J.T.R.I.

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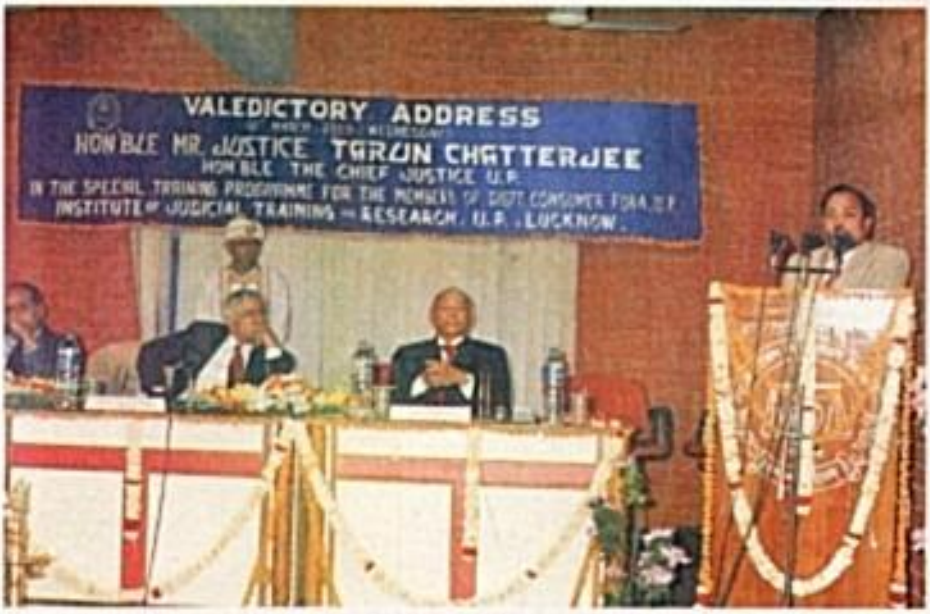

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Photograph of Inaugural Session of Training Programme arranged for the members of District Consumer Redressal , For a seen in the picture of dais Ms. Rachna Pal, Member, Hon'ble Mr. Justice Palok Basu. Chairman, U.P. State Consumers Disputes Redressal Commission, Shri A. B. Shukla, Principal Secretary & LR, U.P. Sri Raghvendra Kumar, Addl. Director (Admn.), Sri R.V.S. Gautam, Dy. Director (Management), Sri Nirvikar Gupta, Additional Director addressing the audience from the podium.

ADOPTION AND RELATED ISSUES*

Justice Brijesh Kumar
Judge, Supreme Court of India

Things change with the times. So the views, social philosophical needs and necessities, as may emanate from the circumstances, which also keep on changing from time to time. It is true about Adoption as well as for any other thing. In our country Adoption is an ancient practice and custom, which assumed the status of the personal law of the Hindus. We find that Wisemen and Sages of those days have spoken on the subject. Manu said "a son of any description must be adopted by a man destitute of male issue, for the sake of funeral cake, water and solemn rights and for the celebrity of his name". Such was the view expressed by Saint Atri and in Duttak Mimansa and Duttak Chandrika. It is thus to be seen that main consideration for adopting a son has been the concept that it is necessary to have one to perform such rites and rituals and for the sake of progeny. May be one of the hidden ideas was also that there must be someone to take care and look after in the old age and may also provide financial, personal and social security to the aged and worn out person. The whole idea centered around a person adopting a son is in the interest of his own, in this and the other world and to continue the name of the family. Manu though has said about the child's welfare, a reference of which shall be made later at an appropriate place.

Obviously the philosophy of the Hindu Personal Law has not been of universal application. In some religion there has not been any such concept of adoption, in some of them there has not been any prohibition in some religion it was felt that it is not permissible. For the purposes of administrating the Hindu Personal Law Hindu Adoption

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* Inaugural Address delivered on 23rd November, 2002 in the Institute of Judicial Training and Research, U.P., Lucknow, while inaugurating National Seminar-cum-Workshop on "Adoption and Related Issues".

and Maintenance Act, 1956 was enacted having specific provisions regulating the Adoption. Guardian and Wards Act, 1890 was also enacted so as to provide for appointment of guardians of the minors.

With the times social structure also changed and it is well known that industrialization had multi-dimensional effects on the social life of the people. Family structure changed. Social norms could also not remain unaffected. Population kept on increasing. To top it all in the western countries, the two World Wars also had their effects. This all resulted in increase in destitute children. Many became orphans and large numbers of children were rendered without parental care and financial support. The number of abandoned infants also kept on increasing for various reasons. Poverty also took its toll. The helpless tender aged children who needed support became burden for their parents.

The universal Declaration of Human Rights, 1948 as made by the United Nations also deals with the welfare and the development of children. UN Commission on Human Rights drafted convention on Rights of child which was adopted in 1989 by the General assembly. It attracted the attention of different voluntary organizations. The United Nation Convention on rights of children to which India is one of the signatory provides under Article 21 of the convention, "In the countries where adoption is recognized and/or it shall only be carried out in the best interest of the child with all necessary safeguard for given child and authorization by the competent authorities."

The World Human Rights Conference in Vienna in 1993 emphasized for special care and assistance for children and need to create an atmosphere suitable for proper development of neglected children. Further we find that Economic and Social Council by its resolution number 1925 (XLVIII) request the United Nation to have a group of experts in child welfare and to issue a declaration relating to adoption and foster placement of children nationally and internationally. One guideline as provided said "The child should at all time have a name, nationality and legal guardian. This is how we find that with passage of time and pressed by changes and necessity the

focus shifted to the welfare of the child. Adoption in the modern concept is considered and conceived as a means of solving the problem of orphan or destitute or abandoned children. Unfortunately one is pained to know that India is amongst one of those countries which have largest population of street children. It is true adoption alone cannot tackle the problem, it may rather provide respite to a small percentage of destitute children nonetheless it does help in solving the problem in whatever small measure it may. In this context it may be recalled that Manu had great vision when he said that an infant child must be maintained at whatever cost it may be.

Many organizations and agencies sensitive to the cause came forward and rendered in valuable service in the field. Their concern and effort to solve the problem deserves applause. But for doing good things you need good people and good human beings. It is boon to be born as a human being. To be a human being one must have quality of human being but the misfortune is that it also has a satanic instinct when it becomes active dreadful things happen. They can be cruel to the tender aged children. There is no derth of such element taking shelter of rendering service to the children. Many unrecognized adoption agencies cropped up and the memory is still fresh, when about 170 children were rescued from them. They included infants only few months old. Will not any one shudder to hear the report that even foetus are booked and broker pay and advance for the nourishment of pregnant women in turn they earn heavy amounts by selling those children. In some poverty stricken areas where parents are compelled to sell their children to such unrecognized organizations. Even it was reported that if an infant died while its papers were under process for adoption they would buy another baby from needy persons and continue the process by the same name. Such are the pitiable conditions which are prevailing in the civilized society. Sensitivity to such things is the driving force to the people and genuine Non-Governmental Organization to render service with dedication all around the world. There are few other countries from where the children are exported to other affluent countries. The adoption may be within the country or from one country to the other. There is no law covering the field. In such circumstances Supreme Court in the year 1984 in the case of

Laxmi Kant Pandey laid extensive guidelines for adoption to ensure that the children adopted get proper care and protection from any kind of abuse. Several checks have been indicated which may check the nefarious activities of unscrupulous operators. There are departments and councils and child welfare. They also do there bit to advance interest and welfare of destitute children but it is necessary specific laws and enactments regulating adoptions within the country and outside are made at the earliest. There are other grey areas as well posing different kinds of problems where there may inter-religion adoption or the similar other contingencies. It is not that no efforts have been made at all to make the laws in India. The Adoption of Children Bill in 1972 was prepared for uniform adoption applicable but it was dropped. Again in 1980 such a bill was introduced but no law could be made so far. As we see that adoption takes place for different reasons and uniform law on the subject is necessary. In the present context it is for the welfare of the destitute child as well as it also serves the purpose of some people who preferred adopted child for different reasons.

I hope that the seminar that you are going to hold will have in depth and useful discussion on the subject and would be able to thrash out some meaningful conclusion beneficial for the adoption of the destitute children and which may also put check to the nefarious activities of unscrupulous persons and fake organizations indulging in trafficking in children due to poverty. I wish all success to this orientation program which will also help in spreading awareness in the society. I congratulate the Institute for undertaking this program on an important subject and I thank the organizer for providing this opportunity to be here with you and to say a few words on the subject.

CRIMINAL JUSTICE SYSTEM

*- Justice S.B. Sinha**

India has inherited and borrowed from colonial powers its system of criminal law and procedures, as well as rules of evidence. It is partly because of this that Courts, police, and correctional systems fail to fill the societal needs of today. It is unfortunate that our national programs seldom incorporate the changing needs of society in the criminal justice system or formulate them into a national plan.

We will examine how far the system of criminal justice has failed to achieve its two primary goals; the control of crime and the protection of individual rights. Crime control implies an orderly and efficient method for arresting, prosecuting, convicting and punishing the guilty and for deterring crime by others while the protection of individual rights is necessary to safeguard the accused against the arbitrary exercise of power by the State.

Prevention and detection of crime is the primary objective of the police. Increasing criticism that the police has failed to discharge the traditional or modern duties of being accountable to people is not without truth. The police suffers from declining credibility and is dubbed as the protector of the rich and those who can afford. Has the police acquitted itself on expected lines? The rising crime rate and the high rate of recidivism clearly indicates that the police system is not an effective. Today, cases of murder, rape, theft, assault, robbery disorderly conduct, and bride burning occur much more than in the past. The open violation of laws, allegations of bribery of law enforcing agencies, police, presence of professional criminals, and intimidation of victims and witnesses are experienced in day to day life. Those who are not directly victimized often live in a constant state of fear and victimization. Violent crimes during 1986-96 has increased by 33.7%, homicides by 38.1%, rape by 86.7%. In 1998 alone, there were more than 40,000 reported murder cases in a total of four lakh crimes registered in India. This certainly does not augur well for the efficiency

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* Hon'ble Judge, Supreme Court of India.

of the police. In actual practice, the problem of crime is much more serious than the official figures show, as it has been estimated that from one third to one half of all serious crimes are not reported due to a variety of reasons, including intimidation and harassment of the victims.

At least three National Police Commissions have gone into the problem after the inauguration of Constitution of India. The police are said to be insensitive to constitutional violations and the importance assigned to the rights of an individual citizen by the Constitution of India. The problems faced by the police with regard to human resources, scientific methods of investigation, political corruption, political control are no doubt well recognized problems. To take stock of these is as important to the criminal justice delivery system as Court delays.

Although due process (the rule that persons may not be deprived of life, liberty or property except by the established process of law) is an integral part of the Indian criminal Justice system, the system itself discriminates according to the social status of the accused, the ability to avoid arrest and obtain bail, and to hire a good defence lawyer which is largely a consequence of one's income and social status. The police, prosecutors and courts prosecute principally lower class criminals, organized crimes, white-collar crimes, and consumer frauds. The poor, the powerless, and the undereducated are much more likely to be caught, prosecuted, punished or even held in jail for months before they are tried, and sometimes get harsher punishment if found guilty than their counterparts committing the same offence.

How do we judge our system? Reforms in the criminal justice system offer the possibility of greater justice to all. Some years back in Japan the conviction rate fell from nearly 99% to roughly 96%. A commission of inquiry was set up to find out whether the system is responsible for prosecuting innocent persons. In India, the Penal Code dates back from 1860 and the Police Act from 1861, and revisions have been few, whereas our values, norms, social orders and behaviour patterns have changed rapidly in the past few decades, which require a complete overhauling of our traditional criminal justice system. Today,

many of us raise questions about the adequacy and efficacy of the current justice system in the context of the changing patterns of criminal behaviour, as all the wings of the justice system have had nothing to do in common with the social order and crime problem. The shortcomings in the substantive and procedural criminal law with respect to implementation, offer the possibility of the exercise of arbitrary discretion. Instead of enforcing the statutes dealing with lower class criminality or victimless crimes, we must strive to fight with recidivism, corruption, organized crimes and other serious crimes, such as murder, rape, robbery and consumer fraud.

Criminal Law is based on the cardinal principles of presumption of innocence, proof beyond reasonable doubt and onus/burden on the prosecution. Have these principles been worn out? In State of U.P. v. Ramsagar Yadav, AIR 1985 SC 416 the Apex Court suggested an amendment to the law of evidence:-

> "The law as to the burden of proof in such cases may be re-examined by the legislature so that handmaids of law and order do not use their authority and opportunities for oppressing the innocent citizens who look to them for protection."

In State of M.P. v. Shyamsunder Trivedi, (1995) 4 SCC 262 the Supreme Court while referring to the recommendation of 113th Report of the Law Commission of India which had recommended the insertion of Section 14-B in the Indian Evidence Act placing the burden on the police officer in a case of custodial violence observed thus :-

> "The exaggerated adherence to and insistence upon the establishment of proof beyond reasonable doubt, ignoring the ground realities, the fact situations and the peculiar circumstances of a given case, as in the present case, often result in miscarriage of justice and makes the justice delivery system a suspect."

The above view was reiterated in D.K. Basu v. State of West Bengal, (1997) 1 SCC 416.

Justice process in India, however, seems to be a series of discretions and a decision making process through which the suspects may pass. The police, prosecution, and the Courts exercise too much discretion with least accountability. Many a time, discretion is exercised in a selective and discriminatory manner prejudicial to the interests of the poor, undereducated and powerless persons. In our criminal justice system, the police officer has first to exercise discretion whether or not to arrest, investigate, search or use force if necessary. Perhaps much greater discretion is permitted to the prosecuting authority who may decide not to prosecute the offender and may ask the Court to alter, dismiss or withdraw charges levelled against the accused. Thus, in criminal cases, the prosecuting officer has greater power over the freedom and liberty of individuals who come into his contact than any other agency. He has also the power to discontinue the prosecution on the ground that the State has insufficient evidence to win the case. If the accused is found guilty, the prosecuting authority may recommend leniency in the sentence or the most severe sentence as the case may be.

The judiciary has an important role in implementation of the rule of law. In the criminal justice delivery system, the rule of law and detection of the crime has primary importance; investigation and prosecution of the offender come later. But prosecution of the offender as expeditiously as possible has far more influence than others.

It is not uncommon for any criminal case to drag on for may years. During this time, evidence grows stale, witnesses may die or become hostile, or recollection fade, and in some cases the complainant may decide to drop the case. Long delay in Court causes great hardship not only to the accused but even to the victim and the State. The accused who is not on bail may sit in jail for months or even years awaiting trial. To avoid unnecessary delay in Court, there is a greater need to have more trials by increasing the number of Judges, if necessary and of course, settle more cases out of Court through mediation and Court mandated counselling services, and find various ways to make more effective use of the Judges time. After all, the better internal management of the Court system would be helpful in improving the system.

Delay and heavy workloads in the Courts have resulted in the informal system of pretrial bargaining and settlement in some Western countries, especially in the United States. The system is commonly known as plea bargaining. A suspect may be advised to admit part of all of the crime charged in return for a specified punishment rather than await trial with the possibility of either acquittal or a more serious punishment. Plea bargaining, as most criminal justice reformers believe, is more suitable, flexible and better fitted to the needs of society, as it might be helpful in securing admissions in cases where it might be difficult to prove the charge laid against the accused. Practically desirable, the practice has some disadvantages. The main danger is that suspects especially the poor may confess in order to have to matter settled promptly. It is regarded in India as non-permissible. However, the Law commission of India in its 154th Report has come out with this concept to lessen the burden of piling arrears awaiting trial. The commission also made it clear that "plea bargaining" shall not be made available to habitual offenders and persons accused of offences against women and children. Before introducing this unique concept in our criminal justice system, we should seriously consider the pros and cons of this concept in the context of our legal values and norms. In England as well as in India the position of the Courts is that a guilty plea can be considered a mitigating factor and, therefore, influence the Judge to impose a lighter sentence. But the refusal to plead guilty cannot be considered as a factor for imposing a more severe sentence. It is suggested. that every new system should be introduced very cautiously, keeping in view the widespread illiteracy, poverty and social inequality that are prevalent in our society.

The most important factor in preventing and determining crime is the certainty of punishment, the frequency with which those who commit crimes are arrested, prosecuted, convicted and punished. Efforts should be made to improve the management of prosecution in order to increase the certainty of conviction and punishment for most serious offenders and repeaters. For the better administration of criminal justice, recidivists, career criminals and violent offenders need to be prosecuted expeditiously in a selective manner, because these offenders pose a serious threat to the society. For selective prosecution, cases may be classified in terms of (a) the seriousness of the offence

based primarily on the extent of actual harm done to the victim rather than the legal definition of crime: (b) the past criminal records of the accused; and (c) the assessment of the evidentiary strength and the probability of the conviction. In selective prosecution, special attention should be given to the career criminals, worst offenders, and to all those who commit crime against women and children. Today, the problem is that the prosecutors in India are overburdened with too many cases of widely varying degree of seriousness with too few assistants and inadequate financial resources. The result, however, has been the long delay in Courts with individual misery and serious hardships. With slight improvement in the management of prosecution, the prosecutors can play a significant role in the administration of criminal justice by prosecuting only those who should be prosecuted and releasing or directing the use of non-punitive methods of treatment of those whose cases would best be processed outside the Courts. Prosecution of serious offenders, recidivists, and career criminals should be given top priority, as they pose a serious threat not only to the public order but also undermine respect for our justice system.

