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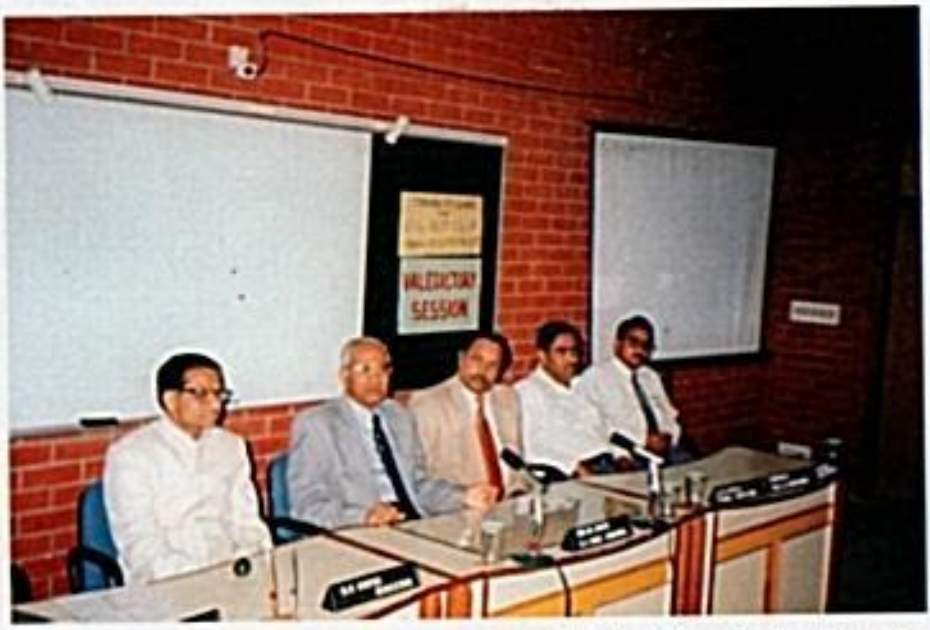

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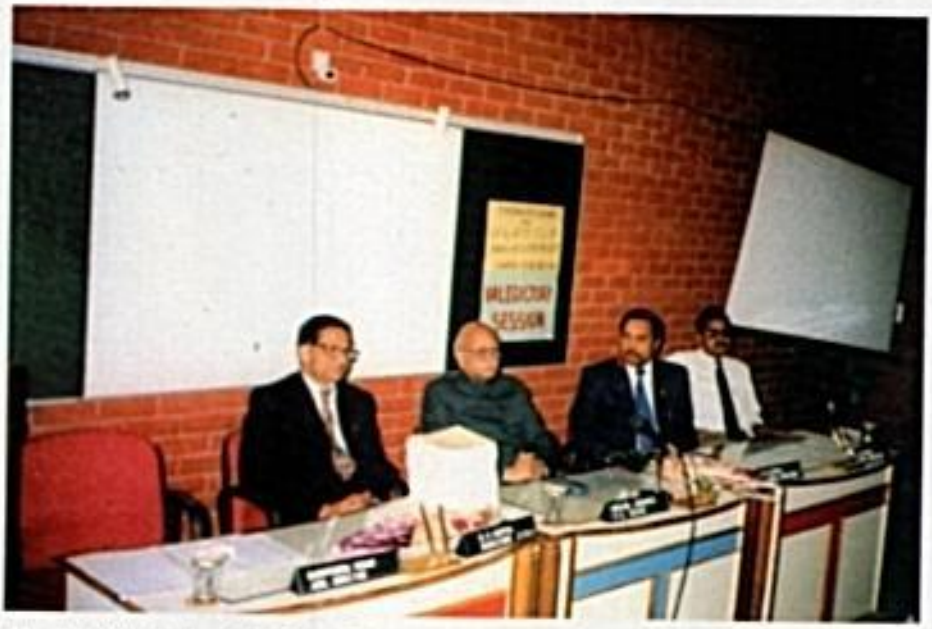

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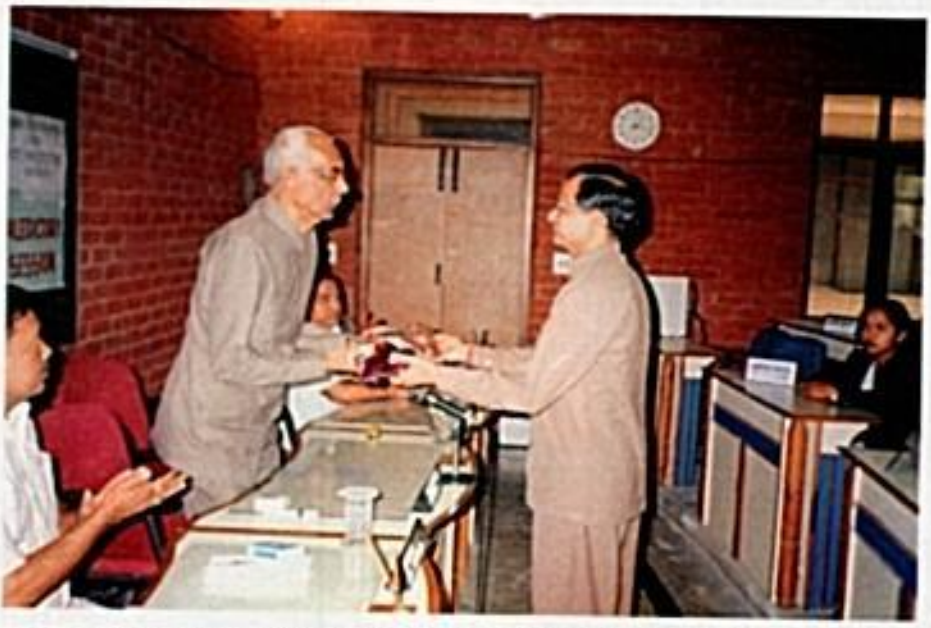

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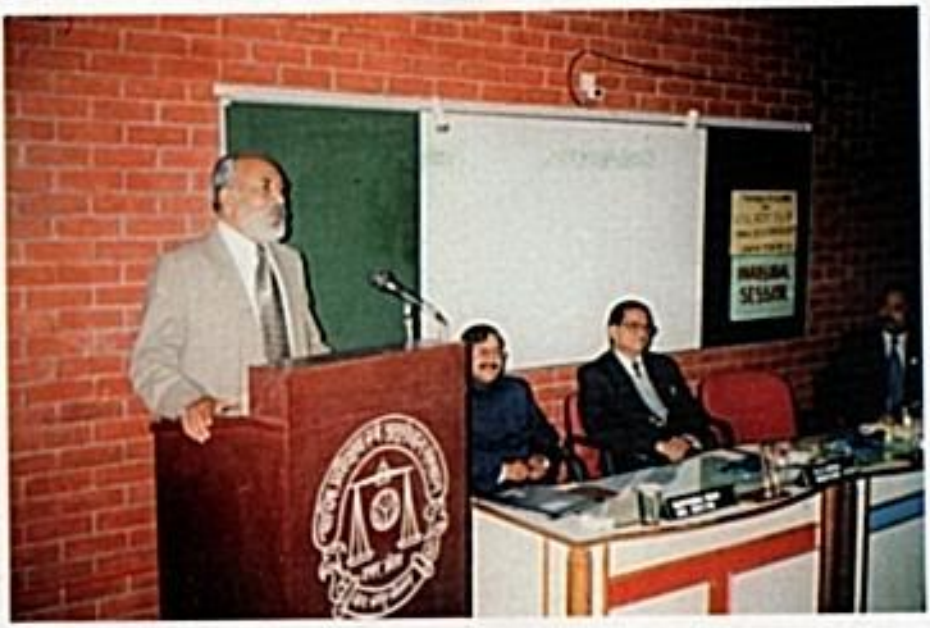

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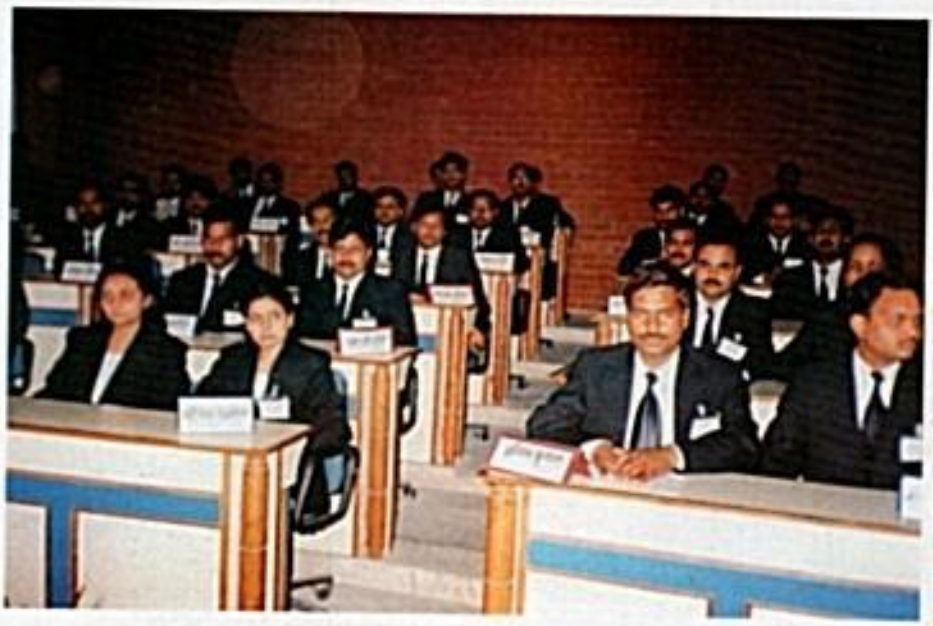

Participants of Foundation Training Programme for newly appointed Assistant Prosecuting Officers of U.P. (I Batch)

Participants of Foundation Training Programme for newly appointed Assistant Prosecuting Officers of U.P. (II Batch)

Participants of Legal Training Programme for DIG/AIG, Stamps and Registration, U.P. (I Batch)

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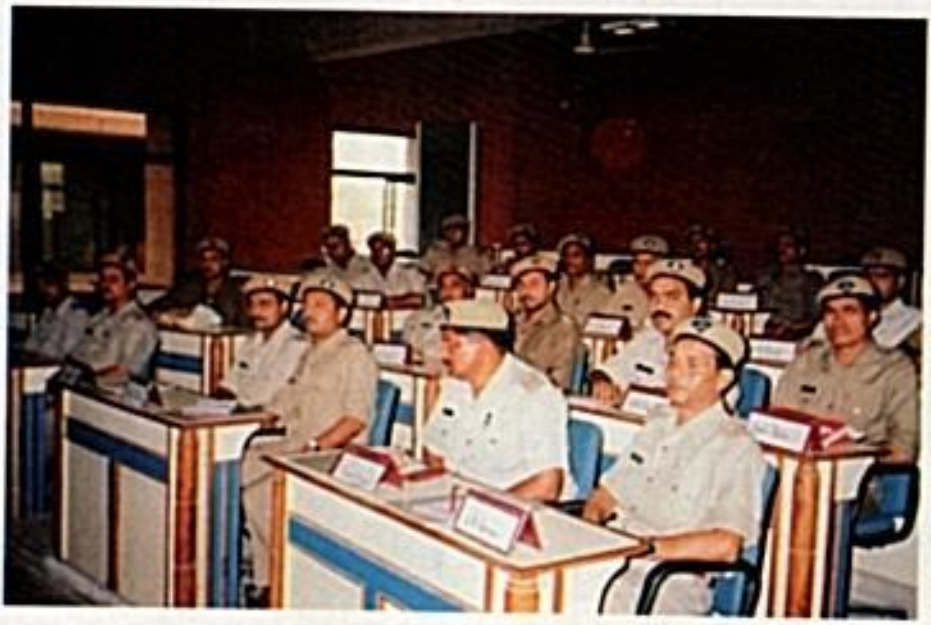

Participants of Legal Training Programme for Jail and Prison Officers of U.P., M.P. and Tripura.

FROM THE PEN OF DIRECTOR

Establishing the supremacy of law, *Bracton* had declared, "the king is under no man, but he is under God and the Law."[1] *Sir Edward Coke*, prescribing that law was founded upon reason asserted, "law is an act which requires long study and experience, before that a man can attain to the cognizance of it; that the law was the golden met-wand and measure to try the causes of the subjects."[2] "The function of Judges", perceived Chief Justice *Warren E. Berger* of American Supreme Court long ago, "is to deliver the best quality of justice at the least cost in the shortest time". Likewise appears to be the moving spirit from the rule of law to rule of justice, from judicial restraint to judicial review and from judicial access to judicial activism.

In Indian lore and traditions, the concept of law and justice has always shone high in the sutras of *'dharma'* narrated by *Yudhisthir*[3(a)] and in the Vedic Philosophy of doing the "maximum good to the maximum number of people". It is our proud privilege that the Indian Judiciary, in the post independence era, has withstood test of time, and with reverence and humility, one can say that constitutional rights of the people of this biggest democracy in the world are safe in the hands of the Indian Judiciary.

Our's is a living and vibrant democracy. Constitution of India is, *suprema lex* of our country defining fundamental freedoms, rights as well as duties. The basis of our constitution is a well planned legal and judicial order. This postulates the pervasiveness of the spirit of law throughout, in all actions and in the matter of discretion as well. But all laws made by the Parliament are to be enforced by human beings-discharging their duties as Judges, who are aptly remarked as the "faces of the judiciary" or the "living oracles of law". Thus it is obvious that the "quality of justice would depend, to a larger extent, upon the quality of the Judges."

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[1] Henry Bracton (1268). In treatise on the Laws and Customs of England. He wrote; 'Quod Rex non debet esse sub homine, sed sub Deo et Lege' {The King is under no man but under the God.}

[2] Sir Edward Coke 1552-1634, Chief Justice of Kings Bench.

[3(a)] Vanparvani-Arneyparva; Adhyay-314;7 (Shri Mahabharte) – {Yash Satyam Damh Shaucham Arjavam Hreer Chaplam Danam Tapo Brahmcharyam – ittetastano Mamh}.

Judiciary in India has by and large enjoyed immense public confidence. But no Institution can take for granted the respect of the community for all times to come, since the performance of the Institution has to match the expectations of the society. It is feared that judiciary is crumbling under its own weight slowly and gradually, because of factors including endless delays, ever increasing costs, uncertainty and complexity in laws, corruption in judicial administration, pressures external as well as internal and lack of judicial accountability. It is high time that judges in India must make an introspection for a social audit in respect of the vast difference between the cherished principles of equality, liberty, fraternity and justice in retrospect of their practical implementation through the present judicial process. An erudite scholar, *Honore Balzac* had observed, "to distrust the judiciary marks the beginning of the end of society; smash the present pattern of the Institution, rebuild it on a different basis but don't stop believing in it."[3] Consequently to keep the judicial system on even keel and further to maintain the respect of the people at large in the judicial process, the duty squarely falls on the shoulders of the judges themselves who, brick by brick, shape this sacrosanct temple of justice.

Supreme Court of India in *Shiv Shankar's Case,* while absolving the Central Minister who himself was briefly a Judge, struck a frank note for introspection by Judges themselves, "It has to be admitted friendly and frankly that there has been erosion of faith in the dignity of the Court and in the majesty of law and that has been caused not so much by the scandalizing remarks made by Politicians or by Ministers but the fragility of the courts of law to deliver quick and substantial justice to the needy. Many today suffer from remedy less evils which courts of justice are incompetent to deal with. Justice cries in silence for long, far too long. The procedural wrangle is eroding the faith in our justice system. It is a criticism which the judges and lawyers must make about themselves. We must turn the search light inward."[4]

Similarly Hon'ble Mr. Justice *V.R. Krishna Iyer* stressing upon social responsibilities of a Judge had remarked, "Judicial genuflection, a creeping

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[3] Quoted by Shri B.R. Sharma in "Public Confidence in the Judiciary – Some Comments", 1988, Indian Bar Review Page 29.

[4] P.N. Duda v. P. Sheo Shanker; AIR 1988 SC 1208 at Page 1217 (Para-17); (Sabyasachi Mukherjee and S. Ranganathan, JJ).

disease, is corroding even the appearance of judicial independence. If this seeping disbelief infiltrates more deeply, all the forms of hearing in court becomes a cover up of impartiality. If the Judge's soul is already purchased by brothers, pressures, propensity to please vested interests or the executive and moral stir within to be grateful for the good done by political executive, there is no reality behind the make up of judicial neutrality."[5] In this back drop one should not loose sight of the glaring truth that the danger of the judicial system is greater from forces operating within the system itself than the outside world.

Karl Marks dismystifying the law quipped, your jurisprudence is but the will of your class made into a law for all, a will, whose essential character and direction are determined by economic conditions of existence of 'your class'.[6] As such the social philosophy of a Judge, is bound to wield influence upon the quality of justice as judged from the societal angle. In such a scenario where do judges stand as the charioteers of the judicial system ?

So, who should guide a Judge; what should be the norms of his functioning and what should enlighten the path of justice. The inescapable conclusion and the only answer is: judges alone, governed by their conscience and not ensnared by the temptations. Justice *Benjamin N. Cardozo*, highlighting the principles responsive for the ideal functioning of a Judge, observed in *Nature Of The Judicial Process*, "a jurist is not to innovate at pleasure. He is not a knight errant roaming at will in pursuit of his own ideal of beauty or of goodness. He has to draw his inspiration for consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise the discretion informed by tradition, methodized by analogy, disciplined by system and subordinated to the primordial necessity of order in the social life.[7] (emphasis supplied)

Much of the malaise that the judicial system is presently suffering from, can squarely be put at the doorsteps of the judiciary itself, including the legal profession. There appears no other department or governmental wing which

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[5] Hon'ble Mr. Justice V.R. Krishna Iyer in "The Indian Lawyer; His Social Responsibilities and Legal Immunities", In Sri S. Seethapathi Rao Panthulu Memorial Lecture at Hyderabad.
[6] Karl Marks as quoted in Indian Bar Review Volume-XV (1 & 2) (1988) Page 122.
[7] Benjamin & Cardozo in "The Nature of the Judicial Process" (Yale University Press.

has been relatively free from public accountability and democratic control than the judiciary in India. The awe regard and reverence with which the judiciary is held by the people, the fear of contempt power and the mask of judicial immunities and privileges have successfully prevented every external scrutiny and criticism of judicial acts or omissions. Though it is said that judiciary has been kept outside public scrutiny since uninformed criticism might result into a greater damage than what was intended to be avoided. Yet it cannot be denied that for many of maladies of the system, Judges too are responsible, directly or indirectly." Therefore, rightly questioned *Lord Denning* in *"Judges and Judicial Power"*, "In the end there is this problem before us; who is to control the exercise of power ? Only the Judges. Someone must be trustee. Let it be Judges".[8]

For curing the maladies of the system and improving morals and mores of the society in the increasing World of materialism we have to guide ourselves from the immortal Worlds of Shri M.K. Gandhi the Father of Nation, who stressed for listening the voice of our conscience and wrote "The reason for the present situation is our inveterate selfishness, our inability to make sacrifices for the sake of country, our dishonesty, our timidity, our hypocrisy and ignorance. Truth alone triumphs. So long as men remain selfish and does not care for the happiness of others, he is no better than animal and perhaps worse. God is conscience. He is the greatest democrat, the world knows; for he lives in us unfettered to make our own choice between good and bad". Therefore, judges owe a sacrosanct duty to listen to the voice of their conscience, and rise above the fog in public duty and private thinking.

We, in the Institute, are making our humble contributions for inculcating qualities of sterling character, resilence and temperament with emphasis on professional excellence in the fields of training, research, publication, court management, behavioural science and many more.

The target groups, generally, are judicial officers and judges; officers from police, prison and jail; senior functionaries in Court Fee, Stamp & Registration; Probation Officers and Asstt. Prosecution Officers alongwith officers from Finance, Accounts and Consumer Fora; Officers dealing with

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[8] Lord Denning in his book "Judges and Judicial Power" quoted in Indian Bar Review, Volume-XV, Page VI

Land Laws, Environmental Laws, Child Rights, Press Laws; Legislative Drafting & Parliamentary Affairs; Cyber Laws and Cyber Crimes; Human Rights and whole host of other subjects of socio-legal importance.

Giving shape to the well conceptualized dreams of its founding fathers, drawing inspiration from the judicial fraternity all-around this Institute has always been nursed and nurtured by the profound guidance and steering enlightenment by the Hon'ble Allahabad High Court. True to the expectations and justifiably withstanding the touch-stones of quality as well as tests of time, the Institute has been successful in carving out its own premier place in the country in so far as dissemination of knowledge and arranging several judicial training programmes are concerned. Numerous International, National & State level conferences, seminars and colloquia have enhanced our confidence and infused the participants with fresh vigour, latest information and profound knowledge in their respective fields of action. Institutions owe a lot to the society to which they belong. The Institute of Judicial Training & Research, gratefully acknowledges the kind guidance and sincere enlightenment shown by its seniors and superiors and profoundly bestows itself to its commitment of rendering its optimum services to the judicial fraternity.

The present issue of JTRI Journal comprises of collected dew drops of wisdom, social ethics and legal perspectives flowing from the pen of distinguished judges and academicians, which is sure to enlighten all its esteemed readers on diverse thoughts, ideas and subjects.

Acknowledging sincere gratitude to all those who made this issue so rich in law and utility.

Yours truly,

(D.P. Gupta)
Director

DEMOCRACY AND JUDICIARY[1]

Justice Brijesh Kumar
Judge,
Supreme Court

Democracy is one of the "organized system of governance" of a country and its people. It is considered to be one of the most civilized and suitable system in the modern times. Democratic theory is based on notion of human dignity and adult autonomy. To achieve that end people take it upon themselves, the responsibility to manage their own affairs and governance but direct rule is not possible by the masses. The people therefore delegate authority to their freely chosen representatives. In one of the American decisions[2] it was observed:

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws, under which we.....must live."

Two things are clear one sharing in the governance through the elected representatives and the laws which are made under which the people choose to live or to abide by. The Rule of Law thus assumes great importance in the democratic system of governance. Equally important principles and concepts of democracy are. Liberty and Freedom. People die for it. As a matter of fact Rule of Law is a tool to achieve those objects, namely Human Dignity, Freedom and Liberty. R. G. Ingersoll says, "what light is to the eyes..... what air is to the lungs what love is to the heart, liberty is to the soul of man."

The people of this country have given unto themselves a Constitution which is supreme and provides for parliamentary system of Government. Sovereignty lies with the people. The elected representatives constitute the Legislature expressing the will of the people through laws setting course of conduct of people. Faithful execution of the laws is the responsibility of the Executive which is accountable to the Legislature. This is how the administration

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[1] Text of the address delivered by Hon'ble Mr. Justice Brijesh Kumar, Judge, Supreme Court of India, on May 4, 2002, in the seminar organized by High Court Bar Association, Law Institute and Sapru Law Institute, at Allahabad.

[2] Westperry V. Sanders 376 US (1) 17, 1964 By Justice Yugo L. Black.

and the matters of administrative policy come within the purview of the Executive.

So far the people are concerned, our Constitution guarantees certain rights e.g. right to life and liberty may right to live with dignity, right of equality before the law and protection against any kind of arbitrariness at the hands of the Executive and the State. It also ensures right to education, right to choose an avocation and profession of one's choice, right to achieve excellence in any sphere of human activity. Right of Freedom of expression and right to know and transparency are also guaranteed to the people. In everyday life, protection is needed to safeguard these rights or to seek their enforcement through the Court of Law. This is how judiciary comes in, to play its most important role to enforce the Rule of Law.

Under the Constitution, Judiciary is to act as a watch-god and to keep a vigil on the Legislature as well as on the Executive so as to check any transgression in exercise of their power if it is going beyond the limits prescribed by the Constitution. The democratic system loathes exercise of legislative power in excess of legislative competence or in derogation of constitutional provisions, simultaneously people do not approve of exercise of executive power in excess of their limit. Every legislative and Executive action is to pass through the test of constitutionality if challenged in Court of Law. Conferment of rights on the people alone will have no meaning if no effective machinery is provided to enforce them and to check their violation. Garner once said: 'a society without legislative organ is conceivable but a civilized state without judicial organ is hardly conceivable". Functioning of a democracy in a country is well gauged by the kind of the judiciary and the judicial system it has. Lord Bryce had aptly remarked: "there is no better test of the excellence of a Government than the efficiency of its judicial system". He further goes on to say: "if the law be dishonestly administered, the salt has lost its flavour..... The lamp of justice goes out in darkness, how great is its darkness". It indicates the need of an independent and impartial judiciary otherwise the Government may function in an arbitrary manner, there being no organ to check or resist the violation of Rule of Law. It has been remarked once that the laws may be sound and just but unless they are applied in right and impartial manner, it loses its significance and justice will be a far cry. It also implies that Judges should be completely immuned from any kind of influence in discharge of their

judicial function. Democracy permits free access to its people to the Court of Law, parties when go to the Courts, they go with an assumption that the dispute shall be decided impartially in accordance with the law by judges who are independent and also independent of their personal beliefs.

About the role played by Judiciary, Lord Irvine once said: "Let me begin with a recognition that the significance of the "democratic deficit", the want of parliamentary control over the Executive in recent years, have been, to an important degree mitigated by rigor of judicial review". Praising the high quality of judicial review in his country he further observes that it improves the quality of administrative decision making. This throws light on one of the aspects of judicial working and its scope and extent and the circumstance in which it is expanded and the extent of impact it may have on the administrative decision making as well.

Coming back to the function of judiciary in a democracy through application of Rule of Law, Lord Bridge Harwich observed in relation to position in England "the maintenance of Rule of Law is in every way as important in a free society as the democratic franchise. In our society the Rule of Law rests upon twin foundation - the sovereignty of the Queen in Parliament in making the laws and sovereignty of the Queen's Courts in interpreting and applying the laws".

In relation to the judiciary in democratic countries, sometimes a point has been raised by some critics about the un-elected judiciary which exercises check and control over the other elected wings of Govt. According to them un-elected Judges cannot claim to have a mandate of the public for their decision. But this idea could not catch up generally with the people and in England the idea of candidates for judicial office, entering into an electoral matter, has been considered to be hostile to the very concept of a neutral and impartial judiciary. Lord Steyn in his write up "The Weakest and the Least Dangerous Department of the Government" observed: that so far he knew there was no support in England for the idea of elected Judges. Edmund Burke said the neutrality of impartial Judges can stand guard over fundamental requirements of a democracy.

Important fall out thus is that for successful functioning of democracy, independent, impartial and unbiased judiciary is essential. The Judges'

independence shall not permit any kind of influence to affect his decision. They must also have, independence from any kind of political or executive interference. In this connection quite often a question has arisen in our country as well as other democratic countries including England about the finances for the judicial system so as to eliminate any chance of any influence on that count too.

Historically in British the independence of Judiciary came a little late where at one time Judges used to be in office during the period of good behaviour and pleasure of the King. Later however by Act of Settlement in 1701, giving security of tenure and removal of the Judges upon the Address of both Houses of Parliament brought change in the position. Independence of Judges as it is obvious is main concern and valued under American system too. And it was said by Hemilton that Judicial independence was essential to ensure impartial administration of justice and to enable the courts to act a check on the other branches of the Government. But ups and down have been seen in different countries and once President Roosevelt threatened to pack the Court with additional justices in order to salvage the New Deal. In our country also the idea of committed judiciary was once floating but it was difficult to bear the onslaught of the public opinion against such an idea. In Germany also judicial independence has been provided to the Judges. The German Constitution does not say anything about removal of Judges and all that is said is that the Judges are independent and subject only to law. Whatever control is there it is with the Judges themselves alone. In our country too, as all of us are aware that Judges are provided full independence and protection from any kind of chance of being influenced in any manner in their functioning. The removal is by impeachment by the Parliament.

There is some murmuring almost universally about the accountability of the Judges were they may exceed their authority or lose objectivity and independence. Therefore, some have expressed a balancing between independence and accountability. On this question it has been observed by David P. Currie in one of his Articles "The critical question is neither how to make Judges independent nor how to control them but rather how best to reconcile the complete values to find the happy medium the golden mean, how in other words to optimize the costs and benefits of judicial independence and accountability". The means of accountability, if at all necessary (debatable

question) have to be found out with care which may not in any manner diminish independence of the Judges. The author in "Law and Contemporary Problems" observed about American situation saying "But I think the principal reason our untidy arrangement works is that the players respect the system. The Judges know they are expected to follow the law; Legislature and Executive know the Judges are supposed to be independent. Nobody want to destroy the system – a system in which no one has absolute power in which there are effective checks on all branches of Government in which Judges are both independent and accountable in which we eat our cake and have it too. It is impossible, of course. But it works. And it will continue to work so long as we believe the impossible dream."

One of the aspects which also needs a mention is how far the personal views of a Judge and his belief in any philosophy can and should influence his decision making. When I joined the Supreme Court, one of my dear friends, a retired Judge of another High Court while felicitating me wrote: "Judicial power is not meant to give effect to the will of the law alone – it should also be exercised and often exercised to given effect to the will of the Judge with enlightened disposition tempered with broad vision". In writing this he definitely had the backing of what Cardozo wrote in his book "Judicial Process" so as to indicate my point of view in support of objectivity in the process of decision making, I may only be permitted to quote what I wrote back him:

"..... Ideally, the will of the Judge must take a back seat while the force of the exercise of the judicial power must be propelled by the law and the existing circumstances so as to appropriately apply the same with some wider comprehension. It is true personal element, in looking at a problem may not escape Judge's own experience and view. To attain absolute objectivity may sound a bit utopian but the extent to which it can be attained would depend upon the effort made and capacity to detach self from the rest. Perhaps easier to say than to do. Constant effort however, to achieve the ideal, and unceasing endeavour for the same may be a better pursuit. Cardozo wrote about sub-conscious forces in the judicial process and also emphasized that it was difficult to say that personal measure is eliminated altogether in decision making. You know it well when he has beautifully described it as "inescapable relation between the truth without us and the truth within' but he is also perhaps inclined to prefer judicial process and decision making without personal

element," when he says "the training of the Judge, if coupled with what is styled as the Judicial temperament, will help in some degree to emancipate him from the suggestive power of individual dislikes and prepossessions. It will help to broaden the group to which his subconscious loyalties are due. Never will these loyalties be utterly extinguished while human nature is what it is". Interestingly, he also writes; "the eccentricities of Judges balance one another..... out of attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than it component elements...."

I have always believed that a Judge must imbibe and develop the capacity and ability to act as one who has specialized in process of decision making. He has to be different and above those who are not entrusted with his onerous responsibility. They cannot be captive of their environment and circumstances of grooming not to the experience of their own. They must develop a sense with the help of which they can come out of their shell and see the things as they are. They must have the ability to see the things independently from the point of view of others by keeping themselves in position of those in respect of whom they have to make a decision. The Rule of Law is the only safeguard in the matter of decision making and to protect the democratic system and its values. Personal views, faith and philosophy must be kept aloof and should not be thrust of inflicted upon those who are to be affected by their judgments. Judicial office and exercise of judicial power is not the appropriate means to implement one's will, whim or views and philosophy of any nature. Whenever it may seem to a Judge that there is a conflict between his personal ideas and views and the laws, since he is called upon to implement and uphold the Rule of Law, the former has to give way and there is no option but to adhere to the latter. This is what is expected by the people depending upon the laws and the Rule of Law which is essence of democratic society. They may not be prepared to accept the personal views and prejudices of the Judges and rightly. Attainment of state of mind of detachment from one's surroundings and circumstances, personal views and faith must be a constant endeavour to achieve, and it is an effort which is always in process of perfection.

The democracy without a strong and independent Judiciary has no meaning. It ceases to be a democracy. Some one has rightly said take out the wing of

Judiciary from a democratic polity see then what remains. It would only be power and absolute power unchecked and infinite. It may result in anything but governance by democratic means. Needless to say that in our country the Judiciary has a successful and good record of upholding and maintaining the democratic principles of governance and Rule of Law and any aberration there from has always evoked desired response.

