision of the House of Lords in Ridge v. Baldwin 1964 AC 40 = 1963 (2) All. ER 66. The effect of the decision is that the judicial review lies not only against an inferior Court or Tribunal, but also against persons or bodies which perform public duties or functions."

Even in the field of service law, if authority has not exercised discretion judicially or it is based on wrong principle of law which otherwise is arbitrary, the Court has power to intervene. In the case of Rameshwar Prasad v. Managing Director, U. P. Rajkiya Nirman Nigam, J.T. 1999 SC 44, while considering the grievance of the petitioner, who was deputationist, regarding refusal of his absorption in the service, the Apex Court observed:

> **"in our view it is true that whether the deputationist should be absorbed in the service or not is a policy matter, but at the same time, once the policy is accepted and rules are framed for such absorption before rejecting the application, there must be justifiable reasons. Respondent No. 1 cannot act arbitrarily by picking and choosing the deputationist for absorption. The power of absorption, no doubt, is discretionary, but is coupled with the duty, not to act arbitrarily, or at whims or caprice of any individual."**

The Courts while judicially scrutinising the exercise of any discretionary power should have justice oriented approach. ***"Justice-oriented approach cannot be decried in the present-day society as opposed to strict rigours of law: law courts' existence is dependent upon the present-day social approach and thus cannot and ought not to be administered on sheer technicalities."*** [11]

The discretion, therefore, is never absolute and it is not only a power but it is coupled with the duty within the obligation of Act, within the framework of law, within the bounds of its authorities to sub-serve the good of the people for which it has been exercised not being guided by fanciful, whims, caprice but on a rationale, reasonable and legal basis.

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[11] N. Kamalam v. Ayyasamy, (2001) 7 SCC 503

CYBER LAWS I.P.R. AND I.T. ACT

Justice Yatindra Singh
Judge, Allahabad High Court

1. New inventions, discoveries and technologies not only widen scientific horizon but also pose new challenges for the legal world. Information Technology—brought about by Computers, Internet, and Cyberspace—has also posed new problems in jurisprudence. It has shown inadequacy of law while dealing with the—

(i) information technology itself;

(ii) changes induced by the information technology in the way we live, perceive and do business.

The Courts throughout the world have been dealing with these problems and coming up with inconsistent answers. Sometimes these problems have arisen in separate tight compartments mentioned above; some times in combination with each other. These problems have arisen in almost areas of law. The law (statutory or otherwise) providing answers to these problems or dealing with the Information Technology is often loosely referred to as the 'Computer Laws' or 'Information Technology Laws' or 'Cyber Laws'.

INTELLECTUAL PROPERTY

2. *'What is worth copying is prima facie worth protecting'* [1] is the genesis for the intellectual property rights. They refer to the property that is creation of the mind: inventions, literary and artistic works, symbols, names, images, and designs used in commerce. It is broadly divided into two categories:

- Copyright, which includes literary and artistic works such as novels, poems and plays, films, musical works, drawings, paintings, photographs, sculptures, and architectural designs.
- Industrial property, which includes inventions (patents), trademarks, industrial designs, and geographic indications of source.

[1] The portion in italics is from the judgement of Paterson J in University of London vs. University of Tutorial Process Ltd. 1916(2) Ch 601)

3. In India Intellectual property is protected under five different Acts namely The Copyright Act 1957, The Patents Act 1970, The Trade Marks Act 1999, The Design Act 1911, and The Geographical Indications of Goods (Registration and Protection) Act 1999. There is another area of intellectual property known as 'trade secret' but as the name suggests it is a secret formula or process known to certain individuals that is not registered under any Intellectual property law. It does not prohibit any one else to find it out or develop it who did not know the secret. Nevertheless an employee who has gained knowledge may be prohibited in using it on the ground of breach of confidence, or trust. This is still part of common law and is so protected under Section 16 of the Copyright Act. Among different areas of intellectual property three, namely Copyright, Patent and trademarks, are affected by the Information Technology and I will briefly discuss them, but first let's understand the functioning of a computer software.

COMPUTER PROGRAM AND COPYRIGHT

Source Code, and Object Code

4. Computers do not understand our language. They only understand 'machine language' or 'machine code' i.e. instructions which consist of a series of 0s and 1s. A suitably trained or skilled programmer can write a program in machine code for a computer. But the process is slow and tedious and the program, although intelligible to the computer, will be virtually unintelligible to anyone except an equally skilled programmer. From the early days of computers, an alternative language for writing programs, known as 'assembler language, was devised. While assembler language had advantages over machine code it still required many instructions to be written in order to achieve the simplest tasks. A number of high-level languages—such as Basic, Fortran, Cobol, Pascal etc has been devised in order to simplify the work of the programmer. The use of these high level languages enables the programmer to write a program in terms, which nearly resemble ordinary English than those used in lower level languages. They also permit complex operations for the computer to be directed by a relatively compact command. The programs as written by the programmer are known as the source code.

When an assembler or a compiler converts it into machine code, it is known as the object code. This conversion is one way. It is not possible to convert object code into source code.

5. World Intellectual Property Organisation (WIPO) recommended in late 1970 that computer software (object code and subject code) should be protected under the Copyright Acts. The question whether both are so protected or not, has troubled the courts from 1970's and has been answered by the courts differently. Australian High Court in 1986[2] held that the subject Code is a literary work and is protected as a copyright. But no such protection was given to the object code. The majority held,

> 'I have not found anything ... that has persuaded me that [the object code] a sequence of electrical impulses in a silicon chip not capable itself of communicating anything directly to a human recipient, and designed only to operate a computer, is itself a literary work, or is the translation of a literary work within the Copyright Act.'

Here the law was inadequate to deal with the information technology.

Amendments in the Copyright Act

6. The Indian response was to amend the Copy-right Act by two amending Acts namely Act no. 38 of 1994 and Act no. 49 of 1999. By these amending Acts some new sub-Sections to Section 2, namely the interpretation clause, were added and Section 2(o) of the Copyright Act was amended to change the definition of the word 'literary work'. It now includes computer programme as well as computer database. The result is that not only the computer programmes (subject code as well as object code) are protected but computer database is also protected as a copyright. In India infringement of a copyright is a penal offence and civil remedies (injunction damages etc.) are also available. By the two amending Acts consequential amendments were also made in other Sections to make enforcement more realistic. But copyright is a weak protection in comparison to Patent right, which we will consider next.

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[2] Gibbs J. in Computer Edge Pty Ltd vs. Apple Computer Inc (1986) 161 CLR 171. Full text is also available in database of judgements of the High Court of Australia at http://www.hcourt.gov.au/)

COMPUTER PROGRAM AND PATENT

7. Patent laws like copyright laws differ from country to country. But generally patents may be granted for inventions (process or end product) that are new and useful: it should not be obvious or frivolous. If a patent is for a process for a known result then any other person may take out patent for another process for arriving at the same result. But if it is for the end result and describes a process then the patent is entitled to protection against other process for arriving at the same result. In India, unlike Copyright, only civil remedies of injunction and damages are available for infringement of a patent.

8. Section 3 of the Indian Patent Act explains what are not inventions. There is no such limitation in the US law as the Congress intended to include anything under the sun that is made by man but US Supreme Court in Diamond Vs Chakarbarty (447US 303=65 L Ed 2d 144) held,

> 'This is not to suggest that ... [law] has no limits or that it embraces every discovery. The laws of nature physical phenomena, and abstract ideas have been held not patentable. Thus a new mineral discovered in the earth or a new plant found in the wild is not patentable subject matter. Likewise, Einstein could not patent his celebrated law that $E=mc^2$; nor could Newton have patented the law of gravity. Such discoveries are manifestation if nature free to all men and reserved exclusively to none.'

The US Supreme Court in Parkar Vs Flook (437 US 584=57 L Ed 2d 451) also held that a method for updating alarm limits during catalytic conversion which is a mathematical formula, is not patentable.

9. Patent Acts India or in the US neither specifically refer to programs for computers nor to the business methods. The US Supreme Court in Gottschalk Vs Benson (409 US 63=34 L Ed 2d 273) held that a method for programming any type of general purpose digital computer to convert binary-coded-decimal numerals into pure binary numerals—not being limited to any art or technology or to any particular machinery or to particular end use—is not a process,

capable of being patented: algorithm itself can not be patented. The result is that Computer software may not be patented in its own right but what would be the position if it were a part of an industrial or business process.

Industrial Process

10. Diamond v Diehr {(1981) 450 US 175= 67 Led 2d 155} (the Diehr case) was a case involving a process for curing rubber that included a computer program. The court by five to four decision held that a patentable claim does not become unpatentable merely it uses a mathematical formula, computer programme, or a computer. In short, a computer program may not be patentable as such but may be patentable as a part of an industrial process.

Business Methods

11. Traditionally, the only kinds of processes that could be patented were those concerned with technology. Article 27(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) also states that 'patents shall be available for any inventions whether products or processes in all fields of technology'. Many other activities including business methods, or data analysis which one would consider processes were excluded from patents. But since the Diehr case there has been shift in US. The US Patent and Trade Office (USPTO) took a policy decision and deleted its earlier policy in its Manual of Patent Examining Procedures {Paragraph 706.03(a)} which read as

> Though seemingly within the category of process or method, a method of doing business can be rejected as not being within the statutory classes. See Hotel Security Checking Co. v. Lorraine Co., 160 F. 467 (2nd Cir. 1908) and In re Wait, 24 USPQ 88, 22 CCPA 822 (1934).

And added new paragraph {706.03(a)}

> Office personnel have had difficulty in properly treating claims directed to methods of doing business. Claims should

not be categorized as methods of doing business. Instead such claims should be treated like any other process claims.

This was noticed by court of appeal in US in State Street Bank vs Signature financial group (the state steel case)[3] and the court held that

> 'Whether the claims are [patentable or not] should not turn on whether the claimed subject matter does "business" instead of something else.'

The court also held that,

> 'To be patentable an algorithm must be applied in a "useful" way.
>
> ...
>
> We hold that the transformation of data, representing discrete dollar amounts, by a machine through a series of mathematical calculations into a final share price, constitutes a practical application of a mathematical algorithm, formula, or calculation, because it produces a useful, concrete and tangible result'

12 Today, USPTO has one chapter on Patent Business Methods and is granting patents to software techniques for business methods and data analysis if they are useful. Australia and Japan has also followed the suit. Some examples of patents of business methods are: single click to order goods in an on-line transaction; an on-line system of accounting; on-line rewards incentive system; on-line frequent buyer programme; and programmes letting customers setting their own prices for hotel booking etc.

13. The EUROPEAN PATENT CONVENTION 1973 specifically says that 'schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers' will not be regarded as inventions {Article 52(2)(c)}. This is also the law of European countries (members of the European Patent Convention)

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[3] 149 F.3d 1352 http://www.ll.georgetown.edu/Fed-Ct/Circuit/fed/opinions/97-1327.html

and computer programs and business methods cannot be patented there. However, in practice, the approach has changed. The applications for patents are now considered if presented as producing technical effects (*ie* programme for speeding up image enhancement) rather than as claiming abstract programs or business methods. In many other countries, computer programs and business methods are not patentable. The law whether computer programmes are patentable per se or in conjunction of business methods is still in flux. It would be best to adopt uniform global approach.

FUTURE—COPYRIGHT

14. Copyright could be protected in the printed world. This is not true in the digital world. Increasingly, it is becoming difficult. It is true that copyright could be enforced in the Napster case but it may be short lived.

The Napster Case

15. Shawn Fanning (high school nickname Napster¾a reference to his nappy hair) wanted to share his music in the computer with his friends. He thought of developing software so that music in one computer could be exchanged with another. No other person thought it to be a good idea. He, still in his teens, left his college to create this software. Now Music in MP3 format can be transferred with help of Napster. In order to do it, one has to download it (provided free of cost on registration) and install it in the computer. This enables the computer to log on to the Napster server. When a request is made, the Napster server searches other users online who may have that music file. If there is one then Napster puts both computers directly in touch with each other so that music files can be downloaded. The Napster server merely puts computers directly in touch with each other but the copyrighted music does not go through its server i.e. it does not receive or contain illegal music at any time. It merely permits transfer of music files (MP3 format) from one PC¾or peer¾to another (P2P). At present there are about 25 million Napster users. The result is that one can download music files, which may be copyright of others free of cost.

16. Several record companies filed a suit against Napster restraining it from engaging in or assisting others in copying, downloading, uploading, transmitting or distributing copyrighted music without the express permission of its rightful owner. According to Napster it is merely a space-shift similar to time-shift in the Sony Corporation case[4] and it seeks expansion of 'fair use' doctrine articulated in that case. The District court of Northern district of California has granted a preliminary injunction against Napster from engaging or facilitating for copying, downloading, transmitting or distributing plaintiffs' copyrighted musical compositions.[5] However, the appellate court has stayed the preliminary injunction granted by the District Court. Napster during appeal has settled the case with most of the companies and has agreed to pay a fee. It may charge money from users now.

17. Napster could be easily restrained as it has an office and everyone wishing to download a file has to go through the Napster server. But it would be difficult in case of newer software 'Gnutella' which is still in development stage. It neither has any office, nor any server. One merely has to install it on a computer and send a message to another computer online that in turn forwards it to other computers online. This goes on till one finds a computer that has the required

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[4] Sony Corporation had made VCRs that could record TV programmes. This has changed the way we watch TV. One can, with the help of a VCR, record programmes, which may be copyrights of others and see it at the later time. Owners of copyrights on television programmes sued Sony Corporation alleging that:

- Individuals have used the VCRs to record some of the owners' copyrighted works on the TV.
- These individuals had infringed the copyrights and
- Sony Corporation was liable for such infringement because of their sale of the VCRs.

The US Supreme Court dismissed the suit and in Sony Corporation vs. Universal City Studios 464 US 417 held that:

- The time shift for watching the TV programme for private viewing was fair use and it does not infringe copyright.
- A manufacturer is not liable for selling a staple article of commerce that is capable of commercially significant non-infringing uses.