In India, the police, and Courts and other correctional agencies tend to be isolated from each other as well as from other community groups such as schools, welfare agencies and human rights institutions. It appears that the administrators of police, Courts, prisons, and probation service tend to maintain their status quo. As agents and organs of the Government, the police and the Courts conform to traditional practices and often have relatively little latitude in which and how to operate. The primary goals of criminal justice system (that is, the prevention and control of crime and the protection of civil rights) can best be secured only through proper coordination between the different wings of criminal justice agencies. Regular meeting between interested member of the police, prosecutors, Courts, correctional institutions and community member need to be emphasized which would help to clarify the needs and problems of each wing and discuss the ways in which they could cooperate to make the justice system more effective to meet the challenges of the growing menace of crimes.

The police and the prosecution which are the components of the criminal justice delivery system have many challenges before them.

The police have to face the challenge of corrupt political control as well as declining credibility. The prosecuting agencies are blamed for their declining scales and dishonest practices in concocting and fabricating the evidence with police connivance. The Court system is faced with the problem of under trial prisoners and guaranteeing speedy trial to the man in the dock. Long delays in trials appear to have become a perennial problem. The present system is yet to come out of the British days and dovetail into the constitutional governance. There cannot be any panacea for all the problems. The ever increasing population is a bane for any reformation or progress in any system. The justice delivery system cannot isolate itself from the realities of society. Indian society is known for its fragmented social anthropology. Though unity in diversity is the motto, all could not be so rosy when it comes to facing the problem.

A concerted effort by all those who are concerned with the criminal justice delivery system including Legislature, Executive and Judiciary should evolve concrete procedures and solutions to face the challengers posed by the recidivists, career professionals, professional criminals, terrorists and serious violent offenders. An attempt to rope in the social groups and other institutions of society would come a long way in managing the material resources as well as non-material resources to tackle the problem. This would help in improving the efficiency of the criminal justice delivery system at least to an optimum level. But the silver lining in the dark cloud is the realization that shortcomings of every other component of the system can be kept to a minimum by an efficient functioning of the system itself. I would, therefore, conclude by quoting Justice Arthur T. Vanderbilt [The Challenge of Law Reforms (Princeton : Princeton University Press, 1955), pp 4-5]

> "...it is in the Courts and not in the Legislature, that our citizens primarily feel the keen, cutting edge of the law. If they have respect for the work of the Courts, their respect for law will service the shortcomings of every other branch of Government; but if they lose their respect for the work of the Courts, their respect for law and order will vanish with it to the great detriment of society.

Article 300A: Whether Compensation Still Required

Justice K.N. Goyal[*]

Historical Background

There has been considerable controversy on the question of compensation for acquisition of property, right from the time of deliberations in the Constituent Assembly. The Indian National Congress, even before we had wrested freedom from foreign bondage, had committed itself to extensive agrarian reforms in favour of the tiller of land. The programme had started in 1937 when provincial autonomy gave the Indian leaders a measure of governmental power. The Government of India Act of 1935 (Sec. 299) required compensation to be paid for any acquisition of property. This stood in the way of the proposed abolition of zamindaris and other like rights of intermediaries. The founding fathers accordingly tried to save their proposed legislation in that behalf by circumscribing the right to property itself, which was being guaranteed as a fundamental right, in several ways. First they laid down in clause (2) of Art. 31 that the adequacy of compensation provided for in any law will not be justicible. Secondly, by clause (4) of that article, they specificlally saved all Bills pending at the commencement of the Constitution in the Legislature of a State provided they were assented to by the President after being passed.

In spite of these provisions the affected Zamindars and Taluqedars did challenge, sometimes successfully, the laws enacted by State Legislatures for extinction of their estates. Apart from land reforms, the welfare State, besides continuing the war-time controls, also started regulating various other fields of economic activity. These laws too encroached on rights of property and of contract and were assailed in courts on various grounds including infringement of Arts 14, 19 and 31. The Government, which at that time held much more

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[*]*Retired Judge, Allahabad High Court, Former Chairman, U.P. State Law Commission.*

than two-thirds majority in each House of Parliament tried to repel all such attacks by getting Arts. 19 and 31 amended and new Arts. 31-A and 31-B and a new Schedule IX enacted (the First Amendment of 1951). These attempts however received a setback when the Supreme Court held that irrespective of any amendment the continued use of the very word "compensation" in clause (2) of Art. 31 implied the requirement to pay the just equivalent of the property acquired (for instance, Bela Banerjee, A.I.R. 1954 S.C. 170, Varjavelu Mudaliar, A.I.R. 1965 S.C. 1017).

The Supreme Court was however not quite consistent in its various rulings on the subject- see for instance, the Metal Corporation case, A.I.R. 1967 S.C. 637, the Shanti lal Mangaldas case, (1969) 1 S.C.C. 509 and the Bank Nationalisation case, (1970) 1 S.C.C. 248. The politicians started reviling the Judges for their status-quoist and over-protective approach towards property rights- a view which was not only shared but openly expressed even by some "progressive" Judges of the next generation in and out of Court. The fact that the American had in an earlier era (in Dred Scott v. Sandford, 1857) upheld the institution of slavery on the basis of property and contract rights and some of our courts had sometimes upheld the challenge of privileged classes to land reform laws came in handy to bolster their criticism. Belittling property rights became a popular pastime of leaders of almost all parties with the sole exception of the Swatantra Party founded by the avowed conservative Rajaji (Sri Rajagopalachari) which anyway was virtually a non-starter. The burden of political rhetoric was that defence of property rights meant support for the 'haves' against the 'have-nots', and was proof of an elitist class-bias of the Judges who came from the affluent sections of society.

Parliament was then persuaded by Mrs. Indira Gandhi to delete the pregnant word "compensation" altogether from Art.31 and to substitute it by a sterile word "amount" (the 25th Amendment). The only exception, which had been engrafted earlier by the Seventeenth Amendment, in the form of second proviso to Art.31-A(1), was in respect of self-cultivated land within ceiling limit. It was politically inexpedient to touch the farmers, hence that exception. A new Art.31-C

was also enacted which virtually withdrew the protection of Art.13 altogether from such laws as Parliament chose to declare to be directed to secure any of the directive principles laid down in Part IV. This was considered by a 13 Judge Full Court in Kesavananda Bharti, (1973) 4 SCC 225. The Judges, put on the defensive, started apologetically saying that the right to property was a weak right and did not pertain to the basic features of the Constitution: see, for instance, citations in Jilubhai v. State of Gujarat, (1995) 1 SCC (Supp.) 596 (paras 21, 22, 43) where such a view has been expressed.

When Mrs. Gandhi lost the 1977 elections and the Janata Party came to power, although it undid many of the constitutional changes made during the Emergency by the 42nd Amendment, yet so far as the right to property was concerned it tried to outshine her in an anti-property stance by proposing to delete Art.31 and also Art.19(1)(f) altogether. But when the implications of the proposed abolition of right to property began to sink in, the new rulers were forced (the 44th Amendment) to enact a new Art.300-A outside Part III, besides carving out an exception in Art.30 for protecting the property of minority educational institutions. Under the new Art.300-A, a limited protection was given to the effect that property may be acquired only "by authority of law". No restriction was thus placed as to what such law need provide; even to suggest as was provided in the repealed clause (2) of Art. 31, that deprivation must be for a public purpose. Nothing was said (in Article 300-A) either about "compensation" or about "amount" though the use of the words "the amount fixed by or determined under such law for the acquisition of such property" in the amendment of Art.30, simultaneously carried out (in the context of property of a minority institution) was implicit recognition of the need to provide for payment of such amount.

The position after the Forty-fourth Amendment:

The phraseology of this new Art.300-A, which is a copy of clause (1) of the repealed Art. 31 was thus comparable to that of Art. 21 ("according to procedure established by law") [1] and identical with that

[1] (in the context of deprivation of life or personal liberty)

of Art.265 ("by authority of law")[2] When Arts. 21 and 31 were adopted by the Constituent Assembly the phraseology of the American Constitution which inhibited deprivation of life, liberty or property of any person without 'due process of law' was deliberately avoided so that the ambit of judicial review in regard to such laws may not become too wide. "Due process of law" was however forcefully restored by judicial interpretation overruling the intention of the draftsmen. The Supreme Court in Maneka Gandhi; (1978)1SCC 248, held that as Art.14 required fairness, reasonableness and non-arbitrariness for all State action, hence the same were necessary requisites for a valid "law" within the meaning of Art.21. Will this interpretation extend to the word "law" used in Art.300-A as well? If so, is the concept of just equivalent or "compensation" for acquisition of property by the State indirectly brought back?

Art.14 and the right to property:

This would depend on the application of Art.14 to a 'law' contemplated by Art.300-A. But the learned Judges in Jilubhai, (1995) 1 SCC (Supp.) 596, have been pleased to observe that Art.14 is not part of the basic structure of the Constitution in the context of right to property (para 30 of SCC). It is respectfully submitted that the general trend of the judgment suggests that in making this observation their lordships probably meant to cover only those situations where the right to property was sought to be abridged bona fide in furtherance of the directive principles of the Constitution (see paras 51, 54, 55, 58, ibid) and not to abandon the sacred doctrine of equality in relation to the right to property generally. Right to equality is alluded to even in the Preamble, and it is on its bedrock that secularism has recently been held to be a basic feature of the Constitution: S.R. Bommai v. Union of India (1994) 3 S.C.C.1

The courts should not therefore hesitate to step in where the onslaught on a person's right to hold property is based on partisan and discriminatory considerations rather than on a genuine regard for the directive principles. In fact courts have always struck down executive exercise of statutory powers of land acquisition when the same has been found discriminatory and therefore mala fide: see for instance

[2] (in the context of power of taxation)

State of Punjab v. Gurdial Singh, A.I.R. 1980 S.C. 319. Will then a law authorizing such discriminatory onslaught be immune from challenge? The usual arguments in support of such laws are that mala fide cannot be imputed to the legislature, that the ulterior motive of the executive in moving such legislation cannot be transferred to the legislature, that where power is vested in a very high authority (namely the Government itself) the likelihood of abuse of power is reduced to the minimum, and so on. It is however equally well settled that a law is colorable which in appearance is competent but is not so in reality, in that it transgressed the constitutional limitations. If a law is patently unfair, unreasonable and discriminatory it is bad for violation of Art 14. A holding to that effect does not amount to imputing motives to the legislature. While applying the presumption of constitutionality to statutes the courts do take into consideration "matters of common knowledge, common report, the history of the times and all other facts existing at the time of legislation": Delhi Administration v. V.C. Shukla, AIR 1980 SC 1382 (Para 51). Of late the Supreme Court itself has been taking note of widespread abuse of discretionary powers vested in the highest authorities, namely Central Cabinet Ministers, whether it be in the matter of allotment of houses belonging to government, or of telephones or cooking gas connections, or petrol pump dealerships or writing off of public dues, in short, arbitrary distribution of all sorts of largesse,-something strongly deprecated in R.D. Shetty, AIR 1979 SC 1628. All these are pointers to the ever increasing permissiveness, of which the courts have to take notice even while interpreting the constitutional limitations on the exercise of legislative power.

Does property need protection at all?

The aforesaid provisions in Arts.30 (minority educational institutions) and 31-A(1) (second proviso) (farmers) stand as grudging admissions that property was after all not quite a dirty word in all contexts. At least in some spheres it did require protection. But are these two the only cases in which property needs to be protected from invasion by the politicians in power? Special provision was made in Art. 30 in respect of minority institutions because it was considered

necessary to assure the minorities that the majority community would not unjustly treat them. But it does not lead to the necessary inference that the property of an educational institution established and administered by persons belonging to the majority community (that is to say, the Hindus in most States, the Muslims in Jammu and Kashmir, the Sikhs in Punjab, the Christians in Nagaland, etc.) but who are out of favour with the political party for the time being in power of a State does not require similar protection. Can the property of such an institution be expropriated without paying anything or for a song?(In TMA Pai Foundations case (2002)8 SCC 481, the right of non-minorities to establish and administer educational institutions has been expressly recognized as a fundamental right). Or, for that matter, can the property of an institution devoted to some other noble public charity be so expropriated and the courts will helplessly acquiesce in it?

Courts cannot shut their eyes to the realities of political corruption while exercising their powers of judicial review of legislation. In our country the evil of corruption is no longer merely part of the rumour mill, and the mere fact that the wrong-doers in our country have gone unpunished does not establish their innocence. The Vohra Committee has officially documented the ugly face of politician- criminal nexus, connected with the role of black money in elections, which explains why no punishment is ever meted out to the corrupt among politicians and administrators. In this context let us visualize the situation where a business magnate refuses to oblige a politician in power, or joins or supports an opposition party or a dissident group. In a Parliamentary democracy the legislature is the handmaiden of the cabinet for so long as the cabinet commands its majority support. Can then the Ministers, miffed by the businessman's audacity, take away, through a law passed at their instance, even the factories or their appurtenant assets belonging to him for an illusory amount, and then justify the lawless law by taking shelter behind the character of the property being that of "means of production not worked or directly managed by their owners, especially the accumulation of masses of property of this kind in the hands of a relatively narrow class" or that it gives the owner "control over human beings" (the phrases of Mathew, J. quoted with approval by K.

Ramaswamy, J. in Jilubhai, (1995) 1 S.C.C. (Supp.)596), and hence not deserving of judicial protection?

Art. 39(b) and the ground realitites:

The blanket assumption – see for instance, State of Karnataka v. Raghunath Reddy, A.I.R.1978 S.C. 215: (1977)4 S.C.C. 471, Tinsukhia Electric Supply Company v. State of Assam, (1989)3 S.C.C. 709 and Jilubhai, (1995)1 S.C.C. (Supp.)596 that nationalisation and acquisition are necessarily steps in aid of the distribution of material resources of the community so "as best to subserve the common good," within the meaning of Art.39(b), needs to be tempered by a recognition of the ground realities. It is now universally accepted that many textile, sugar, electricity and other industrial undertakings which were originally nationalized on the ground of mismanagement by their owners have since turned sick or sicker because they have been treated by corrupt politicians and bureaucrats as their grazing grounds. Thousands of crores of rupees of depositors and taxpayers' hard-earned money, controlled by nationalized banks and other financial institutions, have been irrecoverably lost or been siphoned off to speculators (the "share scam) and political supporters of ministers (the "loan melas"). A succession of Ministers have been overstaffing all public sector undertakings in order to provide employment, - that is to say, jobs without the obligation to work, - to their kith and kin or prospective voters from their constituencies. The chairpersonship of hundreds of such undertakings is distributed as largesse for keeping those legislators happy who cannot be accommodated in even jumbo ministries with a view to earning their continued support in the House. The assets of the undertaking and the amenities and facilities attaching to the office are then misused or squandered, bringing a bad name to the public sector as a whole. The bureaucrats who connive with their political bosses in all these goings-on are often equal participants in the loot. It is because of these weaknesses that even zealous socialists in India and elsewhere have had to switch over to privatization. It is a different matter that the corrupt politicians aided by a pliant bureaucracy can make hay as much with the sum of nationalisation shining as with that of privatization and liberalization. That is of course not to suggest that the breed of honest and competent

administrators and politicians is extinct. Happily we still find numerous honourable exceptions.

Again, what about property belonging to a newspaper whose views are not liked by the government of the day? Will the motivated acquisition of property of such a newspaper not be violative of freedom of the press? The courts and the Press Council of India have been witness to the sustained attack on the Indian Express group by the Central Government during the Emergency and later, the attack on two newspapers in Uttar Pradesh by one political party (while in power in the State) and on one newspaper more lately by another political party (after going out of power). Can a political party coming to power be allowed to stifle dissent by taking away the property of such newspapers?

The Allahabad High Court some years back felt obliged to take suo motu notice of a sustained campaign of house grabbing and land grabbing under cover of rent control legislation (which in U.P. gives power of allotment of a house to any person even for private purposes) by the politicians belonging to parties in power against the law-abiding citizens having no political influence. Property, it has been said, was "man's first social security system, a hedge against hazards of life, such as sickness, old age, widowhood and orphanage" (Wallace Mendelson: Supreme Court Statecraft, 1987, Asian Books, p.230). For Thomas Jefferson, property was indispensable to liberty. As he saw it, the widespread ownership of farms saved Amercians from the misery and bitter class conflicts of the old World. The urban mobs of Paris, he thought, were in effect slaves because being propertyless they were dependent upon their "betters" (p.95, op.cit.). As Justice Brandies would say later, "the necessitous man is not free" (ibid). Justice Jaganmohan Reddy in his Asutosh Lecture (1978) on Liberty, Equality, Property and the Constitutiion has observed: "Take away the right (to property): All other rights will collapse and after that it is as good as writing off Part III from the Constitution and effacing Kesavananda Bharati's case, (1973)4 S.C.C. 225 qua Part III". He has argued for its recognition as a natural right even after the deletion of Arts. 19(1)(f) and 31. In Madan Mohan Pathak's case, (1979)2 S.C.C. 50, even "progressive" judges were obliged to resort to the right to property for protecting the trade unions' claim against the employer (L.I.C.).

Are non-fundamental constitutional rights weaker?

