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FROM THE PEN OF THE EDITOR

Ever increasing awareness of the masses and complexities of social envfronment with its legal ramifications are making additional demands on the already over burdened justice delivery system. There is a complete mismatch of demands and resources that is causing dissatisfaction among the common litigant. To quote the words of ***Hon'ble Mr. Justice K.T. Thomas,*** Judge, Supreme Court of India, "the time is running out for doing something to solve the problem which has already grown into monstrous form. If a citizen is told that once you resort to legal procedure for realization of your urgent need you have to wait and wait for 20 to 30 years, what else is it if not to inevitably encourage and force him to resort to extra legal measures for realizing the required relief. A Republic, governed by rule of law, cannot afford to compel its citizens to resort to such extra-legal means which are very often contra-legal means with counter productive results on the maintenance of law and order in the country". ***[Gaya Prasad v. Pradeep Srivastava (2001) 2 SCC 604]***

Inadequacies and demand-resource mismatch notwithstanding, the judicial system has to live up to the expectations of the society. Attempts have been made to ameliorate the situation by making amendments in various procedural laws including the Code of Civil Procedure but results are yet to surface. However, an alert judicial officer by being active participant in the trial and keeping an eye over the movement of trial can do miracles and abort many dilatory tactics. The Supreme Court has emphasized time and again the need of trial judge being active and vigilant during the trial. In ***Ram Chandar v. State of Haryana, (1981) 3 SCC 191,*** Hon'ble the Supreme Court has observed ".....to be an effective instrument in dispensation of justice the presiding judge must cease to be a spectator and mere recording machine. He must be a participant in the trial by evincing intelligent active interest." More recently ***Hon'ble Mr. Justice R.C. Lahoti (now Chief Justice of India)*** has observed in ***Makhan Lal Bangal v. Manas Bhunia, (2001) 2 SCC 652.*** "An alert Judge actively participating in court proceedings with a firm grip on oars enables the trial smoothly negotiating on shorter routes avoiding prolixity and expeditiously attaining the destination of a just decision." These tips and measures may look small but they go a long way in changing the things in a big way.

(Allah Raham)
Director

Memorable moments

VISIT OF HON'BLE MR. JUSTICE S.B. SINHA, JUDGE, SUPREME COURT OF INDIA ON 18.09.2004

Hon'ble Mr. Justice S.B. Sinha, Judge, Supreme Court of India in the special session of Foundation Training Programme for Civil Judges (J.D.) of Himachal Pradesh and Uttar Pradesh.