[5] Full text of judgement is available at http ://news.cnet.com /News/Pages/Special / Napster/napster-patel.html.

file. Then Gnutella directly connects these two computers and file can be downloaded. It is not restricted to MP3 format: it works on all kinds of files. The other similar software 'Freenet' is also in the pipeline. It would be difficult to ban it as

- There isn't any central server,
- It is decentralised, and
- Gnutella files looks like ordinary web traffic.

It is going to be difficult to stop file sharing over the Internet. New concepts or new strategy may have to be thought about.

LINKING

18. A Web page is constructed using Hypertext Markup Language (HTML), a basic text coding technique, which provides display instructions to a Web browser program viewing the file, which generates the particular Web page. One of the characteristics of web page is that one can go from one web page to another through a hyper link provided in a web page. It is a piece of text that is differentiated from regular text by a special colour (usually blue) or special formatting (such as underlining), By clicking a mouse or other pointing device on a hyperlink, one can view the contents or go to another Web page referenced by the hyperlink. This "jump" to another Web page is the essence of the Web. Linking enables a Web surfer to connect to other Web pages and retrieve information within seconds. It is because of the extensive use of those interconnections between Web pages that the medium is termed a 'web'. The first page of a site is called Home page, which often contains menu to go to different information available on that site. If the hyper like is to home page, it is called liking and if it is to a page inside a Home page, it is called deep linking.

19. Despite dearth of court decisions and injunction granted (later compromised) by English court in Shetland times vs Dr. Jonethan wkills and Zetnews Ltd. linking may not amount to copyright infringement. Publication of a site on the World Wide Web is almost universally regarded as tantamount to an implied licence to link by any other site. Linking to a site without obtaining prior permission is not only an unquestioned practice, but is even considered to be an

advantage to the linked-to site. Advertising is primary source of revenue for web site operators and Advertisers pay according to the number of hits or number of time a site is visited.

20. But this may not be said for another type of link known as the "image" (or IMG) link; it makes use of "in-lined" images. In-lined images are graphics that are visible on screen as part of a Web document's main body (as opposed to being within a separate window), but which originate at a source other than the site that stores the document being viewed. These images (minus the text contents) can be in-lined by any other site. Then it may appear as part of the other the web page. If there is a copyright or trademark in that graphic then difficulties will arise.

Framing

21. Matesite is a site that uses another tool called 'Framing'. This tool provides a means for dividing a Web site into separate windows: each window is displayed in a separate portion of the Web browser screen and functions independently to display an individual Web page. This is done by providing links to other sites. A user can view another site's content within a small area of the initial metasite, without actually leaving the metasite. Framing is similar to an IMG link, but unlike IMG links that views graphics only, frames allow entire site to be viewed on the metasite. This may have to following effects:

- One can see framed site but the browser's computer does not change the address. It continues to display the address of the metasite. This may confuse some casual Internet users.
- The ads appearing on a framed site must co-exist with the ads displayed on the borders of the original metasite: changing the visual impact of the ads on the framed site.
- It changes the way the framed site intended it materials to appear. This may involve copyright violation.
- There may be trade mark violation of the framed site as it is shown on the site of the metasite

The law is yet to be settled in this regard. But should a party rush to a court of law for linking or framing is another question as there are

cheaper technological means to stop them. And if a party fails to adopt them then court may consider against them while awarding damages.

METATAGS

22. Information is retrieved on the Internet with the help of search engines. They locate Web sites that match user's particular interest. It is done by typing a keyword query into the search engine, and the program searches its database and returns a list of results. The results returned by search engine programs are a list of hyperlinks to related Web pages. In finding out relevant Web pages, search engines make use of meta-tag keywords that consists of text coding, which is hidden from normal view. They are located within a specially designated portion of the HTML code, which generates the Web page. A metatag helps in finding out relevant web page. One can improperly use trademark of others as a metatag to associate himself with the others. This may result in trademark violation.

23. These site providing search earn revenues by ads. These ads keep on changing and often appear when particular topic is searched. If one wants to have information about a product by typing trade name on to the search engine, then the result may be hyper link to the home page or other information of about that product. But at this time search engine may show ads of a competition. This is because it is so arranged by the site running the search. It is a kind of selling of metatags or improper use of trademark by the site running the search. Courts still have to decide on legality of these issues.

TRADEMARK: DOMAIN NAME DISPUTE

24. A computer that is more-or-less permanently attached to the Internet is sometimes referred to as a 'host'. To facilitate communication between hosts, each host has a unique address: a complicated string of numbers. It comprises of four groups of numbers separated by decimals. It is called 'Internet Protocol Address' (IP address). But it is hard to remember everyone's IP address. The Domain Name System (DNS) makes it easier by allowing a familiar string of letters (domain name) to be used instead

of the arcane IP address. It is a mnemonic device that makes addresses easier to remember. Thus corresponding to IP address, each host also has a unique fully qualified domain name, which is more commonly referred to as the host's URL ie URL of Videsh Sanchar Nigam Limited (VSNL) is 'http://www.vsnl.com'.

25. The first element of a URL is called the "transfer protocol." On the World Wide Web, this is almost invariably 'http,' which stands for hypertext transfer protocol. The remaining elements of the VSNL site's URL (the 'www.vsnl.com' part of the URL) is a user-friendly version of the numeric IP address for the VSNL. The last three alphabets on the right side (.com in this example) are called the 'top-level domain' (TLD). It stands for commercial. There can be other TLDs like '.edu' reserved for educational institutions, '.gov' is the TLD reserved for government entities, and '.net' is the top-level domain reserved to networks. Is use of a domain name that is trademark or popular name of other illegal?

26. The question whether one can use trade name of other as domain name has arisen in India and the Delhi High Court (Yahoo!,Inc. vs. Akash Arora, 1999 Delhi Law Times 285) and Bombay High Court (Rediff Communication Limited vs. Cyberbooth, 2000 AIR Bombay 27) have taken the view that the domain name serves same function as the trademark and is not a mere address or like finding number on the Internet and, therefore, it is entitled to equal protection as trademark. They have granted injunctions restraining the defendants from using names similar to plaintiffs' trade names as their domain names.

27. The other question whether there can be trade mark in respect of services may not arise in future as the Trade Mark Act 1999 now specifically incorporate 'services' {Section 2(zb)}. It was not there in the Trade Merchandise Mark Act, 1958. The other important change is wider and detailed provision defining what constitutes infringement (Section 29 and 30). In India for infringement of trademark (like that of copyright) is a penal offence and civil remedies of injunction and damages are also available.

Uniform Dispute Resolution Policy

28. At present, Internet Corporation for Assigned Names and Numbers (ICANN) is responsible for managing and coordinating the DNS to ensure that it continues to function effectively – by overseeing the distribution of unique numeric IP addresses and domain names. ICANN has introduced seven new extensions namely .aero, .biz, .coop, .info, .museum, .name, .pro. Some countries also market their two-letter country code Top Level Domains (ccTLD), designated years ago to reserved a plot in cyberspace for each nation, for use by businesses or consumers. TLDs are managed by a company or organization under contract with ICANN. The company that manages each domain, called a registry. But the registries do not sell domain names to the public, that task is handled by other accredited companies, called registrars. They collect fees for each name and pay a portion to the registry.

29. ICANN has provided a procedure to resolve domain name dispute. It has come out with a Uniform Dispute Resolution Policy (UDRP). It is applicable to TLDs .Com; .Net; .Org; and seven new TLDs proposed by ICANN. It is also applicable to those ccTLDs who have accepted UDRP. This policy is incorporated in all agreements with the registrars and all persons who have obtained domain names. It sets out a legal framework for the resolution of dispute between a domain name registrant and a third party (ie a party other than registrar) over the abusive, registration and use, of internal domain name. In case of any complaint the dispute is compulsorily referred to a service provider but decision by them is not final and aggrieved person can go to a court of law.

E-COMMERCE

30. Many areas—though not all—where Information Technology has impact have been sought to be remedied by the Information Technology Act (IT Act). But before we consider them, few words about e-commerce,

31. A document fulfils many functions but main among them, so far as business is concerned, are two:

1. It can be used as evidence.

2. It has symbolic function to show ownership i.e. Railways receipt or bill of lading.

A singed document amongst the others can be used for—

(1) identifying the source of the document

(2) confirming the information;

(3) constituting the proof of signatory's responsibility to the correctness of the information.

32. Information Technology has brought a change. The business is now being done electronically—without use of paper. The advantage of a signed document to a large extent has been sorted out by the information technology by using Electronic Data Interchange (EDI), which is computer-to-computer transmission of business data in a standard format and is more secure than e-mail. The result is that in business communication, paper is replaced with structured electronic messages.

33. The signature function in an electronic document is performed by a procedure known as digital signature. The digital signature has two keys; one a private key that is known only to the person concerned and second a public key to check the private key. In this way, a signed message can be sent safely without being tampered. Contracts now can be executed electronically.

34 There are problems so far as symbolic functions are concerned new ways to sort them out are being proposed but they have a long way to go. The I.T. Act also does not apply to a negotiable instrument, a power of attorney, a trust, or a will, to a contract for sale or conveyance of immovable property or interest in such property {Section 1 (b)}.

35. The changes brought about by the information technology while doing business cannot be utilised unless legal recognition is accorded to electronic documents, digital signatures and sufficient security measures are adopted for their correctness. The United Nations Commission on International Trade Law (UNCITRAL) adopted the Model Law on Electronic Commerce in 1996. The General Assembly of United Nations by its Resolution No. 51/162

dated 30th January 1997 recommended that all States should give favourable considerations to the said Model Law when they enact or revise their laws. The Model Law provides for equal legal treatment of users of electronic communication and paper based communication. So does the IT Act, which is enacted in response to the UNCITRAL resolution.

36. The IT Act tries to sort out many problems of the cyberspace. This is done by two ways: firstly by enacting IT Act; secondly by making suitable amendments in the Indian Penal Code 1860, the Indian Evidence Act 1872, the Bankers' Books Evidence Act, 1891, and the Reserve Bank of India Act, 1934. These provisions give legal sanction to digital signature, electronic records, sort out questions of jurisdiction, evidential issues, security measure, and sanction against obscenity.

37. The IT Act amends Reserve Bank of India Act 1934 and adds clause (pp) to Section 58. The newly added sub-Section empowers the Central Government to frame regulations:

- regulating the fund transfer through electronic means between the banks and other financial institution;
- laying down the conditions subject to which they will participate;
- laying down the manner of such fund transfer;
- providing right and obligations of the participation in such transfer.

Digital Signature—electronic governance

38. The IT Act gives legal sanction to digital signatures (Section 5) and electronic record may be authenticated by means of affixing the digital signature (Section 3). These Sections also provide a procedure. Electronic record is to be converted into another one using 'asymmetric crypto system' and 'hash' function (explained in the IT Act) then incorporating digital signature by the private key unique to that person. Anyone having public key corresponding to the private key can verify this authentication. Chapter III of the IT Act brings about an era of electronic governance. In short this Chapter says that all records where the requirement is to be in writing or in the typewritten or printed form can now be satisfied if it is made in the

electronic form. This Chapter also permits publications of the rules and the regulations in the electronic form. The applications and forms may be accepted electronically.

Jurisdictional Issues

39. Chapter IV of the IT Act deals with attribution, acknowledgement and despatch of electronic Records. They will assist the courts in sorting out problems of jurisdiction in case of breach of contract lest a dispute goes to a court of law.

SECURITY CONCERNS

40. Chapter VI of the IT Act deals appointment of controller and grant of licence to certifying authority who in turn is authorised to issue digital signature certificate. Chapter VII of the IT Act details modalities of issuing Digital Signature Certificate. The Controller is repository of all digital signatures (Section 20). He supervises certifying authorities under the Act and has to lay down standards to be maintained certifying authorities (Section 18). He himself has to maintain standard which are secure from intrusion and misuse (Section 20). Certifying authorities also have to maintain standards, which are secure from intrusion and misused (Section 30).

Deterrent Provisions

41. Before discussing deterrent provisions, let's consider the problems faced by English courts. One Prestel systems provided free e-mail facilities and access to its database to its subscribers. Gold and Schifreen (accused) were hackers and entered its database by hacking its computer. They were caught and prosecuted in England under the Act under which they could be possibly prosecuted namely Forgery and Counterfeiting Act 1981. An instrument was necessary to commit the offence under the Act. They were convicted but the court of Appeal (as well as House of Lords) acquitted them. They held that:

- Any instrument for the purposes of this Act had to be similar as other examples in the statutory definition, which were physical objects;
- The electrical impulse in question were only transient, this did not correspond well with the idea of the creation of an instrument.

- The charge was inapplicable due to nature of the offence as the password used was not false, it was genuine, and there was just no entitlement to use it.

The Court of Appeal mentioned,

'The conduct [of the accused] amounted in essence to dishonestly gaining access to the relevant Prestel data bank by a trick. This is not a criminal offence. If it is thought desirable to make it so that is a matter for the legislature rather than the courts.'[6]

42. Law Commission in England recommended that hacking be made penal. It says

> 'The main argument in favour of hacking offence does not turn on the protection of information but rather springs from the need to protect the integrity and security of computer system from attacks from unauthorised persons seeking to enter those systems, whatever may be their intention or motive.'

The Commission proposed,

> 'The first a broad offence that seeks to deter the general practice of hacking by imposing penalties of moderate nature on all types of unauthorised access; and the second a narrower but more serious offence, imposes much heavier penalties.'

The IT Act has in principle agreed with it and has tried to achieve this by two ways by providing civil and penal consequences for hacking and other wrongful activities.

Civil Consequences

43. The IT Act prescribes penalty against a person who without permission of the owner access, or downloads or introduces virus or causes any damage, or disrupts, or denies access to an authorised person to any computer, computer system or computer network or charges services to the account of any other person. The penalty is to be paid to person affected. It can extend to one crore rupees (Section 43). The quantification of damage is not left to the civil courts but has been entrusted to an adjudicating officer having experience in the field of Information technology (Section 46). The guiding factors for

[6] R vs. Gold (1987(3) All E R 680 affirmed by House of Lords in 1988(2) All E R 186.

quantification of damage is, amount of gain of unfair advantage; amount of loss; and the repetitive nature of the default (Section 47). An appeal lies to the Cyber Regulation Appellate Tribunal against the order of the adjudicating officer or of the controller (Section 57). A further appeal lies on question of fact or on law to the High Court (Section 62).