The assumption that a right falling outside Part III is necessarily a weaker right than one included in Part III, made by the Janata party while adopting the 44th Amendment seems to have influenced the learned Judges in *Jilubhai.* (1995)1 S C. C. (*Supp.*) 596. when they observed that the right to property under Art.3OO-A was *'dethroned* from Part III" (para 23) and was now *"only* a constitutional right" (para 30). Well, the inclusion of a right among fundamental rights does confer an added importance, in that you can directly approach the Supreme Court under Art.32 for its enforcement even without approaching the High Court. As against this, Art.359(1) provides that where a Proclamation of Emergency is in operation the President may declare that the right to move a court for the enforcement of any of the fundamental rights, except those conferred by Arts.20 and 21, shall remain suspended. No constitutional rights outside Part III can so suspended by an executive order even during the Proclamation of Emergency for instance, the rights of a government servant under Art.311 (2) or the security of tenure and other condition of service (corresponding to the Act of Settlement), -the bedrock of independence of judiciary and other important functionaries,-provided to a Judge of the Supreme Court or a High Court or to the Chief Election Commissioner or to the Comptroller and Auditor General of India or to Members of Public Service Commissions. Another handicap from which even the fundamental rights guaranteed by Arts. 14 and 19 suffer while other constitutional rights do not suffer is the provision in Art.31-C, under which the validity of a law giving effect to a directive principle cannot be assailed on the ground that it is inconsistent with the said rights. There is no such provision (excepting Art.360, Financial emergency, which has never yet been invoked) for suspension of any non-fundamental constitutional rights. It may therefore be respectfully submitted that constitutional rights outside Part III are not necessarily weaker or inferior rights than those conferred by that Part.

Interpretation by comparison :

The other assumption in the same judgment (Jilubhai, (1995) 1 S.C.C. (Supp.) 596.) that because specific provision was made about full market value in Art. 31-A for cultivated land within ceiling limit

and in Art. 30(1-A) for property of minority educational institutions therefore, the obligation to pay compensation in other cases was "by necessary implication obviated" (paras 52 and 53 of S.C.C.) is, also, with the utmost respect, open to question. As pointed out in Maxwell (12th edn. Page 61) the use of other provisions for purposes of construction must not be carried too far. There may be excellent reasons for not reading one section in the light of another (p.62, op cit). Whether Parliament while making this provision in Art. 300-A intended that compensation should be paid or not has to be determined on the basis of the language of the article itself in the context of constitutional limitations on exercise of legislative power generally, and not on the basis of the absence of express mention therein of something which Parliament (in exercise of its constituent powers) thought it politically expedient specially to provide by way of added reassurance to certain sections of the public in Arts. 30 and 31-A. It may be noted in this context that the deleted Art. 31 (2) had specifically laid down not only that "compensation" (later substituted by "amount") was to be paid but also that property can be acquired only for a public purpose. Surely no one can suggest that merely because mention of this requirement is omitted in Art. 300-A. the ministers can now order acquisition for their private purposes as well. In Jilubhai, (1995) I S.C.C. (Supp.) 596, (paras 48 and 52) it is accepted that the power of eminent domain can even now be exercised only for a public purpose. Again, despite deletion of Art. 31(5)(b) (ii), the continued existence of the power of deprivation in respect of property without payment of any amount, in exercise of the police power of the State, for purposes mentioned in that sub-clause (for instance, to pull down a building engulfed by fire, to destroy adulterated or insanitarily prepared foodstuffs) has also been expressly recognized in the same case (para 48 of SCC). Thus arguments based on comparison or omission are not always decisive.

The impact of Maneka Gandhi case:

In some earlier cases of acquisition of property, such as Manoel Francisco v. Assistant Collector, AIR 1984 Bom. 461 and State of Maharashtra v. Basanti Bai, (1986) 2 S.C.C.516: AIR 1986 S.C. 1466, notice was taken of the law expounded in Maneka Gandhi, (1978) 1 S.C.C. 248, which was a ruling on Art. 21. That article provides that

the life or liberty of a person may not be taken away except according to procedure established by law. The Constitution Bench in Maneka Gandhi, (1978) 1 S.C.C. 248, held that it was necessarily implied that the "law" should be right, just and fair, and should not be arbitrary, fanciful or oppressive. This followed from Art. 14 which strikes at all arbitrariness in State action. The principle of reasonableness was held to be an essential element of equality or non-arbitrariness. Maneka Gandhi, (1978)1 S.C.C. 248, has not been directly referred to in Jilubhai case (1995) 1 S.C.C. (Supp.) 596, but obliquely it has been alluded to towards the end when it was said that "the principle of unfairness of the procedure attracting Art. 21 does not apply to the acquisition or deprivation of property under Art.300-A giving effect to the directive principle" (para 58 of the report). This observation has to be qualified by the political ground realities mentioned above. Moreover, legislation for abolition of is estates, already separately protected by Arts. 31-A, 31-B and 31-C overriding Art.14.

It is indeed refreshing to find that their lordships have tried to clear the cobwebs in this field of law by distinguishing between different kinds of property, and by authoritatively pronouncing that at least property other than property in the means of production not worked or directly managed by the owner does need judicial protection. Their lordships have noted (para 50 of S.C.C. report) that "all modern Constitutions of democratic character provide payment of compensation as the condition to exercise the right of expropriation" and have also noted with approval the view expressed in Waman Rao, (1981) 2 SCC 362, that property accords status and that due to its lack man suffers from economic disadvantages and disabilities and social inequality leading to his servitude, that providing facilities and opportunities to hold property furthers the basic structure of egalitarian social order guaranteeing economic and social equality, that, in other words, it removes disabilities and inequalities, accords status, social and economic, and dignity of the person. They have however observed that in the context of history of Constitutional amendments relating to the right of property necessitated by the various decisions of the Supreme Court, it should follow that acquisition of the property by law made in furtherance of the directive principles of State policy does not

require payment of just compensation or indemnification to the owners. Their Lordships concluded (para 55 of the report) :

"Acquisition and payment of amount are part of the scheme and they cannot be dissected. However fixation of the amount or specification of the principles and the manner in which the amount is to be determined must be relevant to the fixation of amount. The amount determined need not bear reasonable relationship. In other words, it not illusory. The adequacy of the resultant amount cannot be questioned in a court of law. However, the validity of irrelevant principles are amenable to judicial scrutiny."

One cannot but respectfully agree with the overall approach of the learned judges, the more so in the context of the particular piece of legislation considered by them which was covered by Arts. 31-A, 31-B and 31-C. The wide observations either to the effect, or implying, that Art. 300-A conferred a weaker right than a fundamental right, that Art. 14 is not a basic feature of the Constitution in relation to property rights generally, and that nationalization and acquisition of means of production not worked by the owner were necessarily in pursuance of the objective of distribution of material resources for subserving the common good, were not really necessary for the decision of the case, and should be confined to the context of a law abolishing estates as was in issue.

Lump sum amount

Now, under old Art. 31(2) an "amount" payable to the owner by the State could be specified in the acquisition law. Even if a bunch of properties were to be acquired it was enough to specify a lump sum for the same. This, instead of specifying the principles for determination of the amount, is what was normally done, for two reasons. One, the Government knew beforehand the financial implications, and two, it was considered safer when challenged in the courts. It is therefore, likely that even after replacement of Art. 31 by Art. 300-A this may continue to be the legislative practice, and the holding in *Jilubhai*, (1995)1 S.C.C. (Supp.)596, that the relevance of the principles is "amenable to judicial scrutiny" may not provide any solace to the owners in whose case a fixed amount is specified for the property is so acquired. In this context the decision in *Doypack Systems v. Union of*

India (1988) 2 S.C.C., 299, requires to be considered. The facts were these. Certain textile undertakings were nationalized by a Presidential Ordinance, later replaced by an Act of Parliament. The definition of "textile undertaking" took in not only the mills proper but also assets "pertaining to" them. The company whose undertakings were so acquired was also owner of shares in two different companies belonging to the same business house. The question arose whether those shares also stood acquired as assets pertaining to the undertaking. In this connection the company's contention was that before the acquisition the Central Government had prepared a list of assets meant to be acquired and had assigned values to each asset separately, and their total was then shown as the "amount" in the statute. The company applied to the court that the Government be asked to produce various documents bearing on the question, including details of properties taken into consideration for the determination of amount under the statue. The contention on behalf of Government was that it was the language of the Ordinance or Act that had to be interpreted and if the words "pertaining to" did cover the shares as well, that was the end of the matter, and therefore there was no need to produce the documents, it was objected; that the documents were privileged, and privilege was accordingly sought for under Art. 74(2) of the Constitution. Both these objections were upheld by the court.

Privilege for secretariat notings :

On Art.74(2) it was held that as the documents and notings of the officials had led to the cabinet note, which in turn led to the cabinet decision, and the latter was the basis of the advice tendered to the President while promulgating the Ordinance, the documents and the notings also formed part of the advice. Cabinet papers were protected, from disclosure their Lordships held not by reason of their contents but because of the class to which they belonged. This view of the two judge Divicion Bench has now to give way to the nine Judge Constitution Bench decision in *S.R. Bommai, (1994) 3 SCC 1.* In Bommai, Justices Sawant and Kuldeep Singh in Paras 85 and 86 of the report (SCC) and Justices Jeewan Reddy and Agrawal in paras 320 to 324 have clearly held, with Justice Pandian's concurrence (para 2), that the object of Art. 74(2) was not to exclude any material or document from the courts but only to make the question whether President had followed the advice of

the Ministers or acted contrary thereto non-justiciable Justices Verma and Dayal, and Justice K. Ramaswamy, besides Justice Ahmadi (as his Lordship then was), have also held that Art. 74 (2) was no bar to the production of the material on which the ministerial advice was based (paras 48, 204 to 209 and 33).

Relevance of notings :

The other ground which prevailed with the learned Judges in *Doypack, (1988)2 SCC 299*, was that the documents were irrelevant because the Court had to look only at the language used by Parliament and not into the intentions of the officials who had prepared the draft legislation. In this context their lordships noted that in *Sita Ram Mills case, 1986 SCC (Supp.) 117*, it had transpired that a document which was sought to be relied on for a similar purpose, namely the Task Force Report, had not in fact formed the basis of the cabinet decision, which was contrary to what was contained in that report, vide para 40 of (1988) 2 SCC 299. Thus the notings and documents now sought to be produced may also not be true guides as to what decision the cabinet ultimately took. In other words such documents were of doubtful reliability.

Taking the last point first, it is respectfully submitted that the court cannot prejudge as to whether a document if produced would be reliable or not merely on the ground that in another case of another party in relation to a different statute another document sought to be relied on had been found to be an unreliable guide to the cabinet's intentions. Even the nature of the documents in the two cases was not quite similar; in the earlier case it was the report of a committee, while in the later one it was the documents and noting directly leading to the cabinet note. In any event, if the documents now sought had been allowed to be produced then it would always have been open to the court to satisfy itself whether the cabinet decision was really based on the same or was consistent with them.

So far as intention of Parliament was concerned there was no dispute about the meaning of the statute. Patently, whatever pertained or related to the undertaking was included in the acquisition. The dispute was only factual namely, whether the particular assets did or did not in fact pertain to the undertakings. For decision on such a

controversy their lordships had laid down certain criteria, namely, whether the assets in question were acquired from out of the funds of the undertaking or were held for the benefit of the undertaking, and so on. So the entire discussion as to whether the documents on the basis of which the cabinet advice was tendered to the President, which were sought to be produced, could control the meaning of the statute, was, it is respectfully submitted, beside the point. The documents had been sought to be brought on the record by way of circumstantial evidence for showing that even Government and its officers while preparing the draft legislation had accepted that the shares did not relate to the undertaking and therefore did not need to be valued while determining the "amount".

In the same context their Lordships observed (Para 67 of the report):

"The compensation provided in Sec.8 in not calculated as a total of the value of various individual assets. It is lump sum compensation. See in this connection the principles enunciated by this Court in *Khajamian Wakf v. State of Madras, (1970) 3SCC 894.* There it was held that even if it was assumed that no compensation was provided for a particular item the acquisition of the Inam is valid. In the instant case Sec.8 provides for compensation to be paid for the undertaking as whole and not separately for each of the interests of the company. Therefore, it cannot be held that no compensation was provided for the acquisition of the undertakings as a whole".

Now, the statute in Khajamian, (1970) 3 SCC 894, like that in Jilubhai, (1995) 1 SCC (Supp) 596, was one relating to abolition of estates, which was protected by Art.31-A. In Para 8 of that report (Khajamian), it was observed that the validity of the section was not challenged and all that was urged was that for some of the property included in the Inam, no compensation had been provided. It does not appear from the report on what basis such a contention was advanced when the compensation was provided for the acquisition of the Inam as a whole. In that context Art.31-A clearly barred the plea that there was contravention of Art.31 (2). The question in Doypack, (1988) 2 SCC 299, was quite different. Some evidence was sought to be produced for showing that a particular asset was in fact not the subject of acquisition.

If we take the above observations in Doypack, (1988) 2 SCC 299, to their logical conclusion it will be very easy for a dishonest Government to club four properties 'A', 'B','C' and 'D' in one acquisition law, and even after valuing all the four separately as an internal exercise, then totaling only values of A, B and C and showing that total as the lump sum "amount" to be paid for acquisition of the four properties. It can then be argued for the State, on the Doypack, (1988) 2 SCC 299, reasoning, that as lump sum compensation for the four properties had been provided in the statute, the question whether the value of the property 'D' had been deliberately excluded while arriving at the amount was irrelevant, and that Government cannot be asked to disclose that material, and of course no mala fide can be imputed to the Legislature.

Once it is accepted that the law authorizing deprivation of property, within the meaning of Art.300-A, must be reasonable and fair, and that although the court cannot minutely examine whether the amount provided in the statute was adequate in the sense of just equivalent or not, yet such amount must not be illusory or nil, then it follows that the veil of a statute clubbing several properties and providing lump sum amount therefor should be liable to be pierced by courts who should not abdicate their powers of judicial review by accepting out-dated pleas of privilege which may be raised for concealing inconvenient facts; the courts should rather insist on greater transparency in such governmental transactions relating to property and contract as have no bearing on national security or external relations. After all while it is no doubt a rule of construction that the plain language of a statute must be given effect to, it is also equally well settled that the court should construe a statute in such a manner that the construction results in its validity rather than its invalidity and for ensuring its validity even the words of the statute may have to be read down. If a law in fact provides for no or almost nil compensation for acquisition of one out of several units of property of a person, although it is so garbed as if it does provide for a fair amount for all the units, then the courts cannot stand idly by and the citizen cannot be denied justice against such "arbitrary, fanciful or oppressive" law, which would be "no law at all", applying the test laid down in Maneka Gandhi, (1978) 1 SCC 248 (Para 7 of the SCC report).

JUVENILE JUSTICE AND LAW; A CRITICAL APPRAISAL

Allah Raham[*]

A nation which is not concerned with the welfare of its children cannot look forward to a bright future[1]. Children are the natural resource of our country. They are country's future. Hope of tomorrow rests on them." Thus observed the Supreme Court in State of Rajasthan v. Om Prakash[2]. Nation's concern for its children has been adequately expressed in the Directive Principles of State Policy, contained in Part IV of the Constitution. Article 39 of the Constitution provides inter alia that the State shall, in particular, direct its policy towards securing :

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age of strength;

(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

It is noteworthy that the General Assembly of the United Nations adopted the Convention on the Rights of Child on 20th November, 1989. This Convention has prescribed a set of standards to be adhered to by all State Parties in securing the best interest of the Child. The Convention emphasizes social re-integration of Child victim, to the extent possible, without resorting to judicial procedure. The Government of India further demonstrated its commitment for its children by ratifying the convention on Rights of the Child on 11th December, 1992.

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[1] Munna v. State of U.P., AIR 1982 SC 806

[2] AIR 2002 SC 2235

In furtherance of the Constitutional mandate and International obligations the Parliament of India enacted the Juvenile Justice (Care and Protection of Children) Act, 2000, (New Act for short) whereby the Juvenile Justice Act, 1986 (Old Act for short) was repealed. The point to ponder is who is a Juvenile Delinquent? "Any act prohibited by law for children up to a prescribed age limit is juvenile delinquency and it follows, therefore, that a child found to have committed an act of juvenile delinquency by a court is a juvenile delinquent[3]". The new Act treats the juvenile not as a criminal but as a person in need of correctional treatment. The Old Act defined 'Delinquent Juvenile' as the one who has been found to have committed an offence. The New Act gives almost a similar definition of "Juvenile in conflict with Law" as a Juvenile who is alleged to have committed an offence. The New Act makes special provisions for trial of juvenile in conflict with Law. Stress is on the correctional aspect. The salient features of the new Act are:

(a) That it does not discriminate between a girl and boy. It defines a Juvenile of child as a person who has completed 18 years of age.

(b) The new Act has made provisions of two statutory bodies. For juveniles in conflict with law, Juvenile Justice Board has been provided (Section 4 of the new Act). Provision of Child Welfare Committees has been made for children in need of care and protection (Section 29 of the New Act)

(c) Sub-clause (c) of Clause (1) of Section 15 of the new Act makes provision for performance of community service by Juvenile in Conflict with law.

(d) There is an emphasis on making rules to ensure effective linkages between various governmental, non-governmental, corporate and other community agencies for facilitating the rehabilitation and social reintegration of the Child (Section 45)

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[3] Ahmad Siddique : Criminology Problems and Perspective, Third Edition : Eastern Book Company (1993) 205

(e) Provisions for adoption, foster care and sponsorship have also been made in the new Act (Sections 41 to 43)

(f) Under Section 44 of the New Act State Government may make rules for the establishment or recognition of after care organizations and the functions that may be performed by them.

For the present we shall analyze the functional aspects of a few provision of the New Act.