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"Protection of Human Rights –Role of Judiciary"*

Justice Dr. A. S. Anand,
Former Chief Justice of India

I feel greatly honoured to be invited to deliver Sri J. K. Mathur Memorial Lecture arranged by Rural Litigation & Entitlement Kendra, alongwith Late Justice Mathur's family, friends and admirers, who are present in this august gathering. The presence of so many distinguished judges, lawyers and prominent citizens shows the reverence in which Shri J. K. Mathur was held. In must thank the organizers of the Kendra for giving me this privileges to pay my tribute to a great personality. It is, appropriate that the lecture to perpetuate his memory has been scheduled on "Protection of Human Rights – Role of Judiciary".

"Human Rights" are those rights, which inhere in every human being by virtue of being a human being. These are the modern names of what had been traditionally known as "natural rights" i.e. rights bestowed upon human beings by nature. "Human rights are based on mankind's increasing demand for a decent civilized life in which the inherent dignity of each human being is well respected and protected. Human rights are fundamental to our very existence without which we cannot live as human beings. The basic human rights constitute, what might be called "sacrosanct rights" from which no derogation can be permitted in a civilized society. Fundamental human rights and freedom find expression in constitutions and legal systems throughout the world and in the international human rights institutions. Human rights are universal and cut across all national boundaries and political frontiers.

International Human Rights norms received an impetus 50 years ago following the harrowing experience of the two World Wars and holocaust.

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*Extract of the speech delivered by Hon'ble Mr. Justice A. S. Anand, the then Chief Justice of India, on September 22, 2001 during the second "Late Justice J. K. Mathur Memorial Lecture".

The world community was appalled by man's capacity to destroy him. For the first time the concept of human Rights asserted itself formally and prominently in an official international document, the U. N. Charter. The Universal Declaration of Human Rights, which followed on the 10th December, 1948, was a standard setting declaration of value judgments; but had no legal sanction of its own. It was not a self-executing document. Thereafter, came the two Covenants of 1966: One on Civil and Political Rights and the other on Economic, Social and Political Rights.

The UN Charter hoped to save succeeding generations from self-destruction by proclaiming and establishing equal and inalienable rights of all members of human family – great or small, virtuous or vicious, rich or poor, wise or foolish and their inherent dignity, regardless of birth, status, race, colour, sex, language, religion or political or other opinion. Article 55 of the Charter of the United Nations required the United Nations to promote: "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Article 56 enjoins that: "All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

In India, the Universal Declaration has greatly influenced the constitution making particularly the concept of fundamental rights. The Indian Constitution was adopted shortly after the Universal Declaration. It provided Chapter II dealing with Fundamental Rights.

No society is free and no State is truly democratic, unless human rights are actualized by every citizen. In emerging world legal order, the brooding presence of human rights culture, affecting the thought ways of nations and of community of lawyers and judges is always present. The dialectics of current political realities, however, point to violations of the democratic order in many countries even after the normative prescriptions in the great charter, the Universal Declaration, the International Covenants and a host of other instruments which have since come into being. Every violation of human rights, wherever it occurs, is a threat to the welfare of entire human family. The protection of human rights is, therefore, a worldwide responsibility.

Judicial institutions have a sacrosanct role to play not only for resolving inter-se disputes but also to act as a balancing mechanism between the conflicting pulls and pressures operating in a society. Courts of law are the products of the Constitution and the instrumentalities for fulfilling the ideals of the State enshrined therein. Their function is to administer justice according to the law and in doing so, they have to respond to the hopes and aspirations of the people because the people of this country, in no uncertain terms, have committed themselves to secure justice-social, economic and political – besides equality and dignity to all.

In human affairs, there is a constant recurring cycle of change and experiment. A society changes as the norms acceptable to the society undergo a change. The judges have been alive to this reality and, while discharging their duties, have tried to develop and expound the law on those lines while acting within the bounds and limits set out for them in the Constitution.

The Supreme Court of India has been consistently expanding the dimensions of Art. 21 (Right to life & personal liberty) within the bounds of law by purposeful interpretations. More than fifteen years ago in F. C. Mullin v. The Administrator, Union Territory of Delhi & Ors., Justice Bhagwati observed:

> *"The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. The magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self. Every act which offends against or impairs human dignity, would constitute deprivation pro tants of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law, which stands the test of other fundamental rights."*

The journey of the Indian Supreme Court from A. K. Gopalan to Maneka Gandhi via Bank Nationalization and Hardhan Saha's case is dramatic and educative. The Court in Indian have attempted to mould and shape the law to respond to the society's desire that human rights must be effectively protected. Decisions on such matters which deal with right to live with dignity, free from exploitation are a tribute to the judiciary in India. Strategy of public interest litigation was evolved to bring justice within the reach of the poor and underprivileged sections of the society. The Court in India have been making judicial interventions in cases concerning violation of human rights as an ongoing judicial process in discharge of its constitutional obligations.

The progress of the society is dependent upon proper application of law to its needs and since the society today realizes more that ever before its rights and obligations, the judiciary has to mould and shape the law to deal with such rights and obligations. The mere existence of a particular piece of beneficial legislation cannot solve the problems of the society at large unless the judges interpret and apply the law to ensure its benefit to the right quarters.

The endeavour of the Supreme Court of India is a virtual judicial incorporation of the treaty-law into the *corpus juris* is demonstrated by its opinion in Vishaka and Ors. v. State of Rajasthan & Ors. The Supreme Court of India said:

> *"The remaining and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. Independence of Judiciary forms a part of our constitutional scheme. The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law."*

In Nilabati Behera v. State of Orissa, while justifying the award of compensation for infringement of the right to life, the Court referred to the

Covenant of Civil and Political Rights, 1966 which indicates that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right.

And in D. K. Basu & Anr. v. State of West Bengal & Anr., the Supreme Court noticed a specific reservation made by the Government of India, at the time of the ratification of the International Convents of Civil & Political Rights, 1966 in 1979, to the effect that the Indian Legal System does not recognize a right to compensation for victims of unlawful arrest or detention influenced, by the convention, the Supreme Court evolved the right to compensation in cases of established unconstitutional deprivation of personal liberty or life. The Court said:

> *"Article 9 (5) of the International Covenant on Civil and Political Rights, 1966 (ICCPR) provides that 'anyone who has been the victim of unlawful arrest or detention shall have enforceable right to compensation'. Of course, the Government of India at the time of its ratification (of ICCPR) in 1979 had made a specific reservation to the effect that the Indian legal system does not recognize a right to compensation for victims of unlawful arrest or detention and thus did not become a party to the Covenant. That reservation, however has not lost its relevance in view of the law laid down by this Court in an number of cases, awarding compensation for the infringement of the fundamental right to life of a citizen."*

The judiciary has, thus, been rendering judgments which are in tune and temper with the legislative intent, while keeping pace with time and jealously protecting and developing the dimensions of fundamental human rights of the citizens so as to make them meaningful and realistic. New contents are being provided to criminal justice also resulting in prison reforms and humanitarian treatment of the prisoners and the under trials. The doctrine of equality has been employed to provide equal pay for equal work. Ecology, public health and environment are receiving attention at the hands of the Courts. Exploitation of children, women and labour is receiving the concern, it deserves. The Executive is being made more and more to realize its responsibilities.

Judicial activism in India essentially encompasses an area of legislative vacuum in the filed of human rights. Judicial activism reinforces the strength of democracy and reaffirms the faith of the common man in the Rule of Law. The judiciary, however, can act only as an Alarm-clock but not as a time-keeper. After giving the alarm-call, it must ensure to see that the executive performs its duties in the manner envisaged by the Constitution.

It would be seen that judicial activism, which is the search for the spirit of law, has been profitably used by powerless minorities, such as bonded labour, prison inmates, under-trial prisoners, sex workers and such other powerless minority groups as are crusading for protection of human rights of women and children or seeking redressal against government lawlessness, or relief against developmental policies which benefit the haves at the cost of the have-nots.

Judicial activism, however, is not an unguided missile. It has to be controlled and properly channelised. Courts have to function within established parameters and constitutional bounds. Decision should have a jurisprudential base, with clearly discernible principles. Limits of jurisdiction cannot be pushed back so as to make them irrelevant. Courts have to be careful to see that they do not overstep their limits because, to them is assigned the sacred duty of guarding the Constitution. People of this country have reposed faith and trust in the Courts and, therefore, the judges have to act as their trustees. Betrayal of that trust would lead to judicial despotism – which posterity would not forgive.

We must always remember that the Judges in exercise of their power of judicial review are not expected to decide a dispute or controversy which is purely theoretical or for which there are no judicially manageable standards available with them. The Court do not, generally speaking interfere with the policy matters of the Executive unless the policy is either against the Constitution or some Statute or is actuated by *mala fides*. Policy matters, fiscal or otherwise, are thus best left to the judgment of the Executive. The danger of judiciary creating a multiplicity of rights without the possibility of adequate enforcement will in the ultimate analysis be counter productive and thus undermine the credibility of the institution. Courts cannot "create rights" where none exist, nor can they go on making orders which are incapable of enforcement or violative of other laws or settled legal principles.

The Courts have the duty of implementing the constitutional safeguards that protect individual rights but they cannot push back the limits of the Constitution to accommodate the challenged violation. 'Judicial Activism' is a delicate exercise involving creativity. Great skill is required for innovation. Caution is needed because of the danger of populism imperceptibly influencing the psyche. Public adulation must not sway the judges and personal aggrandizement must be eschewed. It is imperative to preserve the sanctity and credibility of judicial process. The Court of India, however, do not shy away from discharging their constitutional obligations to protect and enforce human rights of the citizens and while acting within the bounds of law the Courts rise to the occasion, as guardians of the Constitution, criticism of 'judicial activism' notwithstanding.

There is one other aspect to which I would like to make a reference in the context of protection of human rights. One of the greatest threats today, to human rights, comes from international and intra-national terrorism. Though with different origin. it has become a global phenomenon. Terrorism arising out of religious extremism poses a great challenge to civilization and humanity. Terrorism, of course, is not a new phenomenon. It has existed for decades, What is new, however, is the international nature of terrorism. International terrorism is, therefore, a special problem for civilized democracies. The growing menace of terrorism which is a fight between barbarism and civilization and is a morally degrading means of struggle. with no justification whatsoever, compounded by internal dynamics and external linkage. poses a formidable challenge to the enjoyment of human rights. Terrorism is most vicious, irrational and senseless kind of violence, which aims at achieving personal, religious or political ends through acts of terror. The main aim of such acts is not to kill or harm a particular person or persons but to create a sense of terror and fear among the people generally, and senselessly violate human rights of innocent citizens. To check terrorism, the State sometimes adopts counter-terrorism measures, which may also be violative of human rights of those engaged in such activity. State terrorism, however, is not answer to combat terrorism. It may on the other hand provide legitimacy to terrorism for the citizen would not know who violates whose human rights. Scientific means and concerted efforts are, therefore, needed to combat terrorism and in this effort all civilized democracies must join.

On 04 December, 1997, The Institute for National Strategies Studies. U. S. National Defence University organized a dialogue on the subject of terrorism. The participants included strategies analysts from India and the United States. Mr. K. Subrahmanyam, s strategic affairs analyst from Indian pointed out at the meet:

> *"You Ayatollahs of nuclear non-proliferation are not listening to us. You are obsessed with your theories. You refuse to put your ear to the ground and hear what is happening. They want to hurt us. they will hurt you too."*

The wide ranging incidents like the Bombay Blasts in 1993 or the continuing proxy war in Kashmir and the latest act of terrorism on the "Terrible Tuesday" of 11th September in the United States – taking in its toll World Trade Centre and Pentagon, with thousands of innocent dead and missing, exposes the grim reality of terrorism.

The challenge of terrorism stares us in the face. It negates all human rights. No super power, howsoever powerful, no judicial courts, howsoever committed and dedicated to protect human rights, can stand against this lawlessness unless concerted efforts are made to eliminate it. It is therefore, necessary that all civilized nations throughout the world must join not so much to mourn the dead, but, to defend the liberty of the living. Terrorism needs to be fought as a common enemy of civilized society and the humanity. Let us wake up to the reality of the clash of civilizations and the desperate attempt of highly motivated terrorist groups to dictate "Their World Order". Terrorism poses a serious threat to protection of Human Rights everywhere. We must, therefore act in unison to meet this threat.

Ladies and Gentlemen, it has been indeed a great pleasure to be with you this afternoon.

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HUMAN RIGHTS AND CRIMINAL JUSTICE

Justice K. N. Goyal,
Honorary Chairman,
U.P. State Law Commission.

International Covenant on Civil and Political Rights 1966

Relevant aspects of international human rights law include:

(a) the right to a fair and public hearing by a competent, independent, and impartial tribunal established by law: art. 14(1);

(b) a right to be presumed innocent until proven guilty according to law: art. 14(2);

(c) the right to be informed promptly and in detail in a language which the accused understands of the nature and cause of the charge against the accused: art. 14(3)(a);

(d) The right to have adequate time and facilities for the preparation of a defence and to communicate with counsel of one's own choosing: art. 14(3)(b);

(e) The right to legal assistance: art. 14(3)(d);

(f) the right to examine, or have examined, the witnesses and to obtain the attendance and examination of witnesses. Id. art. 14(3)(e);

(g) everyone convicted of a crime shall have the right to the review of the conviction and sentence by a higher tribunal according to law: art. 14(5).

2. All these rights are taken care of in our Code of Criminal Procedure and, as would be seen presently, fortified by decisions of our Supreme Court on Articles 14, 20 and 21 of the Constitution.

The U.S. and the Indian Constitutions

3. The main body of the U.S. Constitution contains only one article (Article III) relating to the judiciary. Among other things it provides for jury

trial and for territorial jurisdiction of Courts and also makes a specific provision in respect of the offence of treason.

4. Later a number of amendments came to be passed which provided for various fundamental rights.

The Fourth and Fifth Amendments

5. The Fourth Amendment guarantees the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures and further provides for search warrants to be issued only upon probable cause and with precision of particulars. There are specific provisions in India in the Code of Criminal Procedure in this regard (sections 93 to 105, 165 and 166), which stand the test of reasonableness.

6. The Fifth Amendment which will be dealt with later in detail, inter alia, provides for immunity from self incrimination. Clause (3) of Article 20 of our Constitution makes a similar provision.

THE FOURTH AND FIFTH AMENDMENTS AND THE EXCLUSIONARY RULE: U.S. AND INDIA

7. The American courts have set great store by the prohibition of unreasonable searches. A search affects the citizen's right to privacy and in the words of Justice Brandies in a 1928 case (Olmstead v. U.S. 277 U.S. 438) the "right to be let alone." They have normally insisted on individualised justification of probable cause for search of any person. Mere general suspicion about a class of persons would not be enough justification for search of individuals.

8. The right to privacy in this context is not given the same weight in respect of business premises as is given in respect of the residence of a person.

9. Moreover the Courts have not applied the exclusionary rule in relation to illegal immigrants' deportation cases (vide Police Practices and the Bill of Rights, an article by Lawrence A.Benner and Michal R. Belknap, included in the compilation "The Bill of Rights in Modern America After 200 Years"" published by the Indiana University Press, 1993 p. 132)

10. The requirement of probable cause in respect of each individual has been relaxed in cases of the Government's special interest in railway safety or in a drug-free work force. Thus in Skinner v. Railway Labour Executives Association, 489 US 602 (1989), a federal regulation requiring a railroad

company to compel its employees to submit to blood tests so as to rule out drug or alcohol abuse was upheld on the ground of requirement of railway safety. Similarly in National Treasury Employees Union v. Von Raab 489 US 656 (1989), the U.S. Customs Service had established a urine analysis testing programme for its employees. This was assailed on the ground that urine analysis could reveal such private medical facts as whether one was pregnant or had epilepsy. This was also upheld because of the need to have a drug-free work-force.

11. The U.S. Supreme Court, when headed by Chief Justice Warren, came to be very strict in excluding from consideration any evidence obtained by the investigation agency through an illegal search. In Mapp v. Ohio, 367 US 1081 (1961), the police suspected someone of bomb-making or possessing bomb materials. The suspect was believed to be at the home of a woman friend named Mapp. The police went to Mapp's home when she refused to let them in without a search warrant. She also called her attorney. The police left but returned later, waving a piece of paper calling it a search warrant. She was not however allowed to see it. This search of home disclosed no bomb materials. However some obscene material came to be recovered. She was tried and convicted of possessing obscene material. The Supreme Court set aside her conviction holding that any material recovered through an illegal search of the premises was to be excluded.

12. In Massiah v. United States, 377 US 201 (1964), Massiah was believed to be transporting illegal drugs into U.S.A. from South America. He was charged and was awaiting trial. A friend of his was directed by F.B.I. agents to sit in his car and elicit incriminating statements about drugs from him. That friend was wearing a wire transmitter, and an F.B.I. agent was sitting in a car behind that car in order to record the incriminating statements. Massiah did make incriminating statements which were so recorded and he was subsequently convicted. The Supreme Court over-turned the conviction, saying that the conversation he had with his friend constituted an interrogation since the friend was acting on behalf of and at the instructions of the F.B.I. Massiah had been already charged and represented by counsel. The counsel was therefore entitled to be present during the interrogation. Hence the accused's constitutional rights have been violated.

13. Another landmark decision on the exclusionary rule was Miranda v. Arizona, 384 US 436 (1966). In this case Miranda was arrested on suspicion

of rape and kidnapping. He was not permitted to talk to an attorney nor was he advised of his right to one. He was interrogated by police for several hours, eventually confessing and writing a written confession. He was convicted. The Supreme Court set aside the conviction holding that confessions made by suspects who were not notified of their due process rights cannot be admitted as evidence. Before interrogating him the police officer must advise him that he has a right not to answer questions and that any answer given by him may be used in evidence against him and also that he has a right to counsel and even a right to free counsel at State expense if he cannot afford one of his own. He has also a right to stop answering further questions even after he has once waived his right.

14. There was considerable public outcry against these exclusionary decisions of the Warren Court and ultimately some exceptions were engrafted. One was the good faith exception established by United States v. Leon, 468 US 897 (1984). In this case Leon, a suspected drug trafficker was placed under surveillance by the police. The police obtained search warrants for his three residences and several automobiles. Although the search warrants were later found to be invalid the police officers had been acting in good faith, presuming that the issued warrants were valid. The fault of defective warrants rested with the judges and not the police. The exclusionary rule was founded on the need to prevent police from acting highhandedly. Hence the evidence of seizure of drugs on the basis of the search warrants was held to be admissible. Similarly in Arizona v. Evans, 115 S.Ct. 1185 (1995), Evans was arrested by police thorough a routine traffic stop when it was discovered that there was an outstanding arrest warrant against him. In the search incident to his arrest, police found illegal drugs in his trunk and charged him with possession of the same. He was convicted. Later it was discovered that the outstanding arrest warrant was against a different person with a similar name and that a computer error had led the police to believe that the warrant was against this Evans. It was held by the Supreme Court that the police had no knowledge of the computer error and it acted in good faith when it discovered contraband substances incident to their arrest of a wrong person. The primary function of the exclusionary rule is to guard against police misconduct. Another exception spelt out in Arizona v. Fulminante, 499 US 279 (1991) was the harmless error doctrine. In this case an involuntary confession was used in the conviction of a person for the murder of his

daughter. The Supreme Court held that the harmless error doctrine exists to govern involuntary confessions, but in the particular case the prosecution had failed to show harmless error beyond a reasonable doubt.

15. The Indian courts do not apply either the good faith exemption or the harmless error exception so far as wrongfully extracted confessions are concerned. Section 164 Cr.P.C. which empowers Magistrates to record confessions is hedged in by various restrictions which are supplemented by section 24 Evidence Act the provisions of which are always strictly construed Shivappa v. State of Karnataka (1995) 2 SCC 76, Sarwan Sing Rattan Sing v. State of Punjab' AIR 1957 SC 637; Ayyub v. State of U.P. 2002 (2) Alld. Cr.Rulings 1292 (SC) (Confession recorded by a police officer under the TADA). Police are not allowed to record confession at all (sec. 162 Cr.P.C. and sections 25,26,28,29 Evidenee Act) except where some information contained in confession leads to discovery of a fact (sec. 27,Evidence Act). Only senior officers have now been empowered to record confessions in terrorism cases, and in this case the safeguards are construed even more strictly. (Ayyub, supra).

16. The Indian Supreme Court has not normally applied the exclusionary rule in search cases. In Radha Kishan v. State of U.P., AIR 1963 SC 822, it was held that even though the search be illegal, the seizure of the incriminating articles through such search was not vitiated. The illegality in the search may only require the court to examine more carefully the evidence regarding the seizure.

17. In Shyam Lal v. State of M.P., AIR 1972 SC 886, again it was held that even though a search may not have conformed to the requirements of Section 165 Cr.P.C. it did not follow that the person searched had a right to use violence against the officer conducting the search.

18. Both these cases were followed in State of Maharashtra v. Natwar Lal, (1980) 4 SCC 669. The court also cited another case, State of Kerala v. Alasserry Mohammed, AIR 1978 SC 933, in which the U.S. Supreme Court decision of July 6, 1976 in Stone v. Powell, 438 US 465 was approved. In that case Chief Justice Burger (who had succeeded Warren C.J.) had highlighted the injustice that often resulted from application of the exclusionary rule in the following passage:-

> "To vindicate the continued existence of this judge-made rule, it is incumbent upon those who seek its retention, and surely its

extension, to demonstrate that it serves its declared deterrent purpose and to show that the results outweigh the rule's heavy costs to rational enforcement of the Criminal Law. See e.g., Willough v. United States, 315 F.2d. 241 (1962). The burden rightly rests upon those who ask society to ignore trustworthy evidence of guilt, at the expense of setting obviously guilty criminals free to ply their trade."

19. The Indian Supreme Court expressed its concurrence with these observations. A similar view was taken in State of Punjab v. Balbir Singh (1994) 3 SCC 299. The defects in search merely on the ground of technical violation of sections 100 and 165 Cr.P.C. were held curable. This was however a case under the Narcotic Drugs & Psychotropic Substances Act 1985. As the provisions of this Act are more drastic than those of the ordinary procedural law of the land, the special safeguards contained in section 50 and the proviso to section 52 (1) of that Act were held to be mandatory. The statute required that before search of a person is made he shall be informed that if he so requires he shall be produced before a gazetted officer or a Magistrate. Failure of the empowered investigation officer so to inform the person to be searched and if such person so requires, failure to take him to the gazetted' officer or Magistrate, would vitiate the trial.

20. In this connection while Miranda's case, 384 US 436 (1966), supra, was taken notice of, the Court balanced the requirements of public interest and of fair trial, and in this connection it cited the following passage from Lewis Mayers' "Shall We Amend the 5th Amendment":

"To strike the balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice at the hands of the law-enforcement machinery on the other is a perennial problem of statecraft. The pendulum over the years has swung to the right. Even as long ago as the opening of the twentieth century, Justice Holmes declared that 'at the present time in this country there is more danger that criminals will escape justice than that they will be subject to tyranny'. As the century has unfolded the danger has increased.

Conspiracies to defeat the law have in recent decades become more widely and powerfully organized and have been able to use modern advances in communication and movement to make detection

more difficult. Law breaking tends to increase. During the same period an increasing awareness of the potentialities of abuse of power by law-enforcement officials have resulted, in both the judicial and the legislative spheres, in a tendency to tighten restrictions on such officials, and to safeguard even more jealously the right of the accused, the subject, and the witness. It is not too much to say that at mid-century we confront a real dilemma in law enforcement."

(This passage from Lwis Mayers has been quoted with approval by Krishna Iyer J. also in Nandini Sotpathy's case, infra)

21. In a case under the Narcotic Drugs and Psychotropic Substances Act 1985, it was held by the Constitution Bench in State of Punjab v. Baldev Singh (1999) 6 SCC 172 (para 45) as follows:-

"Prosecution cannot be permitted to take advantage of its own wrong. Conducting a fair trial for those who are accused of a criminal offence is the cornerstone of our democratic society. A conviction resulting from an unfair trial is contrary to our concept of justice. Conducting a fair trial is both for the benefit of the society as well as for an accused and cannot be abandoned. While considering the aspect of fair trial, the nature of the evidence obtained and the nature of the safeguard violated are both relevant factors. Courts cannot allow admission of evidence against an accused, where the court is satisfied that the evidence had been obtained by a conduct of which the prosecution ought not to take advantage, particularly when that conduct had caused prejudice to the accused. If after careful consideration of the material on record it is found by the court that the admission of evidence collected in search conducted in violation of Section 50 would render the trial unfair then that evidence must be excluded."

22. In State of H.P. v. Pirthi Chand (1996) 2 SCC 37 it was held that it would thus be settled law that every deviation from the details of the procedure prescribed for search does not necessarily lead to the conclusion that search by the police renders the recovery of the articles pursuant to the illegal search irrelevant evidence, nor the discovery of the fact inadmissible, at the trial. Weight to be attached to such evidence depends on facts and circumstances in each case. The court is required to scan the evidence with

care and to act upon it when it is proved and the court would hold that the evidence could be relied upon.

23. As noted earlier, in Radha Krishan v. State of U.P. AIR 1963 SC 822, the Supreme Court had held that the evidence obtained by illegal search and seizure would not be rejected but requires to be examined carefully and in State of Maharashtra v. Natwarlal Damodardas Soni (1989) 4 SCC 669 it was held that even if the search was illegal it will not affect the validity of the seizure and further investigation or the validity of the trial which followed.

24. After a review of the case law, it was held in Khet Singh v. Union of India (2002) 4 SCC 380, that law on the point is very clear that even if there is any sort of procedural illegality in conducting the search and seizure, the evidence collected thereby will not become inadmissible and the court would consider all the circumstances and find out whether any serious prejudice had been caused to the accused. If the search and seizure was in complete defiance of the law and procedure and there was any possibility of the evidence collected likely to have been tampered with or interpolated during the course of such search or seizure, then, it could be said that the evidence is not liable to be admissible in evidence."

Telephone tapping

25. The right to life guaranteed by Article 21 has been held by our Supreme Court also to include the right to privacy. In People's Union for Civil Liberties (PUCL) v. Union of India, AIR 1997 SC 568, it was held that telephone tapping infringes the right to privacy of the person through public telecommunication system. However it was held to be permissible on the occurrence of a public emergency or danger to security of the State. These days the terrorists have at their disposal the most modern means of communication and means of transfer of funds (through hawala) to their minions. Unless interception is permitted their intelligence and hawala network cannot be breached. Interception may enable the authority to reach the place and protect the civil system before the terrorist could strike. The Maharashtra law for tackling organised crimes contains such provisions for interception. According to the then Union Law Minister- Sri Arun Jaitley, in his address at a seminar on reforms in criminal justice at Jaipur on February 23, 2002, "Without intercepts becoming an admissible evidence or even

prepared for investigation, the national conviction rate of heinous crimes is six and a half percent while under the Maharashtra law, though they have implemented it for only two years so far, they have achieved under that clause, from the strength of intercepts, the conviction rate of seventy-seven percent." The latest mode of terrorist operations is of suicide attacks. Even former Prime Minister Rajiv Gandhi was assassinated through a suicide attack. Those who killed him died on the spot. Unless interception be permitted, the identity of conspirators behind the person committing such suicide attack cannot be unearthed. Interception is therefore required to be permitted for protecting the civil society and State apparatus from organised mafias and from terrorists. As noted in the TADA case decided by a Constitution Bench, Kartar Singh V State of Punjab (1994) 3 SCC 569 (para 54), our human rights enthusiasm has therefore to be tempered by recognition of the ground realities in this regard.

26. As noted in the said (TADA) case (para 54 of SCC report) secessionist forces working to destabilize the sovereignty of India and its integrity are being encouraged by the neighbouring countries and there are many training camps on the borders of India where training is imparted to militants and terrorists not only in the use of sophisticated and heavy weapons including rocket launchers, machine guns, mines, explosives and wireless communications but also to indulge in illicit trafficking of narcotic drugs and psychotropic substances, which unassailable facts are a matter of common knowledge and which can be taken into consideration by way of judicial notice. Many countries across the borders are supplying deadly arms and ammunitions and are providing sanctuary to the extremist elements as a base for their training and doctrination and are thus creating an outrageous and volcanic situation.

The Grand Jury

27. The Fifth Amendment provides also for presentment of indictment by a "grand jury" before being charged in a court in respect of serious offences. Grand jury is an investigating body consisting of a number of lay jurors: it functions largely as the investigative and indicting arms of prosecutorial officials. As stated in the Encyclopedia of American Constitution, Vol. II at page 860:

"Grand juries hear witnesses under oath, proceeding by question and answer in something close to the style of the courtroom, with a prosecuting attorney doing most or all of the interrogation. Similarly, the grand jurors are given documents or other things as "exhibits" to assist in the attempted reconstruction, or partial reconstruction, of the events under inquiry. A critical difference from the courtroom is the one-sidedness of the presentation. In a system that prides itself on being "adversarial",- as distinguished from the so called inquisitorial system of the European continent and many other countries,- the grand jury is more purely inquisitorial and non-adversarial than almost any other criminal law agency anywhere. Subject to some variations among the states, the norm is that only one side, the prosecution, is heard. There is no opposing lawyer to object to questions or answers on grounds of relevance, fairness, privilege, or anything else. Nobody impartial presides; there are no disputes to umpire. In some places a potential defendant may be allowed on request to appear and present evidence that may persuade the grand jurors not to indict. More commonly, the prospective target will be heard only upon being summoned (and duly warned about the right against self incrimination) by the prosecution.

The ex-parte character of the proceeding means, in most states and in the federal courts, that the trial rules of evidence are not applicable. These rules require for effective operation the presence of an opposing lawyer to object and a judicial officer to rule on objections as the evidentiary record is being made. Free (or deprived) of all that, the grand jury may receive, and base indictments upon, hearsay or other evidence that would be excluded on objection in a trial."

28. It will be recalled in this context that President Clinton had to face a grand jury at which he was questioned about his alleged perjury. It is interesting to note that in a grand jury interrogation a person likely to be accused can thus be cross-examined on oath even before his trial. If however he declines to answer any question on the ground of protection against self incrimination the grand jury can subjectively draw an adverse inference against him and send him up for trial. After all a jury does not have to give reasons; so none can know if such adverse inference was drawn.

29. Grand jury is an institution peculiar to U.S.A. Such a system could act as a curb on the powers of police in respect of submitting "charge sheets" for prosecution. Unfortunately in India even the ordinary jury system which had been originally introduced by the British for sessions trials had to be given up as it was found that jurors were often won over by the defence. With perjury and corruption so rampant here, such procedural reforms cannot succeed.

Double jeopardy

30. The Fifth Amendment further provides that no person shall be subject for the same offence to be twice put in jeopardy of life or limb. This is called the double jeopardy guarantee, similar to that contained in clause (2) Article 20 of our Constitution.

31. It has been held by our Supreme Court in S.A. Venkataraman v. Union of India AIR 1954 SC 375 that a departmental punishment of a public servant, including dismissal from service, can be followed by criminal prosecution in respect of the same mis-conduct (namely, corruption) which amounts also to a criminal offence, and such prosecution does not violate the double jeopardy guarantee. The reason is that departmental proceedings for misconduct do not amount to prosecution for an offence. The same reasoning would apply to punishment for professional misconduct of an advocate by the Bar Council or of a doctor by the Medical Council, and so on.

32. In another case, the accused was an officer in the Customs department. He had retained nine gold bars from out of the bars which he had recovered from some smuggler. He was tried for offences of criminal mis-appropriation by a public servant (Section 409 IPC.) and corruption (Prevention of Corruption Act). On his acquittal he was tried again for offences under the Customs Act and the Foreign Exchange Regulation Act. The Supreme Court held that the ingredients of the offences in the two trials were different and hence the second trial was not barred: A.A. Mulla v. State of Maharashtra AIR 1997 SC 1441.

33. In Maqbool Hussain V State of Bombay, AIR 1953 SC 325, the Constitution Bench was dealing with a case of smuggler of gold. The gold recovered from him was confiscated under the Customs Act. Thereafter he

was prosecuted under the Foreign Exchange Regulation Act. It was held that such prosecution was not barred by Article 20(2).