Criminal Law: Penal Liability

44. Criminal liability is dealt in Chapter XI of the IT Act. Tampering with computer source document (Section 65) and Hacking with computer system (Section 66) are offences punishable with imprisonment which may extend to three years or fine which may extend up to two lakh rupees or both. Securing access to a protected system is punishable with imprisonment, which may extend to ten years (Section 70). The IT Act also provides penalty for breach of confidentiality and privacy of the information received by a person in pursuance of any of the powers conferred under this Act (Section 72). There is penalty, for publishing false Digital signature Certificate false (Section 73); and for creating, publishing, and otherwise making a digital signature certificate for fraudulent or unlawful purpose (Section 74). An offender may be imprisoned for a term, which may extend to two years or fine, which may extend to one lakh rupees. Computers, floppies, compact disks or others accessories in respect of which the IT Act or the Rules or the orders thereunder have been contravened are liable to be confiscated. The punishment and confiscation under the IT Act does not interfere with any other punishment to which a person may be liable (say punishment under Copyright Act or the punishment under Indian Penal Code).

Extra Territorial Application

45. The Act has extra territorial jurisdiction. Hackers or persons causing damage to the computers, computer system or computer network located in India are also liable to be punished irrespective of their nationality or place of committing offence (Section 75).

46. The IT Act also amends Indian Penal Code. The word document now includes an electronic record. The result is that any

one using the forged electronic record is punishable under the Indian Penal Code, as he would be of using a forged document.

EVIDENTIAL ISSUES: ADMISSIBILITY IN COURT PROCEEDINGS

47. Is a computer print out admissible in a court of law? Let's see what English courts have done on this score. One Pettigrew[7] was accused for committing burglary and for handling stolen goods. He was also found with new notes that had come from a bundle of notes, which were stolen. The prosecution produced a computer print out from the bank of England, which tended to prove that bank note found in the accused possession came from the bundle, which was stolen in the burglary with which the accused was charged. The court of appeal did not admit these computer printouts on the ground that no witness could claim first hand knowledge of the various contents and they must be hearsay. The accused was set free.[8]

48. The IT Act takes care of such situation. It makes necessary amendments in the Indian Evidence Act, 1872, and the Bankers' Books Evidence Act, 1891. These amendments have been made in order that electronic record, digital signature and the computer print out may be proved and admitted in courts of law. Of course, this can be done only if conditions mentioned in the amended Sections are satisfied.

MORALITY: FREEDOM OF EXPRESSION

49. It is often said that if your child is spending too much time alone on a computer then one should be careful. The reason is that the content in the cyberspace is as diverse as human thought. It also contains information and material, which is obscene. An impressionable one can be misled or lured by others. The US in order to curtail it enacted the Communications Decency Act of 1996 (CDA). Section 223(a)(1)(B)(ii) of the CDA criminalized the

[7] R vs. Pettigrew (1980) 71 Crl A R 39

[8] The other case is Myers vs. Director of Public Prosecutions 1964(2) AllER 881=(1965) 1 AC 1001(HL). In this case the records were kept on the card index rather than on a computer (as would doubtless be the case today). These records were rejected on the principle of hearsay and accused was set free.

'knowing' transmission of 'obscene or indecent' messages to any recipient less than 18 years of age. Section 223(d) prohibited the knowingly sending or displaying to a person less than 18 years of age, any message that is patently offensive (sexual or excretory activities or organs) as measured by contemporary community standards.' Under the CDA it was valid defence, for those who——

- took in 'good faith, ... effective ... actions' to restrict access by minors to the prohibited communications {Section 223(e)(5) of the CDA} and
- restricted such access by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number {Section 223(e)(5)(B) of the CDA}.

50. The previously mentioned provisions of the CDA Act were challenged in the US. They were struck down by the District Court of Pennsylvania[9] holding:

> 'True it is that many find some of the speech on the Internet to be offensive and amid the din of cyberspace many hear discordant voices that they regard as indecent. The absence of governmental regulation of Internet contents has unquestionably produced a kind of chaos, but ... what achieved success was the very chaos that the Internet is. The strength of the Internet is that chaos.'

The US Supreme Court affirmed this.[10]

51. The US Government enacted another law known as the Child Online Protection Act (COPA) after the CDA was struck down. COPA is US government's second attempt to regulate the dissemination of indecent material to the minors on the Web/Internet. Under this Act, Commercial Web publishers are to ensure that minors do not access the harmful material on their Web site. COPA was also challenged in the US Courts in ACLU vs Reno II.[11] The District Court

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[9] ACLU vs. Reno This case was decided on 11.6.1996. Full text of the judgement is available at: http://WWW2.epic/org/cda/cda-dc-inion.html.

[10] ACLU vs. Reno 521 US 844.

[11] Full text of the judgement dated 22.6.2000 is available at: http://www.epic.org/free-speech/copa/ed-cir-opinion.html

as well as US Court of appeal for third circuit have granted preliminary injunction preventing COPA's enforcement.

52. The IT Act also tries to balance moral issues with freedom of expression. Publishing or transmitting obscene information in electronic forms is punishable and a person guilty is liable to be imprisoned which may extend to 5 years or fine, which may extend to one lakh rupees. This could be enhanced to ten years or rupees two lakh in case of second or subsequent conviction. The US Courts have invalidated some provisions of their Acts because of the first amendment to the US Constitution that provides unqualified right of freedom of expression but Indian Constitution permits reasonable restriction {(Article 19(2) of the Constitution)}. However, what the Indian Courts will do is to be seen. But there may be practical difficulties in enforcing it if the person who is publishing or transmitting information is in a country where it is not illegal as it is clear from the Yahoo case.

The Yahoo Case: Conflict of Laws

53. Yahoo is a site, which provides services. Amongst the services it displays Nazi materials and provides auction of Nazi insignia. Under the French law display of Nazi material or sale of Nazi-in-Signia is illegal. But French user can, not only see Nazi material but, also purchase Nazi insignia. A group in France filed a suit for injunction against Yahoo, which was allowed in November 2000 and the court ordered that Yahoo should find out a way to stop French users from seeing it and participating in auction or pay the fine. Yahoo banned the auction of Nazi items, though information was available. Yahoo simultaneously also filed a suit in US Court to declare French order un-enforceable because of violation of first amendment of US Constitution. In November 2001 a District Court ruled that US Constitution protects free speech and trumped the French Court order requiring Yahoo to remove Nazi material from its Web site. The result is that Yahoo may not be able to operate its office in France because of the order of the French Court but French users can access its sight as it can work in US and make its site available to them.

RIGHT OF PRIVACY

54. The right of privacy is part of Article 21 but it is not absolute. Disclosure of private information is justified under certain circumstances[12]. Nevertheless, right of privacy in the light of Information Technology may have to be dealt by the Courts or suitable legislation may have to be enacted. The right of privacy may be infringed by:

(i) utilising private data already collected for a purpose other than for which it was collected;
(ii) sending of unsolicited emails or spamming;
(iii) unauthorised reading of emails of others.

55. Computer data often contain personal information. It is automatically collected where sales are through credit cards and perhaps in future all sales will be through credit card. This is done for use for a particular purpose but this data may be used for any other purpose. This may breach with private rights of individuals who may like to keep their personal history with themselves. England had enacted Data Protect Act to solve this problem.

56. Unsolicited emails are menace. They should have provision to unsubscribe them or they may not be sent unless asked for. Many states in the US[13] have enacted laws against unsolicited mails known as spam laws. Perhaps with usage of e-commerce we might need similar laws.

CONCLUSION

57. Michael Lewis wrote a book in 1999 on success story of the Silicon Valley entitled 'The new new thing: a Silicon Valley story'. The most quoted line from this book is, *'The definitive smell inside a Silicon Valley start-up was of curry.'* Let's hope that—with better understanding of cyber problems, their solutions, and cyber laws—not only inside a Silicon Valley start-up but also the operating system of e-commerce and cyberspace will smell of curry.

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[12] Xvs. Hospital Z (1998) 8 SCC 296.
[13] A detail summary of these laws is available at http://spamlaws.com.

POVERTY AND LAW

Justice Sunil Ambwani
Judge, Allahabad High Court

Absolute equality is antithesis to 'equality before law' and 'equal protection of law', guaranteed under Article 14 of the Constitution. Even the strict constructionists of law accept that in some areas, in order to bring equality before law, the courts need to sensitize itself these areas include gender justice, justice to juvenile, persons suffering from mental health, disabilities etc. Poverty is one of such areas in law which requires to be addressed and that the courts of law need special attention to it.

'Poverty' is not defined in law. It has various connotations and aspects. The basic connotation of poverty is economic depravation. It js defined in Webster's New Collegiate Dictionary as the 'state of one who lacks a usual or socially acceptable amount of money of material possessions', with its synonyms as indigence, penury, want, destitution.'

Generally speaking when a person or a group of persons are unable to meet the basic requirements of life due to economic depravation, they are said to be suffering from poverty. We find the expression of poverty in Constitution of India, and laws relating to land reforms, slums development and also essential commodities Act. However, meaning of word 'poverty' differs from the object sought to be achieved by such legislation's.

Causes of poverty are attributable both to elements which are within the control of human beings, and those which are not within his control. The causes beyond the control of a person or a group of persons is either man made or by an act of God. Over population, illiteracy, government policies relating to economic or industrial growth, un-employment, economic depression, bad governance, war, internal disturbance, deforestation, dislocations due to dams and other projects are causes attributable to man or his agencies. The second generic cause is act of God, namely floods, earthquakes, drought, excessive rains, alluvial action of rivers, cyclones, hurricane etc. The self inflicted causes are excessive drinking, drugs, gambling and the

like. The object of finding, the causes of poverty is to determine the response of law to such classes of poverty. Judicial response to take actions for protection of Forests, environmental actions, and action in law to check liquor or drug menace; immediate action to maintain law and order and maintenance of peace in time or riots internal disturbances and also actions relating to civil and human rights, are direct or indirect responses to alleviate persons or check causes attributable to poverty.

'Poverty' is not defined in Constitution but as architect of independent nation, the Constitution makers were conscious of the economic under-development of the country, and made various provisions in the Constitution of India for upliftment of poor.

The preamble of the Constitution provides to secure to all its citizens, justice, social, economic and political. The preamble was amended by the Constitution (42nd Amendment) Act, 1976 by adding words "Sovereign Social Secular Democratic Republic". The aim of a social State is to eliminate in-equality in income, and status and standards of life. The basic frame work of socialism is to provide a decent standard of life to the working people and specially security from cradle to grave. This amongst others on economic side envisages economic equality and equitable distribution of income. This is the blend of Marxism and Gandhism, leaning heavily towards Gandhian-Socialism.

In the **Directive Principles of State Policy,** we find the foresight of constituent assembly with regard to State Policy for legislation for poor persons in Article 38, 39, 39-A, 41, 43 and 47.

Article 38, conceives that State shall strive to promote the welfare of people by securing and protecting social order on which justice, social, economic and political shall inform all institutions of the national life to minimize inequalities in income and to endeavour to eliminate inequalities in status, facilities and opportunities to, individual and group of people.

Article 39, provides for principles of policy to be followed by the State. Out of these clause (a), (b) and (c) have relevance for poverty. These provide:

(a) That the citizens, man and woman equally have the right to have adequate means of livelihood.

(a) That the ownership and control of the material resources of the community are so distributed, as best to sub-serve the common good; and

(b) That the operation of economic system does not result in the concentration of wealth and means of production to the common detriment.

Article 39 is most important for the subject. It provides for equal justice and free legal aid and mandates that State shall secure the operation of legal system, promote justice on a basis of equal opportunity and shall, in particular provide free legal aid, by suitable legislation or schemes, or in any other way to ensure that opportunity for securing justice are not denied to any citizen by reason of economic or other disabilities.

Article 41 guarantees rights to work, right to education and right to public assistance in cases of unemployment, old age, sickness and disablement, and in cases of undeserved want, within the limit of economic capacity of the State. **Article 43** provides that justice shall endeavour to secure, by suitable legislation to all workers, agricultural, industrial or otherwise work, a living wage, conditions of work, ensuring the descent standard of life and full enjoyment of leisure and social and cultural opportunities. The last of these articles relating to poverty is **Article 47,** which binds the State under a duty to arise the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties.

Coming to the Fundamental Rights, whereas Article 14 strives to remove arbitrariness in every State activity by guaranteeing equality before law and equal protection of law, Article 23 prohibits **traffic in human being and forced labour.** The words 'equality before law' or 'equal protection of law' under Article 14 have been given a very wide dynamic and positivist meaning. It include equality in justice. There can not be equality in law between a person stricken by poverty, and a person who has adequate and sufficient means of life. Putting these two on a scale justice would amount to denying equality to the poor. An affirmative action must be provided to those who are poor, to make this equality, operate as real equality, and for this purpose the State has made many laws. The judiciary must strive to make them meaningful.

The Constitution was amended by the **Constitution (73rd Amendment) Act, 1992.** Amended Part-IX strengthens the Panchayats and Part-IXA municipalities providing for giving more powers of self governance to local bodies. It is here for the first time that the word 'poverty' found its way into Constitution of India in 1992. Article 243-G provides for powers, authority or responsibilities of panchayats in respect of matter in XI scheduled. Item-16 of Schedule IX provides for **"poverty alleviation programmes".** The Panchayats have thus been provided with powers to prepare plans for economic development and social justice and to implement them with reference to poverty alleviation. Similarly, Article 243-W inserted by the same amendment provided for giving more powers to municipalities for self governance and here in Schedule-XII of the Constitution at item –11, we again find the word 'urban poverty alleviation'.

Coming to **Civil Procedure Code,** poverty has been recognized with reference to the ability of the person to pay court fee under Order 33 Rule 1, 2 and 3 for filing suits by indigent persons. Indigent person has been defined to means who does not possess suitable means to pay court fees, and where no court fee is provided, if he possess property less than Rs.1000/-. There is a detailed procedure for filing suits in forma pauperise, examination and inquiry of such application, the contents of which must provide and verify the details of any moveable or immovable assets. The application in such cases can only be presented in person. An initial inquiry has to be made by the ministerial officer of the court, and thereafter by the court. Grounds for rejection of such application are given in the rules. Similar provisions are applicable to appeals under Order 44 Rules 1, 2 and 3.