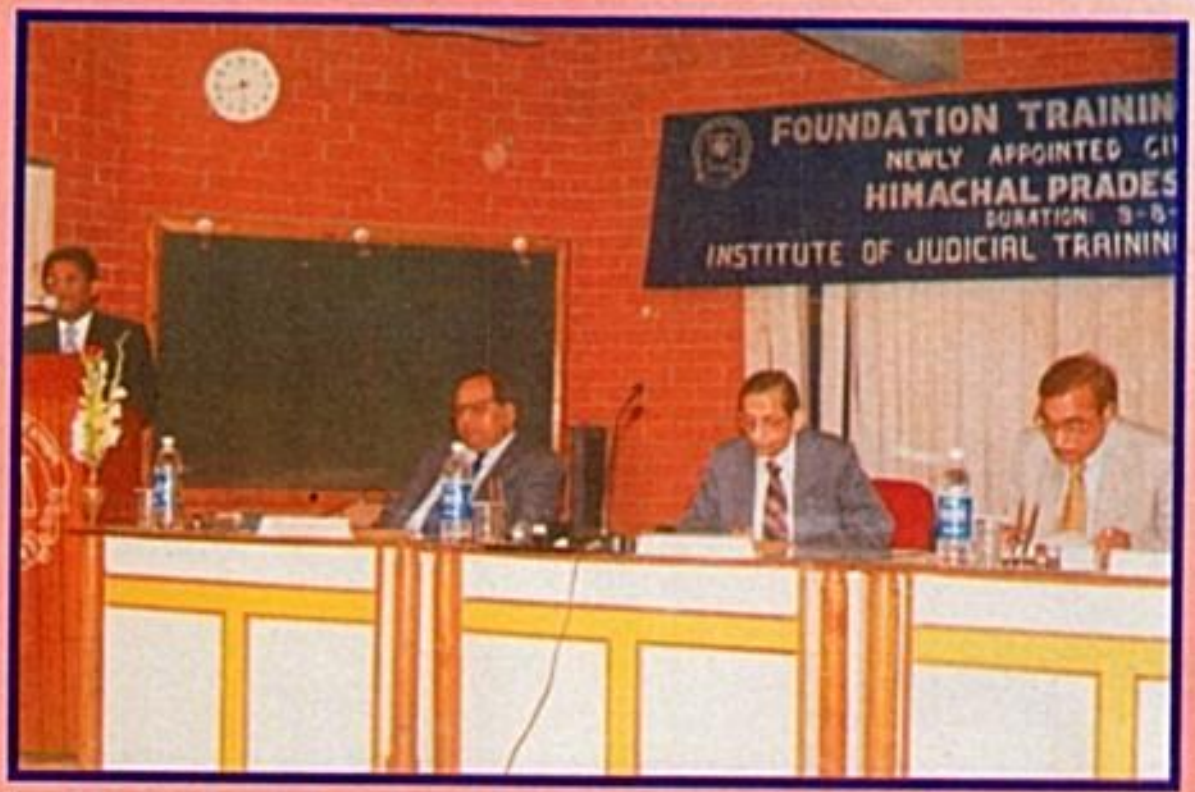
Hon'ble Mr. Justice S.B. Sinha, Judge, Supreme Court of India, Hon'ble Mr. Justice Vishnu Sahai, Senior Judge, Lucknow Bench, Allahabad High Court, being escorted to the venue of special session by Director of the Institute Sri Allah Raham.

Presentation of welcome bouquet to Hon'ble Mr. Justice S.B. Sinha, Judge, Supreme Court of India by the Director of Institute Sri Allah Raham.

Presentation of welcome bouquet to Hon'ble Mr. Justice Vishnu Sahai, Senior Judge, Hon'ble High Court, Lucknow Bench, Allahabad.