There is no doubt that the new Act has been enacted with a laudable purpose. The Act cannot achieve its desired purpose and objective unless the provisions of the new Act are implemented in their letter and spirit. Implementation of the new Act depends much on the State. We are constrained to note that in Uttar Pradesh the implementation of the Act is still incomplete. Much is still to be done. Even Statutory bodies have not been constituted by the State. This aspect of the matter came up for consideration before the Allahabad High Court in Sant Das alias Shiv Mohan Singh v. State of U.P[4] The question for consideration before the High Court was whether the powers of Juvenile Courts could be exercised by the District and Sessions Judges under Section 6(2) of the Old Act. It was submitted before the High Court that the State Government has issued direction in letter No. 1297/60-1-98-1/16(2)/97 to all District Magistrates of U.P. authorizing them to get the powers of Section 6(2) of the Act exercised by the concerned District and Sessions Judges and the said authorization was issued by virtue of powers conferred on State Government by Section 66 of the Old Act. The High Court found that the said "...letter cannot be said a delegation or direction. It is simply a letter issued by Secretary, Mahila and Bal Vikas Anubhag-I to all District Magistrates of Uttar Pradesh that in the absence of constitution of Board they may get the powers of Board exercised by concerned District and Sessions Judges. The letter was not addressed either to the Sessions Judge or to the Registrar of this Court. It cannot be interpreted as delegation of the power conferred on the State Government. Moreover, above letter was also not issued with the concurrence of the High Court and therefore, is not applicable to District and Sessions

[4] 2002 JIC 699 (Allahabad)

Judges. Moreover, it also does not confer any power of the Board upon District and Sessions Judge. It is simply a direction to the District Magistrates and not more than it". It is thus clear that State Government had not constituted Juvenile Welfare Board under Section 4 of the Old Act. A corresponding body namely Juvenile Justice Board has also not been constituted under Section 4 of the New Act. An observation to this effect was made in Sant Das case (Supra) by the High Court. The Court observed that it was not disputed by the Government Advocate that Juvenile Justice Board has not been constituted in any of the Districts of Uttar Pradesh.

In the absence of Juvenile Justice Board problems are being faced in disposal of the bail applications of Juvenile in Conflict with Law. Grant of Bail to a Juvenile in Conflict with Law is the rule while rejection of the same is an exception. Section 12 of the New Act has made three stipulations when bail can be refused to a juvenile in conflict with law. A juvenile shall not be released of bail:

1. If there are reasonable grounds for believing that the release is likely to bring him into association with any known criminal or
2. Expose him to moral, physical or psychological danger or
3. That his release would defeat the ends of justice.

While disposing off a bail application of a juvenile the court must record a finding on the above aspects if it is of the views that bail is to be refused to the juvenile. Cogent reasons should be given for refusing bail to the juvenile on any of the grounds mentioned above.

The new Act contains provisions of appeal against any order made by a competent authority under the Act. Section 52 of the New Act provides that any person aggrieved by order made by a Competent Authority under this Act may, within 30 days from the date of such orders prefer an appeal to the Court of Session. However, no appeal shall lie from any order of acquittal made by the Juvenile Justice Board in respect of a Juvenile, alleged to have committed an offence or by an order given by a committee in respect of a finding that a person is not a neglected juvenile. An order of competent authority declaring a person juvenile or otherwise is appealabad. Similarly, an order refusing bail to a juvenile under Section 12 of the New Act is also appealable. As discussed above, Juvenile Justice Boards have not been constituted in

U.P. The question is where is the competent authority? The matter came up for consideration before the Allahabad High Court in Mohd. Amir v. State of U.P[5] The High Court formulated the following point for its consideration :

> "...in the absence of creation of Juvenile Justice Board, the question is as to who should consider the bail application and record a finding that the applicants are "Juvenile In Conflict with Law" and whether the application can be entertained directly by the High Court".

The High Court routed the solution through Clause (1) of Section 4 of the Cr. P.C. which lays down as follows :

"All offences under the Indian Penal Code (45 of 1860) shall be investigated, enquired into, tried and otherwise dealt with according to the provisions hereinafter contained."

The High Court opined that till the Board is constituted under Section 4 of the New Act bail application of a juvenile can be entertained and decided in accordance with the above provisions of the Code. Finding a solution to the problem the judge held that in the absence of the constitution of the Board, the Juveniles may move application for bail before the Magistrate having Jurisdiction under Section 437 of the Cr.P.C. and in case the same is rejected they may move application for bail under Section 439 of the Cr.P.C. before the Sessions Judge and also before the High Court. This view has been followed in the case of Sant Das (Supra).

As always, a judge has found a solution of the problem. But the basic question is still to be answered. A juvenile whose bail application has been rejected cannot avail of the remedy of appeal under Section 52 of the New Act. Can a Magistrate exercising his power of grant of bail under Section 437 of the Cr.P.C. be termed as 'competent authority' under section 52 of the New Act? The answer may be in the negative because 'competent authority' mentioned under Section 52 of the New Act has not been constituted under Section 4 of the Act. Non-constitution of the Juvenile Justice Board has brought the trial of the Juveniles to a halt. Its effect is that juveniles who have been refused bail will remain detained in observation homes or special homes

[5] 2002 (2) JIC 317 (All.)

waiting for their trial to commence. This may result in detention of the juvenile in these homes for longer periods.

Thus, inaction on the part of the State will add to the misery of the Juveniles. They will be detained in observation homes or special homes for long duration's because the State has not constituted Juvenile Justice Boards. It is, therefore, expected that the State shall discharge its statutory obligations without further delay. Unless these statutory bodies are constituted the provisions of New Act cannot be implemented in their letter and sprit.

LIMITATION IN THE CODE OF CRIMINAL PROCEDURE

- Azizur Rahman[*]

Limitations are necessary for a disciplined and dignified life. So is the limitation necessary to regulate prosecution in dignified manner and not to harass opposite party. Sections 468 to 473 of the Code of Criminal Procedure 1973, deal with law of Limitation.

Sec. 468 Cr.P.C. bars to take cognizance after lapsed of the period of limitation. Sec. 468 reads as thus: -

> "Bar to taking cognizance after lapse of the period of limitation, - (1) Except as otherwise provided elsewhere in this Code, no Court shall take cognizance of an offence of the category specified in sub-section (2) after the expiry of the period of limitation.
>
> (2) The period of limitation shall be-
>
> (a) six months, if the offence is punishable with fine only;
>
> (b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;
>
> (c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.
>
> (3) For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with more severe punishment or, as the case may be, the most severe punishment.)"

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[*] HJS, District & Sessions Judge, Baghpat.

There are various Acts which provide absolute bar. In Sec. 142(b) of Negotiable Instrument Act, limitation to file complaint u/s. 138 of the said Act is one month and it cannot be extended by an agreement between the parties or by representation of the opposite party or by showing sufficient cause as held in km. Mamta Gautam v. State, 2000(2) JTC 391. Similarly, U/s. 20 of Contempt of Courts Act, 1971, proceedings in criminal contempt could not be taken after expiry of one year from the date of alleged contempt as held in K.L. Sharma v. K.G. Rastogi, 1996 AWC 985, but Sec. 468 Cr.P.C. is not absolute bar to prosecution.

Extension of period of limitation is permissible under the Code. Sec. 473 reads as thus: -

> "Notwithstanding anything contained in the foregoing provisions of this Chapter, any Court may take cognizance of an offence after the expiry of the period of limitation if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interest of justice."

Sec. 5 of the Limitation Act, 1963 is analogous to the said section. It too, deals with extension of period of limitation. It is as follows: -

> "Any appeal or any application, other than an application under any of the provisions of O. XXI of the Code of Civil Procedure, 1908 may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.
>
> **Explanation:** The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section".

Section 473 Cr.P.C. somewhat similar to Sec. 5 of the Limitation Act, 1963. To seek condonation of delay an application explaining the delay should be filed before the Court. In Prakash Chand Sharma v. Kaushal Kishore, 1980 A.Cr. R. 176, it is held that it was

necessary to file an application for condonation of delay, but in Dr. Anil Kumar Agarwal v. State of U.P., 1993 A.C.C. 233 our Hon'ble Court observed that the court may entertain an oral prayer too.

Sec. 473 Cr.P.C. explains the period of limitation in two parts. The first part contained non-obstante and gross overriding effect to that section over Sec. 468 to 472.

The Second part of Sec. 473 Cr.P.C. has two limbs. The first limb confers power on every competent court to take cognizance of an offence after the period of limitation if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained. This is a discretionary power. It is desirable that the Court should exercise discretion judiciously and not arbitrarily. It must conform that the law must be the same for all, guided by law of the land and based on judicial norms, justice and equity.

The second limb of the said part empowers a court to take cognizance of an offence if it is satisfied on the facts and in the circumstances of the case that it is necessary so to do in the interest of justice. It is true that expression "in the interest of justice" in Sec. 473 Cr.P.C. as held in Arun Vyas v. Anita Vyas, 1999 (2) A.C.C. 247 cannot be interpreted to mean in the interest of prosecution. What the Court has to see is 'interest of justice' or to do proper and adequate justice avoiding technicalities. The interest of justice demands that the Court should protect the oppressed and punish the oppressor/offender.

In Vanka Radha Manohare V.V.V. Reddy, 1993 A.C.C. 505 Apex Court held that the Court has to take note of the nature of the offence, the class to which the victim belongs including the background of the victim. To add to it, it is desirable that the Court may also take note of nature of offence, number of accused and witness and their status. The period of offence is also a relevant factor as the delay makes the evidence weaker and weaker because of lapse of memory of the person concerned.

Hon'ble Supreme Court in Vanka Radha's case (supra) has held that while considering matrimonial offence nd grievance of a lady of torture, cruelty and inhuman treatment, by the husband or relatives of the husband, the interest of justice requires a deeper examination of

such grievance, instead of applying the rule of limitation. It is further held that it is only as a last resort that a wife openly comes before a Court to unfold and relates the day to day torture and cruelty faced by her, inside the house, which many of such victims do not take to be made public. Thus while, considering an offence U/s. 498A IPC in the light of Sec. 473 Cr.P.C., it was held that the bar U/s. 468 Cr.P.C. shall be ignored and has held that prosecution was in the interest of justice. To ignore may also mean waive the bar in such or similar acts of torture and atrocities.

The question whether or not the prosecution is expedient in the interest of justice must be determined with reference to facts and circumstances of each case and no hard and fast rule can be laid down in this respect. It has been made clear that where the prosecution directed under that section is inexpedient, il-advised and calculated to bring the administration of justice into contempt or disrepute, the order for prosecution is liable to be set aside.

"Sufficient cause" is much the same from what is shown in Limitation Act. In Surendra Kumar V. Ashok Kumar, 1997(1) A.C.C. 818, our Hon'ble High Court held that this is an application for condonation of delay in filing the revision. Condonation of delay is sought on the ground that when the applicant was coming to Allahabad his pocket was picked and he had no money. He had to go back to Moradabad and could not come to Allahabad till 22.2.89 due to heavy rush of Kumbh Mela and it was no intentional default on his part. The Hon'ble Court held that the memo of revision was got prepared on 24.1.89 and it was submitted for reposting on 15.2.1989 and was filed on 23.2.89. In the circumstances the allegations that revisionist's pocket was picked on account of which he could not file the revision in time, do not appear to be correct.

In Majid V. Munna, 1997 (1) A.C.C. 819 the condonation of delay for filing appeal against acquittal was moved. The condonation of delay was sought on the ground that the local counsel advised the revisionist to wait till D.G.C. (Criminal), Moradabad or the Government Advocate, who conducted the trial, moves the State Government for permission to file an appeal against the judgment and order of acquittal. The revisionist remained in bonafide belief that the

State Government must be doing the needful. He was also advised by local counsel that complainant has no legal right to file any appeal or revision. The revisionist has no option but to wait the decision of State Government but since no result was forth coming he consulted the lawyer at Allahabad. He was also short of fund, on account of which he could not file revision in time. The Hon'ble Court held that the delay in filing revision has not been properly explained and the application was rejected.

In B.R. Negendra Gupta and another v. State of Karnataka; 1998 (1) A.C.C. 33 has impliedly dealt with the "stage" when condonation of delay has to be invoked. It is held that there is absolute bar U/s. 468 Cr.P.C. to the maintainability of the prosecution if this time limit is over-stepped. The only exception to this rule would be of continuing offences, which are, covered U/s. 472 Cr.P.C. but present offence cannot be termed as a continuing offence. It is further held that it is well settled law that the ground for extension of the period of limitation U/s. 473 Cr.P.C. must be canvassed before the trial Court when proceeding is instituted, the Csourt should be satisfied that the bar of limitation cannot be waived and an order to that effect will have to be passed extending the period of limitation. Such a procedure has not been followed before taking cognizance and therefore the prosecution was barred by time and the proceeding was quashed.

A natural question shall arise as to when a petition has been barred by time can it be initiated again? This question was replied in Ramesh Chandra v. State, 1977 A.C.C. 159. It has been held that it is made clear that this order quashing the proceedings against the two applicants would not preclude the Magistrate from taking cognizance of the offence afresh in accordance with law. Similarly in Roshanlal v. State, 1977 A.C.C. 306 also this view was taken.

Of course, it is true and natural justice requires that a person shall be heard before he is condemned or he is deprived of the right accrued to. Our Hon'ble Court in Siya Ram v. State, 1985 Cr. Cases 27 (Alld.) held that although there is no provision in Chapter XXXVI of Cr.P.C. requiring a notice to the accused or hear him at the time of condonation of delay but the natural justice demands that he should be heard before passing an order in that regard because such an order is

bound to affect the valuable right which accrues to the accused and which cannot be allowed to be taken away lightly. As such, the accused is to be heard when an application U/s. 473 Cr.P.C. is moved by the prosecution before cognizance is taken.

In State of Maharashtra v. Shared Chandra Vinayak Dongre and others, 1995 A.C.C. 25, our Supreme Court held that the delay if any, for launching the prosecution could not have been condoned without notice to the respondents and behind their back and without recording any reason for condonation of delay. This view was also taken into consideration in Pravin Chaudhari v. State, (HC-LB); 1998 (2) A.C.C. 454.

Similar is the situation with the complainant, if his right is to be tripped and nipped into the bud; it is necessary for the court to provide an opportunity to explain before an extreme step is taken. This view finds support in Roshan's case (supra). The Hon'ble Court has given an instance of a time barred appeal. Hon'ble court held that if an appeal is filed beyond time by an appellant who bonafide believes that it is within time. Subsequently, if it is ultimately decided by the court that the appeal is barred by time, I fail to see why the appellant should be debarred from taking advantage of Section 5 of Limitation Act. Whether the Court in such circumstances will consider the grounds to be sufficient or will not be a question of facts, which will be decided by the court concerned, but I do not think that if once an appellant has filed an appeal beyond time, he would be debarred from taking advantage of Section 5 of Limitation Act. Similar is the situation with Section 473 of the Code.

To conclude, bar of limitation in prosecution of the offences can be condoned on showing sufficient cause of such delay. The Court has ample power to even ignore or waive the provision in the interest of justice, in cases of atrocities or torture on woman and other downtrodden oppressed. The bar may also be ignored relating to offences against public tranquility. Similarly it may be used as sharp cutting weapon to cut down rising number of frivolous and vexatious complaints and prosecutions.

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AFFIRMATIVE ACTION AND RESERVATION POLICY IN INDIA

Minakshi Sinha[1]

INTRODUCTION: Due to the historic phenomenon of the erection of artificial barriers against minorities, justice requires the implementation of programs (designated as affirmative action) to achieve equality object, which may be viewed as being of a remedial nature.[2] Broadly speaking, the notion of equality represents two ideas, numerical (or literal or formal) equality and proportional equality. According to numerical equality each individual is to receive a numerically identical amount of benefits being distributed or the burdens imposed in the public sector.

The principle of proportional equality means that all will receive the same consideration in the distributional decision but that the numerical amounts distributed may differ. It demands a differential and separate treatment to those who are unequal. Unequal and separate and differential treatment would necessarily require an identification system for the purpose of deciding who are unequal and why they are unequal. The principle of proportional equality would involve an appeal to some 'reason' or 'criterion' justifying differential treatment. These 'criterion' or 'reasons' would have to be derived from the social milieu and the historical factors creating socio-economic inequalities, and a law which seeks to bridge the gap between equals and unequal would have to be viewed with approval by the courts as designed to achieve equality for all and this may be called affirmative action.

DEFINITION: The American Association of University Professors explained the concept of affirmative action in these words in 1973:

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[2] See: Robert F. Dorian, "Affirmative Action Under Attack".

"What is sought in the idea of affirmative action is essentially the revision of standards and practices to assure that institutions are in fact drawing from the largest marketplace of human resources in staffing their faculties and a critical review of appointment and advancement criteria to ensure that they do not inadvertently foreclose consideration of the best qualified persons by untested presuppositions which operate to exclude women and minorities".

Fair Employment (Northern Ireland) Act 1989 Section 1.3.1 define affirmative action –

"This is a mechanism for change. The term refers to action defined to secure fair participation in employment by members of the Protestant or the Roman Catholic community by means including-

-The adoption of practices encouraging such participation, and

-The modification or abandonment of practices that have or may have the effect of restricting or discouraging such participation".

The idea of affirmative action has always been conceptually difficult. It does not openly state that there has been overt discrimination in the past. It does not necessarily assume that minorities are grossly under-represented in almost every occupation above those involving the least skilled persons. Affirmative action is designed to counter the negative action that brought about the exclusion of millions of people because of their race or sex. Affirmative action does not say that unqualified persons must be hired but suggests that obviously many qualified persons have been excluded from suitable positions because of a negative attitude towards them by those who do the hiring. The idea behind affirmative action is to abolish unequal treatment and ensure equality.

ORIGIN OF AFFIRMATIVE ACTION: Affirmative action in the USA was born as a result of the Civil Rights Act of 1964. Federal agencies tried to make it clear that employers should reach out to minorities by "affirmative action". Their mandate was to bring the

number of minorities in their work force more or less up to the percent of minorities in the local community.[3]

An Executive Order 11246 was issued by President Johnson which required the following two things:

(1) non-discrimination or "the elimination of all existing discriminatory conditions whether purposeful or inadvertent" and

(2) "Affirmative action", which requires "the employer to make additional efforts to recruit, employ and promote qualified members or groups formerly excluded".