So far as **criminal law** is concerned, some of the provisions in Indian Penal Code can be related to the poverty. After convicting a person, while sentencing him, a discretion is given to award sentence between minimum and maximum provided in the sentencing sections of the Indian Penal Code and for provision of fine. The sentence within these two depends upon the discretion of the Magistrate or the Judge depending upon the gravity of offence and the deterrent or reformative aspects of the punishment. The question whether the poverty should be one of the grounds for awarding sentence is a

debatable question, however, poverty cannot be lost sight while deciding bail applications and awarding sentence to the convicted persons. Section 63 provides that when a fine is to be imposed and that to some extent, to which a fine may be imposed, the amount of fine to which the offender is liable is unlimited shall not be excessive. The word 'shall not be excessive' bring into account both the punishment as well as the aspect of the capacity to pay which by itself includes poverty as one of the grounds. Section 125 Cr. P. C. checks destitution.

Section 304 Cr. P. C. provides for legal aid to accused at the state expenses in certain cases. It says where the accused is not represented by a pleader and it appears to the court that the accused has no sufficient means to engage a pleader, the court shall assign pleader for his defence. Sub-section (2) in the same section provide that High Court with previous approval of the State Government may make rules providing for mode of selecting pleading facilities if allowed to such pleaders and fees payable to them. These rules have been framed and in every district a panel is provided from which these pleaders can be chosen by the court. In ***Hussainara Khatoon vs. State of Bihar,*** **1980 Vol, 1 SCC 98** and ***Madhav Hoskot vs State of Maharashtra*** **1978 Vol. 3 SCC 544** and ***Khatri (III) vs. State of Bihar*** **1991 Vol. 1 SCC 635,** Supreme Court held that every accused who is unable to engage a lawyer and secure legal services on account of the poverty, or other situations he has a constitutional right, and the State is under mandate to provide legal help to the accused, if the ends of justice require and accused person does not object to the provision of such a lawyer.

Law is equally applicable to all. Economic differences which are easily distinguishable create classes which cannot be equated with each other. If a person who is capable of bearing the expenses of litigation, is pitted against a poor person, the fight between the two before the law which professes equality, will be unjustified and that the court proceedings will result into arbitrariness and inequality violating Article 14 of the Constitution of India. In such circumstances, the law must provide to cover the handicap on account of the poverty. Although, a number of legislative provisions and legislations have tried, to cover up this gap but it is so wide that it is

difficult to bridge. It thus becomes the duty of the administration of justice to provide such measures which may cover the gap.

The **Legal Services Authorities Act, 1977** was enacted to sanction legal aid scheme which were being run up till then to secure the aims of Article 39 of the Constitution. On 26th September, 1980 the Central Government by resolution appointed Committee for implementing Legal Aid Scheme (CILAS) under the Chairmanship of Mr. Justice P. N. Bhagwati, to monitor and implement Legal Aid Scheme CILAS evolved model schemes, and legal aid programme throughout the country with Advisory Boards, in every State, which was funded entirely by Central Government. The Legal Services Authorities Act, 1997 provides to give statutory sanction to these authorities and their funding from Central Government and the State Government. It provides for free and competent legal services to the weaker section of the society; to ensure all opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. It also provides for organizing Lok Adalats to ensure that the operation of legal system promotes justice on the basis of equal opportunity. The Act provides for National Legal Services Authority, State Legal Services Authority and District Authorities of which District Judge is Chairman and such other members possessing qualification and experience prescribed and nominated by the government. The funding has to come from consolidated fund of State. The District Authority is required to coordinate activities of legal services in the District, organize Lok Adalat in the district and perform other function as the State Legal Services Authority may in consultation with the State Government, fix by regulations. Section 12 provides for criteria of giving these legal services and these includes a number of Scheduled Castes, Scheduled Tribes, a victim of trafficking of human beings or Begar, a woman or a child, a mentally ill or disabled, a victim of mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster and industrial workmen, persons in custody in protective homes, juvenile homes or psychiatric hospitals and those who are in receipt of annual income of less than Rs.9000/-, if a case is before the Court other than Supreme Court and then Rs.12000/- if the case is before the Supreme Court. Section 19 to 22 provides to Lok Adalats. A Lok Adalat has jurisdiction to determine and arrive at a compromise or settlement

between the parties to a dispute in respect of any matter falling within the jurisdiction of any civil, criminal or revenue court, constituted in the area, where the Lok Adalat is organized. Section 21 provides that every award of Lok Adalat shall be deemed to be a decree of civil court or order of such court where compromise or settlement has been arrived and the court fee paid, is refunded. No appeal lies to any court against the award.

The most effective tool to bring equality in law and to ensure equal protection of law, is **'judicial discretion'.** This again is a matter of debate. A Judge with his ingenuity and sensitivity can exercise judicial discretion in a manner which may remove this inequality caused on account of poverty. Poverty by itself may not be a ground to award relief, but poverty should not be a ground on account of which a poor person may not able to get justice. Some of these situations can be answered while deciding the application where discretion is given to court. Without ignoring the settled and sound principles of judicial discretion, court can and often does exercise judicial discretion in favour of poor. Whether it is a matter of condoning delay, restoring matters, imposing fines or awarding sentences, the courts at all levels have recognized 'poverty' as a ground to exercise judicial discretion. In every provision of law, there is sufficient discretion in which poverty can be one of the grounds which must be noticed and the discretion of a judge can become a road to justice.

There are number of legislation which are directly related to the poverty. Some of these are as follows:

(i) Bonded Labour System (Abolition) Act, 1976
(ii) Child Labour Prohibition and Regulation Act, 1986
(iii) Essential Commodities Act providing for distribution of essential commodities to the persons below poverty line.
(iv) Employment of Manual Scroungers (Prohibition) Act, 1993
(v) Industrial Disputes Act, 1947
(vi) Mental Health Act, 1987
(vii) Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995
(viii) Protection of Civil Rights Act, 1955
(ix) Protection of Human Rights Act, 1993

(i) Slum Areas (Improvement and Clearance) Act, 1956
(ii) Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and may others.

A Judge may not be able to remove poverty which is a task of legislative and executive, but he can provide a healing touch in dispensing with justice, keeping in mind that social justice is one of the aims of the constitution, and that the preamble proclaims to secure to all its citizen, justice social, economic and political.

Mahatma Gandhi said:

"A starving man thinks of satisfying his hunger before anything else. He will sell his liberty and all for the sake of getting a morsel of food. Such is the position of the millions of people in India. For them, liberty God and all such words are mere latters put together without the slightest meaning."

The administration of justice must be sensitive to 'poverty'. It must strive to bring equality and give in the true meaning as enshrined and conceived in Constitution of India.

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Fish die when they are out of water, and people die without law and order

Talmad

Reforms in Intellectual Property Laws in India

Prof. S. K. Verma*

The Agreement on Trade-Related Intellectual Property Rights (TRIPs) came into force on 1.1.1995. It is an integral part of the World Trade Organization (WTO) and lays down the norms and standards in respect of the different kinds of intellectual property rights. The IPRs covered under the TRIPs are : (i) copyright and related rights; (ii) Trademarks; (iii) Geographical indications; (iv) Industrial designs; (v) Patents; (vi) Layout-designs (Topographic) of integrated circuits; and (vii) protection of undisclosed information.

The Agreement sets the minimum standards to be adopted by the members, though they are free to exceed them. Members are free to determine the appropriate method of implementing the provisions of the Agreement under their legal system and practice. These standards have to be given effect through national legislation, either by enacting a new legislation where none existed before or through modification of the existing legislation. The TRIPs lays down precise provisions relating to the scope and term of the IPRs and the rights accruing to the right-holder, as well as the minimum standards and norms for the enforcement of those rights. But it does not lay down the precise procedure for fulfilling the obligations, which has been left to the Members. The Agreement provides a five-year transition period (counted from 1.1.1995, when the Agreement became operative) to developing countries to give effect to the provisions of the TRIPs Agreement. Developing countries that do not provide product patents in certain areas can delay the implementation of the provisions on product patents by a further period of five years (Art. 65(2) & (4)). However, they are obliged to provide exclusive marketing rights (EMRs) for pharmaceutical and agricultural chemical products if a patent has been granted for that product in another Member country (Art. 70(9)).

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There are certain basic provisions of the TRIPs Agreement, which each Member is obliged to incorporate in its legislation while protecting a specific intellectual property right (IPR). They are the principles of national treatment (NT) and the most-favoured-treatment (MFN). While formulating or amending their national laws, Members are free to adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio, economic and technological development, provided that such measures are consistent with the provisions of the TRIPs. Subject to the consistency with the TRIPs, Members are also empowered to take appropriate measures to prevent the abuse of IPRs by rights holders (Art. 8).

India ratified the WTO Agreement in December 1994 and thus became a party to the TRIPs. Hence, it is obliged to make its IP laws TRIPs complaint. In order to fulfil its commitment under the Agreement, the Government of India has initiated necessary steps to bring our IP laws in tune with the TRIPs Agreement. In December 1999, the Government introduced necessary bills for formulating/amending the laws in practically all fields of IPRs which are covered under the TRIPs Agreement. Some of these bills have taken the shape of law, others are still before the Parliament. The following sections will look into the reforms made or proposed to be made in the existing laws on IPRs.

Copyright and Related Rights

Copyright subsists in expression and not in ideas, procedures, methods of operation or mathematical concepts as such. Copyright protection covers all "literary and artistic works". This term encompasses diverse forms of creativity, such as writings, including scientific and technical texts and computer programs; databases that are original due to the selection or arrangement of their contents; musical works; audiovisual works; works of fine arts, including drawings and paintings; and photographs. Related rights protect the contributions of others who add value in the presentation of literary and artistic works to the public: performing artists, such as actors, dancers, singers and musicians; the producers of phonograms, including CDs; and broadcasting organizations. In these areas, the

TRIPs require compliance with the provisions of the Berne Convention. Computer programmes are to be protected as literary works (Art. 10). The term of protection for copyright and rights of performers and producers of phonograms is to be not less than 50 years. However, in the case broadcasting organizations, the term of protection is to be at least 20 years from the end of the calendar year in which the broadcast took place. India is a party to the Berne Convention, (1885) since 1923 and also the Universal Copyright Convention, 1952. Law on copyright in India has always been kept in place in accordance with the international standards as laid down in copyright conventions.

The Indian Copyright Act was thoroughly revised in 1994, incorporating the major provisions of the TRIPs Agreement on copyright and neighbouring rights except for the term of protection for performers' rights and rights of producers of phonograms (sound recordings) which was kept 25 years instead of 50 years under the TRIPs Agreement. The Copyright (Amendment) Act, 2000 has taken care of this anomaly and now the rights of performers and producers of phonograms shall last for 50 years (sec. 38). Similarly, whereas the term of protection for copyright under the Indian Act is 60 years (instead of 50 years as prescribed in the TRIPs Agreement), but this was not made applicable to computer programmes. The Amendment Act provides for sixty years term for computer programmes also. Further, the scope of infringing acts of copyright in the case of computer programme has been curtailed. Earlier the Act provided (sec. 52) that the following acts shall not constitute an infringement of copyright, namely:

(aa) "the making of copies or adaptation of a computer programme by the lawful possessor of a copy of such computer programme, from such copy -

(i) in order to utilize the computer programme for the purpose for which it was supplied; or

(ii) to make back-up copies purely as a temporary protection against loss, destruction or damage in order only to utilize the computer programme for the purpose for which it was supplied."

Now the Amendment Act has inserted the following provisions:

"(ab) the doing of any act necessary to obtain information essential for operating inter-operability of an independently created computer programme with other programmes by a lawful possessor of a computer programme provided that such information is not otherwise readily available;

(ac) the observation, study or test of functioning of the computer programme in order to determine the ideas and principles which underline any elements of the programme while performing such acts necessary for the functions for which the computer programme was supplied;

(ad) the making of copies or adaptation of the computer programme from a personally legally obtained copy for non-commercial personal use."

This addition is in line with the recent technological developments and the use of computer programmes in research and education which was already provided as an exemption from infringement in the Copyright Act as follows :

"(p) the reproduction, for the purpose of research or private study or with a view to publication, of an unpublished literary, dramatic or musical work kept in a library, museum or other institution to which the public has access"

Thus, the Indian position on copyright and related rights is in conformity with the TRIPs. But the Act does not contain provisions to face the challenges posed by the internet to the protection of copyright and related rights and the enforcement of these rights in the digital age. In December 1996, the World Intellectual Property organization (WIPO) adopted two treaties : the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (commonly referred to as the Internet Treaties). India has signed these treaties, but has not ratified them so far. These treaties, although not yet in force, address the issues of the definition and the scope of rights in the digital environment and some of the challenges

of online enforcement and licensing.[1] Very soon, India will have to provide legal mechanism to face this challenge.

The Act provides for civil and criminal remedies against infringement of copyright punishable with imprisonment or fine or both. A police officer, not below the rank of sub-inspector, is given the power to seize without warrant all infringing copies of the work and accessories for making infringing copies wherever found and produce them before a magistrate.

Under the amended Act, the Government of India is empowered to extend the provisions of Copyright Act to broadcasts and performances made in other countries on a reciprocal basis.

Trademarks

Trademarks are an important tool in commerce. A trademark enables consumers to identify the source of a product, to link the product with its manufacturer in widely distributed markets. The exclusive right to the use of the mark, which may be of indefinite duration, enables the owner to build goodwill and reputation in the expression of its identity, and to prevent others from misleading consumers into wrongly associating products with an enterprise from which they do not originate.

Trademark is a form of IPR, which is protectable under the TRIPs Agreement, beside under the other international conventions, such as the Paris Convention. Under the Agreement, "any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark" (Art. 15). It further provides, "such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible."

[1] See generally M.Ficsor, "Copyright for the Digital Era : The WIPO 'Internet' Treaties," 21 Columbia J. l & Arts. 197 (Nos. 3-4, 1997).