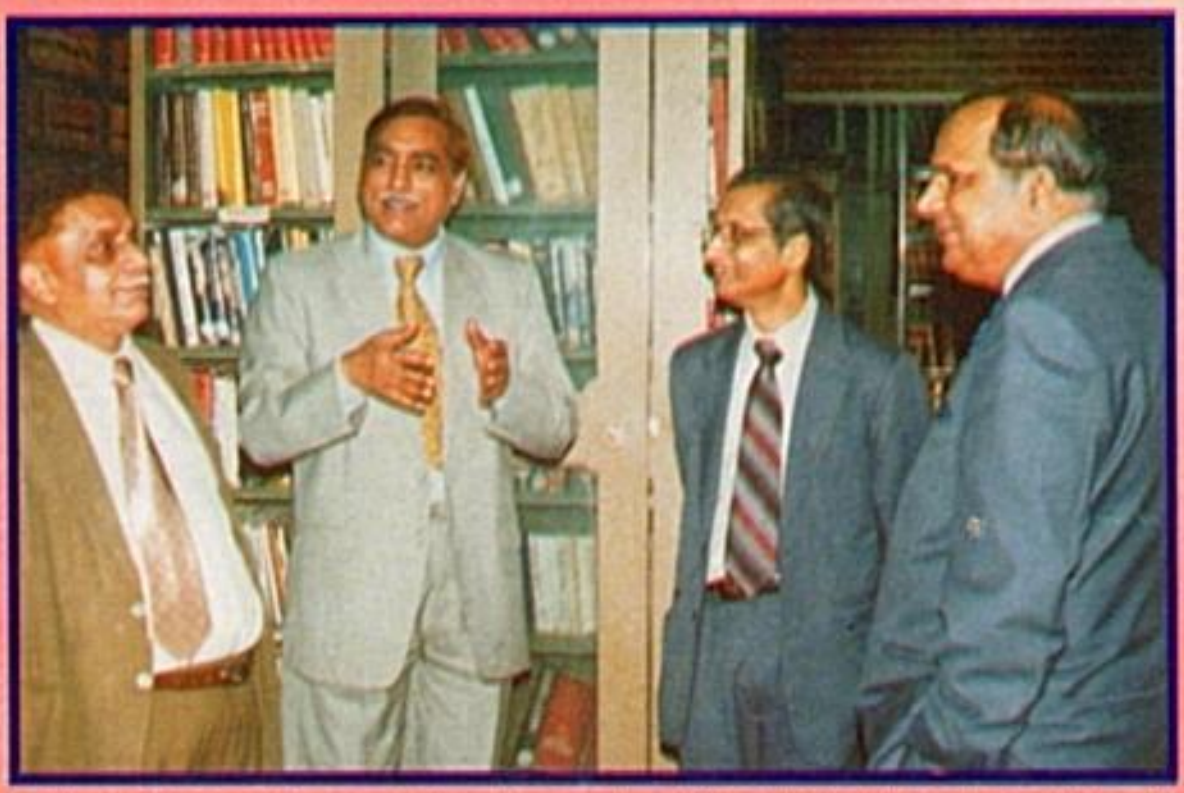
Sri Allah Raham, Director of the Institute delivering welcome address.

Presentation of welcome bouquet to Hon'ble Mr. Justice S.B. Sinha, Judge, Supreme Court of India by Smt. Sheetal Sharma, Civil Judge (J.D.) of Himachal Pradesh.



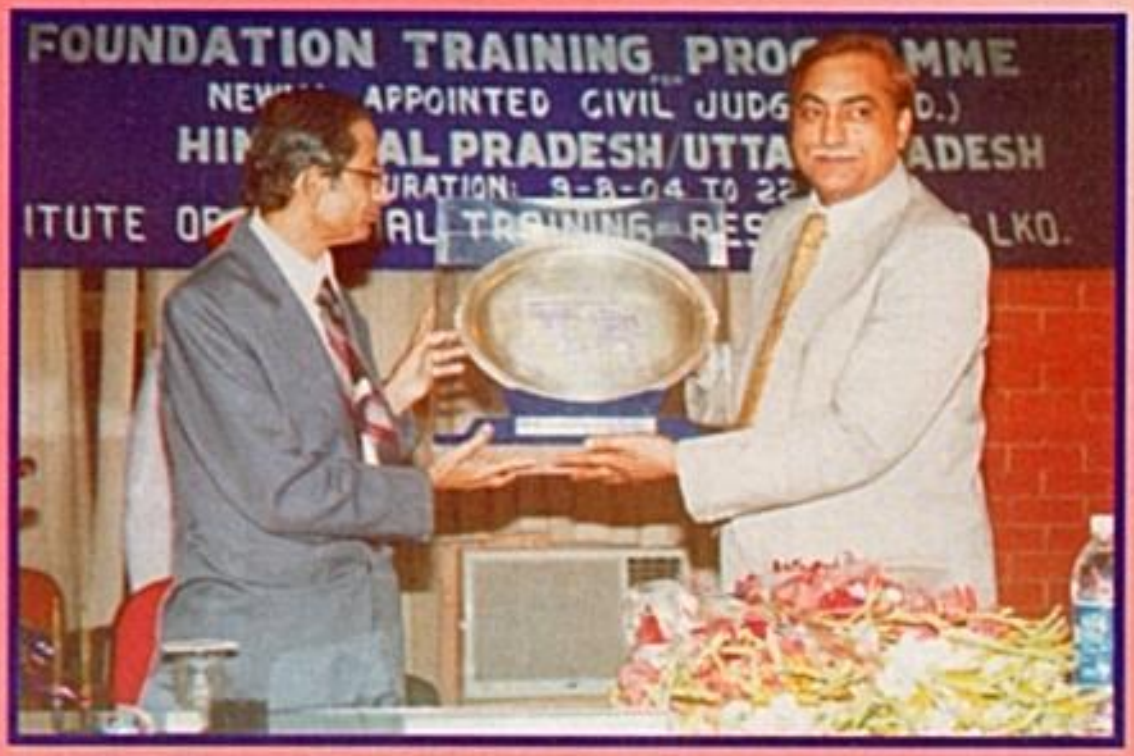
A view of the dais. Seen in the picture are (from right to left) Sri Allah Raham, Director of the Institute, Hon'ble Mr. Justice S.B. Sinha, Judge, Supreme Court of India and Chief Guest of the function, Hon'ble Mr. Justice Vishnu Sahai, Senior Judge, Lucknow Bench, Allahabad High Court, Sri Vijai Varma, Addl. Director (Trg.), IJTR compeering the programme