Not only in USA but also even in India racial discrimination has been a very great problem for a long time. Incidence of violence against Untouchable communities including burning groups of Untouchables[4] to death, killings, raping their women or destroying their localities/villages, have been very common in India for a long time.

Between 1965 and 1976, over 40,000 atrocities against untouchables were reported. From 1973 to 1977 the number of incidents of reported violence rose from around 6,200 to 9,000 each year. Most of the cases regarding atrocities against untouchables are hushed up at the place of occurrence, and a very little concern is shown by the police even after it is reported to them.[5]

With the passage of time Indian leaders felt it necessary to abolish untouchability and bring untouchables on equal footing with the higher classes in society. Gandhi said that these so called untouchables are human beings like other groups of society; they have the same blood as others, and questioned why then these people are regarded as untouchable? He started calling them 'Harijan' meaning people of God. Others joined Gandhi's movement against

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[3] See: Robert F Dorian; "Affirmative Action Under Attack" pp – 14-23

[4] In Ancient India people belonging to scheduled caste were presumed to be untouchables means people of higher caste did not want to touch them. Now this has been abolished.

[5] See: Abdulrahim P Bijapur "Essays on International Human Rights" pp-130-139

untouchability. Thus the idea of inequality sanctioned by Hindu scriptures and Gandhi's crusades for common brotherhood on behalf of untouchables have both been parts of Hindu tradition. With the intention to stop this racial discrimination, affirmative action has been started in India.

The first systematic attempt at the welfare of the 'depressed classes' at the all India level was made with the introduction of Montesque Chelmsford Reforms in 1919, when separate representation on a number of public bodies was given to members of these classes. The provinces and princely states were quite fast not only in catching up with the Center but also in overtaking it in the sphere of reservation. Then in 1921, acting on a resolution adopted by the Legislative council, the Madras Government took steps for higher representation of non-Brahmins in the government services. In 1918 Maharaja of Mysore appointed the L.C.Miller Committee to suggest measures for adequate representation of non-Brahmins in government services and three years hence, the state government began reserving jobs for the 'depressed classes'. The process which began during British rule gained momentum after independence[6] and constitution makers of India decided to abolish these incidences of violence against Untouchables by taking affirmative action.

Article 14 of the constitution of India guarantees "right to equality" to all citizens. But unequal or backward[7] people can be treated as a class in themselves having rational relations with the object of equality seeking to be achieved. Policy of compensatory discrimination is being adopted as an equalizer to those who were made too weak to compete with the advanced sections of the society in the race of life. Not only this but Article 16(4) and 15(4) have further been aided in the Constitution of India as a protective clause to take

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[6] See: P. Tharyan: "Reservation; Raw over the limit" The Pioneer (newspaper) dt. 18.11.1997

[7] Backward is a word used for persons who belong to such caste, place or family where they cannot get proper opportunity for development. They are not aware about advance society. With the intention to bring them on equal footing with advanced groups of society they are given preferential treatment in jobs, education and training programme.

affirmative action by differentiating backward class as a class in themselves having rational relation with the object of proportiona representation of a backward class in society.

Thus the Constitution of India secures political equality to al citizens by providing special privileges to the politically powerles groups in the legislative bodies such as the Scheduled Castes Scheduled Tribes. The provisions set forth a programme for th reconstruction and transformation of Indian society with a firm commitment to raise the sunken status of the pathetically neglected an disadvantaged sections of society.

TYPES OF AFFIRMATIVE ACTION: Affirmative action can be c two types.

POSITIVE ACTION: Positive action means to adopt speci scheme to help backward persons to come to the equal footing wi advanced group of society as scholarships for education, free educatio self-employment et.

RESERVATION POLICY: Under this scheme certain numbers seats have been reserved on which only backward class of people cou be appointed. If they are not available then candidate who belongs advanced group of society cannot be appointed on that reserved seats.

POSITIVE ACTION: Article 15(4) of the Indian Constituti provides that the State may make:

"Any special provision for the advancement of any socially a educationally backward classes of citizen or for the Scheduled Cas and the Scheduled Tribes."

Government in India at the Central and State levels introduc special preferential policies in providing education to the students backward classes by giving them relaxation in age, merit, marks a exemption from payment of tuition fee, application fee (when th apply for job) etc. under the above mentioned Article 15(4) of Constitution of India and Article 46 of the Constitution of India wh reads:

"The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes.... And protect them from social injustice and all forms of exploitation".

Many special schools were established for Scheduled Castes to meet their needs, which led to a gradual increase in their literacy rate, enrolment, and coefficient in the proportion of their representation.

At the outset it can be said that the scheme has benefited a large section of the backward class of peoples in society. Besides this practically every applicant from Scheduled Castes gets a scholarship. Statistics show that the total scholarship for Scheduled Castes and Scheduled Tribes has risen from 731 in 1948 to 37,372 in 1958, and from 156,834 in 1968 to 350,000 in 1975. Consequently, expenditures rose from Rs.500,000 to Rs.136,000,000.[8]

But in spite of the expenses by the Government on different policies for the development of backward classes of people it is observed that they are still not equally represented in jobs, educational institutions etc. Many empirical studies that were commissioned by the Indian Council of Social Science Research (ICSSR) to find out the extent to which these policies have worked and have been utilized by the Untouchables, shed light on these problems. Suma Chitins, in her survey study of Maharashtra, has severely criticized the post-matric scholarships. She has shown that scholarships are not optimally and equitably used and as a result are crating new inequalities. She presents evidence to show how the politically active Mahars caste, which constitutes 35.1 percent of the Scheduled Castes population in the State, is successful in getting/availing 85.8 percent of the total scholarships disbursed in the state. In contrast, the Mangs, another untouchable caste, constituting 32.6 percent of the scheduled castes population account for 2.2 percent of the total number of scholarship's.[9]

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[8] The Times News Paper, dt. 1.7.1990

[9] See : The Pioneer dt 13.9.1900, Lucknow India.

Many of the reserved seats in medical and engineering colleges were not filled. One report regarding the student constitution of 22 medical colleges in 1975-76 shows that only 6.8% of the students belonged to the scheduled castes community.

These ICSSR studies have suggested that the government should try to identify these classes which are not being benefited from educational schemes, and all efforts must be made to motivate them to claim their due share in the re-distribution of resources. Education is free as well as compulsory. Despite it being free, it involves some expenses like books, stationary etc., which are beyond the means of many Scheduled Caste parents who live in abject poverty. Moreover such parents withdraw their children from schools once they reach the age when they can be of use in economic activity of the family.

They are not able to avail of the facilities provided by Government to them. They are still presumed to be an underprivileged section of society. Under such conditions, only the children of the well-off section of Scheduled Caste continue their education. Only certain classes of Scheduled Castes are benefited by the special policies.

Just policies are not good enough. The Government of India should think on the lines of how these policies can be practically fruitful to backward classes. The reason may be that Article 15(4) of the Constitution of India does not say anything about how to decide as to who are socially and educationally backward? First of all there should be legislative criteria as to decide who are really backward people. Only then the policies should be implemented so that preference can be given to those who really deserve it.

It can be analyzed that poverty which is the ultimate result of inequalities and which is the immediate effect of backwardness has to be eradicated by free medical aid, free elementary education, scholarships for higher education and other financial support, free housing, self-employment and settlement schemes, effective implementation of land reforms, strict and impartial operation of the law-enforcing machinery, industrialization, construction of roads, bridges, culverts, canals, markets, introduction of transport, free supply

of water, electricity and other ameliorative measures particularly in areas densely populated by backward classes of citizens.

RESERVATION: Not only positive action, but another media of affirmative action, called reservation of seats in employment for backward classes has also been guaranteed by the Constitution of India.

(a) CONSTITUTIONAL POSITION: Article 16(1) of the Constitution of India guarantees equality of opportunity in matters of public employment[10] and with the aim to benefit an unequally represented group of society, Article 16(4) of the same Constitution provides:

"Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the State is not adequately represented in the services under the State".

Under Article 16(4) reservation of seats in favour of backward classes of citizens has clearly been guaranteed. But the intention of constituent assembly in India is to impose liability on government to make a proper survey and find out who deserves reservation because of their inadequate representation.

In addition to Article 16(1) a more specific provision is made in Article 335 of the Constitution of India for making appointment to the various services from the members of Scheduled Castes and Scheduled Tribes. This Article reads as follows:

"The claims of the members of the Scheduled Castes and Scheduled Tribes shall be taken into consideration consistently with the maintenance of efficiency of administration in the making of appointments to services and posts in connection with the affairs of the Union or of a State".

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[10] There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Article 16 Constitution of India.

(b) **PERCENTAGE OF SEATS:** The central government has provided reservations in Government employment for Scheduled Castes since 1943. In 1947, it reserved 12.5 per cent of posts (revised to 15 percent in 1970) of all the posts recruited directly by an open competitive examination on an all India basis for them. The Government (India) also reserved 16.66 percent of posts which are filled up in other ways than by open competition for them. The reservation percentage is in proportion to the population of the Scheduled Castes. In 1970, probably as a result of the assertiveness of scheduled castes legislators in Parliament, the Government extended its scheme of reservation for jobs to other public sector undertakings, such as public sector industry and nationalized banks (because banks were nationalized only in 1969). Similarly, all State Governments introduced reservation schemes for Scheduled Castes in civil services. But the range of reservation at state level differs from state to state – it ranges between 5 to 25 percent.

While it is true that the law does not prescribe for any reservations in private sector organizations, there has been a continuous pressure on the private sector from political parties, Trade Unions, Government Officials, civic bodies, social organizations and individuals. As a result, some reservations are made available to Scheduled Castes in certain jobs in private sector also.

All these specific measures have led to the gradual increase of the scheduled castes members in government jobs. The 1979-80 report of the Commissioner for Scheduled Castes and Scheduled Tribes provides the following data.[11]

From 1947 to 1976, their share rose from 0.71 percent to 4.75 percent in Class 1 jobs; from 2.01 percent to 7.37 percent in Class II jobs, and from 7.03 percent to 12.35 percent in Class III jobs (like peon, attendants, sweepers, etc.). These statistics show, contrary to the popular misconception, that the share of Scheduled Castes in higher jobs does not correspond with the percentage of their population. The main reason for this poor result is that a large number of reserved posts

[11] Under Article 338 of the Constitution of India a "special watchdog" agency, in the form of an office of the commissioner has been established to investigate the working of all the schemes of preferential policies.

are not filled – on the pretext that the qualified candidates are not found among the Scheduled Castes. Data in 1979[12] indicated that up to 4 percent of these reserved jobs were kept unfilled, seemingly due to insufficient applications coming from Scheduled Caste and Scheduled Tribe classes. This is no doubt true in the case of certain technical jobs, but cannot be said to be a generally prevailing situation in the case of all other jobs. The figure available with the Government-run Employment Exchanges of the eligible Scheduled Caste candidates (seeking jobs) contradicts this fact. The 1968-69 report of the Commissioner for Scheduled Castes and Scheduled Tribes points out that there were enough qualified persons. Moreover, the analysis shows that there has been disparity between the announced reservations and the actual reservations.

(c) CASTE AS A BASIS OF RESERVATION: The Constitutional authorization for reservation of seats for backward classes created a lot of confusion and conflict leading to court cases, appointment of commissions, public discussion to find an answer to the question: "who are the backward classes in India"? The litigation in the area of 'reservation' in university admissions and Government services has been the most intense and caused social tensions and political conflicts.

In Kathi Rani Rawat v. State of Saurashtra,[13] Patanjali Shashtri CJ said that discrimination involves an element of unfavourable bias against others on the grounds only of caste; religion etc. and such discrimination will incur condemnation whenever such unfavourable bias is disclosed.

Apparently, the compensatory discrimination in favour of backward classes is not tainted with unfavourable bias nor is it discrimination only on grounds of caste, religion or race. A valid compensatory discrimination is based on social, economic, or educational backwardness of certain groups. It is a discrimination in favour of certain groups marked out by multiple criteria of backwardness such as caste, religion, poverty, occupation and so on.

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[12] See: Abdul Rahim P. Vijapur in the "International Essays on Human Rights".
[13] AIR 1952 SC 123

In the Kathi Rani Rawat case caste has been accepted as one among the multiple criteria of backwardness. The intention of the court in this case is to accept that caste is not the sole basis of discrimination. In Balaji v. State of Mysore[14] a further question came before the Supreme Court of India as to whether caste can be used as an index to decide backwardness? The Supreme Court of India decided that the state is authorized to use caste as an index of social and educational backwardness for making preferences of course, subject to the rider that caste cannot be the sole or dominant test (although it can be used in conjunction with other relevant considerations like poverty, occupation, place of habitation, etc.).[15]

Further, in Akhil Bharatiya Shoshit Karamchari Sangh,[16] Krishna Iyer, J. emphasized the categorization of Scheduled Castes and Scheduled Tribes as a class on the basis of which the classification could be justified as just and reasonable within the meaning of Articles 15(1) and 16(1) because these classes stand on a substantially different footing from the rest of the Indian community.

Finally, controversy concerning caste as criteria has been solved in the Mandal Commission case[17] where the Supreme Court of India decided that since caste represented an existing, identifiable social group/class encompassing an overwhelming majority of the country's population it was one which according to the Court, can begin with it and then go to other groups.

Caste, however, was not an essential factor for determining social and educational backwardness. It is also not necessary that Socially and Educationally Backward Classes (SEBCs) should be similarly situated as Scheduled Castes and Scheduled Tribes. Within SEBCs classification between the backward and more backward is permissible. To maintain the cohesiveness and character of a class the

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[14] AIR 1963 SC 649

[15] See: Balaji v. State of Mysore, AIR 1963 SC 649; H. Janardhan Subaraya v. State of Mysore, AIR 1963 SC 701; Chitralekha v. State of Mysore, AIR 1964 SC 1823; P. Rajendran v. State of Madras, AIR 1968 SC 1012; State of A. Pradesh v. P. Sagar, AIR 1968 SC 1379; Jaishree v. State of Kerala, AIR 1976 SC 2381.

[16] (1981) 1 SCC 246:AIR 1981 SC 298

[17] Indra Sawhney v. Union of India, 1992 Supp. (3) SCC 217; AIR 1993 SC 477.

'creamy layer' can and must be excluded from SEBCs. The Court also clarified that 'backward class of citizens' in Article 16(4) is a wider category than SEBCs[18] in Article 15(4). In the former, accent is on social backwardness while in the latter it has to be both social and educational. It also held that the economic criterion alone couldn't be the basis of backwardness although it may be a consideration along with or in addition to social backwardness.

Further, the Supreme Court of India said:

"Poverty demands affirmative action. Its eradication is a constitutional mandate. The immediate target to which every affirmative action programme contemplated by Article 15 or Article 16 is addressed is poverty causing backwardness. But it is only such poverty which is the continuing ill effect of identified prior discrimination, resulting in backwardness comparable to that of the Scheduled Castes or the Scheduled Tribes, that justified reservation.[19]

The Supreme Court of India justified backwardness as criteria for reservation. In spite of landmark decisions by the Supreme Court in the above case equality cannot be achieved up until now.

Poverty is everywhere among each and every caste of person. Poverty is the root cause of backwardness but not caste in the present time. After such a long time, since the abolition of Untouchability and removal of caste disabilities now caste should not be the basis of reservation. It is only poverty which makes people backward, not caste.

(d) JUSTIFICATION OF RESERVATION: After deciding the basis of reservation the question arises of how to justify reservation for a particular group of people on the equality notion under Article 14 of the Constitution of India. As Article 14 permits reasonable classification having rational relations with the object sought to be achieved with the intention of bringing backward classes of people on an equal footing with others by granting justification on the doctrine of classification for the differences between the backward and well-to-do classes of citizens in matters of education, wealth, employment and

[18] In future socially and educationally backward class will be abbreviated as SEBCs.
[19] Para 323(13) the Mandal Commission case.

other social conditions is real and a law showing preference to the former has a rational nexus with the object of law, viz. to uplift the backward classes and to remove their educational and economic backwardness.

In Om Prakash v. State of Punjab[20] reservation of seats in favour of the Scheduled Castes in educational institutions was upheld on the ground that the State was authorized to adopt a system of reservation by making a proper classification to promote the educational and economic interest of the weaker sections. In Thomas Case[21] Supreme Court of India declares that Article 16(4) and 15(4) are themselves aimed at achieving equality guaranteed under Article 14[22] of the Indian Constitution.

Classification of Scheduled Castes and Scheduled Tribes as a group is not violative of equal protection clauses in under 14th amendment US Constitution as well as under the Indian Constitution Article 14.[23] Such classification is a media of achieving the equality object by giving a chance to minorities or underprivileged sections of society who have not been given a proper chance due to discriminatory treatment to represent themselves. There is a rational 'relation' between groups of classes and the equality object.

In spite of it, judges in the Thomas case intended to make a case-by-case determination of whether a particular classification violates equality or promotes equality and they said that:

The beneficiary groups should be really backward, should be really under-represented in State services and the purpose of the classification should be to provide no more than adequate representation and that the preference should be compatible with the administrative efficiency.

Then in State of AP v. Babiam[24] reservation of the seats for higher secondary course candidates has been declared discriminatory

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[20] AIR 1951 Punj. 93
[21] AIR 1976 SC 530
[22] Article 14 "Every one shall be entitled to equality"
[23] Article 14 "Every one shall be entitled to equality"
[24] (1972) 1 SCC 660: AIR 1972 SC 1375

by the Supreme Court of India because "such a classification has no reasonable relation to the object sought to be achieved, namely, selecting best candidates for admission to the medical colleges".