The Agreement provides that initial registration and each renewal of registration shall be for a term of not less than *seven* years and the registration of a trademark shall be renewable indefinitely (Art.18). Compulsory licensing of trademark is not permitted and the owner of a registered trademark shall have the right to assign his trademark with or without the transfer of the business to which the trademark belongs. (Art.21).

The owner of a registered trademark shall have the exclusive right to prevent all third parties not having his consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use (Art. 16).

In response to the obligations under the TRIPs, the Government of India has recently enacted the Trade Marks Act, 2000, which has replaced the [Indian] Trade and Merchandise Marks Act, 1958 (TMMA). The ambit of the new Act is very wide which now covers trademark for services also, in addition to goods. "Trade mark" is defined as "a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods; their packaging and combination of colours..." Registration of trademarks which are imitation of well-known trademarks, is not permitted. In accordance with Art. 15 of the TRIPs Agreement, the new Act enlarges the grounds for refusal of registration (Ss. 9 and 10), giving the absolute grounds for refusal of registration and the limitation as to colour for the purposes of deciding the distinctive character of the trademark. Hence, the Act omits the provisions for defensive registration of trademark existing under the TMMA.

Similarly, the new Act has done away with maintaining registration of trade marks in Part A and Part B with different legal

rights, as the legal requirement existed under the TMMA.[2] The new Act provides only a single register with simplified procedure for registration and with equal rights. Further, it simplifies the procedure for registration (Sec. 18) and provides for registration of "collective marks", jointly owned by associations etc. (Sec. 24). It also enlarges the scope of permitted use of a registered trademark (Sec. 28).

The final authority relating to the registration of certification trademarks has now been given to the Registrar instead of the Central Government under the TMMA. A very significant novation under the new Act is to create an Appellate Board, to be known as the Intellectual Property Appellate Board, for expeditious disposal of appeals on the decisions of the Registrar of trade marks. No other authority is empowered to exercise jurisdiction, authority or power against the order or decision of the Registrar.

The new Act has amplified the powers of the court to grant *ex parte* injunction in certain cases (sec. 124). Offences relating to trademark be tried by a court not inferior to that of a metropolitan magistrate or judicial magistrate of first class.

The Act has enlarged the jurisdiction of the courts at par with the Copyright Act. The punishment for the offences relating to trademarks have been enhanced so as to prevent the spurious and counterfeited goods from coming into the market. The penalty for applying false trademarks, trade description is for a term ranging between six months to three years with fine from fifty thousand to two lakh rupees. Same penalty is provided for selling goods or services with false trademark or trade description. For subsequent convictions, the quantum of penalty has been raised. It also empowers the police officer, not below the rank of Superintendent of police, to search and seize the goods and other related tools used in committing an offence in relation to trademarks.

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[2] Marks which were distinctive were accepted in Apart A; marks which, though not distinctive, but were capable of distinguishing were accepted in part B. The difference between the requirements for registration in these two parts is difficult to define. It can generally be said that a mark which at the date of application is not distinctive but which by use is capable of distinguishing the goods and which is not ordinarily required by other traders for *bona fide* descriptive purpose may be considered for registration in Part B. The procedure for registration under the TMMA was contained in Secs. 18-26.

The Act also provides for filing a single application for registration in more than one class, increasing the period of registration and renewal from seven to ten years (TRIPs provides seven-year period), and make trademark offences as cognizable. It has made special provisions (Ss. 154-155) to extend the application of the Act to convention countries, which are members of group of countries or union of countries or Inter-Governmental Organisations.

Geographical Indications

The geographical indications, under the TRIPs Agreement, are defined as "indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin." In their case, the Agreement contains a general obligation that members shall provide the legal means for interested parties to prevent the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good; any such use constitutes an act of unfair competition. A member may, through its legislation, provide the invalidation of trademark based on the geographical indication of a country not indicated therein.

India did not have any specific legislation on geographical indications so far. After the row created over the registration of patent on Basmati rice in USA and also as a part to give effect to TRIPs provisions, the Geographical Indications of Goods (Registration and Protection) Act, 2000 has been enacted by the Government. The Act is self contained in its 87 sections. The "geographical indication" in relation to goods is defined as :

> "an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of such goods is essentially attributable to its geographical origin and in case where such goods are

manufactured goods one of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region or locality, as the case may be."

The duration of a registered geographical indication is ten years, which may be renewed for a period of ten years in a prescribed manner. Like erstwhile TMMA, the Act in Geographical Indications provides registration in two parts – part A is related to the registration of the geographical indications; Part B relates to the registration of the authorised users. Registration is a *prima facie* evidence of the validity of the geographical indication. The Act prohibits assignment, transmission, licensing, pledge, mortgage, etc. of any right to a registered geographical indication. Geographical indication can also be refused to be registered as a trademark in respect of goods not originating in a territory, which such geographical indication indicates. But the trademarks granted and subsisting before the Act comes into force shall not be invalidated.

On the lines of the Trademarks Act, an appeal can be made to the Appellate Board against the order or decision of the Registrar under the Act. Falsification or falsely applying a geographical indication amounts to an offence which is punishable with an imprisonment ranging from six months to three years and a fine of fifty thousand to two lakh rupees. On the lines of Trademarks Act again, no court below the court of metropolitan magistrate or judicial magistrate is empowered to take cognizance of the offences committed under the Act. In other respects also, the Act closely follows the Trademarks Act.

Industrial Designs

The TRIPs Agreement obligates members to provide protection of independently created industrial designs that are new and original. Individual governments have been given the option to exclude from protection designs which are not new or original if they do not significantly differ from known designs or combinations of known design features. The governments may also exclude designs dictated by technical or functional considerations, as against aesthetic considerations which constitutes the coverage of industrial designs.

The right holder of industrial design shall have the right to prevent third parties not having his consent from making, selling or imparting articles bearing or embodying a design which is a copy or substantially a copy of the protected design, when such acts are undertaken for commercial purposes. The duration of the protection is required to be at least ten years (Art. 26).

The [India] Design Act, 1911, which was an old Act, has been replaced by the new Act. The Act provides protection for a period of ten years, which can be renewed for a period of five years as against the 1911 Act which was granting protection for a period of five years, renewable for a further period of five + five years at the time of grant of design protection. Further, now the design is open to the public the day it is registered in contrast to the earlier Act, when the design was not open to the public. The 1911 Act allowed grant of design on the basis of aesthetic or ornamental considerations, but under the new Act the colour patterns are also allowed for design protection. The design to be protected must fulfil the criterion of novelty, which was so far confined to India only, but now to be registered, the "novelty" criterion should be satisfied on a global basis. In this context, it has come closer to the patent law.

Layout Designs (Topographic) of Integrated Circuits

On the lines of Trade Marks Act and Geographical Indications of Goods Act, the Government has recently enacted the Semiconductor Integrated Circuits Layout-Design Act, 2000 (Act has not yet received the consent of the President). The Act protects the "layout-designs" of integrated circuits. The TRIPs Agreement incorporates the provisions of the Washington Treaty (Treaty on Intellectual Property in respect of Integrated Circuits, 1989), which India has signed but has not ratified so far. In the context of layout designs, the concept of "originality" is of utmost significance, whether it is a "novelty or not." In accordance with TRIPs Agreement, India is obliged to protect layout designs that are original in the sense of being the result of their creator's own intellectual efforts and to accord national treatment to foreign rights holders. The term of protection is provided for ten years and the rules of compulsory licensing are the same as in the case of patents.

The Act on integrated circuits provides a *sui generis* system of IP protection. While the patent law requires that the invention should be original as well as novel, the copyright law is too general to accommodate the original ideas of scientific creation of layout-designs of integrated circuits. Hence a *sui generis* protection of layout-designs of integrated circuits has been laid down through the Act.

The Act defines, "semiconductor integrated circuit" as "a product having transistors or other circuitry elements which are inseparably formed on a semiconductor material or an insulating material or inside the semiconductor material and designed to perform an electronic circuitry function."

The registration of a layout design shall be for a period of ten years counted from the date of filing an application for registration or from the date of first commercial exploitation anywhere in any country, whichever is earlier. Under certain conditions, a jointly owned layout design can also be registered. The right owner has the power to assign the layout design and to give effectual receipts for any consideration for such assignment. Assignability and transmissibility could be with or without the goodwill of the business concerned.

On the lines of Trade Marks Act, a Layout-Design Appellate Board is created under the Act, which shall be authorised to decide appeals against the order or decision of the Registrar. The Board also has the power to cancel the registration of a layout design. Appeal from the Board will lie to the High Court within whose jurisdiction head office or the branch office of the Layout Design Registry against the order of which the appeal arises is situated. Infringement of layout design is punishable with imprisonment upto three years or with fine ranging between fifty thousand to ten lakhs rupees or with both. National treatment is accorded to citizens from convention countries, or on the basis of reciprocity to citizens of any other country.

Protection of Undisclosed Information

Protection of undisclosed information or trade secrets is a type of IPR which is required to be protected under Article 39 of the TRIPs Agreement. The Agreement requires members to protect undisclosed

information and data submitted to governments or governmental agencies. It also provides that natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in *a manner contrary to honest commercial practices*, which includes practices such as breach of contract, breach of confidence and inducement to breach, and includes the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know that such practices were involved in the acquisition. Further, members are also required to protect against unfair commercial use, undisclosed or other data obtained as a condition of approving the marketing of pharmaceutical or of agricultural chemical products.

India has not enacted any specific legislation dealing with trade secrets, but an action can be brought for unfair trade practices and breach of trade secrets under law of torts, contracts and criminal law and the Specific Relief Act, 1963 also provide relief, if the case is established.

Patents

Among all the IPRs, patent protection under the TRIPs has raised a lot of controversy in India and led to heated debates all over the country because of its far-reaching consequences for the country.

In the area of patents, beside the TRIPs Agreement, India became a party to Paris Convention in September, 1998 and also to the Patents Cooperation Treaty (PCT) in order to facilitate world-wide search on a patent application.

TRIPs has specific provisions on duration, coverage and criteria of patentability. Art. 33 requires a patent term of twenty years from the date of filing of a patent application. Patents are available in all fields of technology, including biotechnology. Inventions may be excluded from patentability for reasons of *order public*, morality, including protection of human, animal or plant life or health, or avoiding prejudice to the environment, as long as the exclusion is not merely because such exploitation is prohibited by national law (Art. 27(2)). The other permitted exclusions are : diagnostic, therapeutic and surgical methods for humans or animals; plants and animals, other than micro-organisms, essentially biological processes for the

production of plants and animals other than non-biological processes. Plant varieties are to be protected by patents or a *sui generis* system or by any combination thereof (Art. 27(3)).

To be patentable, an invention must be new, involve an inventive step (i.e. non-obvious) and are capable of industrial application. Patents shall be available and patent rights enjoyable without discrimination as to whether products are imported or locally produced. It means that revocation of a patent or compulsory licence based on non-working in the country concerned cannot be granted if the patented product is available in that country through importation. Art. 5A(1) of the Paris Convention, which is a part of the TRIPs Agreement through reference by virtue of Art. 2 of the Agreement, mandates that importation into the country where the patent has been granted of articles manufactured in any of the countries of the Union shall not entail forfeiture of the patent.

Under the TRIPs Agreement, patentee receives the exclusive rights for product patents- making, using, offering for sale, selling and importing a product; and for process patent– using the process or using, offering for sale, selling or importing a product obtained directly by that process (Art. 28(1)). The patentee has the right to assign or transfer by succession and to license the patent (Art. 28(2)). Thus, the patentee shall not only enjoy rights to exclude others from manufacturing, selling and using this patented invention or creation, but also the right to exclude others from importing the patented products in the country of grant.

The burden of proof in an infringement action has been shifted from the plaintiff (the complainant) to the defendant that he has not infringed the right. It provides that in the absence of proof to the contrary, if the subject matter of the patent is a process for obtaining a product, the presumption will be that the defendant has made the product by a patented process, if one of the following two conditions is fulfilled: (i) that the product obtained by the patented process is new; and (ii) that there is substantial likelihood that the product was made by the process and the owner has been unable to determine the process actually used (Art. 34). Due to shifting of the burden of proof, a manufacturer will be required to provide the details of the

manufacturing process to rebut the presumption of infringement of a process patent.

Compulsory licensing

The regime of compulsory license for the non-working of a patent has also been made very regimental. Under Art 5. of the Paris Convention for the non-working of a patent, a non-exclusive and non-transferable compulsory licence could be given after the expiration of four years from the date of filing the patent application or three years from the grant of the patent whichever period expires last. Such a licence can be issued without the patentee's permission and without compensating the patentee. The licence can be refused if the patentee justifies his inaction by legitimate reasons. Forfeiture of the patent is not allowed except where the grant of a compulsory licence is not sufficient for the working of the patent. However, no proceedings for the forfeiture or revocation of a patent can be initiated before the expiration of two years from the grant of the compulsory licence.

Art. 31 of the TRIPs, lays down the procedural requirements for the issuance of compulsory licence. The conditions for the issuance of compulsory licence include *inter alia* that, the proposed user of the patent must first make efforts to obtain authorisation from the right holder; the scope and duration shall be limited to the purpose for which the compulsory licence was authorised (principally to supply the domestic market); the licence shall be non-exclusive and non-assignable, and will be terminated if circumstances which led to its issuance cease to exist and are unlikely to recur. Subject to the adequate protection of the interests of the person authorised to use the licence, the right-holder shall be compensated; the grant of licence and the amount of compensation shall be subject to judicial review.

But these requirements will not be applicable where compulsory licences are granted to remedy anti-competitive practices. In the case of semi-conductor technology, the compulsory licence shall be available only for public non-commercial use or to remedy an anti-competitive practice after judicial or administrative determination. The anti-competitive practices, however, are not specified; they are obviously left to be defined under national legislation.

Thus, the new regime of intellectual property as delineated in TRIPs has

- redefined the subject-matter which can now be legally protected,
- increased the duration and breadth of protection,
- abolished the obligations of the patent-holders to disclose and introduce their patented invention within a definite time frame,
- shifted the burden of proof from patent-holder to the infringer in right-related disputes, and
- curtailed the right of the government to control the activities of the patent-holder.