34. The principle of double jeopardy or autrefois convict was recognised even in Section 26 of the General Clauses Act 1897 which provides that:

> "Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence."
>
> This section does not appear to have been brought to the notice of the Court in A.A. Mulla, supra.

35. It was recognised even in the Code of Criminal Procedure of 1898(section 403) and now also in the Code of 1973(section 300: "Person once convicted or acquitted not to be tried for same offence.") This provision in the Code goes even beyond the constitutional protection inasmuch as it covers autrefois acquit as well and not merely autrefois convict.

36. Although the Constitution does not mention any court or judicial tribunal it was held in Maqbool Hussain, supra, to be implied that what is prohibited is double jeopardy in a court of law. An order of confiscation by a Customs Officer was only an administrative penalty which was not imposed by a judicial tribunal. Hence the mere fact of imposition of the penalty cannot be deemed to bar a prosecution for a statutory offence. The use of the words "prosecuted" and "offence" shows that the word "punished" in Article 20(2) refers only to punishment as a result of prosecution for an offence in a court of law.

37. The principle of double jeopardy does not apply to a civil action for penalty either. Thus in Om Kumar v. State, AIR, 2002 J & K 55, the defendant was first tried and acquitted on a charge of cutting trees standing on the plaintiff's land. In spite of such acquittal a civil suit for damages for the tort of cutting trees and removing them was held to be maintainable.

38. In Piara Singh v State of Punjab, AIR 1969 SC 961, it was clarified that the principle of issue estoppel was different from the principle of double jeopardy. Under the former, where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused such a finding would constitute an estoppel or resjudicata against the prosecution but not be a bar to the trial and conviction of the accused for a different or distinct offence. The principle of issue estoppel had been applied by the Supreme Court in Pritam Singh v State of

Punjab, AIR 1956 SC 415, and Manipur Administration v Thokchom Bira Singh, AIR 1965 SC 87. In Piara Singh's case, however, the issue did not avail the accused because the finding which he was relying on was given in an earlier case to which he was not a party.

The Fifth Amendment Immunity from Self-incrimination

At the investigation stage

39. Clause (3) of Article 20 of our Constitution also, as noted earlier, provides that no person accused of any offence shall be compelled to be a witness against himself.

40. In India, unlike developed democracies, any statements made by even a witness to a police officer are not admissible in evidence, vide section 162 of the Code of Criminal Procedure. Confessions made by an accused while in police custody are also not admissible unless made before a Magistrate. This is so not because the Constitution prohibits it but because the police in this country is not yet treated as trustworthy enough. However, in exceptional cases, such as drug and terrorism related offences, powers are now being given, subject to certain safeguards, to senior police officers regarding recording of confessions of persons in their custody. This provision contained in the Terrorist and Disruptive Activities (Prevention) Act 1987 has been upheld by the Supreme Court in the cases of Kartar Singh v. State of Punjab, (1994) 3 SCC 569 and Union of India v Mohd. Sadiq, (1993) 1 SCC 8. Accordingly, the same provision repeated in the Prevention of Terrorism Act 2002 should be valid too.

41. In respect of ordinary offences too, where the statement of a person in custody leads to the discovery of fact, that part of his statement, even if it amounts to a confession, is admissible under section 27 of Indian Evidence Act. This has been upheld by the Supreme Court in the State of U.P. v Deoman Upadhyay, AIR 1960 SC 1125. The Constitution Bench held that it did not offend Article 14. No discrimination is involved in making this provisions.

42. In Kartar Singh v. State of Punjab, (1994) 3 SCC 569, it was clarified that a confession extorted by using third degree methods was not only inadmissible but the police officer resorting to such extortion was punishable under sections 330 and 331 of the Indian Penal Code.

43. Section 91 of the Code of Criminal Procedure empowers the Court or an officer incharge of a police station to issue a summons in order to produce a document or other thing from his custody. This corresponds to section 94 of the old Code. It was contended before the Supreme Court in State of Gujarat v Shyam Lal, AIR 1965 SC 1251 that this power of requiring a person to produce a document or thing infringed the protection enjoyed by an accused against self-incrimination, guaranteed by Article 20(3). Shah J. in an erudite judgment referred to various statutory provisions for pointing out that the pre-Independence legislature in India had set its face against the rule of self-incrimination being introduced in the law in India. He further pointed out that even in the U.K. there is a strong body of opinion that the reason of the original source of the rule,- alluding to the Star Chamber,- had disappeared long ago and to continue a doctrinaire adherence thereto goes only to protect the criminal. [Similar scepticism about the rationale of this privilege was later expressed by Krishna Iyer J. speaking for a three Judge bench in Nandini Satpathy's case, (1978)2 SCC 424) paras 14 to 18.] However, Shah J. added, the Court is bound to give effect to Article 20(3). In view of this constitutional protection a person required to produce a document or thing may refuse to comply with the summons or order and he will be saved from prosecution under section 175 of the Indian Penal Code on the basis of this lawful excuse. But the order of the police officer calling upon a person to produce a document or thing cannot itself be held to be an infringement of the guarantee under Article 20(3). Shah J. in this connection referred to State of Bombay v Kathi Kalu, AIR 1961 SC 1808 in which an eleven judge bench had held that the mere questioning of an accused person by a police officer resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not compulsion within the meaning of Article 20(3). Such a statement, it had been held in that case, would be admissible under section 27 of the Evidence Act.

44. The other four judges constituting the majority in Shyam Lal's case, however, skirted the question of Article 20(3) while interpreting the said section of the Code (present section 91) as not including an accused person at all. It was admitted that the question about the constitutionality of the section had not been argued before the Court because at the end of the hearing the judges had indicated to the counsel that they were inclined to put a narrow construction on this section, and so the question about its constitutionality did not arise.

The majority however was not deterred from expressing their difference of opinion from Shah J. in regard to the implications of Kathi Kalu's case, supra. They pointed out that if the accused were to tell the police officer that he would not produce the document or thing because of Article 20(3), such officer could not be in a position to decide the matter and will choose to reject the accused's contention outright. Hence, according to the majority, Shah J's suggestion was unworkable and the accused cannot be required at all to produce a document or thing.

45. An eight Judge Constitution Bench in M.P. Sharma v Satish Chandra, AIR 1954 SC 300, held that the power to issue a search warrant under old section 96, corresponding to section 93 of the new Code, did not infringe the fundamental right guaranteed by Article 20(3). Jagannathdas J, speaking for the Bench also referred to the historical background and held that the constitutional guarantee did not require to be so widely construed as to cover even a search. A search effected by police does not involve the giving of any oral or written evidence by the person searched. (The same view has been reiterated in V.S. Kuttan Pillai v Ramakrishnan, AIR 1980 SC 185.)

46. It was however clarified in M.P. Sharma that:

> "Indeed every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part. Nor is there any reason to think that the protection in respect of the evidence so procured is confined to what transpires at the trial in the court room. The phrase used in Articles 20(3) is "to be a witness" and not "to appear as a witness": It follows that the protection afforded to an accused in so far as it is related to the phrase "to be a witness" is not merely in respect of testimonial compulsion in the court room but may will extend to compelled testimony previously obtained from him. It is available therefore to person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution. Whether it is available to other persons in other situations does not call for decision in this case.
>
> Considered in this light, the guarantee under Article 20(3) would be available in the present cases to these petitioners against whom a

First Information Report has been recorded as accused therein. It would extend to any compulsory process for production of evidentiary documents which are reasonably likely to support a prosecution against them."

47. In Nandini Satpathy's case, supra, it was added:

"Article 20(3) strikes at confessions and self-incriminations but leaves untouched other relevant facts."

Further,

"The policy behind the privilege, under our scheme, does not swing so wide as to sweep out of admissibility statements neither confessional per se nor guilty in tendency but merely relevant facts which, viewed in any setting, do not have a sinister import. To spread the net so wide is to make a mockery of the examination of the suspect, so necessitous in the search for truth. Over-breadth undermines, and we demur to such morbid exaggeration of a wholesome protection."

48. Reliance was placed in this regard on Kathi Kalu, supra, where it was held:

"In order that a testimony by an accused person may be said to have been self-incriminatory, the compulsion of which comes within the prohibition of the constitutional provisions, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. In other words, it should be a statement which makes the case against the accused person at least probable, considered by itself."

49. "Compulsion" within the meaning of Article 20(3), was held in Kathi Kalu's case, reiterated in Nandini Satpathy, to mean "a physical objective act and not the state of mind of the person making the statement, except where the mind has been so conditioned by some extraneous process as to render the making of the statement involuntary and, therefore, extorted. Hence, the mere asking by a police officer investigating a crime against a certain individual to do a certain thing is not compulsion within the meaning of Article 20(3). Hence, the mere fact that the accused person, when he made the statement in question was in police custody would not, by itself, be the foundation for an inference of law that the accused was compelled to make the statement. Of course, it is open to an accused person to show that while

he was in police custody at the relevant time, he was subjected to treatment which, in the circumstances of the case, would lend itself to the inference that compulsion was, in fact, exercised. In other words, it will be a question of fact in each case to be determined by the Court on weighing the facts and circumstances disclosed in the evidence before it."

50. The power of police under section 161 of the Code to interrogate an accused was upheld (in Nandini Satpathi, supra). However, the view taken in Kathi Kalu's case was explained in para 57 of the report (SCC) by holding that physical 'coercion' would include "psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like" but not include "legal penalty for violation. So, the legal perils following upon refusal to answer, or answer truthfully, cannot be regarded as compulsion within the meaning of Article 20(3)".

51. This last explanation is in line with the view taken by the House of Lords on the English law that an adverse inference may be drawn, where appropriate, against an accused from his failure to give testimony on oath for explaining the incriminating circumstances appearing in the prosecution evidence against him : R v Lambert, (2001) 3 All ER 577 (para 39). The prospect of the drawing of such adverse inference, it was held, does not amount to compelling him to give evidence in violation of the protection against self incrimination guaranteed by the European Convention.

52. The guarantee against compulsory self- incrimination is not violated by compelling an accused to exhibit his body at a test identification parade or in the court room for purposes of identification. He may also be required to give a sample of his handwriting: U.S.A. v Euge, 444 U.S. 707. Taking of his finger prints or photographs also does not amount to compelling him to give evidence against himself.

Self-incrimination in Court at the Trial

53. The view of our Supreme Court in Nandini Satpathy, supra(para 57 of SCC report) that the legal perils following upon refusal to answer cannot be regarded as compulsion within the meaning of Article 20(3) is contrary to the majority view of the U.S. Supreme Court taken in 1965 in Griffin v California, 380 US 609 and supports the minority view taken by Justices Stewart and White in that case and by Justice Powell in Carter v Kentuchy.

450 US 288 in 1981. It is also in consonance with the view taken by the House of Lords, noted above.

54. The Indian Parliament has thus been over-protective of the accused by providing in proviso (b) to section 315 (1) of the Code that his failure to give evidence shall not be made the subject of any comment by counsel or the Court or give rise to any presumption against him. Such over-protection is not required by Article 20(3) as interpreted by our own Supreme Court or by the English Courts.

Unsworn statement of the accused

55. The old Code's sec. 342 (corresponding to the new Code's section 313) did permit the drawing of an adverse inference from the accused's refusal to answer any question put by the Court and it had been upheld by a full Bench of the Allahabad High Court in Roshan Lal v State, 1975 Cr. L.J. 1877. And yet the provision regarding inference from refusal has been omitted even from sec. 313.

56. The provision in section 313 (2) that the accused shall not render himself liable to prosecution by giving false answers to questions put to him by Court is also over-protective of the accused and not required by Article 20(3) as interpreted in Nandini Satpathy, supra.

57. Even the requirement in section 313 (1) (b) that the Court shall compulsorily examine the accused after the close of the prosecution case and give him an opportunity to explain the circumstances appearing in the evidence against him is no longer justifiable. As held in Hate Singh v State of M.P., AIR 1953 SC 468 (para 8) it was required because at that time "an accused person (was) not allowed to enter the box and speak on oath in his own defence."

58. The provision is the successor of the old section 342 which was enacted in the nineteenth century at a time when the accused had no right to appear in the witness box in his defence. The right had been given to the accused in England a hundred years back but, in India it was given only in 1956 for the first time (Section 342-A of the old Code). When providing for such right in 1956, the old provision of section 342 requiring obligatory examination of the accused by the Court should, as a logical corollary, have been omitted. But this was not done. Not only this, the English provision

that an adverse inference may in an appropriate case be drawn against an accused from his failure to enter the witness box was also rejected and as stated above, even the provision of the old Code that an adverse inference may be drawn from his refusal to answer questions was omitted from sec. 313.

59. This requirement under section 313(1)(b) gives an unfair advantage to an accused in our Courts in several ways. Firstly, the accused is not subjected to any cross-examination either by the prosecutor or by the Court. Indeed superior courts have required that the trial court cannot put questions to the accused in a manner that may amount to his cross-examination, e.g., by pointing out to him other circumstances appearing to be inconsistent with his explanation: Shri Ram v. State of U.P., AIR 1975 SC 175. Secondly, the statement of the accused given on such examination is required to be taken into consideration by the Court while considering his guilt or innocence irrespective of whether there exists on the record any evidence in support of the explanation given by the accused: See Deonandan v. State of Bihar ALJ 1163 para 19; Kallan Narayana V. Empreror AIR 1933 Madras 233 at 238; State of Maharashtra V. Laxman Jai Ram, AIR 1962 SC 1204. Thirdly, any inadvertent omission on the part of the trial court to put any particular piece of evidence or incriminating circumstance to the accused for his explanation goes to vitiate the conviction.

60. The right to fair trial guaranteed by the European Convention has been interpreted by the Courts in England as involving "fairness both to the defendant and the prosecution because the fairness of a trial is not all one sided; it requires that those who are undoubtedly guilty should be convicted as well as those about whose guilt there is any reasonable doubt should be acquitted": Ebrahim v Feltham Magistrates, (2001) All E.R. 831(para 25); also R. v Lambert, (2001) 3 All E.R. 577(H.L.).

61. There is thus no longer any justification for shielding the accused from cross-examination while allowing him full rights to cross examine the victim of the crime. Such denial is an unjustified discrimination against the unfortunate victim.

62. It is thus high time to adopt the English law on the subject under which the right of an accused to make unsworn statement has been abolished by the Criminal Justice Act, 1982.

Right to silence:

Does accused have a right not to disclose his defence till the end?

63. Following the old English practice our Code of Criminal Procedure of 1898 provided, and this has been followed in the new Code of 1973, that the accused shall place his defence case before the Court at the end of the prosecution evidence. This is done by him in his statement under Section 313 when he is examined by the Court to explain the circumstances appearing in the prosecution evidence against him.

64. On the basis of this long standing procedural provision an impression has gone round that the accused has a right not to be asked to disclose his defence earlier. In fact such a plea is often taken when a Government servant is required to answer a charge during a departmental inquiry and the charge is of such a nature that it also amounts to criminal offence for which a prosecution has also been initiated against him. Such a plea has been negatived by the Supreme Court in several cases such as State of Rajasthan v. B.K. Meena (1996) SCC 447 and Depot Manager, APSRTC v. Md. Yusuf Mian, (1997) 2 SCC 699.

65. Similarly Commissions of Inquiry are sometimes set up in respect of matters of public importance and at the same time criminal cases are also started against persons accused of crimes committed during the course of the incidents which are the subject matter of inquiry before the Commission. When the Commission asks any such person to appear as a witness before it he sometimes takes a plea that by being required to give his statement on oath he will be put to two disadvantages. First, that his defence, which is still to be disclosed before the criminal court, will come to light, and secondly that he will be put questions which may have the tendency of incriminating him. The short answer to these objections is that a commission inquires into the incidents and not into charges against individual accused persons. Of course the conduct of individuals may also incidentally come up during the inquiry into the incidents but the Commission cannot come to a definite conclusion of guilt against any individual. It can only recommend to the Government that in view of a prima-facie case found by it in respect of the role of an individual he should be subjected to criminal investigation and prosecution. However the matter has not been finally decided categorically by the Supreme Court so far.

66. The common law practice of the accused disclosing his defence at the end of the prosecution evidence, which was copied in India, did not make much difference in England or the rest of Europe or America. For in those countries any statement made by the accused even to a police officer at the time of his arrest or later during investigation has been admissible in evidence. In Europe the adversarial system is not strictly followed and what is followed is more in the nature of inquisitorial system. In those countries thus the Court did know from the very beginning what the defence was. In India, on the other hand, no statement made to a police officer was admissible and only a confession formally made before a Magistrate was admissible. Thus in India it did make a difference. However in British times this difference did not have much impact on the result of the trial. This was because the trials used to conclude within a few months from the occurrence. Thus there was not much time lag between the date of offence and the date of disclosure of the defence. Secondly, prosecution witnesses normally did not dare go back on the statement once given by them before the police. Thirdly, the trial in serious cases was preceded by full-fledged commitment proceedings at which each prosecution witness of the occurrence was examined on oath and the accused was given, though he rarely availed at that stage, the opportunity of cross-examining him. The accused was also examined by the committing court.

67. During the last few decades conditions have changed considerably for the worse. The Code of 1973 has abolished the full-fledged commitment proceedings. The prosecution witnesses are examined very late due to inordinate delays in the regular trial Earlier if a prosecution witness was in a rare case won over by the accused, his statement given during the commitment proceedings could be used as substantive evidence. In the new Code there is no such provision. All that is being suggested by the Law Commission of India and the Central Government is that to overcome the problem of witnesses turning hostile, the statements of the eye witnesses should be recorded by a Magistrate under section 164 of the Code. Such statements may no doubt be used for cross-examining a witness in the event of his turning hostile, but as the accused did not have any opportunity of cross-examining the witness at the time his statement was recorded under section 164, that statement cannot be used as substantive evidence against him. Thus this half hearted remedy is not going to be of much use.

68. In England, an accused is now required by the Criminal Procedure and Investigations Act of 1996, section 5(5) to (8), to disclose his defence at the stage at which the prosecution furnishes to him the details of the prosecution evidence. In India, this has not been adopted so far. The result is that the accused is able to just wait and watch the prosecution evidence and he in his uncross-examined and tutored statement is then able to make out some case according to the flaws spun out in the prosecution evidence. Unfortunately, in our country, the criminal justice system has collapsed to the extent that even sessions trials now take several years to conclude. The prosecution witnesses are no longer examined from day to day until conclusion as was the past practice. The testimony of witnesses is recorded by fits and starts over a long period, which all goes to the advantage of the defence. It is not surprising that the rate of conviction for serious offences in India is only six and a half percent while that in England and America it is over ninety percent.

Due process of law and procedure established by law

69. The Fifth Amendment further makes an omnibus provision that no person shall be deprived of life, liberty or property without due process of law. In our Constitution this has been split into (a) so far as property is concerned, Articles 19(1)(f) and 31 (which have since been omitted by the Forty-fourth Amendment and replaced by Article 300-A) and (b) so far as life and liberty are concerned, Article 21.

70. Our Article 21 speaks of "procedure established by law", while the American Constitution speaks of "due process of law". The Constituent Assembly was asked by some members to adopt the American phraseology. The Drafting Committee however deliberately rejected the American phraseology on the ground that it would give too much power to the courts to examine the reasonableness of the law in question. This view of the Drafting Committee was accepted by the members. It was also accepted by the Supreme Court in the first two decades, starting with the case of A.K. Gopalan v. State of Madras, AIR 1950 SC 27. The Supreme Court in fact had not during the Nehru era come across any lawless laws which would have warranted any other view.

The Emergency of 1975 and its aftermath

71. This view emboldened the executive to resort to widespread abuse of the power of preventive adoption during the period between June 1975 and March 1977. Even the majority of the Supreme Court was cowed down and in A.D.M. Jabalpur v Shiv Kant Shukla, AIR 1978 SC when the enforcement of Article 21 had been suspended in the name of "internal Emergency" and a so-called "law" was passed by a captive Parliament bearing the title the Maintenance of Internal Security Act (M.I.S.A.) totally excluding judicial review of orders of preventive detention it was held by a majority of four to one (with only the distinguished Justice H.R. Khanna dissenting) that a law would be valid even if it provided for taking away the life of a person without any trial and that no order of detention purporting to be passed under the said Act (M.I.S.A.) could be questioned by the Courts even on the ground of mala fide or mistake. This Emergency and the supine role of the Supreme Court led to public revulsion and the general election of 1977 led to overthrow of the Government. The Emergency provisions of the Constitution were drastically amended by the new Parliament and the enforcement of Article 21 was made immune from suspension. The shame-faced Supreme Court Judges also made an about turn, and then followed a series of decisions expanding the human rights like never before.

72. The Supreme Court then came around to the view that notwithstanding the intention of the Constitution makers so expressed in the debates in the Constituent Assembly, even the expression ultimately adopted, namely, "procedure established by law" has the same implication as the American phrase "due process of law". As rightly held by the Supreme Court in its later decisions beginning with Maneka Gandhi V. Union of India AIR 1978 SC 597, any other interpretation would lead to the anomalous result that howsoever oppressive, unreasonable or arbitrary a provision enacted by the Legislature may be, the hands of the Courts will be tied down if merely the procedure laid down in such statute is followed literally. It has thus been held that "procedure established by law" means a procedure which is reasonable, fair and just, not merely any procedure laid down in an enactment. Unless the enactment itself be fair and reasonable it cannot qualify to be called "law" within the meaning of Article 21. It will be lawless law. Sir Edward Coke, five centuries ago, had stated : "How long soever it hath continued, if it

be against reason, it is of no force in law", and also "Reason is the life of the law."

The Sixth Amendment

73. The Sixth Amendment of the U.S. Constitution guarantees the right to a speedy and public trial by a jury; and also the right of the accused to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence. Jury trial, as stated above, was provided for in India also (on the basis of the English law) in the original Code of Criminal Procedure of 1898, but nobody now even thinks of it as practicable. All the other rights, except the last, are deemed comprised in our Article 21 as they form part of the principles of natural justice as often interpreted by the Supreme Court.

Legal Aid

74. The last mentioned right of assistance of counsel for his defence has now been held to comprise the right to legal aid even where the accused does not have the means to afford a counsel. This has been spelt out by the Supreme Court from the Universal Declaration of Human Rights and also the Directive Principle contained in Article 39-A which provides that the State shall ensure that the operation of the legal system promotes justice on the basis of equal opportunity and shall in particular provide legal aid so that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities: Kishore Chand v. State of Himanchal Pradesh, (1991) 1 SCC 286.

Basic rights in the UK

75. Unlike USA and India, England has no written Constitution and as such it had no constitutionally guaranteed fundamental rights which would be binding on Parliament. It used to be said that the British Parliament can pass any law except to declare a man a woman or a woman a man. This was however only theory. The Magna Carta was itself always treated as the fundamental law of the land and no Parliament would have ever dared pass any law in supposed breach of the same. Of course the Courts do not have

the power of judicial review of any law made by Parliament, that is to say, they cannot, unlike Indian and U.S. Courts, declare any law made by Parliament to be ultra vires. But as Dr. Ambedkar in a different context, while referring to legislative powers, said in the Constituent Assembly on December, 2, 1948, "sovereignty is always limited, no matter even if you assert that it is unlimited, because sovereignty in the exercise of that power must reconcile itself to the sentiments of (the people). No Government can exercise its power in such a manner as to provoke (the people) to rise in rebellion". Forgetting this implied limitation King Charles I had asserted his sovereign powers under the 'divine right of kings', and he had to pay with his head. Thus, practically speaking, human rights were always secure in England, due to its free press and a strong public opinion.

76. The British Parliament has now enacted the Human Rights Act 1998 which requires all Courts to so interpret the English laws as to be in conformity with the European Convention on Human Rights as interpreted by the European Court of Human Rights situated at Strasbourg. In theory, even this Act of 1998 can be repealed or amended by Parliament, but in practice there is not the remotest possibility of England going back on its obligations as a member of the United Nations and of the European Community in respect of human rights. It is however interesting to observe that even now no court can declare any law made by Parliament to be ultra vires. It may only exercise its powers of interpretation in such a manner as to ensure that it is in conformity with the European Convention. In a suitable case Parliament itself will make necessary amendment in the statute in the light of a recommendation of the Court.

The European Convention

77. The European Convention provides in Article 2 for the right to life. It lays down that everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction for a crime for which this penalty is provided by law. The said Article 2 also provides for three exceptions with regard to deprivation of life from the use of force, and even in these cases it expects that no more force shall be used than absolutely necessary. These are:

"(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawful taken for the purpose of quelling a riot or insurrection."

78. These three exceptions are taken care of by our Indian Penal Code (Sections 96 to 106) and the Code of Criminal Procedure (Sections 130 to 132) and also flow from their inherent reasonableness in the context of Article 21.

79. Article 3 of the European Convention lays down that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. As would be noticed presently, our Supreme Court has held all this to be part of the guarantee contained in our Article 21.

80. Article 5 relates to the right to liberty and security of person save in specified cases and in accordance with the procedure prescribed by law. The exceptions laid down in paragraph 1 of this Article are as follows:

"(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

81. These, in India, are covered by the Code of Criminal Procedure, the Code of Civil Procedure, the Contempt of Courts Act, the Foreigners Act and other enactments which can safely be deemed protected as reasonable laws within the meaning of Article 21 of our Constitution.

82. Other paragraphs of the said Article 5 are as follows:

"2. Everyone who is arrested shall be informed promptly in a language which he understands, of the reasons for his arrest and of any charge against him;

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

83. All this is covered by our Articles 21 and 22, particularly clauses (1) and (2) of the said Article 22 and also as regards compensation, by the Code of Civil Procedure (Section 9) read with the common law of torts which continues to remain in force as an existing law, and the Indian Penal Code (Sections 220, 330, 331 and 337 to 346) and Articles 226 and 32 of the Constitution: D.K. Basu v State of W.B., (1997) 1 SCC 416 (on arrest and post-arrest safeguards); People's Union for Democratic Rights (P.U.D.R.) v Police Commissioner, (1989) 4 SCC 730 (compensation for police excesses); P.U.D.R. v State of Bihar, (1987) 1 SCC 265; Rudul Shah v State of Bihar, (1983) 4 SCC 141 (also cases of compensation for excesses or wrongful detention). In Francis Coralie Mullin v U.T. of Delhi, (1981) 1 SCC 608 it was held that the right to protection against torture or cruel, inhuman or degrading treatment, which is enunciated in Article 5 of the Universal Declaration of Human Rights and guaranteed by Article 7 of the International Covenant on Civil and Political Rights was implied in Article 21 of our Constitution.

Police Powers

84. Section 41 of the Code of Criminal Procedure lays down various situations in which a police officer may arrest any person without an order from a Magistrate or a warrant. In Joginder Kumar v State of U.P., (1994) 4 SCC 260, which was reiterated and further elaborated in D.K. Basu v. State of W. Bengal, (1997) 1 SCC 416, the Supreme Court has laid down certain guidelines. A police officer is not to make an arrest merely because it is lawful for him to do so under section 41. The existence of the power is one thing; the justification for the exercise of it is quite another. No arrest should be made in a routine manner on a mere allegation of commission of an offence. The police officer must first be reasonably satisfied after some investigation, which at that stage will obviously be summary in nature, as to the genuineness and bona fides of the complaint and have a reasonable belief both as to the person's complicity and also as to the need to effect arrest. Denying a person of his liberty should be treated as a serious matter.

85. It has further been laid down that the arrested person should have the right to have some one (nominated by him) informed of the arrest and to consult privately with a lawyer. He should also be medically examined, if he so requests, for any injuries at the time of his arrest and also thereafter every 48 hours during his detention in custody.

Preventive Detention

86. Here a word may be said about the specific inclusion of provisions relating to preventive detention in clauses (3) to (7) of Article 22 of our Constitution. This is often criticized as a blot on the Fundamental Rights Part III of the Constitution. In this connection two points are noteworthy.

87. The U.S. Constitution surely does not provide for preventive detention specifically, but in U.S.A. a writ of habeas corpus itself can be suspended while it cannot be suspended in India even during an Emergency. The provision in our Constitution is hedged in by several safeguards. The Constitution guarantees a right to the detenue to be supplied grounds for detention, to make a representation which is to be considered by the Government promptly, to have the matter reviewed (albeit in camera) by an Advisory Board consisting of three Judges (serving or retired) of the High Court, whose verdict in favour of the detenue is binding on Government and

finally to assail the order in the High Court and the Supreme Court through a petition for habeas corpus in which he can urge all possible grounds available in administrative .law against an executive order based on subjective satisfaction.

88. It will be recalled that during the Civil War more than thirteen thousand American citizens were detained without trial under orders of President Abraham Lincoln or of his military commanders, and they were denied the right to move any court for habeas corpus. The President in his message to a special session of Congress on July 4, 1861 justified this suspension of habeas corpus by asking rhetorically : "Are all the laws, but one, to go unexecuted, and the government itself go to pieces; lest that one be violated?"

89. During World War II over a hundred thousand of American citizens of Japanese ancestry were relocated and interned on account of mere possibility of their disloyalty to U.S.A. in the wake of the Japanese attack on the Pearl Harbour. General curfew was also imposed on their localities. (See Chief Justice Rehnquist's All the Laws But One, 1998) The Governor of California who strongly supported the relocation was Earl Warren who in his later incarnation as the Chief Justice of U.S. Supreme Court made his mark in the desegregation cases and was, as noted earlier, known also for his pronouncedly pro-accused decisions in criminal cases.

90. The order relating to curfew was upheld in Hirabayashi's case by the Supreme Court which held as follows:-

> "Whatever view we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry, we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded prompt and adequate measures be taken to guard against it" Hirabayashi v. U.S, 320 U.S. at 99 (1943)

91. Subsequently, in Korematsu' case it was held by the Supreme Court that Korematsu ws not singled out because of hostility towards him or his race but-

> "because we are at war with the Japanese empire, because the properly constituted military authorities feared an invasion of the West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily." : 323 U.S. 223-4 (1941).

92. During World War II again, martial law remained in force in the Hawaii islands for about three years.

93. Recently in its "war" against the Taliban and Al-Qaeda in Afghanistan the terrorists taken as prisoners by the U.S. army were blind-folded and manacled, their heads shaved, and taken by cargo planes to the Guantanamo Bay, a remote American naval base in Cuba, and subjected to relentless interrogation.

94. They have not been granted prisoner of war status under the Geneva Convention (despite objections by the International Red Cross and the International Commission of Jurists) because they were not part of a regular army of a country at war with U.S.A. but terrorist outlaws, many of them not Afghans, who were operating in Afghanistan. The U.S. Government has called them "unlawful combatants." As they were not kept on U.S. soil they could not claim the right to life or liberty guaranteed under the U.S. Constitution. Under a Presidential Order dated Nov. 13, 2001, those who are not U.S. citizens among them are proposed to be tried before special military commissions instead of in the regular courts. It will be determined by the President who is an accused terrorist and therefore subject to trial by the Commission. The Commissions have a lower due process standard than even the Uniform Code of Military Justice, which governs the rules of court martial. Hearsay, and evidence that a civilian court may deem illegally obtained could be admissible before a Commission and the defendants could be barred on national security grounds from seeing the evidence preferred against them. All this has been innovatively devised in order to meet the new menace of extra-territorial terrorist crimes. (See Professor Mark A. Drumbl : Judging the 11 September Terrorist Attack, article published in the Human Rights Quarterly 24 (2002) 323-360 : The John Hopkins University Press).

95. This may be contrasted with our Supreme Court's soft attitude towards Pakistani terrorists who had seized the Hazratbal shrine some years back. When the Indian armed forces laid a seige around the shrine and the terrorists holed inside the shrine began to starve for want of food-stuffs the Supreme Court ordered the Government to ensure that the terrorists were supplied adequate nutritious food. The whole purpose of the siege,- to flush out the terrorists by starving them, was thus frustrated.

96. This instance illustrates the necessity of confining the guarantee of Article 21 of our Constitution only to citizens and to friendly aliens and not to unfriendly aliens sneaking into Indian territory for anti- India terrorist activities. Article 22 does clarify in clause (3) thereof that its guarantee does not apply to any person who for the time being is an enemy alien. No such exception has however been engrafted in Articles 20 and 21. This inadvertent lacuna should have engaged the attention of the Venkatachaliah Committee but unfortunately it chose to ignore the same. Even in Article 22, the expression "enemy alien" should be defined as including a person not only belonging to a country officially at war with India but also one belonging to a country engaged in an undeclared proxy war and entering the country illegally for anti-India activities.