Further in Jagdish v. Union of India[25], Justice Krishna Iyer asserted that there is a vital nexus with equal opportunity, broad validation of university-based reservation cannot be build on the vague ground that all universities are practicing it, or that medical graduates resorted to hunger strike to press for higher percentage of reservation of seats".

What can be adequate representation? How to decide whether they have been adequately represented or not? These are the controversies left incomplete.

The ruling in the Thomas case permitting preferential treatment of Scheduled Castes and STs has further been supported by the Mandal Commission case. Where the Supreme Court of India said that[26] any legitimate affirmative action must be supported by a valid classification based on an intelligible differences distinguishing classes of citizens chosen for the protective measures from the generality of citizens excluded from such measures, and such differences must bear a reasonable nexus with the object sought to be achieved, namely, the amelioration of the backwardness of the chosen classes of citizens, which implies a reasonable proportion between the aim of the action and the means employed for its accomplishment, and its discontinuance upon the accomplishment of the object.

Though 'equal protection' clause prohibits the State from making unreasonable discrimination in providing preferences and facilities for any section of its people, nonetheless it requires the State to afford substantially equal opportunities to those, placed unequally.

Any State action distinguishing classes of persons is liable to be condemned as invidious and unconstitutional unless justified as a benign classification rationally addressed to the legitimate aim of qualitative and relative equality by means of affirmative action

[25] (1980) 2 SCC 768:AIR 1980 SC 820

[26] See: Mandal Commission Case Para 323 (15).

programmes of protective measures with a view to uplifting identified disadvantaged groups. All such measures must bear a reasonable proportion between their aim and the means adopted and must terminate on accomplishment of their object. Any legitimate affirmative action rationally and reasonably administered is an aid to the attainment of equality.

In my opinion any such differentiation or classification for special preferences must not be unduly unfair to the persons left out of the favoured groups. The question arises what must be quantum of reservation? So that it will not be discriminatory and unfair to a person left out of the favoured groups.

(e) **QUANTUM OF RESERVATION:** In M.R. Balaji v. State of Mysore[27], where the validity of a Mysore government Order reserving 68 percent of the seats in the engineering and medical colleges and other technical institutions in favour of backward classes including the Scheduled Castes and Scheduled Tribes was challenged, the Supreme Court of India held:

"A special provision contemplated by Article 15(4) like reservation of posts and appointments contemplated by Article 16(4) must be within reasonable limits .... In this matter again, we are reluctant to say definitely what would be a proper provision to make. Speaking generally and in a broad way, a special provision should be less than 50 percent; how much less than 50 percent would depend upon the relevant prevailing circumstances in each case".

Reservation of 68 percent of seats in the case was decided by the Supreme Court of India plainly inconsistent with Article 15(4). Following Balaji, in Devdasan v. Union of India,[28] a rule of the Central Government which actually reserved only 17.5 percent posts in the Central Services for the Scheduled Castes and Scheduled Tribes but provided for carrying[29] forwarded of their unfilled quota, in the absence

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[27] AIR 1963 SC 649, 663

[28] AIR 1967 SC 108

[29] By a resolution of the year 1950, the Government had indicated its intention to reserve 12.5 percent and 5 percent of the total available vacancies in any one year respectively for the Scheduled Castes and Scheduled Tribes. Supplementary

of availability of suitable candidates, to the next two succeeding years was invalidated on the ground that accumulation of 17.5 percent in three years would come to approximately 54 percent and in the instant case it had come to 64 percent because out of 45 vacancies, 29 went to the reserved quota.

Then in KC Vasanta Kumar v. State of Karnataka,[30] some of the judges doubted and others supported the 50 percent limit. In Chakradhar Paswan v. State of Bihar,[31] the Supreme Court of India, however, held that a single post in any cadre couldn't be reserved either at the initial stage or in filling up of a future vacancy.

Thus unresolved controversy concerning quantum of reservation and carry forward rules have finally been resolved in the Mandal Commission case[32] by the Supreme Court of India. In that case the Court was asked to pronounce on the constitutional validity of two office memoranda of the Central Government. One of them, which were initially brought before the Court, was issued on 13 August 1990. Implementing partially the Mandal Commission Report, it reserved 27 percent vacancies in civil posts and services under the government of India to be filled by direct recruitment from the Socially and Educationally Backward Classes (SEBCs). Before the Court could decide the validity of this memorandum the other memorandum was issued on 25 September 1991. It provided for preference to the poorer sections of SEBCs in respect of 27 percent reservation made by the first memorandum and also made additional reservation of 10 percent vacancies for 'other economically backward sections of the people'

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instructions issued by the Government in 1952 provided that if in any particular year the number of suitable candidates available was less than the number of reserved posts, the posts so in excess shall be treated as unreserved for that particular year but in the next year the number of posts which would have been otherwise reserved for such candidates in the normal course would be augmented by the number which had been converted into non-reserved posts in the preceding year. This process of carrying over which was to operate for one year at a time under the 1952 instructions was directed to operate for two years at a time by an amendment in 1955.

[30] (1985) Supp SCC 714, (Chinnappa Reddy, J at P 756 and Venkataramiah, J at P. 810

[31] (1988) 2 SCC 214; AIR 1988 SC 959.

[32] Mandal Commission Report.

who were not covered by any existing schemes of reservation. The first memorandum stated that the SEBC would comprise in the first phase the castes and communities which are common to both the lists in the report of the Mandal Commission and the State Government's list', by a six to three majority (in which the four majority judges gave a common opinion while the two other judges concurred in separate opinions and the three minority judges gave three separate opinions) the Court upheld the first memorandum but invalidated the addition of 10 percent by the second.

Further, the Supreme Court of India in the same case said that this limit of 50 percent applies only to reservations and not to exemptions, concessions and relaxations. For the applications of 50 percent rule a year should be taken as the unit and not the entire strength of the cadre, service or the unit, as the case may be. So long as this limit is observed, carry forward rule is permissible.

In my opinion, as Scheduled Castes and people from backward classes get relaxation of age etc. they may get more than 50 percent of seats in jobs. This is unfavourable for the people who do not come under reservation quota. Persons who actually deserve to be recruited because of their merit cannot be selected for a job while people who belong to a backward classes (being unsuitable for the post) by getting an unfair advantage of relaxation and reservations may stand on higher rank.

CONCLUSION AND SUGGESTIONS: In spite of clear constitutional provisions and their practical implications through landmark decisions by Supreme Court of India, people of lower castes remain poor, uncertain and helpless. The administrations are heavily titled against them and there is no end to police atrocities when it comes to the lowest among them, Dalits or Harijans as they are called. The reach and riches of three upper castes remain undiminished and the diffidence and deprivation of the lower unremitted.

Both the beneficiaries and non-beneficiaries are unhappy over the policies of reservations. Beneficiaries complain that the benefits of job reservations are enjoyed only by the creamy elites among the backward classes, leaving the large masses in the state of utter

deprivation and neglect. The non-beneficiaries complain that it is an unfair way of distributing benefits to the preferred groups at the expense of innocent individuals who are more meritorious than those selected. Today the policy of "reservations" as a means of promoting equality overall is seriously questioned and has come on the social, political, juridical and above all on the national agenda.

Not only reservation policy but also positive action as a whole:

(a) Utilize and alter the distributional practice and effects of existing institutions; it alters the rules of competition so that the favoured have more chances of success. Such treatments reduce efficiency and productivity of administration and destroy standards.

(b) Unfairly place the burden of helping those who are preferred on those who are excluded. This is an unfair way of distributing the cost of a legitimate goal. Better qualifications confer upon the holder a prima facie right to be chosen in preference to any one who is less qualified.

Thus it is suggested that the selection policy and practice of an employer must be firmly based on the principle of selection according to merit as practiced in Northern Ireland.[33] Positive action programmes should aim at the helping of the disadvantaged sections of the society enabling them to catch up to the standards of competition set up by the larger society by providing special training programmes in a particular area for a particular class of persons belonging to scheduled caste, scheduled tribes. In Northern Ireland different types of special training programmes for women or minority group in a particular area are being provided with the intention to help them so that they compete with the advanced section of society.[34]

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[33] Section 5.1 Fair Employment (Northern Ireland) Act, 1989 provides policy and practice of an employer must be firmly based on the principle of selection according to merit.

[34] Section 3.3.2 Fair Employment (Northern Ireland) Act, 1989 provide-Fair Employment Commission can direct training to take place at a particular location in Northern Ireland, or for a particular class of persons (provided that selection criteria are not based on religious belief or political opinion).

Numerical quotas or 'reservations' are impermissible as they impose unfair burdens on those excluded and they involve the suspension of standards. Compensation to the disadvantaged group should be made in such a way as not to exclude anyone. Nothing in the constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of ethnic groups.

Now the time has come to end quotas and criteria of backwardness should be socially and economically backward or poor group of people not persons belonging to scheduled caste and tribes.

A clear-cut legislative policy should be formulated to classify socially and educationally backward class of people rationally related with the object of their adequate representation. This adequate representation should be in proportion to the population of socially and educationally backward class of people not person belonging to scheduled caste and scheduled tribes.

There must be periodic administrative review by specially constituted authorities so as to guarantee that such policies and actions are applied correctly and strictly permitted constitutional ends. One will have to set constitutional limits as regards the extent of preferences, the permissible modes of eliminating group-inequalities, standards for selecting the legitimate beneficiaries and the standards to strike a reasonable balance between the claims of individual fundamental rights and the claims of social equality.

Cesspools of Corruption and Logic's of Law

Nirvikar Gupta[*]

PROLOGUE -

In a country like ours where bribery and gratification are the magic words in the cesspools of corruption, little do we know about the legal dimensions of these tantrums in our democracy.

Strange it would sound that 'bribe' has not been defined in any Law[1]. The slippery and sleazy words 'corruption' and 'gratification' too are not defined with their essential tentacles either in Indian Penal Code,1860 or under the Prevention of Corruption Act, 1988. Embracing innumerable devices and crafts of moral deterioration, corruption has silently permeated through all the layers and cadres of the society[2]. Looking to its confiding nature, corruption appears so difficult to be defined by mortals while so simple to be understood, rather felt through its immortal practices[3].

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1 While 'bribery' has been defined only in relation to election offences (under Section 171-B in the recently introduced chapter IX-A of Indian Penal Code, likewise 'bribery' has been cited as one of the corrupt practices in electoral process, under section 123 of the Representation of the People Act, 1951.

2 "It may be stated that corruption is rampant in our country and it is a social evil and hardly there would be any walk of life where there is no corruption" [Mansukh Lal Vithal Das Chauhan v. State of Gujarat 1994(2) Crimes 137 (Guj.) D.B.].

3. "Now what is the exact meaning of that word 'corruptly'? It is difficult to tell" per Martin, quoted in "Words & Phrases Legally Defined" (Butterworth-publication).

With the object of prohibiting public servants[4] or those engaged in public duty[5], the Legislature has provided stringent measures & punishments under the Prevention of Corruption Act, 1988, in case a public servant takes gratification (other than legal remuneration) in respect of an official act. There can be no quarrel to the propositions that the offences of accepting gratification or receiving bribe (as a motive or reward for doing or forbearing to do any official act) can not be committed by a public servant singly, without the active or conniving participation of another person seeking favours. The legal propositions by and large seem to have 'ripened'[6] in so far as the corrupt 'fails, falls and fouls' of public servants are concerned. Yet the logics of law are still uncertain, obscure and vague in so far as the legalistics of the operating mechanism of abettors, accomplices, conspirators or provocateurs are concerned.

CORRUPTION IS CONTAGIOUS :

Corruption is termed as a plague, which is not only contagious but if not controlled spreads like fire in a jungle. Its virus is compared with HIV leading to AIDS, being incurable. It has also been termed as royal thievery. The socio-political system exposed to such a dreaded communicable disease is likely to crumble under its own weight. Corruption is opposed to democracy and social order, being not only anti-people, but also aimed and targeted against them. It affects the economy and destroys the cultural heritage. Unless nipped in the bud at the earliest, it is likely to cause turbulence – shaking of the socio-economic-political system in an otherwise healthy, wealthy, effective and vibrating society.[7] Corruption corrodes morals and corruption by

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4 'Public servant' is differently defined in Section 21 of Indian Penal Code and Section 2(c) of the Prevention of Corruption Act, 1988, leaving a big gap in between.

5 'Public duty' so defined in Section 2(b) of Prevention of Corruption Act, 1988 is yet to be understood clearly in view of the Explanation attached to it and several interpretations their upon.

6 In the earstwhile Sections 161 to 165 (since repealed) in the Indian Penal Code, 1860 and specifically by the provisions of the Prevention of Corruption Act, 1947 and at present by the Prevention of Corruption Act, 1988.

public servants not only leads to corrosion of the moral fabric of the society but is also harmful to the national economy and national interest, as the persons occupying high posts in the Government by misusing their power to corruption can cause considerable damage to the national economy, national interest and image of the country8. A Constitution Bench of the Apex Court9 has shown serious concern for "weeding out bribery and corruption" and to eliminate all possible delays in "bringing the offenders to book".

TWO FACETS – ONE COIN:

To get a thing done corruptly may be said to mean or include to give any gift to an agent as an inducement for showing favour with relation to his principals' affairs. The evil is the giving of the gift or consideration, not bonafide but malafide, and designedly, wholly or partially for the purpose of bringing about the effect forbidden. It need not necessarily amount to a bribe to do some specific act, or a reward for having done it[10]. Factually speaking giving presupposes acceptance. It is a dual process singly looked. There can be no question of acceptance of illegal gratification unless there is someone to offer such gratification. The ball is therefore, set rolling by the person who offers the bribe and, as such he is the "primary culprit".[11]

Chief Justice Iqbal Ahmad, speaking for the Division Bench, in Keshri Chand, observed;

> *"In determining the gravity of the offence of giving illegal gratification, there is no distinction between him who gives and him who takes the bribe. It is true that the I.P.C. does not*

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7 State of Madhya Pradesh and others v. Ram Singh and others (2000) 5 S.C.C. 88 (Before K.T. Thomas and R.P. Sethi, JJ.)

8 G.T. Nanavati J. in J. Jayalalitha v. Union of India (1999)5 SCC 138 para 15 (at page 155).

9 Asghar Ali Nazar Ali Singapore Walla v. State of Bombay; AIR 1957 Supreme Court 503.

10 See "Words and Phrases, Legally Defined" (Butterworths)

11 Emperor v. Keshri Chand 1946 Cr.L.J. 132 (Allahabad).

contain any specific provision dealing with the offer of an illegal gratification, but section 109 places both the giver and the taker in the same level. Both giver and taker are parts of the same instrument. The minds of both work in union; both act in concert and it is their concerted action, which produces a result constituting a menace to the society. There can be no question of acceptance of illegal gratification unless there is someone to offer such gratification. The ball is therefore, set rolling by the person who offers bribe, and, as such he is the primary culprit".

In legal perspectives, it is interesting to examine the role and operating mechanism of the person who sets the ball rolling.

INSTIGATOR:

Explaining the meaning of instigation, Chief Justice Macleod, citing Russell on Crimes, has observed;

"A person is set to instigate another to an act when he actively suggests or stimulates to him to the act by any means or language direct or indirect, whether it takes the form of express solicitation or of hints, insinuation or encouragement".

An instigator would come within the clutches of Section 109 IPC since he would come within the purview of an abettor. In the same sequence a person can be an abettor through intervention of a third party and therefore the abatement for accepting bribery being an offence, the abatement of such an abatement would also be an offence within the meaning of explanation 4 to Section 108 IPC. Accordingly a person may constitute himself an abettor by the intervention of a third person without indirect communication between himself and the person employed to do the thing. It is sufficient if he engages in the conspiracy, in pursuance of which the offence is committed.

The Indian Penal Code made, the giving or offering a bribe an offence, in the same way as the code made the acceptance of a bribe an offence. Hence if such an offence is abetted, it would also come within the clutches of Section 161 read with Section 109 or Section 116 of IPC. Infact abatement is a crime apart and it is not necessary that the substantial offence must have been actually committed.

Supreme Court, in a leading decision in *Faguna Kanta*, made this succinctly clear;

> *"Under the Indian Law for an offence of abatement it is not necessary that the offence should have been committed. A man may be guilty as an abettor whether the offence is committed or not. There being thin difference between instigating or engaging another in conspiracy on one hand and that of a person aiding in committing a certain offences. The traps of law are for both.*[12]

ABETMENT & CORRUPTION :

Abetment of an offence is generally-instigation, conspiracy or intentional aid.[13] The abetment of an offence is itself a separate and distinct offence. It is a crime apart[14]. An abetment would only be an offence if the act abetted were an offence[15], though the commission of the act abetted is not necessary[16]. The scheme of section 107 IPC to

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12 For a fuller discussion see, Faguna Kanta Nath v. State of Assam, AIR 1959 S.C. 673 & Sri Ram v. Statecf U.P. AIR 1975 S.C. 175

13. Section 107 Indian Penal Code; Malan v. State of Bombay; AIR 1960 Bom. 393

14. R Puttu Swamy v. Union Territory, Pondicherry; 1992 Madras Law Journal (Crl.) 665; Barendra Kumar v. King Emperor; AIR 1925 P.C.

15. State of Himachal Pradesh v. Tara Singh; (1991) 1 Shimla Law Journal 671 (HP)

16 Faguna Kanta v. State of Assam; AIR 1959 SC 673

Section 120 IPC deals with abetment, abettors and punishments are provided there under, while Section 7 of the Prevention of Corruption Act, 1988 deals with the abetment of an offence of bribery, gratification and corruption, in case the favor is to be done by a public servant.