The TRIPs provide a transitional period of five years, which may further be delayed if product patent is to be provided in a particular area for a further period of five years. However, paragraphs 8 and 9 of Art. 70 of the TRIPs Agreement have drastically curtailed this transitional period. Para 8 of Article 70 requires a member to provide a means by which applications for patents for such inventions can be filed. The EMRs have to be granted for a period of five years from 1995 onwards under para 9. Together, they require members to provide pipeline (mail-box) protection and exclusive marketing rights (EMRs) in the fields of technologies related to pharmaceuticals and agricultural chemical products, which were not patentable on the date of its entry into force in a particular member country.

Immediately after becoming the party to the WTO, in order to fulfil its obligations under Art. 70, paras 8 and 9, the Government of India attempted to provide arrangements by which applications for patents for pharmaceutical and agro-chemical could be received. But the Patents (Amendment) Bill, 1995 could not be passed by the Parliament due to opposition to it. The Government was found to be defaulted on its international commitment by the Dispute Settlement Board (DSB) of the WTO on 19th December, 1997, on a complaint filed by the United States with the TRIPs Council. India gave effect to the decision of the Appellate Body of the WTO through the Patents (Amendment) Act, 1999 on 26th March, 1999. This was the first amendment to the 1970 Patents Act.

In order to bring its patent law in line with the TRIPs Agreement, the Government introduced in the Parliament in

December 1999 the Patents (Second Amendment) Bill, which is presently before the Select Committee of the Parliament. The proposed law has given effect to the mandate of TRIPs on patents, as delineated above.

In the patent field, the main challenges posed before the Government of India under the TRIPs are in the fields of pharmaceuticals, chemicals, biotechnology, plant variety protection and the protection of undisclosed information. Indian Patents Act, 1970 did not provide product patents for pharmaceutical and chemicals. In the proposed legislation, section 53 of the Patents Act, 1970 stands amended by omitting the distinction between product and process patent. It provides a uniform term of twenty years for all categories of inventions. It has provided necessary safeguards for the protection of public interest, national security, bio-diversity, traditional knowledge, etc. Being the party to the PCT, the proposed legislation also tries to harmonise the procedure for grant of patents in accordance with international practice.

Whereas the proposed Act align the provisions relating to compulsory licensing of the TRIPs, the provisions relating to licenses of rights have been omitted from the 1970 Patents Act. Plants and animals are excluded from patentability. Where the patent is sought for biological material, it is necessary to deposit the biological material alongwith the specifications with depository institution, disclosing the source and geographical origin of the biological material used in the invention. It provides provisions relating to parallel import of patented products (exhaustion of right), by giving the right to patent holder to prohibit third parties who do not have his consent from making, using, offering for sale, selling or importing for those purposes that product in India (clause 22).

It also incorporates provisions for the protection of biodiversities and traditional knowledge (clause 28) by refusing to grant patent or revoke a patent if the application wrongfully mention the source or geographical origin of biological material. The provision has also been made for an Appellate Board which shall be the same as created under the Trade Marks Act, 2000. The Board shall have the power to hear appeals against any order or decision of the Controller of Patents and all such cases pending before any High Court shall be transferred to the Appellate Board. The new provision

has been proposed on national security (clause 157A). The Government shall not disclose any information relating to any patentable subject matter, which it considers prejudicial to the security of India. The Government is empowered to revoke any patent which it considers necessary in the interest of the security of India.

Similarly section 108 of the 1970 is proposed to be amended to provide additional reliefs to the patentee in case of infringement of the patent by giving power to the courts for destruction of goods and implements used for production of such goods.

A new provision has been added, relating to certain acts which are not to be considered infringements. It is proposed that the act of making or using a patented product for the purpose of development and submission of information to a regulatory authority regulating marketing approval of the product, shall not constitute an infringement. This provision is proposed to ensure that generic drug should be available in Indian market immediately after the expiry of the term of the concerned patents. It is also proposed that the importation of patented product from the person who is duly authorised by the patent holder shall not constitute an infringement. This provision is proposed to ensure availability of the patented product in the Indian market at minimum international market price.

Plant Variety Protection

The TRIPs Agreement under Art. 27(3)(b) imposes a duty on the members to protect plant varieties either by patents or by an effective sui generis (unique, of its kind) system or by any combination thereof. This provision has close relationship with the protection of propagating material – seeds, and thus with the food security of India. Through a sui generis system, states are given some scope in devising an indigenous protection system. At the international level, the UPOV (Union Pour le Protection des Obtentions Vegetals) Convention, 1961 mainly adhered by developed countries, exists, which provides a sui generis model for the protection of plant varieties. The Convention has been amended in 1972, 1978 and 1991. Currently, its 1991 Act is in force since April 1999. There are some fundamental differences between the 1978 and 1991 Acts of the Convention regarding the scope of coverage, plant

breeder's rights and the farmers' exemptions. The 1991 Act is more restrictive than the 1978 Act, which provides more privileges to the farmers. The TRIPs does not mandate its members to follow UPOV Convention, but it is a model for an *effective* protection of plant varieties.

To give effect to the TRIPs mandate, the Government introduced the Protection of Plant Varieties and Farmers' Rights Bill, 1999, in the Parliament which is presently before a Select Committee of the Parliament. The main characteristic of the proposed law is that it seeks to introduce plant breeders' rights PBRs, meant to provide protection to formal breeders' plant varieties. The Act does not attempt to provide an indigenous definition of these rights, but derives its provisions nearly verbatim from the UPOV Convention. Despite the government's stand, that UPOV is unsuitable for India, the proposed law goes further taking some of its central provisions from UPOV's latest version (1991) which broadens the scope of PBRs and conversely reduces the farmers' rights and privileges, such as criteria for registration of plant variety.

While the main focus of the Bill is on defining PBRs, the title suggests that it also provides for farmer's rights. In reality, just one provision is devoted to the definition of farmer's rights (Clause 48), the content of which is virtually meaningless. Indeed, the proposed law does no more than protect the rights of farmers to save, use, exchange, share or sell their farm produce of a protected variety.

In other words, the proposed law only grants farmers' rights over their crops. A comparison with Article 15 of the revised draft of the International Undertaking on Plant Genetic Resources defining farmers' rights is instructive, which include protection of traditional knowledge, right to participate in sharing the benefits arising from the use of plant varieties and right to participate in decision making concerning their management.

The proposed legislation will extend to all categories of plants, but will not include micro-organisations. In order to be eligible for protection, a variety must be distinct, uniform and stable.

These basic issues notwithstanding, the proposed law includes a number of provisions, which are new and do not derive from the UPOV framework. It provides, for instance, for benefit-sharing and compensation. Benefit-sharing is meant to provide individuals or

groups with the possibility to receive financial compensation when a protected variety is developed, using their genetic material. Another provision allows communities to file claims for their contribution to the development of a protected variety. It also includes a specific ban on the registration of any variety containing technologies like 'terminator technology', injurious to the life or health of humans, animals or plants. Further, the proposed law provides for compulsory licensing of protected varieties if the right holder does not arrange for the production and sale of the seeds to ensure that the protected seeds are available to the farmers.

None of these provisions are entirely satisfactory. In the case of benefit-sharing, for instance, the claimants can neither stop the registration of the variety nor claim property rights on their own varieties. Indeed, compensation is only offered for material contributed and not for knowledge, there is thus no recognition of any intellectual contribution to the development of a variety by farmers-breeders in the proposed legislation. It is hoped that these factors will be taken into account while adopting the Act on plant varieties protection.

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In the matter of conscience, the law of majority has no place.

Mahatma Gandhi

Justice to a "just-unjust"

NIRVIKAR GUPTA*

PROLOGUE–

One of the basic tenets of criminal jurisprudence postulates the innocence of the accused in every *criminal trial*[1] . Therefore, a person, accused of an offence, can be convicted and sentenced, if found guilty of charges, proved beyond reasonable *doubt or suspicion*[2] on the basis of evidence brought before the Court. Article 20(3) of the Constitution of India, prohibits the compulsion of an accused to become a witness against himself and undisputably the prosecution has to succeed on its own *legs*[3] . Thus, in every criminal trial, up to the time, a finding of guilt is arrived upon by Court, the accused is not

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1. There is a presumption of innocence in favour of an accused and against the commission of any crime. Kerry's "outlines of criminal law". 19th Ed. Page 456.
2. "reasonable doubt & suspicion" have now received a proactive interpretation by Supreme Court where in the Court has observed that "It must be remembered that neither mere possibilities nor remote probabilities nor mere doubts which are not reasonable can, without danger to the administration of justice, be the foundation of acquittal of an accused, if there is otherwise fairly credible testimony; (Khem Karan v. State, AIR 1974 S.C. 1567; 1974 Cr.L.J. 1033). In Orilal's Case the Apex Court, explaining the meaning of words "reasonable doubt", held that " Reasonable doubt is simply that degree of doubt which would permit a reasonable and just man to come to a conclusion. Reasonableness of the doubt must be commensurate with the nature of the offence to be investigated (See State v. OriLal; (1994) 1 S.C.C. 73) . Further explaining the words "benefit of doubt" the Court cautioned against exaggerated devotion to the rule of benefit of doubt. In Orilal (Supra) the Court observed "....the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion".
3. Prosecution must stand or fall on its own legs. It cannot derive any strength from weakness of the defence. S.D. Soni v. State; 1992 (S.C.) 331.

required to adduced *evidence*[4] or as such participate in any trial for the establishing his innocence or the manner, mode, object, cause or even any of the circumstances leading to the commission of the crime in question, barring a few exceptional cases e.g. the right of private defence or so.

In contradiction to the pre-trial silence, of an accused; at the post conviction stage; the accused has been provided an opportunity of *hearing*[5] and participation in Court proceedings, for hearing him on the quantum of sentence. This hearing is altogether of a different nature and requires an active participation of the Court, prosecution and accused. The participation is not by limited to only hearing alone but may also include the production of material, having a bearing on the question of sentence.

It has been observed that the penological jurisprudence, in so far as it relates to the hearing of accused on the quantum of sentence, is little understood and even lesser practised.

Section 235(2) and Section 248(2) Cr.P.C. , almost in a similar tune emphasize for, "hearing the accused on the question of sentence."

What is the scope and extent of such a hearing is the nagging question to be considered, to be discussed and answered.

"HEARING" THE ACCUSED –

Explaining the scope of the word *'hearing'* used in Section 235(2) Cr.P.C. Supreme Court of India, in the case of *Santa Singh*[6] , has held that the meaning of an ordinary word is to be found not so much in a strict etymological propriety of language nor even in popular use, as in the subject or occasion on which it is used and the object which is intended to the be attained. The court, following a

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4. An accused is entitled to rely on the presumption of innocence in his favour and cannot be compelled to swear against himself. K.Joseph v. Narayana AIR 1964 S.C. 1552; (1964) 7 S.C.R. 137. In the changing scenario in England the accused (defendant) is now required to enter defence, and failure to enter defence is taken to be a circumstances against him & thus affirming the prosecution case.

5. In fact the word "hearing" now deserves to be defined more precisely and clearly understood in view of dichotomy of its ambit and scope between pre-conviction & post-conviction stages.

6. Santa Singh v. State of Punjab; AIR 1976 S.C. 2386.

well settled rule of interpretation, hallowed by time and sanctified by authority observed –

> "The **'hearing'** contemplated by Section 235(2) is not confined merely to hearing oral submission, but it is also intended to give an opportunity to the prosecution and the accused to place before the Court facts and material relating to various factors bearing on the question of sentence and if they are contested by either side, then to produce evidence for the purpose of establishing the same."

Generally speaking the statutes provide the 'outer limit' of sentence for an offence or crime. There is no statutorily fixed or otherwise prepared straight jacket formula for awarding fixed or predetermined sentence in given types of cases. The duty of assessing a reasonable & just sentence against an accused found just-unjust, squarely lies on the shoulders of the Court.

Explaining the scope of such a requirement of hearing the accused for assessing the right sentence, Ahmadi (*J*), as he then was, in *Allauddin Mian*[7] observed –

> *"It is a fundamental requirement of fair play that the accused who was hitherto concentrating on the prosecution evidence on the question of guilt should, on being found guilty, be asked if he has anything to say or any evidence to tender on the question of sentence. This is all the more necessary since the courts are generally required to make the choice from a wide range of discretion in the matter of sentencing."*

DUTY IMPERATIVE –

It may be observed that provisions of Section 235(2) Cr.P.C. are salutary and must be followed strictly, and non compliance thereof is sure to commit in-justice to the accused. This casts a duty imperative on the courts while hearing the accused to approach the question seriously with an endeavour to see that all the relevant facts and circumstances bearing on the question of sentence are before the Court. The circumstances may be mitigating or aggravating but these are required to be brought before the court prior to inflicting any sentence.

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7. Allauddin Mian & others (Sharif Mian & others) v. State of Bihar (1989) 3 SCC 5 [S.Natarajan & A.M. Ahmadi, JJ.]

Hon'ble Supreme Court in Allauddin Mian (Supra) held –

"We think as a general rule the trial courts should, after recording the conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant material bearing on the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender."

True that twin sections prescribe of hearing the accused on the question of sentence, else the sentence is vitiated, yet there are certain exceptions to such a procedure, which are-

1. If the accused is released after being given benefit of probation or admonition.
2. Or if on being convicted under Section 302 IPC a minimum sentence of imprisonment of life is awarded to him.

The Apex Court in *Tarlok Singh*[8] , having considered the fact that the minimum sentence permissible under law had already been awarded to the accused, was of the opinion that failure to provide an opportunity of hearing to the accused as envisaged above, would not vitiate the sentence.

DEFECT VITIATES TRIAL AND NOT CURABLE –

This has to be very clearly kept in mind that the failure to adhere to the procedure given under Section 235(2) or 248(2) Cr.P.C. is not curable and a non compliance cannot be described as merely an irregularity in the course of trial, curable under Section 465 Cr.P.C. It is much more serious, since it amounts to by passing an important stage of the trial and omitting it altogether, so that trial cannot be said to be that contemplated in the Code. The Apex Court, in Santa Singh (Supra) has clearly ruled that such a non compliance is an *illegality*[9] .