97. The applicability of Articles 20, 21 and 22 to a foreigner was considered by Mr. Justice Dua as Vacation Judge in Anwar v State of J& K, AIR 1971 SC 337. A habeas corpus petition was filed by a Pakistani national against his detention in custody. The learned Judge clarified that the petitioner being not a citizen of India was not entitled to any fundamental right guaranteed by Article 19. He had no right to remain within the territories of India. He had entered into the country without any right and without any requisite authorisation. He could only claim rights under Articles 20, 21 and 22. He had been detained under a statute which empowered the Government to detain a foreigner with a view to making arrangements for his expulsion from the State. Even after the expiry of the normal period of detention under the J & K Preventive Detention Act the State authorities were compelled to keep him in custody with a view to taking suitable steps for deporting him from India. Even if there be any legal flaw in the detention, the Court should not consider claims of hostile infiltrators from Pakistan lightly. A claim to personal liberty made by such unlawful infiltrators cannot be placed above the security of the country. Habeas corpus though a writ of right, is not a writ of course. The petitioner having no right to

move about freely in the country could not claim the assistance of the court for his release. The order of his release by the Court would not only have resulted in his presence in a part of India in contravention of the statutory provisions but would in addition have rendered it difficult for the authorities to enforce compliance with the order of his expulsion. As noted earlier, paragraph 1(f) of Article 5 of the European Convention specifically covers such a situation.

98. State of U.P. v Abdul Samad, AIR 1962 SC 1506, is a case of two Pakistani nationals who had come to India on a Pakistani passport after securing a visa for a temporary stay. After several extensions of the period of stay they were asked to leave India. Their application for grant of Indian citizenship was also rejected. They were then taken into custody and sent from Lucknow to Amritsar for being deported to Pakistan. They managed to have a spurious telegram and spurious telephonic message purporting to emanate from the U.P. Government to be sent to the police at Amritsar requiring them to be sent back to Lucknow. Thereafter the High Court at Lucknow ordered their release on the ground that after their arrival from Amritsar they had not been produced before a Magistrate and this was in breach of Article 22(2). The Constitution Bench of the Supreme Court set aside this order of the High Court. This case was also cited by Justice Dua in Anwar's case (supra) for his view that Article 22(2) could not be invoked on the facts and in the circumstances of the present case.

99. In the European Convention also, Article 15 lays down that in times of war or other public emergency threatening the life of the nation Government may take measures derogating from its obligations under the Convention to the extent strictly required by the exigencies of the situation. Article 17 further lays down that nothing in this Convention may be interpreted as implying for any State, group or person any right
to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

100. It has to be remembered that when our Constitution was framed India was undergoing the agonies of partition and its attendant blood-shed and has since been facing more or less disturbed conditions almost throughout. The wars imposed on the country by its neighbours, and even more so the proxy war imposed by our troublesome neighbour, have surely not improved the situation. The specific provision for preventive detention, which is also necessitated by our ineffective criminal justice system, is in the circumstances

of the country quite reasonable, and has in view of the in-built safeguards mentioned earlier not by and large been abused except during the phoney Emergency of 1975-77.

101. Laws empowering the executive magistrates to pass orders for externmant of dangerous criminals from the locality of their operation have also been uphold on the ground that the maintenance of public safety and order in the interest of the law-abiding citizens must prevail over considerations of preserving the individual's freedoms guaranteed by Article 19 of the Constitution.

Other safeguards in the European Convention

102. Reverting to the European Convention, other important articles are Articles 6 and 7 which lay down as follows:-

"Article 6. Right to a fair trial:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
   (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   (b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him,

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

(This is all impliedly comprised in the right to fair procedure under Article 21 of our Constitution.)

Article 7. No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

(This corresponds to the first clause of Article 20 of our Constitution).

Definition of offence not to be vague

103. As part of the guarantee of fair trial it has also been held in several cases, such as Kartar Singh v State of Punjab, (1994) 3 SCC 569 (para 130) that an enactment is void for vagueness if its prohibitions are not clearly defined. A law should give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Such a law impermissibly delegates basic policy matters to policemen and judges for evaluation on an

ad hoc and subjective basis with the attendant dangers of arbitrary and discriminatory application. Besides, uncertain and undefined words in the definition of an offence unnecessarily lead citizens to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked."

Retrospective procedural provisions

104. The Prevention of Corruption Act, 1947 came to be amended in 1964. By the amendment a new rule of evidence was prescribed under which the fact that the accused person or any other person on his behalf is in possession, for which the accused person cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income may be proved, and on such proof the court shall presume, unless the contrary is proved, that the accused person is guilty of criminal misconduct in the discharge of his official duty. This provision has been held in Sajjan Singh v State of Punjab, AIR 1964 SC 464, not to amount to creation of a new offence. The protection of Article 20(1) does not extend to a procedural provision. It relates only to creation of a substantive offence.

105. As held in Rao Shiv Bahadur Singh v State of Vindhya Pradesh, AIR 1953 SC 394, Article 20(1) did not prohibit the trial for an offence under a procedure different from what obtained at the time of the commission of the offence or by a court different from that which had competence at the time.

106. The Seventh Protocol of 1984 further added a right of appeal in criminal matters (excepting minor offences) (Article 2) and a right not to be tried or punished twice (Article 4). The European Convention of 1987 further provides for the prevention of torture and inhuman or degrading treatment or punishment.

U.S.: The Eighth Amendment: bail, excessive fines, cruel and immoral punishment

107. Reverting to the American Constitution, the Eighth Amendment provides that excessive bail shall not be required; nor excessive fines imposed, nor cruel and unusual punishments inflicted.

108. Our Supreme Court has also recognised all these rights mentioned in the European Convention and in the American Constitution as part of the guarantee of "procedure established by law" contained in Article 21.

Presumption of innocence

109. The presumption of innocence applies to all criminal trials whether in India or in the Western democracies. However it merely implies that the burden of proving an accused person's guilt at his trial is upon the prosecution.

110. There are however two qualifications to this presumption. A person may be arrested and charged merely on reasonable belief of his guilt and may be kept in jail as an undertrial unless released on bail. Secondly, the presumption does not exclude the shifting of the evidential burden on an issue to the accused, e.g., in regard to possession of disproportionate assets in a charge of corruption again st a public servant or, vide R. v. Lambeat, (2001) 3 All. ER 577(HL) in regard to allegedly innocent possession of a controlled drug. Nor does it prevent the drawing of an adverse inference from the conduct of the accused, such as his abscondence or even his silence or lies when required to explain an incriminating circumstance.

Speedy trial

111. The right to a speedy trial, as noted by the Constitution Bench in Kartar Singh v State of Punjab, (1994) 3 SCC 569 (paras 84 ff), is a derivation from a provision of Magna Carta. This principle had also been incorporated into the Virginia Declaration of Rights of 1776 and from there into the Sixth Amendment of the Constitution of United States of America which provides, inter alia, that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial."

112. It may be pointed out, in this connection, that there is a Federal Act of 1974 called 'Speedy Trial Act' which has established a set of time-limits for carrying out the major events, e.g., information, indictment, arraignment, and trial commencement in the prosecution of criminal case: See Black's Law Dictionary, 7th Edn. p. 1408.

113. The right to a speedy trial is not only an important safeguard to prevent undue and oppressive incarceration, to minimise anxiety and concern accompanying the accusation and to limit the possibility of impairing the ability of an accused to defend himself but also there is a societal interest in providing a speedy trial. This right has been activated in the recent past and our courts have given a series of decisions opening up new vistas of fundamental rights,. In fact, lots of cases are coming before our high courts for quashing

of proceedings on the ground of inordinate and undue delay. The invocation of this right need not even await formal indictment or charge.

114. The concept of speedy trial has been read by the Supreme Court into Article 21 as an essential part of the fundamental right to life and liberty and as a concomitant of the requirement in Maneka Gandhi's case that any "law" within the meaning of that article must be 'reasonable, just and fair. The right to speedy trial begins with the actual restraint imposed by arrest and consequent incarceration and continues at all stages, namely, the stage of investigation, inquiry, trial, appeal and revision so that any possible prejudice that may result from impermissible and avoidable delay from the time of the commission of the offence till it consummates into a finality, can be averted. In this context, it may be noted that the constitutional guarantee of speedy trial is properly reflected in Section 309 of the Code of Criminal Procedure.

115. In Hussainara Khatoon (I) v Home Secretary, State of Bihar, (1980) 1 SCC 81, a three Judge Bench decision, while dealing with Article 21 of the Constitution of India the Supreme Court observed thus: (SCC . p 89 para 5)

> "No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21. The question which would, however, arise is as to what would be the consequence if a person accused of an offence is denied speedy trial and is sought to be deprived of his liberty by imprisonment as a result of a long delayed trial in violation of his fundamental right under Article 21. Would he be entitled to be released unconditionally, freed from the charge levelled against him, on the ground that trying him after an unduly long period of time and convicting him after such trial would constitute violation of his fundamental right under Article 21?" This question was left unanswered in that case but has since engaged the attention of other Benches of the Court.

116. In Kartar Singh supra, the Supreme Court cited with approval the 1950 decision in Beavers v Haubert of the Supreme Court of USA 198 U.S. 77 at 87 in which it was observed that the right of speedy trial is

necessarily relative. It is consistent with delays and depends upon circumstances. It secures right to a defendant. It does not preclude the rights of public to justice.

117. The Supreme Court has added that of course, no length of time is per se too long to pass scrutiny under this principle, nor is the accused called upon to show the actual prejudice by delay in disposal of the case. On the other hand, the court has to adopt a balancing approach to all circumstances including, as mentioned in some subsequent cases any delaying tactics adopted by the accused himself.

RIGHT TO BAIL

118. While the American Constitution specifically prohibits excessive bail the Indian Code of Criminal Procedure leaves the entire matter to the discretion of the Court. However the Supreme Court in various cases, particularly Moti Ram v. State of Madhya Pradesh, (1978) 4 SCC 47 laid down that the guarantee of fair procedure contained in Article 21 rules out judicial arbitrariness in the matter of bail also. It was held in particular that a monetary bail should not always be insisted in respect of an indigent accused who may be unable to furnish sureties. As the petitioner in this case was a labourer he was directed to be released on his personal bond alone.

CURTAILMENT OF RIGHT TO APPEAL

119. In A.R. Antulay v. R.S. Nayak (1988) 2 SCC 602, it was contended before a seven judge Bench that an earlier decision of the Constitution Bench R.S. Nayak v. A.R. Antulay (1984) 2 SCC 183, transferring the trial of Antulay under the Prevention of Corruption Act from the court of Special Judge to the High Court was invalid, inter-alia, on the ground that the right of the accused to appeal to the High Court had thereby been taken away as instead of two appeals, one to the High Court and then to the Supreme Court, he could now file only one appeal to the Supreme Court. Although the earlier decision was reversed on other grounds this plea was not accepted as appeal was a mater of legislative provision. It however noted that right to one appeal on facts and law had not yet been recognised as part of the protection of Article 21 (para 66 of the report). Under the Special Courts Act, 1979 all appeals pending before High Courts in cases covered by the Act were transferred to the Supreme Court.

120. The Code of Criminal Procedure does however make more than ample provisions for appeals and revisions and invocation of the inherent powers of the High Court to prevent abuse of the process of Court. Besides remedies under Articles 226, 227 and 136 of the Constitution are also always available.

TRIAL TO BE IN OPEN COURT

121. Section 327 Cr.P.C. provides for trial in open court. This is accepted as one of the requirements of natural justice. However this provision is subject to certain exceptions. In public interest and in order to safeguard the right of privacy of female victims of rape, it has been provided in sub-section (2) of this section that normally such trials of rape shall be conducted in camera. Where a trial is held in camera, publication of any matter in relation to the proceedings except with the permission of the Court is also prohibited. Even in other cases, the Court may due to the special circumstances of a case, such as security requirements, restrict the entry of the public generally or any particular person in the Court room or building. In Smt. Indira Gandhi's assassination trial, due to security reasons, the Sessions Judge was required to hold the trial within jail premises. The validity of the conviction was assailed, among other grounds, on this head as well. The Court however held in Kehar Singh v. State, (1988) 3 SCC 609, that as soon as the jail was specified as the place of sitting of the Sessions Court in respect of any trial it was deemed to be an open court under section 327. There was no evidence or material from record to suggest that anyone was prevented from attending the trial or that trial was held in camera. The notification declaring Tilhar Jail as one of the places where a Sessions Judge could ordinarily sit was issued by the High Court and not by Government.

122. In Kartar Singh v. State of Punjab (1994) 3 SCC 569 it was held that though open or public trial is a normal attribute of criminal justice, this was not related merely to the requirement of fairness but also to the therapeutic value to the public of seeing its criminal laws in operation purging the society of the outrage felt with the commission of many crimes. This was not an absolute right of the accused, as was clear from the exception related to rape cases.

CONSTITUTION OF SPECIAL COURTS

123. In re the Special Court Bill (1979) 1 SCC 380, was a Presidental reference on a Bill pending before Parliament. The Supreme Court answered the reference by upholding the validity of creation of special courts for trying offences of corruption and abuse of power committed by holders of high political offences during the Emergency. However it was insisted upon that the presiding judges of such courts should enjoy security of tenure and be appointed with the concurrence of the Chief Justice of India.

PLEA BARGAINING

124. In USA almost ninety percent cases are disposed of on basis of plea bargaining,–a practice which has now been recognised by the Supreme Court and also by the legislature. It ensures optimum utilisation of scarce prosecutorial and judicial resources. In the Indian Supreme Court, however, a two judge bench headed by Justice Bhagwati in Kasambhai v. State of Gujarat, (1980) 3 SCC 120 strongly disapproved of it.

125. The matter cannot be treated as closed. It is a different matter that in India, with its abysmally low rate of conviction (only six and a half percent in cases triable by a court of session), the system even if formally introduced is not likely to succeed in respect of major crimes. Informally however, the practice still goes on in Lok Adalats in Motor Vehicles Act cases and other petty cases where only a fine is imposed on a plea of guilty. In USA the practice has been quite successful even in murder trials where as a result of plea bargain the charge is reduced to manslaughter (i.e., culpable homicide not amounting to murder) so as to save the accused from capital sentence or from life imprisonment.

CRUEL PUNISHMENT

126. A law which is cruel was violative of Article 21 of the Constitution, vide P. Rathinam v. Union of India, (1994) 3 SCC 394. There has however been a cleavage of judicial opinion on whether attempt to commit suicide should be a punishable offence or not. According to one view a person attempting suicide basically makes a call for help and should not be treated as a criminal. However the other aspect emphasised by other judges is that if right to commit suicide were to be recognised in law it will have

several consequences against public interest. For instance it may be misutilised by agitators for coercing the Government into conceding their unreasonable demands. It will then be difficult to control such attempts. Moreover. It may also be abused by dowry hunters who place the brides in a situation where they feel compelled to commit suicide.

Death sentence whether a cruel and unusual punishment

127. The validity of death sentence has been assailed in a number of cases on the grounds of its being a cruel and unusual punishment. While some learned judges like Justices P.N. Bhagwati and V.R. Krishna Iyer are strong votaries of abolition of the capital punishment the Supreme Court has in a number of cases held that the provision for death penalty does not violate the human rights: Bachan Singh's case, AIR 1980 SC 898; Sher Singh's case AIR 1983 SC 465; Smt. Triveniben's case, AIR 1989 SC 1335; Allauddin's case, AIR 1989 SC 1456, Sher Singh's case AIR 1983 SC. 465; and Jumman Khan's case, AIR 1991 SC 345. As noted above, the European Convention (Art. 2) makes a specific mention of death sentence as permissible punishment.

128. It may be noted in this connection that in our Constitution too Article 72(1)(c) expressly recognises the power of the President to commute a sentence of death. Clause (2) of the same article also preserves the power of the Governor to commute the sentence of death. Thus the Constitution makers specially took note of the existence under the Indian Penal Code, - which itself has been referred to by name in Entry No. 1 of List 3 of Schedule VII,- as a valid sentence imposable by a court of law or by a court martial.

129. Not only has the validity of death sentence been upheld, its made of execution by hanging has also been upheld, vide Parmanand Katare v. Union of India (1995) 3 SCC 248.

130. The death sentence must not, however, be executed in a cruel, barbarous and degrading manner: Deem v Union of India, (1989) 1 SCC 678.

131. Thus the provision in the Punjab Jail Manual that the body of the condemned prisoner should remain suspended for half an hour after the medical officer has declared him to be dead, has been disapproved in the same case, It was held that the right to dignity and fair treatment is not only available to a living man but also to his dead body.

132. Where in a case the Rajasthan High Court directed the hanging to take place publicly, the Supreme Court struck down the order. It does not appear to have been reported in the law reports.

133. Even after death sentence has been finally confirmed by the Supreme Court and mercy petition dismissed by President, the Supreme Court in some cases directed that because of the undue delay in the execution of the sentence it is to be commuted to imprisonment for life. As laid down in T.V. Catheeswaran v. State of Tamil Nadu (1983) 2 SCC 68, procedure established by law does not end with the pronouncement of sentence but includes the carrying out of the sentence. Prolonged delay in execution of the sentence has a dehumanising effect, whatever may be the cause of delay, be it the time necessary for the appeal and consideration of reprieve or some other causes for which the accused himself may be responsible. The decisions of the Supreme Court have however not been uniform on the length of the period or the circumstances in which such interference with the sentence of death may be justified.

134. In fact the continued validity or justification for death penalty has been the subject of considerably divided opinion in Europe and America as well. Even its deterrent value is now being questioned. In India the Supreme Court has considerably softened the provision by requiring that it should be imposed only in the rarest of the rare cases. The result in that in so few cases is the death penalty now ultimately upheld by the Supreme Court and subsequently not commuted by the Executive, that professional hangmen (Jallads) are no longer available. Those who used to do this job in the past have gone out of practice and become too old and their sons and grandsons have opted for other occupations. This used to be a hereditary occupation and it is most unlikely that any new recruits would be available for doing this horrifying job once in a blue moon for a few hundred rupees. Either the death penalty will itself have to be abolished as has been done in several countries or some other method than hanging,- such as the electric chair in America, may have to be adopted for execution of the death sentence.

135. Section 302 of Indian Penal Code provides for sentence of death as an alternative to a sentence of imprisonment for life for the offence of murder. This provision has no doubt been upheld by Supreme Court. However, the provision in Section 303 of that Code which provided for a mandatory sentence of death for the offence of murder committed by a person being

under sentence of imprisonment for life, has been struck down in Mithu v. State of Punjab AIR 1983 SC 473. The result is that even in case of a murder accused already undergoing imprisonment for life the Court will be obliged to proceed under Section 302 and should impose the sentence of death only in the rarest of rare cases while in other cases the sentence of imprisonment for life will have to be imposed.

Children in prison

136. In Sheela Barse v. Union of India AIR 1986 SC 1773, directions were issued to prohibit children below the age of sixteen years being kept in jail. Again, directions were issued to prevent sexual abuse of women and also custodial violence against them: Sheela Barse v. State of Maharashtra AIR 1983 SC 378.

Insane persons

137. The guarantee of Article 21 has also come to the rescue of insane persons declared sane who had been rotting in jail for long periods from thirty-seven years to nineteen years. In Veena Sethi v State of Bihar, AIR 1983 SC 339, the Supreme Court ordered their immediate release. Even though in some cases trials were pending, the Supreme Court quashed the charges against such persons.

Prisoners' rights

138. Prisoners have also been held to have constitutional rights under Article 19. In M. Hasan v State of Andhra Pradesh, AIR 1998 AP 35, it was held that a journalist cannot be debarred from interviewing a convict under a sentence of death or from publishing his interview. Denial of such interview was held to be violative of the prisoner's right to freedom of expression. Reliance was placed on Vatheeswaran v State of Tamil Nadu, AIR 1983 SC 361 (2) in which the Supreme Court had said that prison walls do not keep out the fundamental rights. In Francis Coralie Mullin v Union Territory of Delhi, (1981) 1 SCC 608: AIR 1981 SC 746, it was laid down that a prisoner has a right to have interviews with members of his family and friends, subject to any valid, i.e. reasonable prison regulations. He also has a right to consult a legal adviser of his choice and that a prison officer should not be present within hearing distance but may watch from a little farther.

139. In the State of Maharashtra v. Prabhakar Pandurang AIR 1996 SC 424, the right of a detenue to send his book, written during detention, out of the prison for publication, was upheld.

140. In Charles Sobraj v Superintendent Central Jail, Tihar, AIR 1978 SC 1514, and Sunil Batra v. Delhi Administration, AIR 1980 SC 1579, the Supreme Court has laid down that a person even under sentence of death can also claim fundamental rights. In Sunil Batra v Delhi Administration (supra), the Supreme Court held as follows :

> "It is no more open to debate that convicts are not wholly denuded of their fundamental rights. However, a prisoner's liberty is in the very nature of things circumscribed by the very fact of his confinement. His interest in the limited liberty left to him is then all the more substantial. Conviction for a crime does not reduce the person into a non-person whose rights are subject to the whims of the prison administration."

141. In the same case another provision in section 56 of the Prisons Act empowering the superintendent to confine a prisoner in irons was also similarly read down. Bar fetters, it was observed, curtail, if not wholly deprive, movement of the person and this affects his personal liberty. This power should not be treated as unbridled and should be applied only where necessary for the safe custody of a dangerous prisoner. It should not be imposed merely on the basis of the length of sentence or the number of convictions against the prisoner. It should not be indiscriminately resorted to.

142. In the case of undertrial prisoners it was further held that they should be accorded more relaxed conditions than convicts. Where an undertrial has credible tendency for violence and escape a humanely graduated degree of iron restraint is permissible only if other disciplinary alternatives are unworkable. Moreover the entire regimen should in no case go beyond short spells and should not be applied if sores have resulted. Moreover the grounds for putting on fetters should be duly recorded and given to the prisoner in the State language, and if he is an stranger to that language they should be communicated, as far as possible, in his own language. They should ordinarily not be continued beyond day time as during night the detenues are locked in.

143. While dwelling on the barbarity of bar fetters they were compared with the punishment of whipping which has been abolished.

144. Further directions to ensure that the prisoners are not subjected to torture or to harsh and unfair treatment were given by the Supreme Court in Sunil Batra (II) v. Delhi Administration, (1980) 3 SCC 488.

145. In the Constitution Bench decision in Sunil Batra and Charles Sobraj v. Delhi Administration, (1978) 4 SCC 494, the Court had agreed with the American Supreme Court decisions in Eve Pell, (1994) 417 U.S. 817 and Charles Wolff, (1974) 41 L Ed 2d 935 that while lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a person is not wholly stripped of constitutional protections. "Conviction of a crime does not render one a non-person whose rights are subject to the whims of the prison administration, and therefore, the imposition of any serious punishment within the prison system requires procedural safeguards. Of course a hearing need not be held before a person is subjected to some minor deprivation. Placement in solitary confinement, however, is not in that category'.

146. In Prem Shanker Shukla v. Delhi Administration (1980) (3) SCC 526 it was held that undertrial prisoners cannot be handcuffed merely on the basis of the crime charged or on the basis of their being ordinary class prisoners as compared with the better class prisoners. Handcuffing of undertrial prisoners by escorts while taking them from jail and back was permissible only in very exceptional circumstances and not as a matter of course. The authorities should record reasons and act on clear materials and produce them before the trial court for taking judicial approval. In the absence of such restrictions handcuffing will amount to harsh and humiliating punishment and would offend Articles 14, 19 and 21 of the Constitution. It is hardly surprising that many undertrials have in recent years escaped from custody on the way to or from court or from the court room itself.

147. In Sunil Batra v Delhi Administration, (AIR 1980 SC 1579) supra, the Supreme Court held as follows (at p. 1583 of AIR) :-

> "Prisons are built with stones of law and so it behoves the Court to insist that, in the eye of law, prisoners are persons, not animals, and punish the deviant 'guardians' of the prison system when they go berserk and defile the dignity of the human inmate. Prison houses are part of Indian earth and the Indian Constitution cannot be held at bay by jail officials 'dressed in a little, brief authority', when Part III is invoked by a convict."

148. Prisoners have no fundamental right to escape from lawful custody. They cannot therefore complain against the presence of armed police guards on the ground of interference with their right to personal liberty. So also a complaint against installation of live wire mechanism for preventing escape was rejected. It was held that the prisoners are likely to come in contact with it only if they attempt to escape from prison: D.B.M. Patnaik v. The State of Andhra Pradesh, AIR 1974 SC 2092.

149. A prisoner has also the right to be protected from violence by co-prisoners, and in case he is killed by co-prisoners, the State may be compelled to compensate the dependants of the deceased: P.U.C.L. v. Union of India AIR 1997 SC 1203.

150. The provision of Article 23 prohibiting begar was also invoked in a case relating to prisoners. The Supreme Court held in State of Gujarat v. High Court of Gujarat, (1998) 7 SCC 392, that a person who has been sentenced to rigorous imprisonment cannot complain of 'begar'. He is bound to put in manual labour imposed on him as a punishment for crime. The Court however drew a distinction between undertrial prisoners and convicted prisoners. It was held that undertrial prisoners and also prisoners sentenced to simple imprisonment cannot be compelled to work. They may however be allowed to work by prison authorities on their own request. Even prisoners undergoing rigorous imprisonment were held entitled to equitable wages, a portion of which may be paid as compensation to deserving victims of the offence while the rest may go to the prisoner or his family.

151. In connection with prisoners' rights a recent American decision (see The Statesman, New Delhi, May 27, 2002) shows considerable cleavage of judicial opinion: A federal appeals court narrowly rejected a California inmate's request that he be allowed to mail semen to his wife, saying US prisoners have no constitutional right to procreate. The 9th Circuit Court of Appeals, reversing its own earlier decision in the case, said convicts give up many rights upon being sentenced to prison- and the right to father children is one of them. 'We hold that the right to procreate while in prison is fundamentally inconsistent with incarceration,' the appeals court ruled in its 6 to 5 decision, denying an appeal by convict William Gerber, who won national attention when he sued for the right to mail his semen to his wife.

152. In India, prisoners, whether convicts or under-trials, have not been given the right to vote; the only exception being in favour of those detained

under a law relating to preventive detention [See sec. 62(5) Representation of People Act, 1951]. This provision has been upheld by the Supreme Court on the ground that the right to vote at an election is not a fundamental right but a statutory right and is subject to the terms of the statute: Anukul Chandra v Union of India, AIR 1997 SC 2814.

153. Curiously however, prisoners are allowed by statute to contest an election though not having a right to vote. The courts have expressed unhappiness at the unrestricted entry of criminals into legislatures and suggested safeguards in that regard to the Government and the Election Commission.

154. The Commission has now, as directed by the Supreme Court, issued instructions under its supervisory jurisdiction (Article 324) that all candidates at an election shall on affidavit make a full disclosure of their criminal antecedents and also of the assets owned by them. This has however been disapproved by all political parties, unanimously as, an encroachment by the judiciary on the domain of Parliament. A watered-down legislation on the subject is now expected.

155. The Constitution Review Committee headed by ex-Chief Justice Venkatachaliah had also recommended, vide Summary of Recommendations, as follows :-

> "(34) The Representation of the People Act should be amended to provide that any person charged with any offence punishable with imprisonment for a maximum term of five years or more should be disqualified for being chosen as or for being a member of Parliament or Legislature of a State on the expiry of a period of one year from the date the charges were framed against him by the court in that offence and unless cleared during that one year period, he shall continue to remain so disqualified till the conclusion of the trial for that offence. In case a person is convicted of any offence by a court of law and sentenced to imprisonment for six months or more the bar should apply during the period under which the convicted person is undergoing the sentence and for a further period of six years after the completion of the period of the sentence. If any candidate violates this provision, he should be disqualified. Also, if a party puts up such a candidate with knowledge of his antecedents, it should be derecognised and deregistered.

(35) Any person convicted for any heinous crime like murder, rape, smuggling, dacoity, etc. should be permanently debarred from contesting for any political office."

Victim Orientation to Human Rights

156. The Article 21 guarantee of right to life and personal liberty has been interpreted by the Supreme Court, for instance in environmental protection and pollution prevention cases, to be available not only against the State but also against private parties. The Indian Penal Code provides for ensuring the enjoyment of these rights by peaceful citizens. Its effective enforcement is therefore necessary for protecting the people from encroachment not only on their rights guaranteed by Article 21 but also those guaranteed by Article 19 (e.g. the right to freedom to carry on one's occupation and to move about freely anywhere in India). As observed by David J. Bodenhamer in the Bill of Rights in Modern America (p.102) "only the punishment and prevention of crime vindicated the innocent individual's right to security."

157. Case law on human rights is however, mostly concerned with the rights of accused persons and convicts. The cause of victims of crime is generally lost sight of The Code of Criminal Procedure does provide (Section 357) for the court having the discretion to order payment of compensation to the victim of crime from either out of the fine, if any, imposed as part of the sentence or even in cases where no fine is imposed. However, in actual practice, the fines imposed are generally on the low side, and the courts rarely award compensation to the complainant. Where however some crime has been committed by public servants against persons in custody or otherwise, the Courts have not been slow in awarding compensation to the victim against the State.

158. In this context Justice Krishna Iyer has in his books "Off the Bench" (reprint 2002) p. 195, quoted with approval from an editorial in the Wall Street Journal, "Marking Criminal Pay", the following passage:-

> "Much about the moral fiber of a society can be learned from the way it deals with crime. It is not enough to treat criminals with as much compassion as we can, especially when this liberal spirit is carried to the excess of interfering with crime prevention as the courts have done. It's about time society showed a little moral strength by

acknowledging that victims, real people, are hurt by crime and that it is to them that criminals owe their debt."

159. When California's Governor Brown in 1965 signed into law the first state compensation programme for victims of crime he had aptly observed:

"The murderer of a family provider killed in a holdup, for example, had his basic needs of food, shelter and medical attention provided in prison. But the victim's family, suddenly deprived of all economic support, may be left destitute. Some form of public assistance is the only meaningful way to remedy this situation."

160. The Constitution Review Committee has observed in this connection:

"Among the many reforms canvassed for improving criminal justice is one that advocates a victim-orientation to criminal justice administration. 'Victim orientation' includes greater respect and consideration towards victims and their rights in the investigative and prosecution processes, provision for greater choices to victims in trial and disposition of the accused, and a scheme of reparation/ compensation particularly for victims of violent crimes."

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DOCTRINE OF ULTRA VIRES

Justice U.C. Srivastava•

The use of word *ultra vires* has now become frequent in Courts of law, particularly in Higher Courts. The Latin word, *Ultra Vires*, adopted in English Language means " beyond one's legal power or authority"[1] or "not within the scope of powers"[2]. This doctrine as in England was the basis of judicial reviews and gradually the courts of law shedding its narrower scope, have extended it to other fields including that of administrative actions. From England this doctrine travelled to other countries and also to India, where the Britishers enforced laws made by them mostly on the pattern of laws in England. The laws so made the basis of what are laws in England and still continue to apply in this country, except where the same have been varied, modified or over shadowed by the Constitution of India, or by any other enactment, amendments and interpretation..

About hundred years ago when the scope of this was not so pervasive as it is today, S.R.Das in 'Law of *ultra vires* in British India'. (Tagore Law Lectures) stated as under:

"In speaking of an ordinary citizen we do not speak of any action being *ultra vires*. To an ordinary citizen whatever is not expressly forbidden by the law, is permitted by the law. It is only when the law has called into existence a person for a particular purpose or has recognized the existence of a person for a particular purpose. Such as holder of an office, a body corporate etc. that the power is limited to the authority delegated expressly or by implication and to the object for which it was created. In the case of such a creation, the ordinary law applicable to an individual is some what reversed. Whatever is not permitted expressly or by implication by the instrument is

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• Former Senior Judge (Lucknow Bench) Allahabad High Court; Former Chairman, IJTRUP

[1]The concise Oxford Disctionary of Current English (Oxford University Press)

[2]Stroud's Judicial Dictionary (Sweet and Maxwell). See also Brewer's Dicticnary of Phrases and Fables that ultra vires means "in excess of the power possessed"; "transcending authority".

prohibited not by any express prohibition of the Legislature but by the doctrine of *ultra vires.*"

Time gradually passed and political transformation took place, new development took place all round, new laws and Courts came into existence and India got its own written Constitution. New fields were open in this country. What was said then has also undergone appreciable change in as much as the scope of this doctrine also expanded and is now applicable to Legislative, Administrative and Judicial or quasi-judicial fields much more than what was said in Tagore Law Lectures above, when Legislative field was negligible, judicial field was limited and controlled in this country which was under British subjugation.