The offence[17] of the bribe or gratification has his own jurisprudence; justified as 'all usual'; all normal; speed money, 'fast buck' or the like. With erosion of values the menace of bribe has assumed such dimensions that a common man, in the first instance believes that any or every work can be got done by greasing the palms of the other person or the public servant concerned. In a democracy like ours, corruption has not remained a myth and even the Supreme Court was constrained to observe[18].

> *"Before we part with this case, we would like to observe that as long as an impression exists that-*
>
> *(a) corruption is prevalent; and*
>
> *(b) unless one pays to somebody, things are not done, their would be always persons who would feel the urge to offer bribe,*
>
> *Bribe would be offered not only to get an undue favour but also to avoid unnecessary harassment and to see that no obstruction or delay is caused in getting the most legitimate work done - it would be unfortunate that rightly or wrongly, an impression were to exist that, without payment of illegal gratification things would not be done".*

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17 Sometimes called as inciter; Prem Narain v. State; AIR 1957 All 177 (DB), and sometimes called as instigator or pursuator ; Giriza v. State of M.P.; 1988 MPLJ 421.

18 Mohan Das Lalwani v. State of M.P.; AIR 1973 SC 2679 at P. 2684

Such a situation calls for deeper introspection and resolute determination to wage a war on social and legal fronts.

DETECTION OF CORRUPTION & JUSTIFICATION:

Since corruption is always shrouded in mystery and hatched in secrecy, it becomes very difficult to find evidence or proof to bring home the charges. The usual recourse is to find out evidence of giving or accepting bribe by laying trap and then examining the trap witness or decoy.

"What is a trap?, questioned Iqbal Ahmad C.J. in Keshri Chand and referring to the observations of an earlier judgment in Dinkar Rao[19] answered, "it is nothing but the means of detecting crime – by catching the criminal *flagrant delicto*. Just as crime assumes protean shapes, so has the method of its detection to take countless courses and assume countless forms". Therefore, if a Police Officer receives information that an offence is about to be committed and thus engaged spies to witness the commission thereof, this can be justified only on the ground that he is engaged in the detection of a crime.

The situation would take curious turn if the Police Officer instead of being a witness to the trap, starts himself flaunting bait with the sole objectives of enticing or alluring one unknown to fall prey to it and then to put the blame of being corrupt an one who falls prey to it. Whether it can be expected from a responsible Police Officer, if he himself suggests, induces or incites the commission of a crime and instigates the public servant, directly or indirectly to accept bribe or do a favour? In the latter situation can the conduct of a Police Officer be equated with a genuine public trap or he himself would fall pray to the offence of abatement to accept bribe within the meaning of Indian Penal Code or Prevention of Corruption Act, 1988?

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[19] Emperor v. Dinkar Rao, AIR 1933 All. 513; 34 Cri.L.J. 623.

Justifying use of trapwitnesses, Justice Rama Swami in the case of Ambujam Ammal[20] has held:

> *"The employment of spies agents, provocateurs trap-witnesses is in accordance that the best tradition of Hindu, Muslim State craft. Our historical literature is replete with reference to the employment of such agents".*

The Apex Court providing justification for laying of traps and also giving a caution observed in a later case[21] that laying of traps is justified since it would be difficult to detect the crime specially in cases of corruption, if intending offenders are nor furnishing opportunities to have display of their inclinations and activities. The Court further warned; "Such traps would however be severely condemned if the police authority themselves supply the money to be given as a bribe".

In a legitimate trap the informant is only helping the State in detecting a crime and bringing an offender to justice. Actually he is not abetting commission of an offence. He only helps bringing to book a person who has already declared his criminal tendency. It is the duty of the State to bring all offenders to justice and it is the duty of each and every citizen to help the State in the discharge of such a duty. By his actions the person is only doing a service to the society by giving previous information to the authorities concerned regarding the possibility of the commission of a crime. If his actions and intentions are *bona fide* there is nothing illegal and uncharitable in what he is doing.[22]

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20. re Ambujam Ammal AIR 1954 Madras 326; 1954 Cri.L.J. 417.

21. Rama Krishna v. State of Delhi AIR 1956 S.C. 476; 1956 Cri.L.J. 837. However in Raman Lal Mohan Lal Pandya v. State of Bombay, AIR (1960) SC 961, merely providing the money by the Police, given as bribe, was not held to be looked with suspicion in law.

22 C.S. Raman Mannadrar v. The Dy. Supdt. Of Police and another; 1985(2) Crimes 911 (914-915) (Kerala).: See also the observations of Supreme Court in Maha Singh v. State (Delhi Admn.); AIR 1976 SC 449; - "association in a trap by itself is not sufficient to dub a witness as an accomplice per se or

TRAPS : LEGITIMATE & ILLEGITIMATE:

Distinguishing between a legitimate and illegitimate trap, Madras High Court in re mohiuddeen[23] has held, where the offence has already been born and is in the course, the trap is legitimate while the offence is not yet been born and it temptation is offered to see where an offence would be committed, it is an illegitimate trap.

Probably, the courts of law, keeping a distinction between a legitimate and illegitimate trap, have made it amply clear that in case, bribe has already been demanded and 'the inciter' goes to offer the money to seek a favour and thus becomes a party to the trap, the conduct of such a person may be termed justifiable; at times laudable and admirable, without the least criticism by any honest man. But where bribe was never demanded and gratification never sought yet the Police Officer suggests or induces by tempting to bribe, offer or gratify, such public servant to prove corruption, the operating mechanism would be transgressing the sanctions of law and sanctity of procedure. In a case from Kerala High Court,[24] the distinction between legitimate and illegitimate trap was clearly carved out, and it was held; "there are two kinds of traps. – "A legitimate' and an 'illegitimate trap. The former is one where an offence has already been conceived and borne by the accused demanding bribe; 'illegitimate trap' is one in which, even without a demand, on the belief that the accused is having the criminal tendency of receiving bribe, he is being tempted by the offer on the basis of the trap to receive the bribe. Such an act will be illegitimate unless authorized by some provision of law." Courts have

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even as an interested witness in tqtal absence of materials justifying such an inference."

23 re mohiudddeen AIR 1952 Madras 561.

24 Cherian Lukose v. State of Kerala, 1968 Cri L.J. 168 : AIR 1968 Ker 60

firmly ruled against the "tempting and trapping" of an accused if such a practice is being resorted to by an officer of judicial department.[25]

In such (illegitimate trap) cases, the Police Officer is no better than an agent provocateur, that his conduct is not only reprehensible but also criminal. His object is the detention of a crime so that a charge may be brought for the offence committed but not to invite or induce so that a crime may be committed. In such a situation the Police Officer would not be legitimate in the exercise of his jurisdiction but would become an accomplice because he participates in the crime or a criminal act. It is thus later tide or trap, which is termed illegitimate. Unless authorized by any act of parliament, a person who is party to illegitimate trap may be guilty of committing an offence.[26]

Madras[27] and the Orissa High Courts[28] have annexed limits of collecting evidence with legality. Panigrahi, J.(as he then was) observed;

> *"When on the other hand the spy or the Police Officer goes beyond the limit of collecting the evidence and instigates or incites the commission, he becomes guilty of abetment."*

The idea is that as officers sworn to maintain law can not shed their character as such and break the law. However, laudable the motive may be, end certainly does not justify the means. To encourage resort to doubtful means to expose the unjustifiable, would be to defeat the purpose of law, rather than promot it. Supreme Court of India, in the case of *Rao Shiv Bahadur*[29] and *Basavan Singh*[30] has held that the

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25 Emperor v. Dinkar Rao, AIR 1933 All 513:1933 (34) Cri L.J. 623, Cited with approval in Keshri Chand, 1946 (47 Cri L.J. 132 : AIR 1945 All 207 (supra).

26 The decision in Panalal D. Rathi v. State of Maharashtra; (1979) 4 SCC 526, taking into consideration the effect of Section 165A IPC, held that a person offering bribe to a public servant commits an offence.

27 Mohiuddin, In re, AIR 1952 Mad 561.

28 State v. Meena Ketan Pattanaik; AIR 1952 Orissa 267.

29 Rao Sheo Bahadur Singh v. State of Vindhya Pradesh; AIR 1954 SC 322

evidence of the witnesses who were not willing parties to the giving of the bribe but wanted to accelerate the motive of trapping, stands at a different footing. The Court observed; *"it is the duty of the police authorities to prevent crimes being committed; but it is no part of their business to provide the instrument of the offence"*. In *Basavan Singh* The Court referred to an English decision in Brannan v. Peek, 1947-2 All.E.R. 572 (D), wherein a Police Officer went inside a public house and made a bet on a horse, which amounted to an offence. The motive in making that bet was to detect the offence under the Street Betting Act, 1906, which was being committed by the accused person in that case. In these circumstances Goddard, C.J. observed;

> *"I hope the day is far distant; when it will become a common practice in this country for police officers to be told to commit an offence themselves for the purpose of getting evidence against someone."*

In Ramjanam Singh[31] also, the Apex Court, warning against offering of "temptations" had observed; *"The very best of men have moments of weakness and temptation, and even the worst, times when they repent of an evil thought and are given an inner strength to set Satan behind them; and they do, whether it is because of caution, or because of their better instincts, or because some other has shown them either the futility or wickedness of wrong doing, it behoves society and the State to protect them and help them in their good resolve; not to place further temptation in their way and start afresh a train or criminal thought which had been finally set aside."* Such a practice was deprecated by the Court, the line of demarcation being drawn out for the intention in the mind of the trap witness.

If this be the situation with Police Officers who have a role to play in the Criminal Justice Administration System, how the laying of illegitimate trap at the instance of a journalists, press or media persons

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30 State of Bihar v. Basavan Singh; AIR 1958 SC 500

31 Ramjanam Singh v. The State of Bihar; AIR 1956 SC 643 at Page 651 (E).

may be made justifiable in proof of corruption, or for bringing home the accusations against public servants in relation to their public duties. Adventurism in journalism or investigative journalism may have its own advantages but it is an area where one has to tread with caution, introspection and care.

USE OF DETECTIVE TECHNIQUES & LAW:

While laying traps, the use of surreptitious surveillance or intrusive techniques is again a question which is wrapped up amongst moral standards, ethical proprieties and legal niceties. No hard and fast rules can be laid down either justifying or out rightly rejecting the use of clandestine techniques viz. hidden camera, sound recorder, tape or bug; yet the justifiability of the motive may be said to justify the technique utilized, if it was to sub serve the rule of law and the 'greater public interest', in contrast to a malicious campaign or design with 'vested self interest'.

The legality or the admissibility of such an evidence; admission (or confession?), conversation (or conduct?), or extra judicial confession is another queer question to be considered.

The legal proposition is well formed that any confession made to the police is excluded unless it leads to discovery as provided under section 27 of Evidence Act. Likewise, confession made to the police during investigation (Section 162 Cr.P.C.) and when the investigation may have not begun[32] is also excluded. As such, the admission or confession made by a person before the investigation begins can only come within the purview of extra judicial confession. It is trite law that extra judicial confession by itself is a weak piece of evidence and the court has to take into consideration, surroundings circumstances to find out its voluntary nature and reliability.

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32 Nagesia v. State of Bihar; AIR 1966 SC 119 {P.11-12}.

PLAYING TRICK WHILE LAYING TRAP :

While detecting corruption, the evidence obtained by under cover may not be admissible in evidence, if procured by trick. In a police operation, under which criminals were deceived to think that the police personnels were the dealers in stolen property, the admissibility of confessions made by criminals were the subject matter of scrutiny. The Court held that even if the statements were derived by the police having been engaged in a trick, these could be read against accused if the trick had not resulted 'unfairness'.[33]

In this under cover police operation case from North London, the police resorted to an unorthodox stratagem. A shop was setup by the police itself to unearth burglary, robbery and sale of jewellery. Conversations were recorded by cameras and sound recording systems. Signed receipts were also taken from vendors. Lord Taylor C.J., accepted the evidence so collected by trick and refused to interfere in the conviction on the ground that in the given facts no unfairness has resulted[34]. The Court observed-

> *"Nobody was forcing the defendants to do what they did .....they were dishonestly disposing of dishonest goods ----- they were never tricked into doing what they would not otherwise have done, they were tricked into doing what they wanted to do in that place and before witnesses and devices who can now speak of what happened. I do not think that this is unfair or leads to an unfairness in the trial".*

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33 R. v. Christou and Another (1992) 4 All. E.R. 559.
[34] R. v. Christou ; (1992) 4 All.E.R. 559

Giving a note of caution that *"it would be wrong for police officers to adopt or use an undercover pose or disguise to enable themselves to ask questions about an offence", the case of "Stardust Jewellers" was held quite differently.* ***Lord Taylor C.J., held****; "Putting it in different words, the trick was not applied to the appellants; they voluntarily applied themselves to the trick. It is not every trick producing evidence against an accused which results in unfairness. There are, in criminal investigations, in number of situations in which the police adopt ruses or tricks in the public interest to obtain evidence. For example, to trap a blackmailer the victim may be used as an agent of the police to arrange an appointment and false or marked money may be laid as bait to catch the offender."*

In a similar case the evidence of under cover police officer posing as a buyer of a stolen car, asking the accused whether the car was stolen came up for consideration before the Court and the confession made by the accused was held- inadmissible.[35]

USE OF DEVICES & ADMISSIBILITY OF EVIDENCE

While the use of audiotape[36] was held permissible for recording conversation and demand of bribe and the evidence so recorded admissible, use of cordless telephone[37] in interception of communication was also treated as an evidence in criminal trial. In England, information obtained by call-logging device in a communication was held admissible in criminal trial, if the interception was warranted in Interception of Communication Act 1985 and Tele Communication Act 1984, otherwise it would be unacceptable. Such an interception may validly be made in pager[38] communication, computer or internet[39].

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[35] R. v. Bryce; (1992) 4 All. E.R. 567.
[36] Yusuf Ali Ismail Nagri v. State of Maharashtra; AIR 1968 S.C. 1477 at page 148.
[37] R. v. Effik, (1994) 3 All.E.R. 458.
[38] R. Taylor v. Sabori (1999) 1 All.E.R. 160.
[39] See, Information Technology Act, 2000 & definition of 'electronic record', newly introduced thereby.

While the Supreme Court of USA in the case of Mary Land[40] has held that recording of Evidence by VDO conferencing was not a violation of the Sixth Amendments the Supreme Court of India has stepped further and held that VDO conferencing would be legitimately utilized in criminal trials[41] by expanding the growth of law to respond of to the needs of changing society and bringing the law in tune with digital world.

The evidentiary value of an extra judicial confession soon after the commission of the crime may be admissible during the trial but if no FIR was registered nor the matter was even reported to the police and the then supposed crime is yet to be committed, then the admissibility of such an extra judicial confession appears to be fragile to rope the persons involved in conversation.

EPILOGUE :

In the cesspools of corruption the interstices in law may well be answered by logics of law. But the logics of law alone may not be a valid substitute for our moral courage, ethical values & social mores. The time has come when we have to take the bull of corruption by its horns, of course firmly. The need of the hour is that the evil of corruption is checked and prevented better sooner than later, by taking recourse to fair, if not foul means, lest we fall prey to its insidious entraps.

[40] Mary Land v. Santa Aun Craige (497) US 836

[41] The State of maharashtra v. Dr. Prafula B. Desai and Anothers; 2003 (3) Supreme 19

CO-ORDINATION BETWEEN THE EXECUTIVE AND JUDICIAL SERVICES OF THE STATE

Servesh Kumar Gupta,

Before embarking on the subject I would like to start right from the British Era when apart from the Legislature these two services happened to be one and the same. The Officers of both the services were mutually inter-exchangeable, very often they used to discharge the functions of one and another. There was a single, Indian Civil Services Officers who used to do in the executive as well as in the judicial side. Even they used to become the High Court's Judges and at the same time they used to discharge the functions in the executive at the highest hierarchy level. Perhaps this system suited to the British government because that government had the least regard for the human rights, the social upliftment and good of Nation. So, they preferred both the services under their command. Drawback of that system was that the people of India, very often were deprived to get justice against the government and its decisions because the persons who were forced to implement, the orders of the government and if that order used to be challenged in the law court then the person hearing against the implementation of that particular order were both under the control and command of the government itself. This amounted to denial of justice. So, our National Leaders and constitutional makers while framing the Constitution enacted provision of article 50 in the directive principles of the State policy enshrined in part IV of the Constitution which provides that the State will make every endeavour to create a separate judicial service free from the control of the executive as soon as possible. This provision was enacted to give effect the theory of great jurist montesique. That legal giant propounded the theory of 'Division of Powers' so in order to give effect the Article 50 of the Constitution; the efforts were made to separate these two services after Independence. By and by the powers from the Executive to try the

criminal cases and decide the civil disputes were taken away and handed over to the judiciary who were under the command and control of the Hon'ble High Court at provincial level. Yet the executive used to have certain powers even to try the Indian Penal Code cases till the new Criminal Procedure Code was enacted and came into force in 1973. By application of new Code the entire powers to try all Indian Penal Code cases were shifted to the Judicial Officers and the Executive Magistrates were left only to decide the cases relating to sections 107, 116, 133 and 145 Cr.P.C. and certain other Acts like, the Land Revenue Act, Z.A. & L.R. Act and Public Premises Act. In the above cases also the Judiciary was vested with the supervisory jurisdiction to hear appeals and revisions against the orders and judgments of the Executive Officers.