Hon'ble Mr. Justice S.B. Sinha, Judge, Supreme Court of India showering blessing on the Trainees Civil Judges (J.D.) of Uttar Pradesh and Himachal Pradesh.



In the Library of the Institute. Seen in the picture are from left to right Hon'ble Mr. Justice Vishnu Sahai, Senior Judge, Lucknow Bench, Allahabad High Court, Hon'ble Mr. Justice S.B. Sinha, Judge, Supreme Court of India, Sri Allah Raham, Director of the Institute and Hon'ble Mr. Justice Kamal Kishor, Judge, Lucknow Bench, Allahabad High Court.

Trainees and faculty members in the special session.



Presentation of memento to Hon'ble Mr. Justice S.B. Sinha, Judge, Supreme Court of India by Sri Allah Raham, Director of the Institute.

TRAINING PROGRAMME ON LEGAL PROCESSES AND PROCEDURES FROM 13.9.2004 TO 17.9.2004.

Presentation of welcome bouquet to Hon'ble Mr. Justice Saghir Ahmad, Former Judge, Supreme Court of India by Director of the Institute Sri Allah Raham in the Inaugural Session of the Training Programme.

Hon'ble Mr. Justice Saghir Ahmad, Former Judge, Supreme Court of India
delivering Inaugural Address.

SPECIAL TRAINING PROGRAMME ON "CHILD PSYCHOLOGY AND CHILD WELFARE" FOR JUDICIAL MAGISTRATES.

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Allahabad High Court and Chief Guest of Inaugural Session.

Presentation of welcome bouquet to Hon'ble Mr. Justice I.M. Quddusi, Judge, Lucknow Bench, Allahabad High Court and Chief Guest of the Valedictory Session by Director of the Institute Sri Aliah Raham.

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Presentation of welcome bouquet to Hon'ble Mr. Justice Rafat Alam, Judge, Allahabad High Court and Chief Guest of Inaugural Session.

SPEECHES DELIVERED

By

HON'BLE JUDGES

HON'BLE MR. JUSTICE S.B. SINHA

JUDGE, SUPREME COURT OF INDIA

(IN A SPECIAL SESSION AT THE FOUNDATION TRAINING PROGRAMME OF CIVIL JUDGES (J. D.), U. P.)

I am grateful to the Institute of Judicial Training & Research for giving me this opportunity to be amidst you this evening.

First of all, let me congratulate the new recruits to the Judicial Service who are undergoing training.