"This deviation constitutes disobedience to an express provision of the Code as to the mode of trial, and goes to the root of the matter and the resulting illegality is of such a character that it vitiates the sentence. Secondly, when no opportunity has been given to the appellant to produce material and make submissions in regard to the sentence to be

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8. Tarlok Singh v. State of Punjab, AIR 1997 S.C. 1747.
9. Santa Singh v. State of Punjab; AIR 1976 S.C. 2386. (at page 2387)

imposed on him, failure of justice must be regarded as implicit. S. 465 cannot, in the circumstances have any application in a case like the present."

HEARING ON SENTENCE & GUIDELINES –

Allahabad High Court in a recent decision reported in the case of *Gyan Singh*[10], has elaborately dealt with the entire scope of hearing to be provided to the accused under Section 248 or 235 Cr.P.C. Referring to previous decisions of the Hon'ble Supreme Court, the Allahabad High Court has summarized following guidelines, simplifying the procedure which should be adopted by courts for making compliance of the said *provisions**.

The guidelines are reproduced as below-

1. *After the evidence adduced by the prosecution and defence, if any, is over the Judge or the Magistrate, as the case may be, shall hear arguments and points of law, if any, of both the sides and then deliver the judgment either acquitting or convicting the accused.*
2. *If the accused is acquitted nothing more is to be done in the proceedings and the trial comes to an end then and there.*
3. *On the adjourned date, the Court shall ask the accused if he has any thing to say, on the question of sentence and the statement given by the accused in answer to the said question shall be recorded in writing in the own words of the accused and that statement shall form part of the record.*
4. *Thereafter the accused shall be asked if he has any material to produce or evidence to tender in regard to various factors bearing on the question of sentence and if the accused intends to produce or tender the same, he shall be given a reasonable opportunity for that purpose. Again the question so put to the accused and the answer given by him shall also be recorded in writing and the same shall form part of the record.*

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10. Gyan Singh & others v. State of U.P.; 2000 Cr.L.J. 2802 [Judgment delivered by Hon'ble Mr, Justice J.C. Gupta], para 7 & 8 of page 2803 & 2804.

* These guidelines may also be deduced from a division bench judgment of Allahabad High Court, in Criminal appeal no. 124 (1998) decided on 6.9.99.

5. *While putting the aforesaid questions and before having answers of the accused thereon, the accused should be apprised clearly that neither his statement so recorded nor the material and the evidence produced at the post convicting stage will be used against him as far as his innocence or guilt is concerned and the answers and material-evidence will be considered only or the purpose of awarding an appropriate sentence.*
6. *Where the accused produces material and adduces evidence, that shall form part of the record and if they are contested by the prosecution it shall also be given an opportunity to meet the material and evidence produced by the convict.*

   However, while doing all this, a care will have to be taken by the Court to see that this process of hearing the accused on the question of sentence is not misused for delaying the proceeding. The Court must be vigilant to exercise proper control over the proceedings so that the trial is not unavoidably or unnecessarily delayed
7. *The Court then shall hear both the prosecution and defence and pronounce the sentence after giving due weight to the mitigating as well as the aggravating circumstances placed before it."*

HEARING – FOR WHOM ?

Now there remains no controversy or ambiguity in concluding that although the word '***hearing***' has been used with reference to the accused in the two Sections mentioned above, yet it includes hearing the prosecution also. Therefore the courts are required to hear both the prosecution and defence and pronounce the sentence, after giving due weight to the mitigating as well as the aggravating circumstances placed before it. In *Jagmohan*[11] and *Narpal*[12] the Apex Court has made it quite clear that the opportunity would include leading additional evidence by the accused and also evidence in rebuttal by the prosecution against the evidence led by the accused. The would include the opportunity to the prosecution to lead evidence in case the

11. Jag Mohan v. State of U.P., AIR 1973 S.C. 947.
12. Narpal v. State of Haryana AIR 1977 S.C. 1061.

accused was a "previous convict" also, as provided under Section 248(2) Cr.P.C.

SENTENCING JURISPRUDENCE

It has always to be kept in mind that under the new Code of Criminal Procedure, sentencing procedure is a sensitive exercise of discretion and not routine or mechanical prescription acting on hunch. While selecting the appropriate sentence, on one hand, the Courts are required to keep in mind that the offender of the crime is suitably and adequately punished and the society and the judicial conscience get satisfied, while on the other hand, the Courts must also consider the variety of factors including mitigating and extenuating circumstances and after considering them and taking an over all view of the situation should select the sentence which they consider to weight not only the aggravating circumstances but also the mitigating and the extenuating circumstances going in favour of the accused.

The new Code recognizes the theory that punishment should be awarded with *reformative angle*[13]. In judging the adequacy of sentence the nature of offence, the circumstances of its commission, the weapon used, the manner in which the crime was executed, injury to individual and the society, effect of punishment on the offender and its import on the society are some amongst many other factors which should ordinarily weight with the sentencing Court.

IS "HEARING" ACCUSED AN EVIDENCE ? -

It should be made quite clear that question and answers so recorded during the course of hearing by the court, while examining or interrogating the accused may not come strictly within the definition of ***'evidence'*** as provided in the Evidence Act. The answers which the accused make either under Section 235(2) and 248(2) Cr.P.C. are beyond the narrow constraint of Evidence Act since such an enquiry is exclusively for an altogether different domain. During such a hearing facts and factors which operate are of an entirely different order than those which come into play in the question of conviction. In *Muniappan*[14], Hon'ble Supreme Court has viewed the evidentiary aspect of such a questioning with an altogether different

13. Mohd. Gaiasuddin v. State of Andhra Pradesh, AIR 1977 S.C. 1926
14. Muniappan v. State of Tamil Nadu, AIR 1981 S.C. 1220.

angle and with the duty of the judge *"to caste aside formalities of the court scene and approach the question of sentence from a broad sociological point of view"*. Such answers given by the accused on quantum of sentence cannot be read as evidence against the accused. It cannot be taken as any incriminating circumstance against the accused in so far as the question of guilt is concerned.

But an accused is not supposed to know about such a proposition which is emerging in the developing sentencing jurisprudence. There can be no quarrel to the proposition also that in given cases, the accused may impliedly admit his participation in the commission of crime and may lead evidence or efforts to bring material before the Court, in relation to the extenuating or mitigating circumstances. Such a conduct or implied confession may create an impression in the mind of the accused that the material so brought before the Court, while hearing him on the quantum of sentence, may be considered by the appellate court against his innocence. Such a fear or an apprehension in the mind of the accused may also detract him from bringing mitigating circumstances or event adducing any other evidence in this behalf, before the Court.

While recording a confession, Section 164(2) Cr.P.C. in explicit words requires the Court "to explain to the person making it that he is not bound to make such a confession and that, if he does so, it may be used as evidence against him". There is no such statutory provision, so far, in sections 235(2) or 248(2) Cr.P.C. In this perspective the *guidelines* (and in particular point no. 5 in the guidelines) given by the Division Bench of Allahabad High Court in Gyan Chand (supra) are quite significant. Consequently the sentencing court is also under a legal obligation to apprise the accused clearly that neither his statement so recorded nor the material and the evidence produced at the post convicting stage will be used against him as far as his inocence or guilt is concerned. In view of this such ***'material'*** falls short of ***'evidence'*** to be considered by the Superior Courts while hearing appeal against the finding of guilt.

DICHOTOMY IN LAW – WHICH WAY TO LEAN ?

There is yet an interesting proposition in the matter of the powers of the Court to adjourn the hearing. It is noteworthy that Proviso 3 to Section 309 Cr.P.C. specifically and clearly prohibits

adjournment of the case even for the purposes of hearing an accused on the quantum of sentence.

Section 309 Cr.P.C. – Invests the Court with powers to postpone or adjourn proceedings for reasons to be recorded. However the third proviso to Section 309 Cr.P.C. limits the powers of the sentencing Court while hearing the accused on the question of sentence. The Third proviso to Section 309 reads as follows –

> *Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on* ***him*** [15].
>
> (Emphasis supplied)

Although the third proviso to Section 309 clearly prohibits adjournment of hearing, the effect of such a prohibition is no more longer there in view of several decision of the Apex Court whereby it has been specifically laid down that a *"hurried hearing"* made on the same day when the findings of guilt is pronounced, would be against the spirit of these twins sections. In *Allauddin Mian*[16] and in *Santa Singh*[17], it was observed that the sentencing Court should normally adjourn the case for facilitating real opportunity to the accused as well as the prosecution. As such it has got every jurisdiction to adjourn the trial for hearing the accused and the prosecution under Section 235 (2) or Section 248(2) Cr.P.C.

The Court in *Malkiyat Singh*[18] has deprecated the practice of hearing the accused on the same day. In number of decisions, the practice of adjourning the case for ***"affording a hearing to the accused and the prosecution"*** has been emphasized. In the case of *Bush Standard Company*[19], any sentence imposed on the same day, has been held as illegal. In view of clear pronouncements by Supreme Court of India, there remains no two opinions on the question that the

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15. Ins. by Cr.P.C. (Amendment) Act, 1978, S.24. while the dictum of Apex Court is apparent in pre & post (Amendment) cases.
16. Allauddin Mian & others, (Sharif Mian & others) v. State of Bihar (1989) 3 SCC 5 [S.Natarajan & A.M. Ahmadi, J.J.]
17. Santa Singh v. State of Punjab; AIR 1976 S.C. 2386.
18. Malkiyat Singh v. State of Punjab (1991)4 S.C.C. 341; 1991 S.C.C. (S.C.) 724.
19. Bush Standard Company v. Union of India, (1991)3 S.C.C. 467; AIR 1991 S.C. 1784.

third proviso to Section 309 Cr.P.C. looses its command and as such it is no more obligatory for courts to strictly adhere to it.

The same question came up for consideration before Supreme Court in the case of *Ram Deo Chauhan*[20] in which the Hon'ble Judges of the Supreme Court differ in their views.

While Hon'ble Mr. Justice K.T. Thomas was of the opinion that the accused must be given sufficient opportunity and hearing on the question of sentence; the normal rule being that after pronouncing the verdict of guilt the hearing should be made on the same day and sentence shall also be pronounced on the same day, it was held that if the judge feels otherwise, the proviso to Section 309 (2) is not a bar for affording such time. On the other hand Hon'ble Mr. Justice R.P. Sethi was of the view that in previous judgments, proviso to sub Section (2) of Section 309 was not considered by the Court. Referring to previous decisions on this question, including the case of *Sukh Deo Singh*[21]. Justice Sethi observed that adjournment can be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed upon him.

HEARING & KEEPING A RECORD OF IT

A hearing can be made in the presence of the accused or even in the presence of a counsel, if the presence of accused was exempted, there being nothing peculiar to hear the accused personally.

In *Shobhit Chamar*[22] the judgment was delivered by trial court on 16.2.96 and the accused was recalled in court on 23.2.96 for hearing on the question of sentence. On that date the accused did not

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20. Ram Deo Chauhan alias Raj Nath Chauhan v. State of Assam; 2001 Cr.L.J. 2902 (S.C.) (Decision in a review petition in which an alleged juvenile was sentenced to death).

21. State of Maharashtra v. Sukh Deo Singh; AIR 1992 S.C. 2100.
Hon'ble Mr. Justice R.P. Sethi further observed..... *"I have no doubt in holding that despite the bar of 3rd proviso to sub section (2) of Section 309, the Court in appropriate case, can grant adjournment for enabling the accused persons to show cause against the sentence proposed on him particularly if such proposed sentence is sentence of death. We hold that in all cases where a conviction is recorded in cases triable by the Court of Session or by Special Courts, the court is enjoined upon to direct the accused convict to be immediately taken into custody, if he is on bail, and keep in jail till such time the question of sentence is decided."*

22. Shobhit Chamar v. State of Bihar; AIR 1998 S.C. 2259.

lead any evidence nor brought any material on record nor requested for doing so. The Apex Court ruled that sufficient compliance of Section 235(2) Cr.P.C. has been made and there was nothing to interfere in the sentence awarded, the accused himself not awaiting the opportunity provided.

There is yet another aspect of making such a hearing and keeping record of it. The object underlying in the hearing as contemplated in twin Sections is, not only to give the convict a fresh opportunity of bringing to the notice of the court such material as may be of help to the court for awarding the appropriate sentence for the offence proved, but also to collect sufficient evidence and material and to bring it on record, with regard to the personal, social, aggravating or mitigating circumstances of the case[23], which shall help and assist the appellate court in finding out the justness of the sentence inflicted by the trial court.

Opportunity of hearing should not be taken with such a liberty so as to abuse it for unduly protracting the trial. In *Santa Singh* (supra) the Apex Court has further cautioned to strike harmony with the requirements of affording hearing to the accused as well as the requirements of an expeditious disposal of the case. While in *Karam*[24], it was held that the case should be adjourned if necessary, to afford a fresh opportunity to the accused of making oral submissions or to place other material to make his submission on the question of sentence, an adjournment should be granted, but not in all cases. A too liberal view and unguided devotion for affording a hearing to the accused should not be made a tool to stall the proceedings before the Court[25].

"HEARING"- NOT A FORMALITY

The Court's obligation of hearing the accused is not discharged by putting formal questions to the accused in a mechanical order as to what he has to say on the question of sentence. A *"genuine*

23. Dagdu v. State of Maharashtra AIR 1977 S.C. 1579.

24. Karam v. State of U.P.; AIR 1978 S.C. 30 Para (2)

25. "An accused so minded can stall the proceedings for decades together, if he has the means to do so. The superior courts should also not fall to such strategies & not interfere in the interlocutory orders of the trial Courts". See Santosh v. Archana (1994) 2 S.C.C. 420.

effort" must be made to elicit from the accused, all or which will eventually bear on the question of sentence. The hearing should not be a formality or empty ritualistic but a sincere duty making it *"imperative"* for the Court to hear the accused specifically on the question of sentence.

Resorting to such a procedure and hearing, is bound to assist the Court to make its choice from a wide range of discretion in the matter of sentencing. Such a duty lies not only with the trial Court, but the appellate Court should also resort to such a procedure when conviction is being recorded for the first time, by the appellate Court[26]. Violation of Section 235(2) or 248(2) is not curable. However, appellate Court may reduce the sentence or commute it after hearing the accused. Normally the case should not be remanded for this purpose. What is required is to look to the spirit of the law, while inflicting a sentence according to law, which reflects true justice to the accused, to the prosecution and to the society as a whole.