Ever since the time of separation it is being noted significantly that the two wings of the administration are not in pleasant terms both at provincial level as well as at the district level, while a co-operation between these two services is very much essential to run the administration smoothly and effectively. We know the main task of the administration is the implementation of various social welfare programmes and to maintain peace and tranquility in the society but if the co-ordination with the Judicial Officers is not maintained then these programmes and maintaining the law and order can not be given effect to. We should take those two services like the two limbs of the body. As there remains a perfect harmony in the movement of two limbs while one walks ahead so is the expectation in running the administration ahead with these two wings. If the balance of administration between the two limbs is disturbed then undoubtedly one can not affectively move forward. In the same way, if the harmony between the executive and judicial officers is disturbed or becomes unbalanced then no task of the Government can be implemented to the welfare of the society at large and the peace and tranquility in the society can not be kept maintained by the administration and the police. Unfortunately, these days it is a matter of general observation that co-operation between the two wings of the State is now becoming a rare commodity and often cases are not rare when there becomes open clash between the Officers of these two services. The result is that entire

administration comes to stand still and becomes a subject of public mockery.

I would like to submit that Officers of both services should pay every attention and observe every precaution to maintain harmony with each other. We should always feel that these both services are mutually helpers, not inter-se fighters. The occasions are not rare when we may feel the need of each other for the effective discharge of our administrative/judicial functions. For example, suppose employees of a particular essential service, resort to the method of strike; they agitate in the public and create unruly scene or break the declaration of Section 144 Cr.P.C. and the need arises to arrest them for the offence of Section 188 IPC the circumstances may be such that administrative officers may feel helplessness if the Judicial Officers do not support them. I have experienced such state of affairs when being a chief Judicial Magistrate, on the request of the District Magistrate; I visited the police line for sending such agitators to jail. Had the Judiciary refused to co-operate the administration then the position of the executive might have become embrassing so is the case with the judiciary. If a Judicial Officer or a Judge orders to send a particular offender to jail or to implement a particular order in civil side, uncooperated by executive wing the situation becomes complicated and embrassing for the judicial courts. Although there is way cut to adopt the procedure of contempt but that is a long process and not the immediate solution. So I mean to say that both there services are complimentary and supplementary to each other. One is quite incomplete and ineffective without the help and assistance of other. So we should make every effort to maintain a mutual co-ordination and harmony. Now I would like to state certain tips for this purpose.

(i) Official and social calls.

Officers of both the services are required under rules to make the official calls to the head of both the services inter-se, that is to say that all the Judicial Officers posted in the district are required to make the official call to the District Magistrate and all the Executive Officers posted in the district are required to make official call to the District

Judge. This is being noticed that these rules are being violated very often. Now the Officers very rarely observe this rule and do not make it convenient to have official calls to the respective officers, what to say of the social calls while it is desirable that apart from the officials calls the Officers of both the services in order to strengthen social relations amongst them should have called alongwith their better halves to the residences of each other. It is not a difficult job provided you have zeal and then you can spare time for the same. It is general saying that a busy man finds time for every thing but a lazy man does not find time for anything. He takes the lame excuse. He takes the lame excuse. Making this official any social call undoubtedly will strengthen mutual understanding and relation. It will definitely pave the way to solve the official problems also.

(ii) Keep away the shyness and ego.

What I have experienced in more than two decades of my Judicial Service is that the officers from both the services are often egoistic and feel shyness towards having meeting with each other. By and large the Executive Offices having their glamourous life full of so many amenities provided by the State feel arrogant while coming across their judicial counter parts. This feeling of arrogance increases the distance between the two rather than bringing them closer to each other. Sometimes they feel shy in having introduction with each other even. It is neither proper nor expected from the officers who hear the heavy responsibility to run the administration of the district and to provide justice to the people. Their attitude sometimes becomes a subject of travesty amongst the people at large. So dear friends; do not feel shy or arrogant and always come forward and take initiations to have good understanding with each other.

(iii) Get togethers:

Wise Officers are those who organize get togethers of officers including of the judicial officers on some occasions like Holi, Deepawali etc. sometimes finding a leisure after general elections or on

some occasions like birth day of the child, marriage anniversary but it appears that gone are the good old days where I have experienced such officers. This organizing of get togetherness paves a way to strengthen mutual understanding and relations.

(iv) Do not be much technical:

It has also been my experience that sometimes when an officer feels a personal problem in performing some official duties then his request is not considered on the basis of some technical grounds or inconvenience but always be helpful and do not be so technical while solving the little personal problems of each other. This will further strengthen and develop the mutual love and affection with regard.

Now to sum up, I would like to mention that only for the purpose of maintaining harmony between these two services the government has also taken initiative to set up a monitoring cell at the district level under the presidentship of District Judge, District Magistrate, S.S.P., C.J.M. and District Government Counsel are invited in that meeting held once in a month in the Retiring Room of the District Judge or at some other suitable place chosen by the District Judge. The officers of the administration and the police come to attend the said meeting and discuss the problems which they face in day today administration and the District Judge also apprises the Officers of the administration regarding problems which all the Judicial Officers might be facing while deciding criminal and civil judicial matters in their courts. These problems generally remain due to lack of cooperation by the subordinate police and executive staff to which the District Magistrate and the S.S.P. are made acquainted.

So, now my dear friends, I expect that we being the Officers of both wings have the heavy responsibility on our shoulders and would give at least some weight to my above submission. Thus, we will be able to do administrative/judicial role assigned to us in a most efficacious and effective manner.

My good wishes to all of us at the dawn of new millennium.

RAGGING

*Raghvendra Kumar, H.J.S.**

Ragging is a game of sadistic pleasure played by seniors with the juniors, specially those who join the Institute as a fresher (for the first time). It has become a popular concept in the academics and is being observed as a ritual either it be a college, university or professional institutions imparting specialized knowledge. Even centers known for excellence are also not far lagging behind in observing this newly emerged trend. In the recent past, as noticed, it has become a popular phenomenon amongst the seniors. The glaring aspect of the ragging is that the ritual is being adhered to religiously by the seniors. The time bound history of the genesis of the ragging cannot be ascertained but it can be assumed to be the gift of the English education system. The stray incidents of ragging evidence that its tentacles have increased enough and have crossed the barriers of the academics and have extended even to work places though in subtle form. The ragging, probably owes its genesis from the hostels where it is observed more particularly. The duration of ragging is not defined and varies from place to place and institution to institution but is short lived.

LITERAL MEANING

Ragging, according to dictionaries exactly and literally means an act to torment, scold, tease or annoy. Ragging may also be termed as a programme of entertainment as the case may be.

It also means playing practical jokes with some one thereby annoying or teasing him/her.

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LEGAL DEFINITION

As defined in Maharashtra Prohibition of Ragging Act, 1999, ragging means display of disorderly conduct, doing of any act which causes or is likely to cause physical or psychological harm or raise apprehension or fear or shame or embarrassment to a student in any educational institution.

Kerala Prohibition Act defines ragging as teasing, abusing, playing practical jokes or causing hurt or asking students to do an act which he is unwilling to do.

The Apex Court of the land has defined ragging as "any disorderly conduct whether by words spoken or written, or any an act which has the effect of teasing, treating or handling with rudeness any other student, indulging in rowdy or indisciplinary activities which causes or is likely to cause annoyance, hardship to a junior student or asking the students to do any act or perform something which such student will not do in the ordinary course and which has the effect of causing or generating a sense of shame or embarrassment so as to adversely affect the physique or psyche of a fresher or a junior student.[1]

The cause of indulging in ragging is deriving a sadistic pleasure or showing of power, authority or superiority by the seniors over their juniors or freshers. (Vishwa Jagriti Mission case (Supra)

The new entrants do not muster courage to resist the ragging for, they have the phobia that they may suffer in case they report such incidents. Their apprehension of not getting whole hearted support from the administrative wing of the Institution, to some extent, is not baseless. Their apprehension may even be false altogether.

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[1] Vishwa Jagriti Mission, through President v. Central Government, through Cabinet Secretary and others, 2001(1) Supreme Today 782.

The ragging is a phenomenon where the seniors have prerogative of playing practical jokes with the freshers or new entrants just to annoy or tease them, deriving a sadistic pleasure out of it. The ragging is a life long event to be remembered with, by the victims of institutions or hostels and has perpetuated in the academics because the new entrants, when they become senior, occupy the driving seat, satisfy their ego, false vanity and the feeling of vengeance for the treatment with which they were meted as being new entrants. Majority of the students do not resist and succumb to ragging due to certain reasons.

Certain school of thought advocates for the ragging justifying from their own point of views. Some are of the views that ragging is a mode of interaction of freshers with the seniors. Some justify on the score that ragging is the proper way of removing the inhibitions and nervousness of the freshers. Some are of the views that ragging makes the new entrants extrovert. The pseude mod seniors justify the ragging so as to make the freshers dynamic and versatile, and is helpful in sharpening the edges of the personality of new entrants, bringing in them creativity, attitudinal change, imbibing confidence to withstand in adverse set of circumstances, thus incarnating them as super mod and smart.

FORMS OF RAGGING :

There are different types of ragging. To my view the ragging may be classified as either mild or harsh. The term as such cannot be straight jacketed but can be appreciated through various instances of ragging. Some of the prevalent and prominent forms of mild ragging are being cited below :

1. Asking to adhere to silly dress code.

2. Asking a fresher to sing a song and dance,

3. Putting queries with respect to private parts body,

4. Directing to pay salam or namestey to strangers or even to a member of fair sex,

5. Asking about the various sex processes, violating the norms of decency,

6. Asking to abuse some one,

7. Asking to do certain works of seniors,

8. Putting absurd queries about his or her parents,

9. Asking to smoke and chew betel.

The mild form of ragging involves in it the elements of ethical, social and psychological embarrassment and negatives the element of conspicuous physical torture.

Some of the prominent instances of harsh ragging are being illustrated below:

1) Asking to undress himself publicly,

2) Asking to perform particular sexual act,

3) Directing to take round in nudity,

4) To force new one to take alcohol or drugs or narcotic substances,

5) Physical assault,

6) Directing to urinate on live wire,

The prominence of physical torture aspect can be appreciated from the above illustrations of harsh form of ragging. Physical torture appears to be the core element in the harsh ragging though the aspect of psychological, social and ethical embarrassment is there.

Certain evil consequences emanate from the ragging, impairing the personality of the new entranst, creating lots of social, moral and psychological problems and embarrassments. The ragging sometimes results into serious disturbances and the cases of suicide have also been noticed. It develops phobia. At occasions, the new entrants have left their education ruining their career because of ragging. Dehumanising effect of ragging has at times impaired the academic ambience of the institution.

Appreciating cursorily both sides of coin, let us visualize the legal remedies available for the victims of the ragging.

REDRESSAL MEASURES :

Tamil Nadu is the pioneer State in the country which resorted to legal measures to curb the evil of ragging and preserve the academic ambience by promulgating Prohibition of Ragging Ordinance in 1996. Later it was given the shape of an, enactment 'The Prohibition of Ragging Act 1997' providing for penal consequences in the event of ragging.

The Karnataka Government[2] has issued a circular prohibiting the ragging in the Institutions and in the hostels and has held the Principal of the college responsible in the event of ragging. It has provided de-affiliation of the Institute from the University or from the University Grant Commission or from the All India Council of Technical Education. The circular further provided for setting up review committees headed by the Principal entrusting them with duty to adopt effective measures for bringing down the menace of ragging.

[2] Prohibition of Ragging in Colleges and Hostels, Circular letter dt 8th August-2000 issued by the State of Karnataka.

Review committee shall be comprised of local Inspector or Sub-Inspector of Police and two representatives of the Senior Students. The circular letter provides penalty of one year imprisonment or a fine of Rs. 2000/- on conviction and the convict would be liable to be expelled or rusticated from the Institution.

The Maharashtra Government prohibited ragging within and outside of any educational institution and declared it as an offence punishable with imprisonment for a term which may extent to two years and also fine, which may extend to Rs. 10000/-. The convict shall be dismissed from the educational institution and shall not be eligible for admission in any other Institution for a period of 5 years from the date of said dismissal. The Head of the institution has been enjoined with a duty to initiate enquiry within 7 days from the receipt of the complaint of ragging and on complaint being prima facie to be true, suspend the student and forward the complaint to the police station having territorial jurisdiction. The Head of the Institution, in the event of negligence or failure to perform, in accordance with the foregoing obligation, shall be deemed to be an abettor of the offence and shall, on conviction, be liable to be aforesaid punishments[3]

Legislation of Kerala provides that who shall be found directly or indirectly involved in ragging or abetting the same within or outside the educational institution shall be sentenced to imprisonment which may extend to two years with fine which may extend to Rs. 10000/- on conviction. Such guilty students further can either be suspended or dismissed from the institution or can also be debarred from admission in any other institution for a period of 5 years[4].

With reference to ragging of freshers in Thrivananthapuram Engineering College, the Hon'ble Court provided that in the event of registration of the case and the production of the accused before the Magistrate the direction regarding attendance of the accused before the

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[3] Maharashtra Prohibition ofRagging Act, 1999

[4] Kerala Prohibition of Ragging Bill 1998, which was later passed by the State Assembly.

Police is to be made and the process shall continue till the conclusion of trial. The Court emphasized for disposal of case of ragging on priority basis[5].

West Bengal Prohibition of Ragging in Educational Institution Act provides for imposition of fine up to Rs. 5000/- or a sentence up to 2 years R.I. or both for a convict of ragging. It further provides for expulsion of perpetrator from the Institute without any scope of readmission.

Considering the matter of ragging, the Hon'ble Allahabad High Court has stressed for strict discipline, to be imposed to contain the disease. It should not be overlooked. The Court, while expressing serious concern, has also cautioned, "If a punishment, on account of ragging, is to be inflicted, it has to be inflicted with proper care and caution only when it is established that the student is responsible and the authority has reasons to believe that he had participated in ragging and was responsible for the same. Such a conclusion can only be arrived at, after giving an opportunity of hearing and after holding a proper enquiry in the matter. It should not depend upon the whims and caprices of the authority concerned."

The epidemic of the ragging drew the attention of the Hon'ble Supreme Court through a PIL preferred by the Vishwa Jagriti Mission invoking the jurisdiction under Article 32 of the Constitution of India. Issuing interim directions to curb the menace of ragging, the Hon'ble Apex Court observed that the acts of indiscipline and misbehaviour, on the part of students, must primarily, be dealt with, within the institutions and by exercise of disciplinary authority of the teachers and students. The students ought not to, ordinarily, be subjected to police action unless it is unavoidable.

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[5] Regarding ragging of freshers in Thiruvananthapuram Govt. Engineering College v. State of Kerala, AIR 2000 Kerala 245.

The Hon'ble Court proposed the punishments for ragging by way of expulsion, suspension from the Institution or from the classes for a limited period or fine with a public apology. The punishment may be in the shape of withholding the scholarship or other benefits, or debarring from representations in any event and fine, or withholding results, or suspension or expulsion from the hostel and the mess or alike.

The Hon'ble Court emphasized the need for creating awareness amongst the students, teachers and parents that ragging is a reprehensible act, by sending a clear message that any act of ragging shall not go unnoticed and unpunished thereby generating the atmosphere of discipline. Anti ragging movement should be initiated by the institutions right from the time of advertisement for admission,[6]

The application forms for admission/enrolment should have a printed undertaking in the spirit of legislation if any, to be filled up and signed by the candidates (counter signed by parents as well) to the effect that he/she has become aware of the institution's approach towards ragging and the punishments to which he or she shall be liable if found guilty. If it is being introduced for the first time, the same undertaking be obtained from the students already studying in the Institution and from their guardians/parents as well. A printed leaflet detailing when and to whom one has to turn for information, help and guidance, should also be given to the freshers.

The management, the principal, the teaching staff should interact with freshers and take them in to confidence by apprising them of their rights, as well as, obligation to fight against ragging and to generate confidence in their minds that any complaint of ragging shall be promptly dealt with.

The Hon'ble Court suggested for creating a committee consisting of senior faculty members, hostel authorities like wardens and few respectable students to keep a continuous watch and vigil over

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[6] Vishwa Jagriti Mission (Supra)

ragging and to promptly deal with the incidents of ragging. The vulnerable locations be identified and specially watched. The local community and the students in particular must be made aware of dehumanizing effect of ragging inherent in its perversity. Failing to prevent ragging shall be treated as an act of negligence on the part of management, Principal and persons in authority of the Institution and the hostel warden[2].

The hostel should be carefully guarded wherein entry of seniors and outsiders should be prohibited after specified hours. There should be the provisions for collective punishment to put pressure on the potential raggers.

Migration Certificates issued by the Institution should have an entry whether the student had participated in and in particular, was ever punished for ragging.

In the event of failure to curb ragging, the UGC/funding agency may consider for stoppage of financial assistance to such institutions till such time, it achieves the same. The University may consider disaffiliation of the college or institution failing to curb ragging. There should be deliberations involving seniors and juniors to develop healthy and friendly atmosphere.

Preservation of academic ambience is must and need of the day. Some of the States have played laudable role by taking early initiatives, by bringing appropriate legislation, to curb this evil, incorporating deterrent measures. Ours state (U.P.) is lagging behind in the field of legislation. To my view Central Govt. should legislate a law in the spirit of the verdict of Hon'ble Apex Court and covering all other aspects which it deems just proper and appropriate to contain the evil of ragging so as to bring uniformity in the procedure, penalty, consequences etc. since the subject of education finds place in the concurrent list of VIIth Schedule in the constitution of India.

Conclusion:

After visualizing the aspects of ragging it is high time to take effective measures to curb the menace of ragging to save the student community from the dehumanising effect of the evil inherent in its perversity. Ragging should be treated as our problem and we should no more allow the academic milieu to be contaminated. This can be attained by sensitizing the students, teachers, management, parents or guardians about perversity and dehumanising element inherent in the ragging and bringing in them the attitudinal change and developing critical faculty of analyzing the things for appreciating them sincerely, honestly and in right perspective. The positive results in negating the evil can be achieved by taking recourse to large scale of propaganda through print and electronic media.

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