Getting through successfully into the judicial service is the aspiration of thousands of young advocates of this country. In fact, a recent survey conducted in Delhi and Bangalore found that the first career preference of law students was the judiciary - 49% in Delhi and 45% in Bangalore. So, it cannot be doubted that you belong to a much sought after and prestigious service. There is no other service where one is truly independent and where his or her peers can only judge one's conduct. I can well imagine the amount of industry, patience and stern discipline and how many hours of self-denying toil, has been put in by you young men and women, who have been able to make it to this service.

NEED FOR CONTINUING EDUCATION:

Many of you must have wondered why you were asked to undergo some training even after having passed the judicial service examination. Surely, you have had your basic routine education in school and professional education in a Law College and you have spent some years at the Bar also before taking the judicial service examination. So, why should you have to undergo any training at all? I am sure that by having spent some time in this Academy, you must have now had some indication of, and perhaps also realized, the importance of professional training for the discharge of your duties as judicial officers.

But let me put it in a proper perspective. One of our greatest jurists, Mr. Palkivala once described education, in one of his addresses, as the technique of transmitting civilisation. In order that it may transmit civilisation, education has to perform two major functions: it must enlighten

the understanding, and it must enrich the character.

The two marks of a truly educated man, whose understanding has been enlightened, are the capacity to think clearly and his intellectual curiosity. If you have imbibed the ability to think clearly, you will adopt an attitude of reserve towards ideologies that are popular and be critical of the nostrums that are fashionable; enabling you to find the truth. Intellectual curiosity would enable you to continue and intensify the process of learning even after you have finished your training.

The second function of education is to enrich the character. What we need today, more than anything else is moral leadership founded on courage, intellectual integrity and a sense of values. If you have been able to assimilate some of these attributes during the course of your training, only then I shall consider that this Academy has fulfilled its objective of imparting you proper education and the necessary training. You must appreciate that as members of the Judicial Service, you perform an important duty and belong to one of the important wings of administration. More importantly, in the course of your duties you would be discharging essential sovereign function of dispensing justice.

This is where character is important. It is easy to get carried away with the importance of your position and to wield power that you never had before. But, you must remember that you are dispensing something divine, that is, justice according to law and reason. The power that you hold is therefore limited and circumscribed and not absolute. You cannot exercise power beyond your jurisdiction, and a man of character will be able to determine where his jurisdiction ends and when he begins to wield power that is beyond his jurisdiction. Training at the Academy is intended to guide you to appreciate your limits and thereby help you to build your character.

ATTRIBUTES OF A JUDGE:

Every judicial system consists of two components -A framework provided by the law and the Judges who work within the system. The effectiveness of a system usually depends, in a substantial measure, on the effectiveness of the men who belong to and operate the system. The judicial system, even if it is perfectly structured, may yet not be an effective justice delivery system if the persons working as Judicial Officers and

Administrative Officers discharging judicial functions do not have the requisite operational skill or are not enthused to deliver robust substantial justice. Therefore, the quality of justice depends more on the men who administer the laws than on the laws they administer. It is these men and women who constitute the critical factor in the system, which has been operating for more than a century in this country.

For this reason, many people believe that our justice delivery system, which has existed for so long is not at fault - they believe that it is the judges who are to be blamed for the ills of the system. Therefore, the judiciary today is at a cross-road. Accountability of judges is being talked about. There is nothing to worry about this and we must remember what Lord Atkin said in **Ambard vs. Attorney General (AIR 1936 PC 141).** He said:

"Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful even though outspoken, comments of ordinary man."

An eminent senior counsel and a member of the Rajya Sabha recently introduced a Private Member's Bill, which contemplates that the disposal by each judge should be brought within a statutory scheme. In the event of a failure on the part of a judge to dispose of the requisite number of cases, action is contemplated against him. Although the Union Law Ministry does not agree with it that the said Bill be introduced in Parliament on the ground that statistics are furnished by the respective High Courts and information about the disposal of a particular judge is also available.