The word '*ultra vires*' is not synonymous with the word illegal. The word illegal comes in when the act done is opposed to public policy or prohibited by law. But the word *ultra vires* is with reference to the power or capacity of the person or authority of the doer. Such acts are necessarily illegal but could be illegal also.[3] Lord Cairns, L.C. in *Ashbury* case [4] has drawn distinction between the words illegality and *ultra vires* using two more words *extra vires* and *intra vires.* Therefore the essence of the doctrine of *ultra vires* is that it is applicable only to acts done in excess of the legal powers of the doer, as distinguished from want of jurisdiction and illegality.[5]

It is not only when the authority acting has done beyond powers or had no power to it or to the extent it was done, the act would be *ultra vires,* but in the broader sense also when it has abused its power or acted in bad faith or inadmissible purpose or on irrelevant grounds or considerations or with gross irresponsibility, as all these action or ways of action are directly relatable to the power and its exercise of power. *Ultra vires* acts are void unless a declaration to this effect is made by competent Court or authority, the same cannot be presumed to be void as presumption is otherwise. If power is given to certain specified person and the person or authority is to act in a particular manner and if it is not done by the said person and not in the manner provided it will be *ultra vires.* This applies even in the case of exercise of

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[3] The distinction between the two has been very lucidly expressed in Bissell v. Michigan Southern & C. Railway Companies (22 N.Y. 258, quoted by Brice on the Doctrine of Ultra vires 3rd Edition P. 44)

[4] Ashbury Railway Carriage & C. Company V. Riche (L.R.7 H.L.653)

[5] See *Law of Ultra Vires* by Satyanarayan Das (Tagore Law Lectures).

judicial or quasi-judicial powers. The Apex Court in *Supreme Court Employees Union*[4], has laid down "an act is *ultra vires* because the authority has acted in excess of its power in the narrow sense, or because it has abused its power by action in bad faith or for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness". If the act, whether administrative, legislative or quasi-judicial, is in conflict with the Constitution or governing Act or repugnant to the general principles of the laws of the land or it is arbitrary or unreasonable and no fair minded authority could ever have made it, would be *ultra vires*.

An enactment will be *ultra vires* if the legislature is not competent to legislate in respect of said matter; like State Government legislating in respect of a matter provided in Union list or if State enactment overrides the Central enactment in respect of matter provided in Concurrent List. The enactment would, in such event, be unconstitutional and *ultra vires*. The same will be the position if any enactment of Central or State legislature violates any constitutional provision like Articles 14, 19, 21 etc.

The doctrine of *ultra vires* is applicable to subordinate or delegated legislation like Rule and Regulations etc. If the parent Act is unconstitutional, the delegated legislation framed under it would become unconstitutional and *ultra vires*. This would be the position if the subordinate legislation is made not by the authority which alone has power to do or the delegatee has transgressed the limits or when the delegated legislation fails to take into consideration vital facts which expressly or by implication are required to be considered by Constitution of India or the enactment itself or that the same is in conflict with any other Statute or is so arbitrary that it could not be said to conform to the Statute or be violative of Article 14 of the Constitution of India.

In *Supreme Court Employees Welfare Association*[5] the Court observed: "The true position thus appears to be that, just as in the case of an administrative action, so also in the case of subordinate legislation (whether made directly under the Constitution or Statute), its validity is open to question

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[4] Supreme Court Employees Welfare Association v. Union of India, AIR 1990 SC 334

[5] Supreme Court Employees Welfare Association v. Union of India; AIR 1990 SC 334, Para 106; (Hon'ble Mr. Justice T.K. Thommen, referring to the text adopted by Lord Russel in Kruse v. Johnson (1898) 2 QB 91 and by Lord Green M.R. in Associated Provincial Pricture House Ltd. v. Wednesbury Corporation (1948) 1 KB 223, and several other decisions.

if it is *ultra vires* of the Constitution of India or the governing Act or repugnant to the general principles of the laws of the land. This would be the position if the law is so arbitrary or unreasonable that no fair minded authority could ever have made it."

If the rules do not tend in same degree to the accomplishment of the objects for which power has been delegated to the authority the Court will declare them to be unreasonable and therefore void. The Court, in *S.C. Welfare Association*, further observed: "this is so even if it were to be assumed that rules made by virtue of power granted by a provision of the Constitution are of such legislative efficacy and amplitude that they cannot be questioned on grounds ordinarily sufficient to invalidate the generality of Statutory instruments." However, these principles, are subject to the overriding consideration, as to the amenability of the impugned subject matter to judicial review.

If the subordinate Legislation viz. Rule, Regulations etc. is within the scope of powers conferred on it, the same will be *intra vires* and beyond the domain of the Court to enquire whether the purpose of the Statute can be served better by adopting a policy different from that what is laid down by legislature as its delegate. If the delegate has exceeded power or has wrongly exercised it, the exercise of power will be *ultra vires*. Even if the subordinate legislation like any enactment provides that it shall be 'conclusive evidence' or shall not be called in question in any Court i.e. exclusion of judicial review, yet its validity or *vires* even then is open to challenge as *vires* of a legislation or delegated legislation can not be affected by such provisions. In the absence of any such conferment of power delegated legislation can have no retrospective effect.

The old maxim *delegatus non potest delegare*, (a delegate cannot further delegate) still holds good. Any departure or deviation from the same invokes the doctrine of *ultra vires*. If delegation is in favour of a particular body or authority, it is to be exercised by that body or authority and they can not sub-delegate their power and authority unless they are authorised to do so expressly or by necessary implication by the delegated legislation itself.

The doctrine of *ultra vires* has got applicability also in the manner power is exercised by the body or authority on when it is conferred. If the power conferred has been exercised in a *malafide* manner or in bad faith, the same would be *ultra vires*. If an enactment also suffers from the same vice it would also be *ultra vires* and can be challenged as such . Thus an act in

broader sense is *ultra vires* either because the authority has acted in excess of its power or in narrower sense it has abused its power by acting in bad faith, inadmissible purpose or on irrelevant grounds or without regard to the relevant considerations or with gross unreasonableness, is exercised in bad faith motivated by personal animosity towards those who are directly affected by its exercise. It is equally abused even when it is exercised in good faith but for an unauthorized purpose or on irrelevant grounds.[7]

Summarising the entire concept the Supreme Court of India in Sri Sitaram Sugar Company[8] observed:. "The true position therefore is that any act of repository of power, whether legislative, administrative, or quasi-judicial is open to challenge if it is in conflict with Constitution or the governing Act or the general principles of the Law of Land or if it is so arbitrary or unreasonable that no fair minded authority could have ever made it."

Statutory corporation and public undertakings also, being creation of Statute cannot travel beyond the Statute and if they exceed the powers conferred upon it the act becomes *ultra vires*. If an act is not provided expressly or by necessary implication in the Statute creating it, the same is to be taken to be prohibited but incidental and consequential powers of Statutory Corporation would not be *ultra vires*. The acts of Administrative authority exercising powers under Statute too can be struck down being *ultra vires*.

The doctrine of *ultra vires* applies both in the matters of substantive as well as procedural laws. Where procedure is prescribed power is to be exercised accordingly. If certain procedural requirements are prescribed and there is noncompliance with the same, it will be a case of procedural *ultra vires*. If before making rules or bye laws the requirement is prior publication of draft rules or bye laws or requirement is mandatory to consider some authority or body, failure to do so would invalidate the rule, bye-laws etc. as the same suffers with the vice of procedural requirement.

The principles of estoppel , waiver or acquiescence are not applicable in the matter of *ultra vires* acts. Similarly the plea of approbate and reprobate too is inapplicable in such acts. Even though subordinate Courts have not much to do with the doctrine of *ultra vires*, yet it is a doctrine which requires them also to be conversed with its principles and application.

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[7] See, S.C. Employees Association case (Supra)

[8] Sitaram Sugar Company Ltd. v. Union of India; AIR 1990 SC 1277

शीघ्र एवं सस्ता न्याय - लोक अदालतें एक सशक्त विकल्प

न्यायमूर्ति दिनेश कुमार त्रिवेदी
कार्यपालक अध्यक्ष
उ० प्र० राज्य विधिक सेवा प्राधिकरण

भारत के संविधान के अन्तर्गत हर नागरिक को त्वरित न्याय पाने का अधिकार दिया गया है। इसी के साथ-साथ यह भी बात सत्य है कि यदि न्याय लेने में कोई देरी होती है तो उसका अर्थ यह होता है कि उस व्यक्ति को न्याय नहीं दिया गया है। जैसा कि इससे साफ़ है कि Justice delayed Justice Denied. इस काम के लिये न्यायपालिका को अधिकृत किया गया है। वर्तमान समय में न्यायपालिका में इतने अधिक वाद लम्बित हो गये है जिसके कारण आम नागरिक को त्वरित न्याय नहीं मिल पा रहा है और त्वरित न्याय न मिल पाने के कारण उसके मौलिक अधिकार को हनन हो रहा है। इसी तरह से सरकार और न्यायपालिका का यह भी कर्तव्य है कि वह समय समय पर ऐसे अधिवेशन या सेमीनार करती रहे जिसके द्वारा आम जनता को उसके अधिकारों को ज्ञान प्राप्त हो सके। विधिक सहायता व्यवस्था का इतिहास बहुत पुराना है। इस बात की महत्ता को समझते हुये। दुनिया के हर कोने में कार्य किया गया है। कानूनी सहायता कार्यक्रम सन् 1861 में शुरू हुआ जब First Organic French Law of Legal Assistance स्थापित हुआ। इसके बाद 1876 में न्यूयार्क में जर्मन निवासियों को लीगल ऐड देने के लिये एक सोसायटी बनायी गयी और उसी के बाद यूनाइटेड स्टेटस में कई विधिक सेवा समितियाँ अलग अलग निवासियों के लिए बनायी गयी। सन् 1903 में यूनाइटेड किंगडम Criminal Legal Aid Scheme शुरू हुयी और 1913 में निर्धन बन्दियों को विधिक सहायता देने के लिये Poor Prisoners Defense Act बनाया गया। इंग्लैण्ड में 1950 में Civil Legal Aid Scheme बनायी गयी और उसके बाद दुनिया के हर देश में विधिक सेवा की संकल्पना को देखने के बाद कई कमेटियाँ अलग अलग नामों से बनायी गयी इन सब के पीछे मुख्य उद्देश्य यह था कि सभी को समान न्याय के सिद्धान्त को पूरा किया जा सके।

भारत मे स्वतंत्रता के बाद और न्यायालय मे बढ़ते हुए वादो की संख्या को देखते हुये सन् 1980 मे Committee for Implementing Legal Aid Scheme बनायी गयी और इस स्कीम के अन्तर्गत लम्बित मुकदमो के निस्तारण के लिये लोक अदालते लगाई गयी। लोक अदालतो की सफलता को देखते हुये और इस बात को ध्यान मे रखकर कि स्कीम को कोई विधिक मान्यता नही है। सन् 1987 मे विधिक सेवा प्राधिकरण अधिनियम बनाया गया जिसे 09.11.1995 को लागू किया गया। इस अधिनियम के अन्तर्गत केन्द्र मे एक राष्ट्रीय विधिक सेवा प्राधिकरण के नाम से Appex Body बनायी गयी और राज्यो मे राज्य विधिक सेवा प्राधिकरण बनाए गये, जिलो मे जिला विधिक सेवा प्राधिकरण गठित किये गये और तहसील स्तर पर तहसील विधिक सेवा समितियाँ बनायी गयी। सर्वोच्च न्यायालय मे उच्चतम न्यायालय विधिक सेवा समिति तथा हर प्रान्त मे उच्च न्यायालय मे भी उच्च न्यायालय विधिक सेवा समिति का गठन किया गया। इन सभी प्राधिकरणो और समितियो का मुख्य उद्देश्य न्यायालयो मे लम्बित मुकदमो का निस्तारण जल्द से जल्द समझौते के आधार पर लोक अदालतो द्वारा निर्णीत कराने एवं आम नागरिक को उनके विधिक अधिकारो का ज्ञान कराना था। इन स्कीमो और लोक अदालतो के गठन के बाद यह बात देखने मे आयी. कि लोक अदालतो के द्वारा काफी वाद निस्तारित किये जाते है एवं यह बात भी स्पष्ट हो गयी कि जागरूकता शिविरो द्वारा भी आम जनता मे उनके मौलिक अधिकारो के प्रति काफी जागरूकता आयी है। इन्ही सब बातो को ध्यान मे रखकर बार-बार इस बात पर जोर दिया जा रहा है कि हमारे न्यायिक अधिकारी लोक अदालतो के माध्यम से जल्द से जल्द वाद निस्तारित कराने की कोशिश करे ताकि उनके न्यायालयो मे लम्बित वादो की संख्या मे कमी आ सके और वो उन वादो मे ज्यादा ध्यान एवं समय दे सके जिनको गुण, दोष के आधार पर निस्तारित करना है।

भारत के पूर्व मुख्य न्यायाधीश माननीय न्यायमूर्ति श्री एस. पी. भरूचा ने राष्ट्रीय विधिक सेवा प्राधिकरण द्वारा प्रकाशित पत्रिका **'न्यायदीप'** के भाग 3 अंक 3 जुलाई-सितम्बर 2000 मे प्रकाशित लेख मे यह स्पष्ट रूप से लिखा है कि लोक अदालत और लीगल एड कार्यक्रम मे हर न्यायिक अधिकारी को Involve कर दिया जाये और न्यायिक अधिकारियो द्वारा इसमे पूर्ण रूप से अपना सहयोग देना चाहिये। ताकि भारतीय संविधान के Article 39A का पूर्णरुपेण पालन हो सके। संसद मे विधिक सेवा प्राधिकरण अधिनियम 1987

बना और न्यायपालिका से यह अपेक्षा की गयी है कि वह इन लीगल सर्विस स्कीम्स और कार्यक्रमों को कियान्वित करें और इनकी कार्यप्रणाली की बराबर मानीटरिंग करती रहे क्योंकि इन लोक अदालतों में न्यायिक अधिकारी Involve रहते है। इसलिये विधिक सेवा का कार्य हर न्यायिक अधिकारी का एक कर्तव्य हो जाता है।

उत्तर प्रदेश राज्य विधिक सेवा प्राधिकरण ने भी प्रदेश के सभी न्यायिक अधिकारियों को विधिक सेवा कार्यक्रमों की जानकारी देने और इन कार्यक्रमों के प्रति समर्पित भाव रखने हेतु 2-2 मण्डलों के न्यायिक अधिकारियों को बुलाकर अधिवेशन कराया गया है और उन्हें इस बात से अवगत कराया गया है कि विधिक सेवा, लोक अदालत एवं विधिक साक्षरता शिविर आदि को समर्पित भाव से देखें और जल्द से जल्द और ज्यादा से ज्यादा वादों के निस्तारण की योजना बनाये और यह देखें कि कैसे वाद जल्द से जल्द तय हो सकते है।

इधर यह बात देखने में आ रही है कि विधिक सेवाओं एवं लोक अदालतों आदि का कार्यक्रम एक रूटीन मैटर सा हो गया है और उसे न्यायिक कार्य का कार्य नही माना जा रहा है। यहाँ पर यह भी बताना आवश्यक होगा कि हर न्यायाधीश का, चाहे वह अधीनस्थ न्यायालय का हो या उच्च न्यायालय का हो, सभी का यह दायित्व एवं कर्तव्य है कि उनके यहाँ के लम्बित मुकदमों का जल्द से जल्द से निस्तारण किया जाये। उच्च न्यायालय में परमानेन्ट लोक अदालते लगाने की एक स्कीम जो राज्य विधिक सेवा प्राधिकरण द्वारा बनायी गयी थी, उच्च न्यायालय से अनुमोदित हो चुकी है और सरकार की अधिसूचना के लिये लम्बित है। उसके आते ही हम उच्च न्यायालय में भी स्थायी लोक अदालतों का आयोजन करेंगे। उच्च न्यायालय में अवकाश प्राप्त न्यायमूर्तियों की मदद से परमानेन्ट लोक अदालत लगायी जायेगी और उनमें जो भी मुकदमें सुलह समझौते के आधार पर तय हो सकते है, उनको तय कराने की कोशिश की जायेगी। इस तरह से उच्च न्यायालय में भी एक बड़ी संख्या में मुकदमें परमानेण्ट लोक अदालत द्वारा तय हो सकते है। हमारे प्रदेश में लोक अदालतों का आयोजन न्यायालय समय के बाद या छुट्टी के दिन ही किया जा सकता है। इस वजह से काफी मुश्किले आती है और बहुत से छोटे-छोटे मुकदमें उदाहरणार्थ आबकारी, मोटर यान अधिनियम के अन्तर्गत चालान, बैंकों से सम्बन्धित ऋण वाद, पारिवारिक न्यायालयों के मुकदमें एवं मुनिसिपल बोर्ड या

विकास प्राधिकरण के मुकदमे यदि लोक अदालत मे आ जाये तो लोक अदालत द्वारा बहुत शीघ्रता से निस्तारित किये जा सकते है। वादो की संख्या दिन प्रति दिन बढ़ती जा रही है और इस बात को ध्यान मे रखकर यह भी आवश्यक हो गया है कि हम शुरू से ही इन वादो के निस्तारण कराने एवं जो झगड़े अभी वाद के रूप मे न्यायालय मे नही आये है उनको प्रीलिटीगेशन स्कीम के अन्तर्गत इन परामर्श एवं सुलह समझौता केन्द्र के द्वारा सुलह समझौते के आधार पर निर्णीत करा दे तब भी बहुत से लम्बित वाद एवं ऐसे वाद जो न्यायालय मे दाखिल होने जा रहे है की संख्या को कम किया जा सकता है।

इसी तरह से राजस्व के मुकदमे भी न्यायालयो मे वर्षो से लम्बित चल रहे है। इन मुकदमो के लिए भी यह आवश्यक है कि जिले के जिलाधिकारी एवं अन्य राजस्व अधिकारीगण इन वादो को भी लोक अदालत के द्वारा निर्णीत कराने की कोशिश करें। इसके लिए यह आवश्यक है कि हर तहसील मे परामर्श एवं सुलह समझौता केन्द बनाये जाये और वह केन्द्र ज्यादा से ज्यादा मुकदमो को सुलह समझौते के आधार पर निरस्तारित कराने की कोशिश करें।

हर तहसील मे तहसील दिवस के दिन लोक अदालत लगायी जा सकती है और उस दिन राजस्व के लम्बित मुकदमो और ऐसे वादो को जो अभी न्यायालय तक नही पहुँचे है उन सब का निस्तारण उस दिन कराया जा सकता है। वर्तमान मे लम्बित वादो की संख्या को देखते हुए यह आवश्यक हो गया है कि हर न्यायालय मे लम्बित मुकदमो के निस्तारण के साथ-साथ इस पर भी जोर दिया जाय कि जो वाद न्यायालय मे दाखिल हो जा रहे है उनको न्यायालय मे जाने से रोककर लोक अदालतो के द्वारा पहले ही निस्तारित करा दिया जाय।

सरकार एक सबसे बड़ी वादकारी है और सरकार मे कुछ ऐसे भी विभाग है जिनमे वादो की संख्या बहुत अधिक है। इस बात को ध्यान मे रखकर राज्य प्राधिकरण ने सरकार के विभागो मे लोक अदालत लगाने की स्कीम तैयार की है और यदि सरकार उस स्कीम को स्वीकृति दे दे तो हर विभाग मे वादो की संख्या को देखते हुये एक या दो विभागीय स्थायी लोक अदालते लगायी जा सकती है। स्कीम के अनुसार उस लोक अदालत मे एक सेवानिवृत्त न्यायिक अधिकारी पीठासीन अधिकारी तथा उस विभाग की

कार्यप्रणाली से भिन्न एक सदस्य के रूप मे होगा। यदि यह विभागीय लोक अदालते सुचारू रूप से चल गयी तो बहुत से मुकदमे यही निस्तारित हो जायेगे और उस मामले मे अधिकरण मे या उच्च न्यायालय में याचिकाओं द्वारा वाद दाखिल नही होगे। इन सभी लोक अदालतों की सफलता के लिये आवश्यकता इस बात की है कि हम रिकन्सीलियेशन सेण्टर ठीक प्रकार से बनाये और उसमे जो सदस्य नामित करें वह सभी लोग इस कार्य के लिये समर्पित होने चाहिये। इन योजनाओं की सफलता के लिये सबसे बड़ी आवश्यकता इस बात की है कि हमें कितना सहयोग सरकार, उच्च न्यायालय एवं न्यायिक अधिकारियों से मिलता है। न्यायिक अधिकारी तो इस समय भी कटिबद्ध है। अतः इन योजनाओं की सफलता सरकार एवं उच्च न्यायालय के सहयोग पर भी निर्भर है।

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ARTICLES 323A, 32, 136 & 226 OF THE CONSTITUTION : SCOPE IN SERVICE MATTERS

Justice Kamleshwar Nath
Former Judge
Allahabad High Court

1. The laws and policies of the Government in power have to be implemented through a body called the *Executive*. In a vast country like ours, the executive has to be manned by a very large number of persons, called *Public servants under the employment of the State*. The relationship between the State and public servant is not only that of *Master and Servant*, but also something higher knows as *Status*. The idea is that a public servant discharges his duties not only on the basis of the contract of service but also as State's representative exercising *a part of State's Sovereignty*, howsoever tiny that party may be! That is why the conditions of service of a public servant are also governed by *Service Rules*. These Rules can be changed unilaterally by the State.
2. We have lakhs and lakhs of public servants functioning in various administrative units. Naturally these persons could have problems and grievances related to the discharge of their duties. In our normal set up, the function of examining and affording relief, if any, to public servants was discharged by Civil Courts. However, experience showed that the number of cases was so large that Civil Courts could not cope up with them causing immense delay in determining the controversies between the State and the public servant; there was also the evil of multi-tier stages of proceedings before arriving at a finality. It was in public interest therefore to devise a mechanism for quick redressal of the grievances of the public servant. Hence Art, 323A was introduced in the Constitution of India to provide for creation of Tribunals for the purpose, endowing it with all the powers of all the Courts (except Supreme Court) and making its decisions immune from Appeals, Revisions etc.

3. The Administrative Tribunals Act 13 of 1985 (for short, the Act) provides remedial procedures and forum for redressal of grievances of persons appointed to public services and posts in connection with the affairs of the Union of India in respect of their Conditions of Service. The Central Administrative Tribunal (for short, the Tribunal) is established under section 4 of the Act. Since this paper is concerned only with employees of the Union, I need not refer to the provisions of the Act relating to 'State' Administrative Tribunals.
4. The Tribunal is established under section 4 of the Act. Its jurisdiction and powers are set out in section 14. It has *all* the jurisdiction, power & authority of *all Courts* except the Supreme Court in respect of *all employees* concerning *all service matters*, including the power to determine the constitutional validity of any Statute; but its jurisdiction in matters falling within the purview of Industrial Tribunal or Labour Court under the Industrial Disputes Act, 1947, has been excluded by Section 28 of the Act.
5. The Act does not apply to Defence Forces or other Armed Forces of the Union under section 2 (a), but applies to all matters relating to the conditions of service of other employees of the Union under section 2 (q).
6. It is important that while the Tribunal exercises all the powers of High Court u/s 14(1), the powers of High Court in matters within the jurisdiction of the Tribunal was excluded by section 28. This exclusion was declared to be unconstitutional by the Supreme Court in the case of *L. Chandra Kumar v. UOI*, (1997) 3 SCC 261 . A 7-Judge Bench held that power of *judicial review* vested in the High Court under Articles 226 and of *supervision* over all Courts and Tribunals under Articles 227, as also the power of the Supreme Court under Article 32, is part of the *integral, essential, and basis structure* of the Constitution hence cannot be ousted or excluded. It was further held that the Tribunal is competent to test the constitutional validity of statutory provisions and rules. Incidentally, the view taken in part 16 of *Sampat Kumar's case* (1987) 1 SCC 124 that exclusion of the jurisdiction of High Court is not invalid, is no longer the correct law. However, the prospect of overlapping of or conflict in exercise of jurisdiction by the Tribunal and High Court is taken care of by the Supreme Court laying down that the High Court will not entertain the

matter in the first instance which must be done by the Tribunal, and that the matter in the High Court will be considered only by a Division Bench.

7. Art. 32 creates a Fundamental Right to enforce any or all the Fundamental Rights contained in Part III of the Constitution by invoking the jurisdiction of the Supreme Court. In *Chandra Kumar's case* (Supra) the Supreme Court quoted Dr. Ambedkar in Constituent Assembly Debates as declaring that Art. 32 was 'the most important Article', 'the very soul of the Constitution the very heart of it'. Art, 136 confers powers on the Supreme Court to grant 'special leave to appeal from *any judgment* or order *in any cause or matter passed* or made *by any court or tribunal*' in India; the Supreme Court has unlimited powers under Art. 136 to mould the relief in a matter to render full justice in the cause : See *Bhagat Ram v. State of Himachal Pradesh,* (1983) 2 SCC 442.
8. The competence of the Tribunal in respect of *all matters* relating to service conditions extends to all kinds of conceivable grievances. At the lowest, rejection of leave, at the highest, dismissal from service; even a grievance concerning Pension – all fall within the purview of the Tribunal because they all relate to Conditions of Service. All disciplinary inquiries and punishments imposed therein – *minor or major* – are open for adjudication.
9. It is important that the Departmental authority holding a disciplinary inquiry proceeding is the 'master of facts'; i.e. the Tribunal cannot interfere with the *findings of the inquiry officer or Competent Authority,* provided they are *not arbitrary or utterly perverse* and the inquiry has been held in accordance with rules and principles of *Natural Justice.* Similarly, the question what *punishment would meet the ends of justice,* is a matter exclusively within the jurisdiction of the competent authority; the Tribunal has no jurisdiction to interfere therewith unless it is *malafide ; UOI v. Parmananda* (1989) 2 SCC 177.
10. For invoking the jurisdiction of the Tribunal, an application is made under section 19 of the Act; but before doing so, the public servant must exhaust, u/s 20 of the Act, any *alternative departmental remedy* available to him. If the motion for such remedy is not disposed of within 6 months, application u/s 19 can be made. Section 21 provides one year's *limitation,* from the date of the impugned order – original or appellate – or from

expiry of 6 months from the date of motion for alternative remedy (including appeal or representation). The delay in making the application after the period of limitation may be condoned by the Tribunal if the public servant satisfies the Tribunal that "he had sufficient cause" for not making the application within time.

11. Pending disposal of Section 19 application, the Tribunal may pass an *interim order* under section 24; but before doing so, the Tribunal must ensure that copies of the application and all supporting documents have been furnished to the opposite party, and an opportunity of hearing has been given to the latter. The section, nevertheless, provides for *postponing performance of these conditions* in an urgent matter where the Tribunal is *satisfied and records reasons* that, otherwise, such loss would be caused to the applicant as cannot be adequately compensated by money. Even so, such an interim order shall automatically cease to exist after 14 days if the said conditions are not fulfilled in the meantime.
12. The most important aspect of redressal of a grievance in proceedings under the Act, concerns *execution* of the Tribunal's order. Section 27 of the Act provides for Execution. The period of limitation for applying for execution of the order is one year u/s 21 from the date of the order as held by the Supreme Court in the case of *Hukum Raj Khinvsara v. UOI,* (1997) 4 SCC 284. Experience, however, shows that the power of *execution u/s 27* is rarely made use of, and the normal practice is to approach the Tribunal for action in Contempt of Court u/s 17. I shall be back to the question of execution shortly.
13. In matters of contempt, the Tribunal is usually concerned with *civil contempt,* defined in section 2(b) of the Contempt of Court Act, 1971, as 'wilful disobedience' of an order. *Mere* disobedience does not invite contempt proceeding ' See *State of U.P v. M. v. Siddiqui (1980) Suppl SCC 691, & Vijay Singh V. Mittan Lal Hindoliya* (1997) 1 SCC 258. The period of limitation for moving the Tribunal to take action for contempt is one year from the date of alleged act of contempt u/s 20 of Contempt of Court Act. It is plain enough that exercise of contempt jurisdiction is an indirect way of forcing the other party to implement the order; it does often work, but one has to be careful both about the 'wilful' element and period of limitation.

14. The process of *execution* is somewhat complicated because of peculiar terminology of section 27 read with section 20(2) (a) of the Act. I am not aware of any decision of the Supreme Court on interpretation of the combined effect of these two provisions. Section 27 speaks of a final order 'of the nature referred to' in section 20(2) (a), and requires that the order of the Tribunal must be 'executed in the same manner' as if it was a final order of that 'nature'. Now, what is the 'nature' of an order under section 20(2)(a)? Firstly, the authority which might have passed the final order : It must be the Govt. or other authority/officer/persons 'competent' to pass an order 'rejecting any appeal or representation made by' the applicant (in whose favour the Tribunal passed the order) to seek the alternative remedy before his application under section 19 could be admitted for hearing. Who is the precise authority – Govt. or otherwise – competent to pass such an order would depend upon the particular facts of each case applicable to the classification of the applicant. It is plain enough that there *must be such a competent authority in each case,* and yet the Tribunal need not know who exactly is that authority. It is a 'blanket provision' entitling the Tribunal to presume that the order passed by the Tribunal shall be deemed to be the order of the competent authority, *whoever he may be.* Secondly, the conditions of section 27 r/w section 20(2) (a) having been satisfied, the Tribunal's order may be executed fully *by the Tribunal* to give relief awarded to the applicant in the case. Thus if the Tribunal has ordered a terminated public servant to be reinstated, the Tribunal 'will' require the applicant *to be physically placed in position and handed over charge of office through a charge certificate, wherever necessary, by an Officer of the Tribunal.*
15. It should be noticed that the Tribunal exercises the powers of the High Court as well, and the provisions of Civil Procedure Code, 1908 apply to the High Court u/s 117 CPC. Section 22(1) of the Act does not 'debar' the Tribunal to make use of CPC; it only says that the "Tribunal shall *not be bound* by the procedure laid down" in the CPC. It is a well recognized principle that the rules of procedure contained in the CPC may be adopted as representing principles of fair play and justice.
16. Moreover in a democracy governed *by the rule of law,* it is a constitutional principle that an authority competent to pass an executable order has

ancillary and incidental powers to do all such acts as are fairly necessary to give effect to the order ; See *Grindley's Bank v. Central Govt. Industrial Tribunal* (1980) Suppl. SCC 420; *Dr. A. Laxmana Swamy Mudaliar v. LIC of India,* AIR 1963 SC 1105; *Checkpost Officer Coimbatore v. K. P. Abdullah & Bros.* (1971) 27 STC 1 (SC).

17. Last, but not least – particularly relevant to this batch of Civilian Officers in Defence Services - , is the power of the President of India under *Pleasure Doctrine* contained in Article 310(1) of the Constitution under which Civilian employees in defence services do not have the protection of Inquiry provisions under Art. 311(2). In express terms, Art. 311 applies only to a member of a civil service of the Union, an all-India service or a civil service of a State or a person who holds a civil post under the Union or a State, hence does not apply to Defence Services or civilians in defence services : *UOI v. K. S. Subramaniam* 1989 Suppl. (1) SCC 331 (welder in Naval Base); *Lekhraj Khurana v. UOI* (1971) 1 SCC 780 (supervisor, Army Ordinance Corps) . This does not mean that no disciplinary inquiry can be held at all; indeed the service rules of civilians in defence services do have provisions to hold inquiry for misconduct etc. which must be complied with. All that it means is that if with or without an inquiry, the President thinks it fit to invoke his powers under the pleasure doctrine, the result of the inquiry will not prevent him from exercising those powers even contrary to the inquiry findings.