EPILOGUE

Benjamin N. Cardozo[27], highlighting the "indwelling and creative principles" of law observed;

"The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. Ethical considerations can no more be excluded from the administration of justice, which is the end and the purpose of all laws."

Truly speaking, Judicial power is not exercised for the purpose of giving effect to the will of the Judge, but as observed by Marshal[28] "always for the purpose of giving effect to the will of the legislature; or in other words, to the will of the law" viewed as such the exercise of judicial powers under Sections 235(2) & 248(2) Cr.P.C. is not to just inflict *any sentence* but to render justice to an accused who has been just found to be unjust.

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26. See Allauddin v. State of Bihar AIR 1989 S.C. 1456.

27. Benjamin N. Cardozo in his book "The Nature of the Judicial Process".

28. Marshal (J) in, Osborne v. Bank of United States, 9 wheat 738, 866.

From the Pen of Director

व्यवहार विदः प्राज्ञा कृतशील गुणान्विताः।
रिपो मित्रे समा ये च धर्मज्ञास्सत्य व दिनः।।
निरालसा जित कोपः काम लोभः प्रियंवदा।
राज्ञा नियोजित व्यास्ते सम्यास्सवसि जातिषु:।।
शुक्र नीति (अध्याय IV-5-15-18)

"One who is well versed in behaviour, law and procedure, sprightful, of sterling character, impartial towards friends and foes, of dharma abiding nature, truthful, ever active and who have established control over anger, desire and greed and pleasant in speech and demeanour, should be appointed a judge". (Shukra -Neeti – Chapter IV-5-15-18)

Hon'ble Mr. Justice B.N. Kirpal and Hon'ble Mr. Justice D.P. Mohapatra, while deciding writ Petition No. 437 of 2000 Delhi Bar Association Vs. Union of India, reported in 2001 (8) Supreme 466, referring to the qualities of a good Judge have observed;

"Whether a person is intelligent and will in due course of time become a good judge. It may not be necessary for him to be academically brilliant or knowing all the law at the time when the process of selection is undertaken. What has to be seen is, whether the candidate has the attributes of becoming a good judicial officer, namely integrity, honesty, basic knowledge of law and robust common sense".

In a Democracy, the role of Judiciary is crucial, but still vulnerable. In a secular democratic republic like ours, the Judiciary has a definite, and well defined role of play, while performing its duties within the bounds stipulated by the Constitution. Judiciary conducts itself as a 'conscience keeper' of the constitutional promises

and assurances. Democratic polity declares sovereignty in the people. Occasionally the function of Judiciary is deemed to be creating inroads therein.

Judges being the members of Society possibly do bear the sense; social, economical and political. In discharge of duties, such notions may not be feasible to keep at a distance. Over dominance and interruption thereof in judicial discharge needs to be curbed with a determination. And one need not entertain the canvassing of imaginative sharing, the passion of Constitution and Society.

The Judiciary is independent, but the judicial function is inter-linked with the sister wings and thus inter-dependent. Independent is Judiciary. The demand is, it ought to be independent from the Judges. In a democracy people are governed by the Laws. The Legislature enacts and Executive enforces them. In the event of any dispute, the Judiciary settles it. Summarising the significance of the Judicial system, Hon'ble Mr. Justice K. Subba Rao has categorically observed, "It is a balancing wheel of the Federation, keeps equilibrium between Fundamental Rights and Social Justice, keeping within their bound all authorities of the State, and also controls the Administrative Tribunals."

A Judge is addressed as Justice. He is bound to administer justice according to law. Mere knowledge of law does not make a perfect judge. However able and learned a judge may be, he would be failing in his duty, if he does not understand what justice means.

The Judge must shape his judgments in obedience to the fundamental interests of the society. He must recognise the role of ideals of right and justice in giving shape to the law in accordance with experience, developed by reason. Roscoe Pound said in one of his lectures, *"what we must keep in mind is experience and reason. Experience teaches decisions that prove to satisfy the demands of justice. Reason shapes and orders and develops decisions to ideals of justice and so into principles of law. I repeat: we must not underestimate the role of ideals in the development of the law."*

Hon'ble Mr. Justice K.T. Thomas, Judge, Supreme Court of India classifying Judges and stressing upon improving the judicial system observed.

"There are three variety of Judges, i.e. sleeping Judges, talkative Judges and non-talkative Judges. You have to adopt your own methods to escape from sleeping in Court. I do not wish to elaborate on it. But a participating judge will be the ideal judge compared with non-talking judge. Much time is wasted these days in Courts for the calling work. Some times the calling work goes up to lunch time and the summoned witnesses are standing outside the Court, simply for no purpose. All the witnesses would be asked to come again on the next hearing date. This practice should be avoided. You summon a witness to assist you to decide a case. The witnesses are in fact your invitees. You have to treat them as you treat your invited guests. But now a witness is treated worse than a litigant, every witness summoned is shuddering in that they have to suffer virtual persecution in Courts. While dealing with bail applications, the practice of writing lengthy orders should be avoided and bail orders should be brief. Speed is the need of the day for judicial work. In medical and engineering professions they have found their devices to speed up all their methods. But the judiciary is still at its usual slow pace. Of course, judiciary cannot afford to work at unusual speed. The Judges are therefore advised to utilize the existing infrastructure to speed up the Court process."

It has been the endeavour of this Institute to help prepare perfect judges. This Institute is working under the profound patronage of Hon'ble the Chief Justice, Allahabad High Court and constant guidance of other Hon'ble Judges. This Institute has undertaken various projects for improving legal governance in the State. At the very inception of service, through foundation training courses, emphasis is to inculcate a perception that it is a part of every judge's duty to decide the case to the best of their ability without fear or favour. The judge is under a duty within the limit of his power of innovation to maintain a relation between law and morals; between the precepts of jurisprudence and those of reason and good conscience. Judges ought to be more learned than witty, more

reverend than plausible, and more advised than confident. Above all things, integrity is necessary virtue and an unjust judge may corrupt the fountain. Injustice makes a judgement bitter and delays make it sour.

The idea of the Foundation Training Programme is to initiate and integrate the trainee officers of Justice. The basic objective is to equip them with such knowledge, skills and values, as may be necessary to enable them to perform their functions and to discharge their duties efficiently and effectively, meeting and facing the challenges ahead, in keeping with the highest traditions of the Judiciary.

The topics covered are wide in amplitude and diverse in nature but relevant to the functioning of the Judges/Magistrates in the capacity of trial Judges. It includes, among other things, Administration of Court, Management of Trial, Legal Aid, Lok Adalat, Alternative Dispute Resolution, Judicial Ethics and Accountability, Gender Justice, Appreciation of Evidence, Land Laws, Judgement Writing, Financial Rules, Service Jurisprudence and Forensic Science and many more. Emphasis is also focused on personality development.

The entire course is given a distinct practical slant and as such, it helps in effective functioning of a Trial Judge. The emphasis is more on "doing" although knowledge is a must. Communication of knowledge has to be there but efforts are predominantly directed towards development of skills. Simply speaking, it means transformation of knowledge into action and application of the legal principles to solve real life situations. Values also constitute a crucial component of the training inputs. Endeavour is made to inculcate in them moral, ethical & social values and to sensitise them to issues related to women, children, socially and educationally backward class & other weaker sections of the society. During training programmes Rule of Law, Social Justice, Natural Justice and Human Rights are also given due weight Emphasis is also laid on procedural aspects of justice since substantive justice should not be sacrificed on the altar of procedural technicalities.

Panel discussions with active involvement of the trainees is the dominant technique applied to make the programmes more interactive, effective and interesting besides undertaking problem solving and order/judgement writing exercises. Moot Courts, debates, paper presentations, visits to forensic laboratories, Yoga, P. T., Motor Driving, Swimming etc. are some other segments included in the training module.

We, in the Institute firmly believe that judges, who are well read, well informed just and disciplined alone, can strengthen the faith of the people at large in the judicial system. Let us resolve to give shape to all the ideas for rendering justice to one and all.

Details of training programmes arranged in the year 2001 and those proposed for the year 2002 are also given herewith.

With wishes warm and true, for anything and everything that brightens life, I wish a very Happy New Year 2002 to all.

(D. P. GUPTA)
Director

Details of Training Programmes, Conferences, Workshops, Seminars, successfully arranged in the YEAR 2001 :

S.No.	Details of Training Courses	Duration	Number of Participants
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 & 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 & 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 & Information Technology" for Judicial Officers	19.03.2001 to 24.03.2001	19

9.	First Phase Foundation Training Programme for newly appointed Civil Judge (J.D.) (First Group)	17.04.2001 to 30.05.2001	42
10.	Training Programme on "Computer Application & Information Technology" for Judicial Officers	17.04.2001 to 21.04.2001	20
11.	Training Programme on "Computer Application & Information Technology" for Judicial Officers	23.04.2001 to 28.04.2001	19
12.	Gender Sensitization for Police & Judiciary of U.P. in collaboration with NIPCCD, 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 & 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 (J.D.) (Second Group)	25.06.2001 to 06.08.2001	54
18.	Training Programme on Computer Application & Information Technology for Judicial Officers	18.06.2001 to 23.06.2001	10

19.	Training Programme on Computer Application & Information Technology for Judicial Officers	25.06.2001 to 30.06.2001	14
20.	Training Programme on Computer Application & Information Technology for Judicial Officers	23.07.2001 to 28.07.2001	06
21.	Training Programme on Computer Application & Information Technology for Judicial Officers	06.08.2001 to 10.08.2001	08
22.	Training Programme on Computer Application & Information Technology for Judicial Officers	13.08.2001 to 18.08.2001	05
23.	Second Phase Foundation Training Programme for Civil Judges (J.D.) (First Group)	16.08.2001 to 29.09.2001	42
24.	Training Programme on Legal Procedures and Processes for Officers of Indian Defence Accounts Service	01.10.2001 to 06.10.2001	23
25.	Second Phase Foundation Training Programme for Civil Judges (J.D.) (Second Group)	16.10.2001 to 29.11.2001	54
26.	International Level Training Programme on Cyber Laws & Crimes and Intellectual Property Rights for SAARC Countries Judicial Officers	01.12.2001 to 13.12.2001	15
27.	Training Programme for Officers of Jail & Prison	15.12.2001 to 22.12.2001	29

Training Programmes, Seminars, Workshops, Conferences proposed for the YEAR 2002

Duration	Name of Training Programme/ Conferences /Seminars/ Workshops
05.01.2002	Conference-cum-Workshop on "Consumer laws under the auspices of State Consumer Dispute Redressal Forum, U.P.
07.01.2002 to 11.01.2002	Special Training Programme for Presiding officer of Fast Track Courts (F.T.C.)
14.01.2002 to 24.01.2002	First Training Programme for the Members of the District Consumer Fora, U.P.
15.01.2002 to 19.01.2002	Special Training Programme for Presiding Officer of Fast Track Courts (F.T.C.)
21.01.2002 to 25.01.2002	Special Training Programme for Presiding Officer of Fast Track Courts (F.T.C.)
05.02.2002 to 07.02.2002	First Training Programme for the Secretaries of District Legal Services Authority, U.P.
11.02.2002 to 21.02.2002	Second Training Programme for the Members of the District Consumer Fora, U.P.
26.02.2002 to 28.02.2002	Second Training Programme for the Secretaries of District Legal Sevices Authority, U.P.
04.03.2002 to 08.03.2002	Special Training Programme on "Compensation Laws" for Additional District and Sessions Judges
13.03.2002 to 12.04.2002	Foundation Training Programme for newly appointed Assistant Prosecuting Officers in the State of U.P. (Batch-I).

13.03.2002 to 12.04.2002	Foundation Training Programme for newly appointed Assistant Prosecuting Officers in the State of U.P. (Batch II)
16.03.2002	Conference on "Human Rights"
15.04.2002 to 20.04.2002	Refresher Training Programme for Civil Judges (S.D.)
20.04.2002	Conference on "Law's Delays-Causes and Remedies"
30.04.2002 to 04.05.2002	Refresher Training Programme for Civil Judges (S.D.)/JSCC on rent laws under U.P. Act No. 13 of 1972
15.04.2002 to 29.05.2002	First phase of Foundation Training Programme for newly appointed Civil Judges (J.D.) (Batch-I)
21.05.2002	Seminar on "Controlling Terrorism and Laws"
03.06.2002 to 07.06.2002	Special Training Programme for the Officers of Jail & Prison
10.06.2002 to 23.07.2002	First phase of Foundation Training Programme for newly appointed Civil Judges (J.D.) (Batch-II)
27.07.2002 to 09.09.2002	First phase of Foundation Training Programme for newly appointed Civil Judges (J.D.) (Batch-III)
14.09.2002	हिन्दी दिवस; 'न्यायालयो में हिन्दी का प्रयोग' विषयक संगोष्ठी
17.09.2002 to 02.11.2002	Second Phase of Foundation Training Programme for newly appointed Civil Judges (J.D.) (Batch-I)
19.09.2002 to 21.09.2002	Special Training Programme on Gender Sensitization for Judicial Officers, Police Officers & Prosecuting Officers

07.11.2002 to 21.12.2002	Second Phase of Foundation Training Programme for Newly appointed Civil Judges (J.D.) (Batch-II)
23.11.2002	Conference on "Violence against Women; Remedies and Reliefs"

The above calendar is not the end. Special Training Programme for the officers of different departments (State and Central) shall also be undertaken as and when required. Conferences, Seminars and Workshops such as "Gender and Law", "Media and Law", "Intellectual Property Rights", "Law in Action and Family Courts" and Special Training Programme on "Legislative Drafting and Parliamentary Affairs" are also to be arranged. Special Programme in collaboration with UNICEF and National Human Rights Commission are also likely to be taken up during the year. The Institute has been regularly organising Special Training Programmes for the officers of IDAS. As and when a request is received, a Training Programme for the officers of IDAS shall also be arranged. Special Training Programmes on Computer Application and Information Technology would also be arranged during the year, as per the approval of the Hon'ble Court. The calendar is subject to change and may vary according to the exigencies.

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