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PRESERVE DEMOCRACY

Justice K. L. Sharma,
Former Judge,
Allahabad HighCourt

The people of India realized their dream and aspiration of independence in 1947 after several decades of struggle, sacrifices of man and material and sufferings of all kinds but followed the path of Ahinsa for about a century. They liberated themselves from the British colonial Rule of about 300 years on 15th August, 1947, as a result of their unique unity, integrity, brotherhood and a high character and moral conduct. The Independence Act, 1947 made British India an independent country by carving out the Dominion of India and the Dominion of Pakistan out of the territories of British India. It was a great blow to the people of India that the unity and integrity of their nation was broken and put to challenge. The framers of the Constitution for the governance of an independent India laboured hard and studied not only the Constitutions of various countries of the world where democracies were functioning in one form or the other but also took into account seriously the background of the people of India, the diversities of religions, beliefs, faiths, modes of worship, languages, literacy, social and economic backwardness. After about two years of studies, consideration and debates in the constituent Assembly, the Constitution of India was drafted, adopted and enacted and given to the people of India on November 26, 1949. Consequently the people of India resolved to constitute India into a sovereign democratic republic on 26th January 1950.

The ideals, aspirations and the objects which the Constitution makers intended to be realized were contained in the preamble of the Constitution. It was resolved by the people of India for self governance to secure to all its citizens; Justice-social, economic and political, Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity and to promote among them all; Fraternity assuring the dignity of the individual and the unity and integrity of the nation. By Constitution (42nd Amendment) Act, 1976, the words, "Socialist and secular" were inserted between the words, "sovereign

and democratic republic" and the word, "integrity" was also inserted between the words, "unity", and the nation." The ideals, aspirations and the objects were the guiding factors for self-governance and enabled the Constitution makers to draft the various provisions in the Constitution. A great emphasis as it was the need of the people who lived in the state of slavery under British Rule was given to the fundamental rights and the directive principles of state policy. The people of India cherished freedom of speech. Equality, Personal liberty, protection of life, freedom of speech, religion and profession as the summum bonum of their life. In the course of last 52 years since the commencement of the Constitution of India the people of India became conscious and conscious of their fundamental rights only without reciprocal duties and forgot the great sacrifices of their forefathers, freedom fighters and the noble and selfless leaders who achieved for them independence and adopted a democratic system of governance. The people of India became the rulers themselves of their India i.e. Bharat and acquired the power to govern themselves through their elected representatives as per their own wishes, Constitution and their own laws.

What we have lost during last 52 years after such achievements is very much agonising and frustrating in every sphere and walk of life. The high spirit of unity and brotherhood amongst the various communities of the country which was on top level during the long period of struggle for freedom has disappeared. Smallest incidence is creating tension, trouble and strife and leads to communal riots frequently. The mutual faith and belief is decreasing so as to take away the peace of every body and is creating insecurities. Such an atmosphere of stress and strain, distrust apprehensions is leading to chaos and confusion and is seriously affecting the developments of the individual and the progress of the society as a whole. The dignity of the individual has been adversely affected and the mutual respect for each other is painfully missing. The youngers do not respect the elders and even thwart their own parents. The subordinates do not respect and obey the superiors. Discipline is such a great casualty. Work culture is also dis-appearing. The authorities and the heads of the public institutions are in a great dilemma and have been subjected to considerable stresses and strains and have also become tools in the hands of miscreants. Vested interests of the individuals have been trying to promote only selfish ends to the great detriment of public good. Even some of the Constitutional functionaries are drifting away from their objectives, ideals and policies and have been failing in the discharge of their Constitutional duties and

responsibilities. The institutional system and mechanism established for the welfare of the society and progress of the nation are becoming decreasingly in effective.

During British regime we used to hear the complaints that the Britishers were looting the country and taking away the wealth of India to Overseas Banks. During last 52 years of independence and self-governance; similar complaints have been cropping up in hundreds and thousands. It is the tragedy of the highest order that the selfish individuals wherever they are stationed or functioning are amassing wealth by undesirable means, corrupt practices and robberies and taking such wealth to the Overseas Banks. Thus corruption in independent India has also assumed the shape of black elephant. Even the citizens of the smallest means indulge in and justify the corrupt practices by proclaiming that the highly placed persons are amassing wealth by corrupt practices and nobody checks them. Our political parties have been taking up this issue of corruption in their agenda with the assurance of eliminating the same but the experience has shown that nothing tangible has been done to even control the corrupt practices and punish the guilty ones.

The expectations of the people of free India have risen to great heights. They expect their own Governments manned by their representatives to do every thing for them without contributing any thing by themselves towards their own upliftment, progress of the society, the enrichment and the advancement of the country, which remained backward for several centuries. The Governments of the State and the Union are not financially so rich as to afford to grant all benefits of all kinds to every citizen of the country. Naturally the limitations come in the way of realization of the expectations of the people. The fundamental freedom of forming associations and unions gave them the strength to start agitation, gharao, bandhs, and strikes and create law and order problem to get their demands satisfied. Even for small incident, misunderstanding, trifling matters or even a rumour creates big agitations and riots. Movement of the trains is blocked, roads are jammed and the society as a whole is put to ransom and normal life is paralysed. Not only this, public properties from which the citizens get benefited are recklessly destroyed. Wagons, buses, machines, furniture and fittings are put to fire in a fit of anger. There is not even the slightest hesitation in doing all this. Such persons are not ready to listen that in the independent India they are in fact destroying their own property and wealth. Unfortunately, even the political parties without any

distinction are resorting to agitations, gherao, bandhs, dis-obedience and disorder with a view to create hurdles in the execution of the policies and programmes of the Government. In the net result the welfare of the citizens is substantially and adversely affected.

The intellectuals and senior citizens of the country have become demoralised and totally frustrated. When the country became independent, the people of India were very much enthusiastic in the matter of choosing and electing their representatives to the Parliament and the State Assemblies and the Local Bodies but in the course of time, erosion of moral values, discipline, honesty and integrity and the misuse of liberty have made the people quite indifferent and un-concerned with the Elections. The mischievous persons have contributed to great extent by playing foul in the matter of preparation of the electoral rolls. Genuine voters do not find their names in the voters list and they return without casting vote at the General Elections. The names of dead persons continue to find place in the voters list. The elders stand excluded and the minors stand recorded. The residents of colonies of important areas find to their dismay that they are all out of the voters list. In the last Election an instance of such a lapse came to the notice when a voter from the Raj Bhawan campus came to the Polling Booth and did not find his name in the voters list. He got annoyed and told the voters standing in the queue that the A.D.M. himself had come to the Raj Bhawan and had collected the prescribed forms containing the names of the voters living in the campus but surprisingly all the residents of the Raj Bhawan campus do not find their names in the voters list. How can every citizen make an effort to get his name entered in the voters list when the A.D.M. himself had failed to get the names of the eligible voters of Raj Bhawan campus recorded in the voters list? It is not un-common to see at every Election that the respected persons residing in urban colonies are wholly omitted from the voters list. Our electronic media has been highlighting the voters plight and has shown on many times pictures of a large number of voters holding proper identity cards in their hands but they are returning from the Polling booth for the reason that their names are not existing in the Voters list. Such large number of people are deprived of their valuable constitutional right of voting or participation in the Election. In the result the percentage of votes cast in the General Elections has been substantially decreasing to less than one fourth of the total number of voters for a particular constituency and no political party gets even simple majority in the Legislature.

How can it be called democracy when the minority is resuming reigns of Government to rule the majority? The society has become divided and caste ridden despite constitutional prohibition. In such circumstances no one can and should expect a political party to get a ruling majority in any Election and there will always be a fractured verdict and create the necessity of a coalition Government. What good can be expected by the people from such unstable Governments of diverse and conflicting pulls and pressures? The present day political climate in the country, the indifference of the people towards Elections, non-exercise of the voting rights, the lapses, omissions and mistakes in the voters lists and the time, money and man power involved in the preparation and updating of the electoral rolls clearly establish an urgent need for the change in the Election system. The Election Commission of India, should, therefore, seriously consider to dispense with the system of the voters list and replace it by the identity cards carrying photos and other particulars issued in the prescribed form either by the Election Commission of India or by other authorities specified in this behalf. Consequently the Election Commission should also undertake an exercise to suggest for the necessary changes in the existing provisions in the Constitution of India, the Representation of people Act, the Electors rules and the like and also to suggest that every citizen shall exercise his right of voting as recognized by Article 326 of the Constitution of India in which the words used are "Adult suffrage".

Article 326 of the Constitution has defined the "adult suffrage" to say that every person who is a citizen of India and who is not less than 18 years of age on such date as may be fixed in that behalf by or under any law made by the appropriate legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice shall be entitled to be registered as a voter of any such Election. But the citizens have been deprived of their constitutional right of exercising their votes at the Elections to the House of people and to the Legislative Assemblies just on the ground of the negligence of the officers preparing the electoral rolls. We find at intervals in the news papers that electoral rolls are being revised and those whose names are not recorded in the voters list may approach the specified officers at the specified places to submit their prescribed form for entries. Some persons take the trouble to going to the specified place and do the needful. They get dismayed at the time of Elections that their effort to get their

name recorded went in vain. Therefore, others who had not undertaken such an exercise are not encouraged to ensure the recording of their names in the voters list. A large number of persons do not show their concern for their lethargy or lack of interest to exercise their votes at the Elections. This is a great tragedy for the democracy in India. Further more, the representatives elected on the basis of a small percentage of votes fail to discharge their constitutional duties towards the nation and the citizens and in the result the poor voter becomes a silent and helpless spectator. The live telecast of the proceedings in the Parliament and in the State Legislature on the television are telling the people how the democracy in India is functioning and what they expect from their representatives.

There has been almost total loss of ethical values in the actions and practices of the members of our independent and democratic society. Nobody counts honesty of thought, belief and action. Everybody praises those who have amassed wealth irrespective of their ways and means. Nobody thinks of any duty towards the fellow being, the society, the community and the nation but devotes all the time and attention to advance his own selfish ends. Everyone has become more conscious of the fundamental rights enshrined in the Constitution and asserts time and again his own rights without any reciprocal duty to the detriment of similar rights of the others. They are never aware of any duties which are co-extensive with their rights. The makers of the Constitution did not initially provide for the duties to be performed by the citizens of independent India because by the mood of the countrymen exhibited during the period of struggle and strife they were convinced that the Indians after independence and during self governance would never forget their cultural values of unity, integrity and dignity towards their fellowmen and the nation. But in the course of time our revered representatives in the Parliament realized in the Emergency period of 1976 the loss of consciousness of reciprocal duties and ethical values and so they enacted Constitution (42nd Amendment) Act to lay down ten mandatory duties of a citizen by introducing Article 51 A in the Constitution of India; Every citizen of India has been ordained to cherish and follow the noble ideas which inspired our national struggle for freedom to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities, to renounce practices derogatory to the dignity of women; to value and preserve the rich heritage of our composite culture, to safeguard public

property and to abjure violence and to strive towards excellence in all spheres of individual and collective activity. Every citizen is also mandated to uphold and protect the sovereignty, unity and integrity of India; to defend the country and render national service and abide by the Constitution and respect its ideal and institutions, the national flag and the national anthem. Further every citizen is directed to develop the scientific temper, humanism and the spirit of enquiry and reform, protect and improve the natural environment, wild life, and to have compassion for living creatures. However, no duty to participate in the Elections or to cast vote at an Election was prescribed. No provision was made for the enforcement of the fundamental duties.

It is unfortunate that the fundamental duties were not laid down initially alongwith fundamental rights in the Constitution and no provision was made for the enforcement thereof even when the duties were prescribed as late as 1976. The Honourable Supreme Court of India had made very pertinent observations in the case of Chandra Bhawan v. State of Mysore (AIR 1970 SC 2042) and said "It is a fallacy to think that under our Constitution there are only rights and no duties". The provisions in Part IV enable the legislature to impose various duties on the citizens. The mandate of our Constitution is to build a welfare society and that object may be achieved. Despite the introduction of fundamental duties, the citizens of India have been ignorant thereof and have not cared to perform their Constitutional obligations even when they are asserting and clamouring for their fundamental rights. Therefore it is the need of the time for the Indian society that a statutory provision to enforce the fundamental duties and to vote at the participate in the Elections should be made as early as possible and the citizens should be made liable for failure to perform the duties. The elected representatives should also be made to perform and held liable for the failure of such fundamental duties and the constitutional functions assigned to them under the Constitution.

A question may also arise as to why we should preserve democracy? Simple answer to this question is that the democratic system has been considered to be the best of all systems of governance all over the world. Every country in the world which is either under monarchy or dictatorship or colonial rule is crying for the establishment of the democratic system. The people demand for democracy has been recognized by the United Nations Organisation. Consequently the number of countries adopting democratic system is increasing. A great political thinker Dicey defined rightly the Democracy as the Government

of people, by the people and for the people. It is the democracy alone which enables the people to participate in governance, make their own laws and govern themselves in such a manner that it advances not only the welfare and interest of the individual but also the progress of the society as a whole and raises the level of achievement of the nation in the eyes of the world. If the democracy once attained is not duly taken care of and preserved, the future of the people will be bleak and the nation will become weak and vulnerable. Look towards the neighbouring country Pakistan where the democracy could not survive and the country fell into the hands of Military dictators not only once or twice but many times. The people of Pakistan were initially given independence and democratic system of governance by the Independence Act, 1947. But they have not been able to preserve, retain and regain it after Military coups. Therefore, it is an absolute necessity for the people of India to take stock of the present day deteriorating position about the functioning of the democracy, peace and progress of the society, welfare of the humanity, unity and integrity of the nation. *It appears quite possible to preserve our democracy if the citizens of our country make efforts at every level to restore the ethical values, discipline, work culture, unity and brotherhood and performance of the fundamental and civic duties; actively participate in the Elections by choosing and electing rightful and responsible representatives and finally abide by our Constitution and the laws framed by the Parliament and the State Legislature.*

ACCOUNTABILITY OF BUREAUCRACY : PEOPLES' RIGHT TO KNOW AND ROLE OF JUDICIARY

Justice A. K. Yog,
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Allahabad High Court.

The above topic is most relevant in the present social scenario vis-à-vis State of Governance in the Country.

'Man' is a 'inquisitive creature' who has always clamoured for 'Power' with desire to establish supremacy over the other.

The game is on-you may call it by any name-viz. Dictatorial or democratic governance or socialistic or communistic pattern. In 'modern-political science' people in 'power' have corresponding 'duty' to render 'accountability' to the people at large-who are in the source of 'power'.

'Duty' in its stride casts an obligation and makes the People in power responsible, but possible only when people are informed.

All persons in power, be it Legislature, Executive or Judiciary- ought to be impressed upon the idea that they are repository of power in trust on behalf of the people and are to account for the said trust.

Bureaucrats have a patent responsibility to keep strict vigil and of being fully informed of all others view point, keeping them reminded that the pious desire of 'critical analysis' is to achieve 'social justice' – a solemn object under our Constitution.

In India, Head of the State, 'the President' in the case of Centre, or 'the Governor' in the case of a State, call upon a leader of a political party that commands majority to form Government, appoints him as 'Prime Minister', or 'Chief Minister' as the case may be; and on the advice of the Prime Minister or Chief Minister the President the Governor appoints ministers amongst whom Business of the government gets allocated as per rules framed under Article 166(3) of the Constitution of India.

Executive power of the government is distributed departmentwise, Minister, who is the Head of that Department, is responsible for the actions

and policies of his department. He is thus principally accountable and answerable to the people of the Country, Liability for the acts or omission of the officers of the Government rests solely on the Minister.

Edmund Burke stated, as early as in 1778: 'Arbitrary system indeed must always be corrupt one'. According to Francis Beau mount – "Corruption is a tree whose branches are often unmeasurable. They spread everywhere and the dew that drops from thence, has infected some chairs and stools of authority."

S.M.Lipset in 'Encyclopaedia of Democracy' mentioned that corruption is an abuse of public resources for private gains.

This precipitates a piquant situation wherein a non corrupt citizen starts believing that one counts only if one have the right personal contact with those who hold power and permits persons with money power to get things done to their advantage through backdoor.

Bureaucrats are in the gaze of public eye and hence under constant scrutiny, provided society is awakened and vigilant. Needless to emphasize that credibility of the Bureaucrats in the present time has been virtually lost over the years.

Part III of the Constitution of India contains Fundamental Rights and assures "People of India" certain privileges, namely, equality before law, equal protection of law (Article 14), equal opportunity in matters of public employment or appointment to any office under the State (Article 16), Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth (Article 15). Freedom of speech and expression to form association or Unions to move freely throughout the territory of India, to practice any profession or carry on any occupation, trade or business (Article 19), protection of life and personal liberty (Article 21), protection against conviction (Article 20), protection against arrest and detention (Article 22), Right against exploitation, Right to freedom of Religion (Article 25), freedom to manage religious affairs (Article 26) etc. Protection of interest of minorities (Article 29), Right to Constitutional Remedies (Article 32) etc.

Part IV of the Constitution contains Directive Principles i.e. principles/ policies to be followed by the State; Viz, Equal Justice and Legal Aid Organisation of village panchayats, Right to free and compulsory education, living wages for workers, Just and human conditions of work and maternity, participation of workers in Management of Industries, to raise level of Nutrition,

standard of living, to improve public health, Organization of Agriculture and Animal Husbandary –all emphasizing upon the State to adhere to certain norms and strive to achieve goal in the light of the directive principles.

Part IV-A of the Constitution consists of Article 51-A, which provides for Fundamental Duties.

The above makes the working components of Government machinery, to interfere with the life of people in the society.

In the case of Shri Lekha Vidyarthi v. State of U.P.. AIR 1991, SC 537, the Apex Court observed;

"Every holder of a public office by virtue of which he acts on behalf of the State or Public body is ultimately accountable to the people in whom the sovereignty vests. As such all powers so vested in him are meant to be exercised for public good and promote public interest."

In Abhai Kanta's case – 1995 supp. (4) SCC 169, the Apex Court emphasized upon certain settled standard norms, propriety, self restraint and to avoid pitfalls.

In the case of State of Assam v. P. C. Mishra – AIR 1996 SC 430, stress has been laid upon constant awareness of the exercise of power for public good and not for personal benefits, gains or personal status.

Why should one feel uncomfortable, if exposed to accountability? Why should one treat it as a charge against one self. This inevitably brings in picture, the role of judiciary, which had to dissect in public and claim an explanation from the Bureaucrat which find it unpalatable, Judiciary, however, does the thankless job and faces criticism-branding it venturing in 'Judicial Activism' – fully approved and accepted legally, due to the faith reposed by the Public in it.

In the post independent era, Courts were initially reluctant to interfere in the areas of constitutional authority were primarily all responsibility of satisfaction was that of the Executive.

The Supreme Court till the decision of the case of Kasturi Lal relying upon the decision in the case of Peninsular and Oriental Steam Navigation Company 1861 (5) Bombay H.C.R. Appeal – 1 fell back upon the dictum; 'The King can do no wrong' extending sovereign immunity as claimed by the East India Company which had dual role of performing self-functioning and of exercising sovereign power as a representative of the British crown.

In the case of Kasturi Lal, the Supreme Court held that since the act of Police Officer was in exercise of sovereign power, the state was not vicariously liable for the same and that the State was not liable for the negligence committed by its police officers.

The issue in due course became debatable and finally the Supreme Court, as well as other High Courts in subsequent decisions held that the Executive did not enjoy absolute or un-impeachable immunity as the power was derived from the people and, therefore the State was answerable to the People in India.

If the Administration is conferred with the discretionary power, it could be exercised in excess of the powers vested with the authority in law or there may be abuse of such discretion being used for collateral performance or in bad faith, capriciously or arbitrarily and hence interference by Court. Constitution provides judicial review of administrative action, as embedded in Article 32, Article 226, and Article 136 of the Constitution of India.

In such cases, finality clause, if any, cannot be pressed or pleaded as defence and the action of the executive will be subject to judicial review by Higher Courts in India.

Doctrine of Administrative or official discretion constituted hurdle against judicial review. The Executive Body sought to assume enormous powers sans judicial scrutiny by prevailing a 'finality-clause' in certain legislation whereby concerned Authority exercised discretionary powers under high sounding phrases of subjective satisfaction, eschewing objectivity by incorporating expressions like 'on being satisfied', 'deemed fit', 'expedient' etc.

However the Courts in Indian have drawn the extent of immunity by laying down following principles to be borne by an officer while discharging his duties i.e. not to travel beyond its jurisdiction (2) there should be no bad faith or malice actuating the authority in exercise of its powers, (3) authority exercising discretion must do so on his own Rules of Law (4) Rules of Natural Justice have to be obeyed in administrative and Executive enquiries/actions.

Reference may be made to the case of : (1) AIR 1982 Bom, 27, Mohd, Shafi Suleman Qazi v. Doctor Dhondu Kavishwar, (2) AIR 1981 J&K 60, Union of India v. Abdul Rehman, (3) AIR 1978 MP 209, N. Hira Lal v. Union of India, (4) AIR 1978 All 417, Iqbal Kaur v. Chief of Army Staff, (5) AIR 1972 All. 486, State v. Hindustan Lever Limited, (6) AIR 1979 J&K 6, Union of India v. Miss Savita Sharma.

The Courts failed to see how the Government of India could consider itself a superior power in its relationship with its citizenry. However, despite such categorical and socially relevant observations, there does seem to exist areas of doubt where the "GHOST OF SOVEREIGN POWER" of the State and 'SOVEREIGN Immunity' to the State still cast its shadow. In our country the Executive cannot exercise any sovereignty over the citizens.

The Executive in our country, possesses no sovereignty as there is no analogy between the 'President' in India and the British crown in United Kindgom. The President is a creature of the Constitution. He can only act in accordance with the Constitution.

It is ironical to note that bureaucracy still living under hang over of the colonial rule and clamour for immunity for any tort arising from the exercise of its 'sovereign power' when the maxim 'the king can do no wrong' which is no longer in existence in England due to enactment of Crown Immunity Act.

The ratio in the Privy Purse Case – 1971 (1) SCC 1985 – Madho Rao Sindhia v. Union of India – wherein Supreme Court held that there was nothing like sovereign power under our Constitution in the matter of relationship between the Executive and the citizen, is the declared law of the land under Article 141 of the Constitution of India. The State is hence liable and cannot claim immunity.

It is the prerogative of Parliament to formulate policy and make it binding Rule of Conduct. The innovation of Zero hour is peculiar to our legislature which permits raising of urgent matters and thereby keeping the people informed of developments taking place in the country.

In 1996, the President in his Republic Day address to the Nation identified -, **Criminalisation, Communalism** and **Casteism** as primary evils – which had – weakened our 'Democratic Polity' and consequently eroded the confidence of the People.

The need to examine the nexus between politics and these evils assumed significance because of the disturbing developments that have taken place in the recent past. Wide spread scandals revealing large scale corruption at all levels and practically in all fields, compels us to examine the relation between the bureaucrats/politicians on one hand and the legislature/executive on another hand vis-à-vis the Judiciary on the third side.

The two main causes for the malignant growth of corruption and communalism are the generation of 'Black Money' and defective 'Election

Rules'. Image of Indian Politician nose-dived on account of allegations of involvement in financial scandals and now publicly known links with the underworld. There is a general belief amongst people that nexus between criminals and "Bureaucrats" has strengthened in recent times and hence valid and reasonable apprehension over growing fair and honest 'Elections'. Bureaucratic functionaries have failed to come upto the expectations of the people and thus belied their cherished desires and perceptions.

The Bureaucracy in first two decades after Independence caved into the outside pressure and looks, it has failed to work with desired independence.

After the State indulged into commercial fields and set up public sector undertakings, plum posts in these corporations created charm attracted the attention of 'Senior Bureaucrats' and tempted to get in pitfalls. The importance of certain positions in the administration also increased over a period of time. The politician found wonderful opportunity of using these openings to influence the Bureaucracy and fall in their line. This marked the beginning of a nexus, which flourished with the flow of time. The already weakened Bureaucrat caved, being victim of their surroundings lost independence and became susceptible to easy gains.

Police force did not remain far behind. By now the nexus between the politician and white-collar criminals surfaced in the society, and with the police chipping in, the vicious circle is complete. All the three working in unison feel secured and have nothing to fear. This has made democratic functioning of Government a mockery of the model form of governance.

Healthy condition have to be restored. Vicious circle has to be broken – if democratic polity is to survive in the country.

Who will take the initiative? – Will it be the Politician, the Bureaucrat the Police or some one else? I leave it for all to guess.

Credibility in the functioning of the system is a vital consideration to ensure the continuance of public confidence in the impartiality of the system. The existence of power must be accompanied by accountability to the people in whom sovereignty vests.

It is, therefore imperative to retain public confidence which is the real source of strength. Erosion of public faith is the greatest latent threat to the very existence of the system. External vigilance to guard against internal dangers is necessary lest the society suffers from self inflicted mortal wounds and there be no Rule of Law, in absence of which no democracy can survive.

Ours is a 'welfare State' which has to promote the prosperity and well-being of the people. It is therefore a solemn duty of the State to promote welfare of the people by protecting a social order which ensures justice social, economic and political in all the institutions of our National Life.

The idea of common good and interest of general public has been duly emphasized in Article 19 of the Constitution of India. Under Article 19(6) of the Constitution of India, State can make any law imposing reasonable restriction "in the interest of General Public" which expression is wide enough to include public order, Public health, public security, public morals, Economic Welfare of the community and the objects mentioned in Part IV of the Constitution. In this constitutional background and philosophy of 'Welfare State', legislature proclaim to enact various legislations to promote and control as well as eliminate and punish deceptive acts and mal-practices of manufacturer, traders so as to protect the consumers from exploitation by unfair trade practice.

The Consumer Protection Act, a total Welfare Legislation, is a mile stone in the history of Socio-economic legislation in the country. The main purpose of the Act is to protect consumer from exploitation by unfair trade practice and to provide simple handy and inexpensive redressal.

The problem of Environmental disaster led to environmental crisis during 20th Century. Urbanization, modernization, industrial development and race for technological development, exploitation of natural resources, experiment with atom and entry of Nuclear Test in space, underground and underwater threatening Ozone and very atmosphere without which man cannot live al all.

Article 51(A)_ of the Constitution provides – "to protect and improve natural environment including forests, Lakes, rivers and wildlife and to have compassion for living creatures."

Case of Ratlam Municipility v. Vardhichand – AIR 1980 SC 1622 is an example of Courts' effort to give effect to the constitutional imperatives. Supreme Court enabled citizens to bring action against public bodies to force them to be vigilant and keep the environment free form pollution.

In Rural Litigation & Environment Kendra v. State of U.P. AIR 1985 SC 652, the Supreme Court made a detailed order regarding working of the limestone quarries inDehradun and Mussoories.

In M. C. Mehta v. Union of India, AIR 1987 SC 965 in a petition under Article 32 of the Constitution. Apex Court observed that all those who are responsible for conduct of industry, cannot adopt casual approach in the

handling of environmental matters. Court suggested setting up of Environment Courts on regional basis.

In M. V. Sharma v. Bharat Electricity Limited, Supreme Court laid down guide-lines for the protection of workers' health. There is a chain of litigation and decisions, where judiciary has played a very important role in growth and development of constitutional law and bringing an awareness of the major problems of pollution, violation of human rights.

In the case of Shiv Sagar Tiwari v. Union of India, 1996 (6) SCC 558. The Apex Court while referred to the earlier cases on the question of liability of the State in tort, observed that it desired to bring home in law that misuse of power by a public official was accountable in tort. In such cases, damages awarded were exemplary and the Court made it clear that tortuous liability followed if there was misfeason by a public office.

In *Indian Council for Enviro-legal Action v. Union of India and others* – (1996) 5 SCC 281 – Court gave dynamic interpretation to Article 14, Constitution of India so as to include within the concept of 'right to life and liberty' a 'meaningful and dignified life'. Court did not shirk from having a green bench to hear the cases within this range including 'closer of polluting industries', control of vehicular pollution', traffic regulation', 'cleaning of rivers', 'prohibition of felling of trees' etc.

Unnikrishnan J. P. and others v. State of Andhra Pradesh and others –(1993) 1 SCC 656 (730) is a historical judgment underlining right of children regarding adoption, custody and duty of the State as custodian.

Sunil Batra v. Delhi Administration (1978) 4 SCC 494 is a case where Supreme Court apprehended right to free legal services under Article 21 of the Constitution of India for those who cannot secure such service because of being handicapped.

Judgment in the case of *Kesavananda Bharti v. State of Kerala* (1973) 4 SCC 225 has put and end to all suspicion ruling that 'basic features' of the Constitution cannot be changed, amended, varied or rescinded by the Parliament.

In *Supreme Court Advocates-on-Record Association and Others v. Union of India* (1993) 4 SCC 441, Court upheld primacy of the judiciary in the matters of filling up of vacancies in the High Court and Supreme Court (Overrulling the case of SP Gupta) to ensure judicial independence.

In the case of *Consumer Education & Research Centre and others v. Union of India and others*, (1995) 3 SCC 42 Court did not hesitate in issuing requisite 'directions' to the 'employer' to provide its employees employer minimum requirement of life, to prevent pollution, and protect environment at places of their workmen.

Pt. Parmanand Katara v. Union of India and others (1989)4 SCC 286, Supreme Court is another landmark judgment showing continuing crusade by explaining of expanding the ambit of professional-responsibility of 'medical – people'.

In the case of *Rinok International v. I. V. R. Construction Limited* , Court showed its concern in the matter of states projects and expressed that a party heard, who has interest in it when the State enters into a commercial transaction and awards contract to a given party.

It is now amply proved that with recognized expanding horizons of Court power of judicial review, the Court has made the Constitution 'organic' and in true sense infused soul in 'the Constitution of India'.

The Apex Court through its epoch making judgments – rendered in exercise of its 'duty' under Constitutional obligation developed the concept of State liability to compensate the injured person. The Apex Court awarded compensation to riot victims and rape victims, in the case of custodial deaths, case of careless and negligent conduct of local bodies, sub-standard construction of flats by Development Authorities etc. The Supreme Court went still ahead by propounding theory of 'polluter pace' by penalizing the Polluter indeed, a new vision in law.

The Supreme Court also gave a new direction by giving landmark judgment by awarding compensation in the case of hazardous or inherently dangerous activity causing death or injury to the members of the society.

The fact that public has right of information has been duly recognized by legislature by presenting the Freedom of Information Bill, 1997. The Bill contemplated that People of India have a right of information to any official document, until and unless the document in question was exempted for security reasons and secondly official document was liable to disclosure if it was in public interest. There is a clear desire and consequently an attempt to formulate doctrinal approach for enforcement to Freedom of Information of the citizen of India of course with desired reservation and restriction.

The Law pertaining to the right to secure freedom of information can be traced back to the case of State of U.P. v. Raj Narain AIR 1975 SC 865, Wherein Apex Court dealt with the validity of section 173 and 162 of the Evidence Act, wherein State claimed immunity from disclosing any document. In this case the Court developed the doctrine of 'public interest' under which an official document cannot be claimed to be 'privileged' and kept secret.

In the case of S. P. Gupta v. Union of India AIR 1982 SC 147, the Court ordered Union of India to disclose the document of correspondence between Chief Justice of India and the president of India. The Court went on expanding the philosophy by further defining 'right of information' in the series of cases, namely, (i) Indian Express Newspaper v. Union of India AIR 1986 SC 515, (ii) Tata Prem Limited v. Mahanagar Telephone Limited, popularly known as yellow pages case – AIR 1995 SC 2438.

The process was concluded in Dinesh Trivedi v. Union of India – 1997 (4) SCC 306, where the Court directed the authorities to divulge the Vohra Committees report which dealth with the nexus between the criminals and the politicians.

Mr. C. R. Irani, in his article "Cry the Beloved Country" (The Statesman, Delhi Edn. 9-8-1997) says:

> "When the executive refuses to apply the law and willfully, constantly and conspicuously refuse to do their duty, it falls to the judiciary to act in defence of the Constitution and the mandate of the rule of law and equality before law".

Thus, the enlightened opinion welcomes the social role sought to be played by the Courts perhaps because of the lack of public trust in many of the politicians of the present time, and the executive in their hands.

In *Nilabati Behera v. State of Orrissa* The Supreme Court while considering the question of grant of relief in a case of custodial death of the son of the petitioner opined that the old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the courts too must as the 'protector and guarantor of the indefeasible human rights of the citizens' and went on to say that the courts have an obligation to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspirations. The Court, therefore, in that case moulded the relief by granting compensation by way of penalizing the wrongdoer and fixing the liability for the public wrong on the State which failed in its public duty to

protect human rights of the citizen. It was stressed that a public body or officials should not act unlawfully and should perform their public duties in accordance with law. This was done by the Court in exercise of its public law jurisdiction.

Prof. N. R. Madhava Menon, the outgoing Director of the National Law School of India University in his Article "Committed to judiciousness' which appeared in the Calcutta Edn. Of The Daily Telegraph on 11-8-1997 very rightly said:

> "Judicial review is a weapon to discipline abuse of executive power ..... Any institution with such vast powers can become a threat if it does not have Judges of the highest integrity, sensitivity to constitutional values and great professional competence.

The criticism that since the judiciary in India is not elected. It should confine itself to its orthodox role, and leave all other matters to the elected representatives, is based on a grave misconception about the source of power of the judiciary and the role assigned to it. To say and believe that judiciary is not accountable to anyone is misleading. The Constitution is the fundamental law of the land which establishes the judiciary and empowers it to eliminate those acts of the legislature and/or actions of the executive as are found to be unconstitutional. The Courts are the guardians of the Constitution framed by WE THE PEOPLE OF INDIA and have to act according to their conscience to uphold the Constitution. The courts act for the people on the foundation of 'Public Confidence'; - reposed by the people in them.

The accountability of the Judges is, therefore, not only to their conscience but also to the PEOPLE in whom the ultimate sovereignty vests, Legislature, Executive and Judiciary are the servants of law and function for the society and therefore are accountable to it.

People have definite as well as dominant role towards maintenance of high standards in all the three Wings of the State – the legislature, the executive and the judiciary.

The dismal scene is that 'IDEALS' no longer today exist in practice. Unimpeachable integrity and high values are becoming rare. Standards of morality are diminishing day by day and have precipitating sense of distrust, suspicion and mortality of merit and excellence.

People want to know the grounds of their success or failure.

If people are asked to prepare a balance-sheet showing Credits and Debits – of the three wings – Legislature, Executive and Judiciary, - I am confident, - performance of the Judiciary shall alone have a credit balance. Among the three wings of the State it is still the best. We, the members of the Bar & Bench have to ensure to maintain it.

Our Ved, Smritis, Upnishads, Purans, Teachings of Great Saints and Rishis tell that a 'Hermit' must be accessible exposed and transparent in order to earn respect & faith. Similar principles apply to People in power and be accountable.

SWAMINATHAN S ANKLESARIA AIYAR in his Article – "Markets punish better than courts" commented thus – "any civilized, healthy society needs good governance and accountability both have deteriorated sadly in India. Those with money and muscle can put the fear of death into witnesses, who do not believe the government can protect them. Which is why witnesses have turned hostile in the Jessica Lal Case and BMW case, save for one witness who happens to be an NRI and so beyond the reach of local thugs.

Obviously such a moribund state is incapable of jailing perpetrators of communal killings, and so communal revenge takes the place of rule of law. Supposed enemies of the state caught for the 1993 Mumbai bomb blasts are still on trial, and will doubtless die of old age before being convicted beyond all stages of appeal. Just is it happened in Harshad Mehta's case ..... In India, alas, legal delays thwart such accountability .....

It means reducing the patronage network of politicians, reducing control and privatizing PSUs and banks ..... Their remains a very imperfect form of accountability. The market can do only so much. Governance can never be satisfactory if the state does not deliver.

However, the silver lining in India is that the rise of competitive markets and decline of Government monopolies have increased accountability in many areas, offsetting the deterioration in state services. It is not good enough. But it is cause for hope. We are not all condemned to Biharisation.

Accountability is meant to adhere to some golden rules and values and also with the resultant outcome of performance. Value is a relationship between a person and an environmental situation, which invokes an appreciative response in the individual.

It is said, 'ideals are like the stars. We never reach them but, like the mariners on the see, we chart our course by them'.

The dismal; scene is that ideals no longer exist to day in practice. Unimpeachable integrity and high values are becoming rare, the standard of morality is dismissing day by day. All these require great attention and care.

People of our country have in silence endorsed their approval to the concerns and approach on the part of the Supreme Court and High Courts in the matters of public concern. Alleged criticism by so called public representatives –ignoring real welfare of the public at large is a mirrage. Beware of being prey to their pitfall.

The real remedy lies in adopting proper mood, adequate resolve and timely sincere effort to act upon proclaimed resolves.

In the words of Bernadshaw 'Democracy is like a balloon going high up in the sky, while people looking up, their pockets being picked up.'

The sarcasm hidden in the above words, cautions that people in a democracy must maintain vigil throughout and not get misled by the hollow declarations of a "Government' though constituted by their own elected representatives.

Ultimate conclusion is that people have a 'Government' what they deserve.

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HUMAN RIGHTS-BASIC CONCEPTS

Justice Pradeep Kant
Judge,
(Lucknow Bench) Allahabad High Court

Justice V.R. Krishna Iyer[1] while echoing the voice of Mahatma Gandhi who said: "I feel myself related to every other individual in this world and realize that I cannot be happy until the smallest of them is happy", observed that human rights must triumph over inhuman wrongs but without struggle injustices cannot be wished away where comes the need for 'operation sensitization'.

Human Rights are natural rights, which are inalienable. All humans are having uninterrupted right of water, air, sunshine, food, shelter and clothing, which are basic human rights. These rights which are not exhaustive but only illustrative do constitute right to life. Right to life is not a mere animal existence but means a dignified and healthy life. The quality of life thus is the essential human right, which includes the right of livelihood.

Human Rights can be broadly categorized in two heads, human rights as against individual and as against the State. To say it conversely, all human rights which are violated against an individual and violation of human rights by the State or its machinery.

Violation of human rights as against individuals in private capacity may also relate not only to some legal or statutory violations but also violation of some moral code of conduct or morality. For example, if aged parents are not being properly looked after by their children and are not being provided food and shelter and proper health care, it would be violation of their rights, may be, that morally it is only a pious duty of children of aged parents to look after them, which may or may not be enforced under law. Situation will, however, change where the State is to guarantee all such protections to the aged persons who are not capable of meeting their requirements because of their ill-health,

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[1] In the preface of his book 'Human Rights and Inhuman Wrongs'

old age or otherwise. Nonetheless, such persons face trauma of despair and dejection and find it difficult to even carry on their life with two times stomach full food.

A child labour is engaged by ambitious industrialists and businessmen denuding, his right of education and depriving him of the liberty of growing to his full potentiality as a useful citizen of the country and that too on the wishes of his parents, may be because of poverty or for lack of educational resources or for any other reason but that cannot be an answer to the violation of human rights of such a child. The State is under legal obligation to prohibit child labour and for that matter various enactments have been made and the Act enforced is Prohibition of Child Labour Act, 1986. Considering the scheme in the said Act and making it workable and more effective, the Supreme Court[2] propounded a scheme so as to not only prohibit the child labour but also provide a system where such a child can go to school for taking education and one adult member of the family of such child is given employment. The question before us is not only as to whether the scheme has been properly implemented or reasons for engaging child labour being multifarious including the necessity of such family of child to have additional money for meeting both the ends meet but also as to whether any amount of explanations or excuses for engaging the child labour can be a ground for permitting the exploitation of child labour even in an era where right to education has been made a Fundamental right and without education there cannot be an awareness nor full development of personality of a child.

In the aforesaid case the Supreme Court for the first time fastened civil liability upon the offenders or violators of the Act, while prior to the said judgment only criminal action was provided under the Act. The procedure for bringing the guilty to book was simplified and provided for payment of Rs.20,000/- per child. Probably the punishment arising out of prosecution for violating the provisions of the Act were not found sufficient so as to deter the businessmen and industrialists from engaging child labour and, therefore, monetary fine which is supposed to be most deterrent for a profit earning person was provided by the Supreme Court. Reference: can be given to the case of Shanti Star Builders[3] wherein Supreme Court has observed: "The

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[2] M.C.Mehta v. State of Tamil Nadu and others, (1991) 1 SCC 283

[3] Shanti Star Builders v. Narain Khimala Totame, 1991 SCC page 520

right to life would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in".

It has been held[4] that right to shelter is a fundamental right under article 19 (1) of the Constitution. To make the right meaningful to the poor, the State has to provide facilities and opportunity to build houses. Again in the case Chemeli Singh[5] the Apex Court has held: "In any society, right to live as a human being is not enshrined by meeting only the animal needs of man. It is secured only when he is assured of all facilities to develop himself and is freed from restrictions which inhibit his growth. All human rights are designed to achieve this food, water, decent environment, education, medical care and shelter. These are basic human rights known to any civilized society. All civil, political, social and cultural rights enshrined in the universal declaration of human rights, any convention of under the Constitution of India cannot be served without these basic human rights. The ultimate object of making a man equipped with a right to dignity of person and equality of status is to enable him to develop himself into a cultured being".

It is needless to trace the history of human rights and its enforcement and action taken by United Nations, International Covenant on Civil and Political Rights and Universal Declaration of Human Rights and many more as it is the concern of the right minded people having compassionate mind and soul to find out the strictest and more workable means for protection and enforcement of human rights.

The role of judiciary is most important in respect of protection and enforcement of human rights. In a democratic polity like ours independence of judiciary is the backbone of our Constitution. The Independence of judiciary is the inviolable basic structure of the Constitution. A strong judiciary with independent Judges can only save the weaker sections of the society from tyranny of the mighty ones, may be individuals or the state or its officers. Our Constitution guarantees fundamental rights in Chapter III and Directive Principles of State Policy in Chapter IV. Fundamental rights incorporate basic human rights, which have been given enforceability through High Courts or Supreme Court under the Constitution.

An independent and strong judiciary will mean a judiciary which works not under the pressure or terror of the State or under political influence, imparts

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[4] State of Karnataka v. Narsimha Murthy & Ors, 1995(2) SCC page 524

[5] Chemeli Singh v. State of U.P. (1996) 2 SCC page 549 (Para 8)

justice as per rule of law but not as a stone faced idol with no heart and soul but as dynamic, sensitized and humanitarian justice within the bounds of law. Men are not made for law but the laws are made for men. The laws have to take in their ambit the prevailing system in the society, the malaise in the society, hardship and tyranny which is being faced in the society and the Judge has to be alive to the State of affairs prevalent in the society and cannot be oblivious to such factors while enforcing the fundamental rights.

The Supreme Court has also observed[8] that where there is a clash of two fundamental rights between two parties, then the rights which would advance the public morality or public interest, would alone be enforced through the process of court, for the reason that moral considerations cannot be kept at bay and the Judges are not expected to sit as mute structures of clay in the hall known as courtroom, but have to be sensitive, in the sense that they must keep their fingers firmly upon the pulse of the accepted morality of the day.

Free access to the court of law with minimum expenditure coupled with the speedy trial are amongst the few requirements, which are essential for the enforcement of human rights and fundamental rights. It is some times not the required court expenses but the heavy fee which is being charged by the lawyers which obstructs the litigant in his right to approach the court for justice for which I have to put a word of advise which may not be misunderstood by the lawyers that they also owe a social duty to fight for the just cause and standard of fee should not come in the way in propagating the rightful claim of a person, who is incapable of paying their fee. The deprivation of right to get his fundamental rights or human rights enforced through court of law because of the high fee may or may not mean violation of any fundamental right but it certainly deprives such a person from legal acumen of the lawyer whom he wishes to engage and who can rise to the occasion for getting him justice.

Article 14 offers fundamental rights which provides equality before law or equal protection of laws within the territory of India and thus restrain the State from denying any person equality clause as enunciated under Article 14.

Article 19 (1) provides that all citizens shall have right –

(a) to freedom of speech and expression; (b) to assemble peacefully and without arms; (c) to form associations or unions; (d) to move freely

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[8] "X" v. Hospital Z (1998) 8 SCC 296

throughout the territory of India; (e) to reside and settle in any part of territory of India; and (f) to practise any profession, or to carry on any occupation, trade or business.

These rights guaranteed under the Constitution or such other rights, which may not find place under the Constitution but emerge from other statutory provisions or enactments are such rights which can be enforced by the High Court or the Supreme Court, as the case may be. This thus speaks of most important role of independent judiciary, which should be sensitized, compassionate, just and strong. The natural corollary is that in a civilized State, the rule of law must prevail. If the rule of law prevails, the misuse of power is checked.

As far back as in the year 1954 Albert Einstein in his address at Chaicago Decalogue Society spoke on the importance of human rights and their recognition as under:

"The existence and validity of human rights are not written in the stars..... Those ideals and convictions which resulted from historical experience, from the craving for beauty and harmony, have been readily accepted in theory by man-and at all times, have been trampled upon by the same people under the pressures of their animal instincts. A large part of history is therefore replete with the struggle for those human rights, an eternal struggle in which a final victory can never be won. But to tire in that struggle would mean the ruin of society."

"In talking about human rights, we are referring primarily to the following demands: protection of the individual against arbitrary infringement by other individuals or by the government; the right to work and to adequate earning from work; freedom of discussion and teaching; adequate participation of the individual in the formation of his government. These human rights are nowadays recognized theoretically, although, by abundant use of formalistic, legal maneuvers, they are being violated to a much greater extent than even a generation ago".[7]

In everyday life we find grave violation of human rights e.g. in the Medical Dispensaries and the Hospitals run by the State either the doctor are not posted or if posted, they are not available for various reasons and besides this the medicines and other infrastructure is missing. The result is that all those

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[7] Quoted from the book Human Rights – Inhuman Wrongs by Justice V. R. Krishna Iyer.

persons who are in the need of medical treatment and care have to wait and run here and there and sometimes it becomes too late so as to save the life of an ailing person. It is for the state to look to this clear violation of human rights, as right to health and to lead a healthy life is a recognized fundamental right and stringent action should be taken against the erring doctors or other personnel who are responsible for not maintaining the Dispensaries and Hospitals and for not running them properly.

The Supreme Court in the case of Murli S. Deora[8] held that smoking in public places is indirect deprivation of life without any process of law which infringes the fundamental rights guaranteed under Article 21 of the Constitution and, therefore, prohibited smoking in public places.

Taking the note of the errant attitude of medical practitioners in not providing prompt medical aid to the injured, the Supreme Court[9] directed that all doctors, including private doctors are obliged to render immediate medical aid in injury cases. The cases of death in police custody and custodial torture, third degree method being adopted during interrogation and handcuffing and parading of undertrial prisoners and right of speedy trial are such rights which constitute right to live with human dignity and have been the subject matter of consideration in one or the other case by the Supreme Court. The Supreme Court has specifically held that speedy trial encompasses all the stages, namely, state of investigation, enquiry, trial, appeal, revision and retrial,[10] and in appropriate cases has also awarded compensation to the victims[11] . It also took note of the fact that award of compensation in terms of money cannot be treated to be an award for sufferings already undergone which are incapable of calculation in terms of money and all that the courts can do in such cases is to award such sums of money, which may appear to be giving of some reasonable compensation, assessed with moderation, to express the court's condemnation of the tortuous act committed by the State.

The post retiral dues including pension, gratuity and provident fund etc. are not paid within time or say within reasonable time to the employees who retire, despite clear instruction that such dues should be paid immediately

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[8] Murli S. Deora v. Union of India and others, (2001) 8 SCC 765

[9] Parmanand Katara v. Union of India & others, (1989) 4 SCC 286

[10] Mahendra Lal Das v. State of Bihar (2002) 1 SCC 149

[11] R. D. Upadhyaya v. State of Andhra Pradesh and others, (2001) SCC 437

without any delay. The employees are compelled to rush to the courts for getting their lawful dues realised but such matters are not taken up for years together because of rush of work in the courts. It is no doubt true that the court dealing with such matters should be fast in disposing of the matters but at the same time the accountability should also be fixed on the erring officers/ officials because of whose negligence or deliberate inaction or for any other extraneous reasons, the lawful dues were not paid to such employees. Imagine a situation where an employee has put in his entire life into service with the hope that on attaining the age of superannuation he would meet his requirements with the amount of his post retiral dues including the pension but such dues are not paid for years together without any rhyme or reason, pave the way for starvation of such employees and their families. This is again violation of human rights, as retired persons are totally deprived of their livelihood and are left in state of lurch and despair to be burden upon their friends or relatives for such time the dues are paid.

FIRs are not being lodged in the police stations despite repeated requests and approach and at time the courts have to order for lodging the FIR. There can be innumerable examples in our day-to-day life where there is constant violation of human rights and deprivation of fundamental rights and even after 55 year of independence, we have not been able to provide even clean drinking water in various parts of the State. News articles of the like nature can be seen in the newspapers where sometimes toxicated, obnoxious and dirty water is supplied resulting in epidemics and sometimes the grievance is raised in the courts that the locality is having even no water pipe line for drinking water. In all these matters, why one should be forced to go to the courts when it is the obligation of the State to provide clean water to every person. In A. P. Pollution Control Board[12] the Supreme Court observed:

"Drinking water is of primary importance in any country. In fact, India is a party to the resolution of the UNO passed during the United Nations Water Conference in 1977 as under:

> "All people, whatever their stage of development and their social and economic conditions, have the right to have access to *drinking water* in quantum and of a quality equal to their basic needs"

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[12] A. P. Pollution Control Board II v. Prof. M. V. Nayadu (Retd.) and others, (2001) SCC 62

Thus, the right to access to drinking water is fundamental to life and there is a duty on the State under Article 21 to provide clean drinking water to its citizens".

One more aspect of the violation of human rights is the deliberate attempt of the State and its officers of flouting the Court's order and not obeying the same and in most of the cases for no valid reason. This has resulted in compilation of a large number of contempt matters in the High Court and the experience tells that a litigant has to first approach the court for getting an order in his favour and thereafter has to approach again for getting the order enforced by moving a contempt application. The contempt proceedings, it is said, cannot be taken as a substitute for execution for implementation of the order passed but so far as the writ jurisdiction is concerned, there is no alternative, for getting the orders implemented. It is no doubt true that contempt proceedings cannot be initiated for arm twisting but in the absence of any enforcement mechanism for implementing the order passed by the High Court, a person is left with no other option but to move for the Contempt of Court under the small hope that under the fear of contempt perhaps the order would be complied with. This is a matter which requires consideration by all concerned and particularly by the State Government or the Central Government, as the case may be, who should see that the orders passed by the courts are complied with, promptly, without requiring every person to approach the court in contempt proceedings.

The deliberate non compliance of the orders passed by the courts by the State machinery results in piling of cases under the Contempt of Courts Act which not only deprives a person of his just right which has been upheld by the court but also is violation of human rights in so far as it negates the very purpose of rule of law. In the present situation almost every time when an order is passed by the High Court, the natural of-shoot is that contempt proceedings are initiated, adding one more case to the pendency of litigation in the High Court. For getting the courts orders enforced with desired promptness, the State Government, and the Central Government, would be well advised to include specifically, the deliberate disobedience, violation and Contempt of Court s orders as misconduct under relevant service Rule, so that guilty or an errant officer may be punished accordingly, looking to the gravity of the misconduct committed by him. All departments and Public Sector Undertakings should also get their service Rules amended likewise.

If rights are not to be enforced, they are no rights. Human rights or fundamental right or any statutory right, if is only a right on paper and cannot be enforced promptly, it is undisputedly violation of human rights and of all such rights which are available to any person or citizen. Appropriate and effective law with a simplified concrete, procedure which may not be taken as a substitute for contempt proceedings, be provided by proper legislation for execution and implementation of the orders. This power should also be vested with the High Court and a litigant should not be solely left with the option of approaching the Court through contempt proceedings for enforcement of their legitimate right, which have been upheld by the High Court. There can be one more situation, where it is said that contempt is a matter between the court and the contemnor and if the contempt petition is dismissed or notice is discharged by the court, the aggrieved person does not have any right of appeal. This again brings the person to barehand and his fight for justice which has resulted in an order being passed by the High Court in his favour would be of no avail, it he does not get the fruits of the order.

Article 21 of the Constitution deals with the protection of life and personal liberty reads as follows:

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

Chapter III of our Constitution not only prescribes fundamental rights but also makes them enforceable through court of law and right to get the fundamental rights enforced has itself been made an enforceable fundamental right by the Supreme Court under Article 32 of the Constitution. Such a right is not to be found in any other Constitution of any other country. Fundamental rights in a sense are restrictions imposed upon the State while dealing with its citizens or all such persons to whom the fundamental rights are available. When Article 21 protects the life and personal liberty of the persons, it extends to each and every individual/person irrespective of his citizenship.

We are conscious about child rights and about women's rights. There is the landmark judgment in Visakha's[13] in which the Supreme Court has said that a woman has right to work in a safe working place where there should not be any danger to her life or personality and there should not be sexual harassment. The Supreme Court has gone to the extent of saying that if in the

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[13] Visakha v. State of Rajasthan, (1997) SCC (Crl.) 932

enforcement of fundamental rights there is a vacuum in the legislation, then the Supreme Court can lay guidelines for that also which have to be adhered to by all concerned. It says:

> "Women have right to gender equality, to work with dignity and to work in environments safe and protected from sexual harassment or abuse. In the absence of suitable legislation in this sphere, international conventions and norms in so for as they are consistent with the constitutional spirit can be relied upon."

Accordingly guidelines and norms were provided by the Supreme Court with the assistance of the Solicitor General appearing for the Union of India and other counsel. The Court directed that these guidelines/norms must be strictly observed in all working places by treating them as law declared under articles 141. And in this regard, Beijing's Statements of Principles of independence of judiciary in the Lawacia region, Article 10 of Convention of the elimination of all forms of discrimination against women and Protection of Human Rights Act, 1993 were taken into consideration while holding that sexual harassment results in violation of fundamental rights of women workers under articles 14, 19 and 21 of the Constitution. Now this is the interpretation given by the Supreme Court which is binding on all.

Then again, it is a very landmark judgment in Chandrima Das's case[14] very recently where after holding that rape amounts to violation of fundamental rights, as was held in Gautam's case, it said"

> "Rape is a crime not only against the woman, it is crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. Rape is therefore the most hated crime. It is a crime against the basic human rights and is violation of victim's most cherished right, namely right to life which includes right to live with dignity contained in article 21".

In this case, again, the Supreme Court said that rape violates right to life of a woman. Right to life is recognized as a basic human rights. It has to be read in consonance with the Universal Declaration of Human Rights, 1948, preamble and Articles 1,2,3,5 and 9, Declaration of elimination of violence against women, Article 1,2,3 also of Covenant of Civil and Political Rights and Covenants of Economic, Social and Cultural rights to which India is a

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[14] Chairman Railway Board v. Chandrima Das (2000) 2 SCC 465, AIR 2000 SC 988

party having ratified that. However, this right has to be subject to such restrictions as may be imposed in the interest of the nation and security of the State. Supremacy of the interests of the State and security of the State will have to be read into the UDHR, as also article 21. It is also available to a non-citizen, including foreign nationals, subject to restrictions as may be imposed in the interest of security of the country and other important considerations.

Article 21 obliges the State to prescribe just, fair and reasonable procedure and if the procedure is otherwise, the same would be unreasonable and unfair which cannot be protected under law. In Maneka Gandhi[15] the apex court observed:

> "The principle of reasonableness, which legally as well as philosophically, in an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test or reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and nor arbitrary, fanciful or oppressive, otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied."

Right to live with human dignity has been very elaborately propounded in two cases;[16 & 17] of Bandha Mukti Morcha where in the Supreme Court observed:

> "Right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of worker, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State – neither the Central Government

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[15] Maneka Gandhi v. Union of India, (1998) 1 SCC 248

[16] Bandhuwa Mukti Morcha v. Union of India, (1984) 3 SCC 161

[17] Bandha Mukti Morcha II v. Union of India, (1991) 4 SCC 177.

nor any State Government – has the right to take any action which will deprive a person of the enjoyment of these basic essentials."

To the similar effect are the observations of Supreme Court in Danial Latifi.[18]

In a country like ours where there is lack of awareness amongst the people, lack of resources, lack of knowledge, lack of education and above all, lack of means and poverty prevailing, it needs no mathematical calculation and analysis to see that a large majority of countrymen are not even aware of their basic rights and to be more precise, their fundamental rights. It is high time where the people should be made aware and conscious of their rights guaranteed under the Constitution and for that purpose the role of non Government Organisations and other public spirited persons gains significance. It is because of these reasons that public interest litigation has come into existence. The public interest litigation is meant for espousing the cause of those who are having no means to approach the court for claiming their right either because of want of knowledge, education or for want of funds. To avoid misuse of public interest litigation, the Supreme Court has very categorically warned that there should not be any misuse or abuse of the process and that public interest litigation cannot be filed or entertained for personal interest and for personal gains.

The human rights culture and extension of human rights is not only a concept of morality now. It has taken the shape of a codified law to a great extent. I can say with certainty that so far as our country is concerned, it is the most civilized country where all human rights which can even be imagined of – if not all, then almost all of them – are embodied in the Constitution itself. So far as fundamental rights are concerned, everybody knows that they are enforceable under law through the courts and mere infringement of a fundamental right is sufficient for courts to issue the necessary writ, order or direction, whatever it may be. So far as Directive Principles of State Policy are concerned, it was previously thought that this is a matter which cannot be enforced through courts of law. But from the recent trend of judgment rendered by the Apex Court, which judgments are binding throughout the territory of India, one can very well find that these directive principles have also given a status much higher than what was expected to be in earlier days of our

[18] Danial Latifi and another v. Union of India, (2001) 7 SCC 740

Constitution. The Constitution Law is developing day by day and we find that for achieving the goal which has been enshrined in the Preamble – Justice, political, economic and social, Liberty of thought, and expression and unity and mutual respect for all others – can be achieved only if the State follows the directive principles. If voluntary organization, people who are public oriented, public spirited, consider as to what should be done for that lot of people who are human beings but are not getting those rights, benefit or facility or privilege which they should get. Justice Bhagwati in the case of Bandhua Mukti Morcha[19] while appreciating role of voluntary organization has said that certain matters which otherwise could not have been brought to the notice of the courts, have been done by the organization, which made the people feel that they are also human beings and has very aptly said that justice has been done to them and they have been transformed, or an effort has been made to transform them "from non-beings to human-beings".

The Protection of Human Rights Act, 1993, which came into force on 28th September, 1993 has been enacted to provide for the constitution of a National Human Rights Commission, State Human Rights Commissions in States and Human Rights Courts for better protection of human rights and for matters connected therewith or incidental thereto. One of the objects and reason for enacting the aforesaid law was that there has been growing concern in the country and abroad about issues relating to human rights and having regard to this, changing social realities and the emerging trends in the nature of crime and violence, Government has been reviewing the existing laws, procedures and system of administration of Justice, with a view to bringing about greater accountability and transparency in them, and devising efficient and effective methods of dealing with the situation. The Protection of Human Rights Act has been brought into existence for protection of human rights and for which a complete code has been provided under the Act, namely, constitution of National Human Rights Commission, its functions and power and the manner in which the complaints can be made and looked into, Though the Act envisages establishment of the Commission in the States also but in would not be an exaggeration to say that in various States including the State of U. P. despite several orders being passed by the High Court and assurance given by the State, the State Human Rights Commission has not yet been constituted. If is

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for the State to consider as to by not constituting the State Human Rights Commission whether it is violating the legal obligation which rests upon it or not.

We have been talking about the violation of human rights as against individuals in private life and also as against those persons, whose life and liberty is curtailed not in accordance with the procedure prescribed by law under Article 21. Various directions issued by the Supreme Court in respect of the matters of handcuffing of prisoners/detenu, their living conditions in jail, use of third degree method in investigation and interrogation, their right to live with that much of dignity for which they are entitled under law and also of those persons who are termed as down trodden, poor, illiterate, unaware about their rights residing in any part of the country including tribal areas but the experience tells that there are cases where educated people, professionals, government servants and alike have made attempt to get undue advantage of the protection given to them. I may give one example in this regard.

In a matter where husband and wife both were doctors in State Government service and were posted at a particular place for more than 10 years filed a writ petition under Articles 226 before the High Court challenging the order of their transfer on the ground that the Chief Medical Officer expected undue favour from the lady doctor, namely, one of the petitioners and, therefore, he has been instrumental in getting the petitioners transferred from that place. A complaint about the alleged misbehaviour of the Chief Medical Officer with the lady doctor in recent past was made to the National Human Rights Commission and the National Human Rights Commission issued notice accordingly calling for a report. In the meantime, the State Government issued orders of transfer of the aforesaid two persons, namely, husband and wife and in the writ petition the order of transfer was challenged on the ground as aforesaid and to bring strength to the theory set up by the doctor petitioners, shelter was sought to be taken to the notice issued by the National Human Rights Commission on the complaint of the lady doctor. I am neither commenting upon the actions taken by the commission not and entering into the question as to what steps National Human Rights Commission should have taken and what ultimately have been found by the National Human Rights Commission but with great respect I would say that both the doctors, namely, husband and wife were staying at a particular place of posting for more than a decade and on the instructions received by the State Counsel, it was stated that they were doing private practice though it is banned in State of U.P. and, therefore, they

do not want to be shifted. There were certain other irregularities in the performance of duty by these doctors. The petition was, however, dismissed and a query put by the court to the petitioner's counsel that if the Chief Medical Officer was craving for some undue advantage and undue favour from the lady doctor, why he should be instrumental in getting her transferred from that place whereas such person would like the lady doctor to stay under his control. This query remained unanswered. I have given the example to make it known that undoubtedly it is the constitutional mandate to protect every citizen from violation of human rights and to enforce the rights guaranteed under the Constitution and the human rights wherever they are infringed effectively but caution has to be taken that the persons who are capable of misusing the liberty or the right, should not be allowed to abuse the process.

The reason for the inhuman activities may be attributed to the following two factors, namely unchecked exercise of power or misuse of power by the mighty ones against the weak, may be State, its machinery or individual and in some cases criminal instinct of the offender or violator of human rights. Even the most stringent laws may not be sufficient to prevent violation of human rights, as it requires moral upliftment of the individual, with the right training and by instilling tender and kind feelings towards the mankind. Misuse of power or excessive exercise of power is to be checked by the Courts, but for removing the criminal instinct, proper training of mind and heart is required. This can be done only by imparting right education. The education system should be such which gives due importance to the moral teaching so that the child since the very beginning inculcates the habit of helping others and avoids tormenting the weaker ones. This training is to continue till the child grows upto a full man, competent enough to live in the society as a useful citizen.

I would like to quote few lines of Samuel Adams in this regard:

> "Neither the wisest Constitution not the wisest laws will secure the liberty and happiness of a people whose manner are universally corrupt".

Violation of human rights in on increase, which is an alarming global phenomenon and we find each and every day that there is ruthless killings of innocent persons and all sorts of torture and agony are inflicted upon them, who have no enmity with anyone. Sincere and effective efforts have to be taken by all concerned and the courts do play most important role in dealing with such matters. The society must also rise to the occasion and with firm hand such nefarious and nasty activities should be dealt with and condemned.

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MENTALLY CHALLENGED PERSONS AND THEIR LEGAL RIGHTS

Justice Sunil Ambwani
Judge
Allahabad High Court

There are reported to be about 15 million mentally challenged persons in India. This means that about 1.5% of the population of the country suffers from mental ailments. The progress in the field pf Psychiatry and awareness of the rights of mental challenged persons has been a subject matter of concern for a long time. This article attempts to deal with issues relating to legal right of such persons.

Indian Lunacy Act, 1912, was found to be grossly inadequate and outdated with greater awareness of the rights of such persons, and need for their special protection. With this object in view Mental Health Bill, 1981 was introduced in Parliament to consolidate and amend laws relating to treatment and care of mentally ill persons, to make better provisions with respect to their property and affairs, and for matters connected therewith. It took six years for the bill to be promulgated as Mental Health Act, 1987 (Act No. 14 of 1987), repealing Indian Lunacy Act, 1912, the Lunacy Act, 1987 (Jammu & Kashmir Act) (25 of 1977), and to have over-riding effect over anything inconsistent contained in any other law.

The Mental Health Act, 1987 has given a new deal for mentally ill persons. Whereas, the Indian Lunacy Act, 1912 defined Lunatic as "an idiot or a person unsound mind", under section 3(5) of the said Act, The Mental Health Act, 1987 defines mentally ill person under section 2(1); to mean, "a persons who is in the need of treatment by reasons of any mental disorder other than mental retardation". This change in definition has introduced a wholly new humanist approach of the law relating to mentally ill persons. Unsoundness of mind is not mere mental weakness or lack of intelligence. It is more particularly an incapacity to manage one's own affairs. Such a state of mind is not to be found with mental condition effected by age, by stroke of paralysis, or by a person who is not able to answer the question with regard to his estate, affairs,

or family with certain account of intelligence. Difficulty in communication due to some physical deformity can not be treated unsoundness of mind. Every slight abnormality can not deny a person a right to control and manage his affairs. The opinion of legal experts has to be taken while the ultimate decision rests with Court. The Mental Health Act, 1987 has tried to remove a number of doubts with regard to the identification and protection of mentally ill persons.

'Mental disorder' is a psychiatric term. There are different schools of psychiatry, which explain, mental disorder in different ways. These can be broadly classified a 'medical school', and 'humanitarian school'. Whereas the 'medical school' holds that mental illness has its source in the individual and not in the environment, its treatment should be pursued through such mechanisms, such as psycho-therapy and not by manipulation of environment.

The 'Humanist School', on the other hand holds, that there is no uniform standard of mental health deviation, which results in mental illness. Whatever standards from which there is deviation are psycho-social, or ethical, and hence the aberration can only be understood in legal psycho-social or ethical terms. This second school holds that medical extension is totally irrelevant, vide R. D. Laing : The Divided Self, 1960.

The Act of 1987 adopts the medical school prospective of mental illness. The provisions of the Act has however, not given up the humanist school approach and that a Magistrate while recording a finding has to adopt the humanist approach. The definition of mentally ill persons takes into account the medical school approach namely that the person is a need of treatment on reason of mental disorder. The finding to be recorded by a Magistrate is a synthesis of both the schools which is a pragmatic approach namely that such mentally ill person suffers from mental disorder of such a nature and degree which requires treatment or that it is necessary in the interest of the health and personal safety of the mentally ill persons or for protection of others that such persons shall be detained in psychiatric hospital or psychiatric nursing home. The earlier attempt by Indian Judiciary to identify a mentally ill person, can be found in Joshi Ram Krishnan v. Rukmani Bai (AIR 1949 Alld. 449), in which a bench of Allahabad High Court observed as follows:

> *"Unsoundness of mind implies some unusual feature of the mind as has tended to make it different from the normal and has, in effect, impaired the man's capacity to look after his affairs in a manner in which another persons without such mental*

irregularity would be able to do in a matter of his own. The idea suggests some derangement of the mind, whatever be its degree and it is not to be confused with or taken as analogous to a mere mental weakness or lack of intelligence."

"If a man is able to understand and answer question on various matters except those relating to arithmetical calculations, he cannot be regarded as mentally unsound, although he would be held as having a weak or undeveloped mind."

The later decisions approved the view of Allahabad High Court and have cautioned the courts in judiciously balancing and weighing the evidence on record in coming to a finding with a sense of responsibility, keeping to the forefront all the implications of making a finding that the alleged person is of unsound mind and incapable of managing himself and his affairs, while remembering that the person concern is at serious risk of being deprived of his Constitutional rights and liabilities. A person who is incapable of managing his affairs is not necessarily of unsound mind and a person of unsound mind may not be incapable of managing his affairs. For the purpose of making an inquiry about the unsoundness affecting the capacity to manage his affairs, a judicious balance has to be maintained.

The Act of 1987 provides establishment of Central Authority for Mental Health Services and State Authority for Mental Health Services, to regulate, develop, co-ordinate and issue direction with regard to mental health services to the Central Govt. supervise the psychiatric hospitals and psychiatric nursing homes and to advise the Central Govt. on all the matters relating to mental health. The State Authority carries out the same purposes in respect of States. The establishment and maintenance of psychiatric hospitals and psychiatric nursing homes can not be made except under a license granted by the Licensing Authority, which are to be periodically inspected. The admission to such hospitals and nursing homes is either voluntarily or on request by guardian of a mentally ill minor. The discharge under section 18 of the Act, of voluntary patients is however, subject to satisfaction of the Medical Officer-in-charge, who may constitute a Board to seek its opinion as to whether such voluntary patient needs further treatment. Admission under the special circumstances, can be made on an application by a relative or a friend. If the Medical Officer-in-charge is satisfied that in the interest of mentally ill person it is necessary so

to do, provided that admission beyond 90 days is subject to the provisions of the Act, i. e. the satisfaction of Medical Officer-in-charge or the Board.

Where in the opinion of Medical Officer-in-charge, on an application by husband, wife or other relative, the treatment is required to be continued for more than six months, or it is necessary in the interest of the health and personal safely of the mentally ill person, or for protection of others, an application has to be made to the Magistrate with the local limit of whose jurisdiction the psychiatric hospital and psychiatric nursing home is situate, reception order is to be issued by such Magistrate. The application must be on prescribed form, to be accompanied by two medical certificates, of whom one is of the medical practitioner in the service of government. The Magistrate on his satisfaction that mentally ill person is suffering from mental disorder of such a nature or degree that it is necessary to detain him for treatment of it is necessary in the interest of health and personal safety of mentally ill person, or for the protection of others, that he should be so detained and that a temporary treatment will not be adequate, make a reception order. The Magistrate may personally examine the person for reasons to be recorded in writing or may cause an inquiry by issuing notices to any other to whom, in his opinion, the notice is required to be given. The proceedings are to be held in camera.

The police has been provided with an important duty to protect a mentally ill person who is incapable of taking care of himself or is may be believed to be dangerous by reason of mental illness. Such person may be detained for the purposes of protection, is to be produced before the Magistrate within 24 hours and that the Magistrate may after causing inquiry in respect of such detained person under section 23 in accordance with section 24 of the Act, and after recording his satisfaction that the medical officer is satisfied, such person to be mentally ill and that the Magistrate is satisfied that the said person is mentally ill person and in the interest of health and personal safety of such person or for protection of others, pass a reception order. The Police Officer is also required to report to the Magistrate if it has reason to believe that any person, within the limit of his station, is mentally ill and is not under proper care and control, or is ill treated or neglected by any relative or other person, having charge of mentally ill person.

The Act takes care of protection of human right of mentally ill person. Section 81 provides that no mentally ill person shall be subjected, during treatment, to any indignity (Whether physical or mental or cruelty) and that no

mentally ill person under treatment shall be used for the purposes of research unless it is of direct benefit of him for the purposes of diagnosis or treatment or of such a person being a voluntary patient has given a consent in writing, provided such consent is valid. He has also been given protection of any communication sent by him or sent to him to be intercepted, detained or destroyed. The Act mandates that the cost of maintenance of mentally ill person detained in psychiatric hospital or psychiatric nursing home to be borne by the Government of the State and that powers have been given to district court, to issue orders to such persons who is required to maintain mentally ill person, to pay the cost of such maintenance. Where a mentally ill person is incapable of managing the affairs of his property the district court under section 52 can appoint a guardian for managing his property or to direct the Collector to do so. The Court of Wards can also be authorized to assume management of such property in accordance with that law, The powers and duties of Manager and its responsibility to furnish inventory and annual account and the removal of Manager or guardian in also provided under the Act.

Some other Statutory provisions providing for the rights, obligations, legal consequences and protection of mentally ill persons can be found in section 145 of the Army Act, 1950, Section 144 of the Air Force Act, 1950 and section 143 or 144 of the Navy Act, 1957, section 30 of the Prisoners Act, 1900, Section 330 or section 335 of the Code of Criminal Procedure, 1973 and sections 11 and 13 (1) (iii) of the Hindu Marriage Act, 1955. The provisions of the Army, Air Force and Navy Acts provide for keeping the accused person, who can not be charged by reason of unsoundness of his mind and is incapable of making his defence, to be kept in custody in the manner prescribed after reporting the mater to the Central Govt. and the continuance of Court Marshal after he is found to be capable of making his defence. The Central Govt. is also authorized to release such person to be transferred to public lunatic asylum and also for handing over his custody to his relatives.

The Hindu Marriage Act, 1955 provides that after the commencement of the Act, a person may get the marriage declared null and void by a decree in case at the time of marriage either party is incapable of giving a valid consent to it in consequent of unsoundness of mind; or thought capable of giving a valid consent has been suffering from mental disorder of such a kind, or to such an extent as to be unfit for marriage and the procreation of children. Mental disorder is also provided to be a ground of divorce under section 13 (1) (iii) of

the Act, where either party has been incurably of unsound mind and has been suffering continuously or intermittently from mental disorder or such a kind and to such an extent that the petitioner can not reasonably be expected to live with the respondents. The explanation (a) and (b) to the aforesaid grounds for divorce defines mental disorder, to mean mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder of disability of mind and includes schizophrenia. The expression 'psychopathic disorder' means a persistent disorder or disability of mind (whether or not including sub normality of intelligence) which results in abnormally aggressive, or serious irresponsible of conduct on the part of other party and whether or not it requires or is susceptible to medical treatment.

In Mohammedna Law marriage is a civil contract and this it attracts all the incidents of contract including the capacity of a party to enter into contract of marriage. A marriage of a Mohammedan who is not of a sound mind in not valid. The fact that the Mohammedan will marry only with his consent implies that he and she must be a sound mind. Vide 252 Mulla's Principles of Mohammedan Law, 19th Edition, a guardian of a minor or a lunatic and minor who have not attained puberty may validly contract marriage by the respective guardians but such a marriage can be annulled by a minor or attaining puberty, where father of father's father has acted fraudulently or negligently, as where a minor is a lunatic, the contract or the contract is to the manifest disadvantage of the minor, the contract is voidable at the option of the minor or attaining puberty. The dissolution of Muslim Marriage Act, 1939 gives a female right to repudiate the marriage before attaining the age of 18 years, provided the marriage has not been consummated, but is case of male the right continues until he was gratified the marriage either expressly or impliedly as by payment of dower or by co-habilitation. The repudiation must be confirmed by court. A lunatic can exercise the option when the lunatic recovers, his or her reason.

Articles 102 (1) (b) and 191 (1) (b) of the Constitution of India provide for disqualification from membership of either house of Parliament and Legislative Assembly or Legislative Council of the State, as the case may be, respectively, if such person of unsound mind and stands so declared by a competent court.

The criminal justice system also has special provisions to deal with persons of unsound mind and their rights. Chapter XXIV deals with the provisions as the accused person of unsound mind when a Magistrate holding

an inquiry has reason to believe that the inquiry has been held in respect of a person who is an unsound mind and consequently incapable of making his defence. He shall inquire into the fact of unsoundness of his mind and shall cause such person to be examined by the Civil Surgeon of the district of such medical officer as the State Govt. may direct and thereupon he shall examine such civil surgeon or such an officer as a witness and produce the examination in writing. If he is of the opinion that the person referred to in sub-section (1) is of unsound mind and consequently incapable of making his defence, he shall record a finding to that effect and shall postpone further proceeding in the case. In case of trial where it appears to Magistrate that the persons is incapable of making his defence, the fact of unsoundness or incapacity shall be tried, and after considering medical evidence or other evidence which may be produced before him, further proceedings shall be postponed. This trial is deemed to be part of the trial before the Magistrate. He may release such person pending investigation or trial, under section 330 on sufficient security, that he shall be properly taken care of, and shall be prevented from doing injury to himself or to any other person and for his appearance when required before the Magistrate, or court, or such officer, as may be appointed. If in the opinion of the Magistrate or Court, they should not be taken or sufficient security is not given, the Magistrate or court, as the case may be, shall order the accused to be detained in safe custody in such place and manner as he may think fit, and shall report the action taken to the Government, provided that no order of detention of the accused in lunatic asylum shall be made except in accordance with the provision of Indian Lunacy Act, 1912, now replaced by Mental Health Act, 1987. The trial has to be resumed under section 331 of the person concerned has ceased to be unsound. Section 334 requires that where a person is acquitted on the ground that at the time at which he committed the offence, he was by reason of unsoundness of mind incapable of knowing the nature of act, alleged as constituting the offence, or that it was found or contrary to law, a finding is to be specifically recorded whether he committed the act or not. Where the finding states that he committed the act, which but for the incapacity found have constituted an offence, shall pass an order to detain him in safe custody in such place and in such manner as the court thinks fit or order such person to be deliver to any relative or friend, or recording a satisfaction that he shall be properly kept and prevented from doing injury to himself of to any other person and shall be produced for detention of such

person at such time and places as the State Govt. may direct after reporting to the State Govt. Where as person has been detained on the ground of incapability of making a defence, the Inspector General Prisoners or the visitors of such asylum may report to the Magistrate to deal with such person under section 332 for his satisfaction to proceed with the inquiry or trial. The State Govt. may in case of release of lunatic pending investigation or trial or after acquittal may give the custody of such person to his relative or friend.

Section 30 of the Prisoner's Act, 1900 deals with lunatic prisoners. It gives powers to the State Govt. where it appears to it that the persons detained or imprisoned is of unsound mind, issue a warrant setting forth the grounds of its belief and order of his removal to a lunatic asylum for other place of safe custody within the State, to be kept and treated during the remainder of term for which he has been sentenced, to be detained or imprisoned or even after expiry of term if the medical officer satisfies that it is necessary for safety of prisoner to be further detained under medical care or treatment until he is discharged in accordance with law. If a person is confined in a lunatic asylum, after his removal as prisoner, on the ground that he is of unsound mind and his term of detention or imprisonment has expired, he may be confined in lunatic asylum in accordance with the provisions of section 9 of the Lunatic Asylum Act, 1858. These are powers of the State Govt. in respect of mentally ill prisoners.

The prisoner's Act, 1900 does not contain any provision of separation or segregation of prisoners of unsound mind as section 30 deals with such prisoners to be removed to lunatic asylum or other place of safe custody within the State for remainder sentence or until he is discharged in accordance with law. In Hussain Ara Khatoon v. State of Bihar (1980) 1, SCC 108. Supreme Court directed that lunaties and persons of unsound mind should not be kept in ordinary jails along with under trial prisoners.

Rule 15 of Order XXXII of the Code of Civil Procedure, makes the provisions of Rules 1 to 14 except Rule 2 A to apply to persons of unsound mind and where the persons have not been so adjudged, or found by the court on inquiry to be incapable by reason of any mental infirmity of protecting their interest when suing or being sued thus all the provisions relating to suits by or against minors, except furnishing of security are applicable to the suits filed by or against person of unsound mind.

From the aforesaid statutory provisions we find that whereas the definition and scope of inquiry in case of a mentally ill person in Mental Health Act, 1987, has recognized a progressive human right oriented and humanist approach to mentally challenged persons, the other Statutes are yet to follow suit, These Statutes require amendment or a judicial pronouncement may consolidate the position and may insist upon the new found approach to be equally applicable to all the Statutes, with the object and purposes of the Act.

In recently reported cases, the Supreme Court has adopted a dynamic, humanist and protection oriented approach to mentally challenged persons. In Sheela Barse v. Union of India (1993) 4 SCC 204, Supreme Court held the confinement of non criminal mentally ill persons in jails in West Bengal to be illegal and unconstitutional. After considering the report of the Commissioner appointed by the Court, direction were issued that instead of Executive Magistrate, the Judicial Magistrate shall examine such person by a mental health professional psychiatric and to send them to the nearest place of treatment and care. Directions were also issued for upgradation of mental hospital setting psychiatric service in all teaching and district hospitals and integrating mental health care with primary health care. In Rakesh Chandra Narain v. State of Bihar (1994) Supp. 3 SCC 487 the Supreme Court recommended a strong second look to the administrative set up at Ranchi Mental Hospital. The recommendations of Sri M. S. Dayal, Health Secretary in his report submitted in pursuance of the directions of the court were accepted and a scheme was framed, defining the objective of the hospitals to include (a) diagnostic and therapeutic facilities for mental patients (b) social and occupational rehabilitation of mental patients (c) professional and para-professional training in the field of Psychiatry, Clinical Psychology, Psychiatric Social Work and Psychiatric Nursing (d) expansion of mental health services at community level by providing training to medical and para-medical personnel in the field; and (e) Research in behavioural sciences. The Hospital was provided to be an autonomous institution. The admissions were provided to be strictly in accordance with the provisions of Mental Health Act, 1987. Important direction was given with regard to the funding of the hospital. The amount quantified and apportioned for the expenses payable for treatment of patient from different states, was to be provided to Union Health Secretary to determine contribution of by means

of states and after hearing the state concern they were held liable to be complied with the directions of the Union Health Secretary for payment of such amount.

With an estimated population of 2.4 millions mentally challenged persons in Uttar Pradesh, based on the data of national figures of 1.5% of the population, suffering from mental ailments, the number of psychiatric hospitals and psychiatric nursing homes are negligible. A handful of registered Psychiatrics practicing in U. P. can not cope up with specialized treatment required for mentally challenged persons. The State is far behind the progress made by the State of Maharashtra and Tamil Nadu in this field. The statutory rights and protections are meaningless until the requisite infrastructure is created. Time has now come to wakeup to the rights of this under privileged section of society, and to sensitize government, bureaucracy, police and medical and profession towards their rights and the progress made by law in this sphere.

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RIGHT TO KNOW/RIGHT TO INFORMATION IN INDIA

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After attaining independence, "we the people of India" resolved to make India a "Sovereign Democratic Republic" for securing certain objectives mentioned in the preamble of our Constitution. Our democratic set up is based on Westminister type of British Parliamentary system. In it, the elected executive survives in power so long it is able to command majority in the lower house and the moment it forfeits the confidence of the majority in the said House, it has to step down from office. Thus it has a greater accountability to public as compared to American Presidential form of government in which President once elected cannot be removed easily before expiry of his term of four years. A democratic polity can be either direct or of representative type. In the former kind people directly participate in the governance of the country whereas in the latter people participate in the governance of the country through their elected representatives.

Freedom of speech and expression is the *sine qua non* of participative type of a democracy. Article 19 (1) (a) of our constitution also guarantees freedom of speech and expression to every citizen of India, This right includes the "right to know"[1] . Through, this right people enforce transparency and accountability of government and its departments in public interest and thereby reducing corruption. But the public interest also requires that vital secrets of State should be kept confidential from the people in the larger interest of people. Hence a just balance between these contrary interests has to be achieved. Confidentiality should be confined to areas of nation's security and integrity,

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[1] S. P.Gupta v. Union of India & others, AIR 1986 SC 515; Relinace v. Indian Express (1988) 4 SCC 592 (para 34)

which outweigh individual's right to know. For proper participation of people in the democratic process, they must be kept informed of the vital national in formations. Democratic form of government has acquired world vide legitimacy and acceptance. Consent of people alone lends legitimacy to a government[2]. It is a principle which has been recognized and proclaimed by UN Charter as well as the International Bill of Rights.[2] Democracy no doubt has its own drawbacks but it has to be preferred as there is no better alternative to it. It the words of our apex court "To ensure continued participation of people in the democratic process, they must be kept informed of decision taken by the Government and the basis thereof. Democracy, therefore expects openness and openness in concomitant of a free society."

However, the Apex Court has warned that if every decision of the Government or executive is converted in to a controversy under popular pressure and made subject of enquiry to soothe popular sentiments, "it will paralyse entire system and bring it to a grinding halt." It has therefore, suggested that there is a need for maintaining a fine balance between two conflicting situations in the larger public interest[5]."

FREEDOM OF INFORMATION IN U.S.;

In USA the freedom of Information Act, 1966 was enacted conferring a right on people in general to seek information from Federal agencies in accordance with the provisions and regulations framed thereunder.

The Object of Freedom of Information Act (FOIA) was to provide in sustained manner a well informed citizenry which is *sine qua non* for proper functioning of a democracy. Due to paucity of space and time we cannot undertake a detailed study of the provisions FOIA. However we may make a passing reference to its scheme and objects. It casts a statutory obligation on every government agency to generate five kinds of information's and to publish them in the Federal Register[3] [Sec. 552(1) (a)] and generate five categories of documents[4] and to make them available to public for inspection and copying

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[2] Article 19 UDHR (Right to freedom of opinion and expression); Article 21 UDHR – The will of the people shall be the basis of the authority of the governance, the will shall be expressed in periodic and genuine elections.

[3] Section 552 (a) (1) of FOIA

[4] Section 552 (a) (2) of FOIA

[Sec 552(1)(b)]. Any violation of the requirement of publication in the Federal Register is likely to have serious consequences because the unpublished information or document cannot be used against a member of public if it adversely affects him. In fact such an information has been declared invalid by the District Court[5]. Section 552(a)(3) provides that any agency record which is not covered by sub-paragraph (a)(1) and (a)(2) must be made promptly available upon request to any person. Therefore, they have a right to know as to how the government is functioning. How its decisions are made and reasons therefore. Whether it acts and decisions are promoting welfare of people or sheltering corruption and nepotism by promoting opaqueness in administration. For achieving this object people must enjoy the right to know or right to information. However, this right also cannot be absolute in nature like other rights. It has its own limitations. In respect of transactions likely to have serious repercussions on security and integrity of the country, confidentiality can legitimately be maintained. This position has been accepted by our Apex Court also, because, then "it would be in the public interest that such matters are not publicly disclosed or discussed"[6]. This is also the object of section 5 of the Official Secrets Act, 1923 of India and also the provision of section 123 and 124 of The Indian Evidence Act, 1872. But this Act was enacted by the British Government for maintaining its firm hold on British Indian Territory and on its subjects. Its provisions are "catch them all" type of provisions, a large number of documents have been included in the category of 'classified documents' which enjoy confidentiality and public servants having their custody are not entitled to disclose their contents to any other person than those who are entitled under the law to have access to them. A good number these classified documents which have no serious bearing on the security and integrity of the country should be declassified for streamlining the working of Official Secrets Act and some members of judiciary was tabled in Parliament. A PIL writ petition was filed by one Member of Parliament in conjunction with NGOs praying for direction to Govt. of India to make public the report along with its annexures, memorials and written evidence, that were placed before the committee, to reveal names of all those against whom there was tangible evidence, to present to the court and active package of follow up measures

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[5] E. G. Anderson v. Butz, 550 F 2 d 459 (9th Cir. 1997)

[6] Dinesh Trivedi v. Union of India, (1997) 4 SCC 306

and declare Official Secrets Act as unconstitutional. However, the Supreme Court in the light of its observations already referred to above held, that the report tabled in the parliament is 'genuine, authentic and unabridged and also public document" a full disclosure of supporting material would be against public interest and need not be directed." If refused to consider the constitutionality of Official Secrets Act.

Tamil Nadu Right to Information Act, 1997

Tamil Nadu was the first State in India to have passed Tamil Nadu Right to Information Act, 1997. Section 3 (1) confers on every person bonafide requiring information to have access to the information in accordance with the procedure specified in the Act. However sub-section (2) of this very section provides that notwithstanding anything contained in Sub-section (1), no persons shall be given any information relating to in clauses (a) to (v) . Thus the information sought cannot be denied on any of the grounds specified in these clauses. Information has to be supplied by the Competent Authority within 30 working days from the date of application or to be refused in writing within that very time. Any person aggrieved by an order of the competent authority may appeal to the authority within two months from the date of receipt of the order (Rule 4).

Goa Right to Information Act, 1997

Goa the smallest state of India was the second one to enact Right to Information Act, 1997. Right to Information has been defined in Section 2(d) to mean right to access to information and includes inspection of works, documents, records, taking notes and extracts and obtaining certified copies of documents or records or taking samples of material. Under this Act every citizen has the right to information from a competent authority; the information can be supplied in English or official language [Section 3 (3)]. Information under the Goa Act can be refused if it effects India's sovereignty and integrity, inter relations between states, public order or administration of justice; disclosure of which has no relation to the affairs of state; which is trade or commercial secret; which is breach of Parliamentary or State Legislative Assembly Privilege, Information can also be refused if it is a clear and unwarranted invasion of personal privacy or will not subserve any public interest. Section 8 of the Goa

Act makes the illegal denial of information or delayed supply of information punishable with a fine of Rs.100/- per day after the information was required to be supplied. For promoting right to information, review the operation of the Act and rules made thereudner the State provides for establishment of a State Council headed by The Chief Minister of the State. Thus the Goa Act has furnished a tool to the citizens of Goa to tackle the bureaucrats but not the politicians. But as pointed out by M. K. Jos all competent authorities are bureaucrats who have been made answerable under the Act to every citizen. This Act has been a 'gift to those who are in a position to use it intelligently". Bureaucrats who were earlier like lions have now been' tamed like lions" according to Mr. Jos.

The Main Objects to Right to know/ Right to Information

Right to know/right to information is a recent innovation of western democracies like USA, Canada, UK, Australia, Newzeland etc. for keeping their democratic government on the right track through public scrutiny. Its main objects are ensuring transparency in governance and rooting out political and bureaucratic corruption and there by establishing an open and transparent administration. In these countries this right has been introduced through legislations. Freedom of Information Act, 1966 in USA; Access to Information Act in Canada. This right gives an opportunity to citizens to participate in government in a well informed manner. Without such information citizens would be ignorant of pros and cons of vital public issues and will not be able to reflect their choice regarding policy decisions and in electing their representatives periodically in accordance with well informed public opinion based on authentic information. Governance through ill informed citizens would be like governance by the blind people. In these circumstances, there is growing demand in India also for making right to information a fundamental right. For achieving this object Deve Gauda Government had constituted a working group under the Chairmanship of Mr. H. D. Shourie, President of "Common Cause" an Indian NGO for suggesting ways and means for actualizing the right to know or right to information. After surveying the US, Canadian, UK, Australian and Newzealand legislations. The Shourie Committee submitted its report to the Government and a bill was also got drafted on the basis thereof but the Deve Gauda Government fell and the Bill could not become a law.

However, without waiting for the Parliamentary Act on this topic to materialize, some of the states have already taken initiative in this behalf. State of Rajasthan was the first to confer right to information on people, at Panchayat level, on December 30, 1996 by making provision for furnishing copies of panchayat documents to people on demand. This has been utilized by activists of Mazdoor Kisan Shakti Sangathan (MKSS) under the leadership of one Sri Shankar Singh. He informed the people how their Sarpanch (Village head) had gobbled up the money meant for their development, on the basis of informations received in exercise of the right to information. On the basis of his report an enquiry was set up by the Chief Minister Mr. Ashok Gahlot. The two volumes of report brought out by Deputy Secretary (Finance – Audit) Mr. Banna Lal on gross root corruption in Janwad is virtually a list of the ways in which money can be misappropriated. Chief Minister Mr. Ashok Gahlot in April 2001 on being informed that 55% of funds meant for development works - 68 lakhs out a total sum of Rs. 1.23 crore had been misused over the past six years suspended seven officials and asked Anti Corruption Bureau to initiate criminal proceedings against the accused and recover Rs. 67 Lakhs from them. Chief Minister remarked "Let citizens use their right to information to expose." He also promised similar exercise in other panchayats also. Earlier an enquiry had been got conducted through Rajsamand Collector by the Chief Minister. The author has commented that "Despite findings and the success of the MKSS compaign, the efficacy of the Right to Information Act is still debateable. Aruna Roy who had joined the Janwad movement has remarked that she was denied information at least on twenty occasions. There is no provision in the Act to punish those who refuse to supply information illegally. The Government also shied away from punishing those in supervisory roles[7] However, a good start has been made at Janwad in exposing corruption at grass root level of Panchayats.

Information Counters opened in Ministries in the Centre and States

In the absence of any central legislation regarding right information the ministries of the Central Government have opened counters for supplying informations pertaining to their respective ministries to members of public seeking the same. In Uttar Pradesh also Government has introduced on

[7] Right to know by Rohit Parihar. "India Today" September 17, 2001 at page 41.

September 17, 2001 its ambitious policy of right to information in the State Secretariat and in the State Urban Development Authority (SUDA). According to the GO issued in this behalf three counters have been opened on the first floor of the Darbari Lal Sharma Bhawan for receiving applications from people from 10 am to 1 pm and from 2 pm to 4 pm. For visiting these counters people will not be required to take any visitors pass. On counter no.1 files of Chief Minister's Secretariat, Chief Secretary branch, home appointment. Industrial development, finance and planning departments can be inspected. On counter no. 2 files of Social Welfare Department, education housing and urban development, PWD, Irrigation, energy and transport can be inspected. On counter no. 3 files of agriculture, panchayatraj, rural development, cooperatives, animal husbandry, rural engineering, forest food and civil supplies, medical and health and law departments can be inspected. In SUDA district offices inspection of files would be permitted on every Monday and Thursday from 11 am to 3 pm and in the office of Director of SUDA also. The files pertaining to people living below powerty line, safai workers rehabilitation scheme. National slum Improvement Scheme and details of grants and loans can be inspected. Let us hope that these measures adopted by the U. P. Government will be fully utilized by the enlightened citizens for making the government departments more accountable and transparent[8].

Advantages and disadvantage of Right to Information:

Having said this much we must pause to enumerate the advantages and disadvantages of right of information.

(1) It imparts openness and transparency to administration and there by instills greater confidence among the people in the administration;

(2) It creates greater awareness in the administration regarding the problems faced by people which helps in formulating policies pro removal thereof.

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[8] News item appearing on page 3 of Times of India, dated 18th September 2001, Times News Network.

CALENDER FOR THE YEAR - 2002

Details of Training Programmes, Conferences, Workshops, Seminars, successfully arranged in the YEAR 2002 :

S.No.	Details of Training Courses	Duration	Number of Participants
1.	Conference–cum- Workshop on Consumer Laws	05.01.2002	
2.	Special Training Programme for Members of District Consumer Fora	14.01.2002 to 24.01.2002	13
3.	Special Training Programme for Members of District Consumer Fora	11.02.2002 to 21.02.2002	13
4.	Training Programme on Court Fees and Financial Management for DIG/AIG Registration	01.03.2002 to 07.03.2002	31
5.	Training Programme on Court Fees and Financial Management for DIG/AIG Registration	13.03.2002 to 19.03.2002	28
6.	Foundation Training Programme for newly appointing Assistant Prosecuting Officers	13.03.2002 to 12.04.2002	50
7.	Training Programme for Jail Officers of UP, MP & Tripura	19.04.2002 & 30.04.2002 to 02.05.2002	25

8.	Foundation Training Programme for newly appointing Assistant Prosecuting Officers	07.05.2002 to 05.06.2002	49
9.	Foundation Training Programme for newly appointing Assistant Prosecuting Officers	18.06.2002 to 18.07.2002	49
10.	Foundation Training Programme for newly appointing Assistant Prosecuting Officers	29.07.2002 to 27.08.2002	48

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

Duration	Name of Training Programme/ Conferences /Seminars/ Workshops
14.09.2002	हिन्दी दिवस; 'न्यायालयों में हिन्दी का प्रयोग' विषयक संगोष्ठी
16.09.2002 to 20.09.2002	Training Programm on Legal Procedures and Process for Officers of Indian Defence Account Services
19.09.2002 to 21.9.2002	Special Training Programme on Gender Sensitization for Judicial Officers, Police Officers & Prosecuting Officers
26.10.2002 to 27.10.2002	Seminar on Copy Rights & Neighbouring Rights for CJM/ACJM/JM/Prosecuting Officers & Investigating Officers
23.11.2002	Conference on "Violence against Women; Remedies and Reliefs"

Recruitment process of 147 Civil Judges (JD) is in progress. Foundation Training Programme for newly appointed Civil Judges (JD) shall be arranged accordingly. 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.

Apart from these training programmes, several other training programmes for the officers of U.P. Avas Vikas Parishad, Central Adoption Resource Agency (CARA), newly appointed members of District Consumer Fora, Members of Juvenile Justice Board and Labour Enforcement Officers of U.P. are also to be conducted in the coming months.