But there are some people who could unfairly use all the weaponries in their possession on the least provocation. In this, you need to be forewarned and forearmed. The first and foremost attribute that you must inculcate as a Judicial Officer and a member of the judiciary is the necessity of living such a life and conducting yourselves in such a manner, both inside and outside the court, so as not to provoke the critics. You have to make yourselves totally above criticism. But when there is constructive criticism, it must be accepted without being over- sensitive about the issue.

The concept of accountability is connected with the power to govern. A person who is given the authority to govern has certain duties, obligations and functions to be performed. But it is to be mentioned that there has

been complaints against judiciary by legislators and executive that the former impedes social development by misappropriating power, which does not belong to it. But this should not unduly bother you, for the Supreme Court said that:

"In the free market place of ideas criticisms about the judicial system or judges should be welcomed as long as such criticisms do not impair or hamper the administration justice" (AIR 1988 SC 1208, P. N . Duda Vs. P. Shiva Shankar).

Judges play a pivotal part in the administration of justice and further the trial judge has a greater role to play in the dispensation of justice. Impartiality, honesty, knowledge and sincerity are the basic and inherent qualities, which a trial judge must possess in the discharge of his duty as a Judicial Officer.

The conduct of every Judicial Officer should be above reproach. He should be conscientious, studious, comprehensive, courteous, patient, punctual, just, impartial, fearless of public glamour, regardless of public praise and indifferent to private, political or partisan influences; he should administer justice according to law and deal with his appointment as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity .

Judges are expected to be impeccable in their dealings. Each case coming before judge has its own peculiarity and requires a fresh application of mind and skill. A judge has to constantly be a creative artist. His work, therefore, requires constant thinking and display of talent.

In light of the position projected above, the nature of judicial office, and the independence of the judiciary, personal conduct and official conduct of men who preside over this the most important branch of State have to be approached with care and caution. You must remember that judges are not employees of anybody. As members of the judiciary, you exercise the sovereign judicial power of the State. At whatever level they may be, judges represent the State and its authority. (See AIR 1993 SC 2493, All India Judges Association v. UOI).

It is, therefore, essential that the personality of the Judge, which in ultimate analysis consists of his equipment, behaviour and attitude, is developed to optimize the efficiency of the justice delivery system.

I would like to end this aspect of the discussion with sagely advice given by the Greek philosopher Socrates, over 2000 years ago:

"Four things belong to a Judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially".

ADMINISTRATION OF JUSTICE:

Philosophers have long debated and discussed what is justice. But, we need not enter that domain, for we are concerned more with the administration of justice rather than its theoretical aspects.

Democratic Polity of India is based on rule of law.

Ours is a vibrant democracy, which not only has a strong and independent judiciary but also integrates with a society that recognizes the existence of the Rule of Law. For the continued existence and sustenance of a truly democratic State, administration of justice should be in the hands of not only competent but also impartial, independent and conscientious persons so that justice is rendered and Rule of Law is upheld, both of which are imperative for a free society.

We have given ourselves a beautiful Constitution with a high tone. However, it is widely accepted that it is not the letters of the Constitution but the people who manage it, that makes it successful. India has been a great country with one of the greatest and oldest civilisation to boast about.

This is not what we say about ourselves; it is the perception of many scholars of foreign origin as well. I will quote Friedrich Muller, a German Scholar, in this behalf:

> "If I were to look over the whole world to find out the country most richly endowed with all the wealth, power and beauty that nature can bestow-in some parts a very paradise on earth- I should point to India. If I were asked under what sky the human mind has most fully developed some of its choicest gifts, has most deeply pondered on the greatest problems of life, and has found

solutions of some of them which well deserve the attention even of those who have studied Plato and Kant -I should point to India. And if I were to ask myself from what literature we, here in Europe, we who have been nurtured almost exclusively on the thoughts of Greeks and Romans, and of one Semitic race, the Jewish, may draw that corrective which is most wanted in order to make our inner life more perfect, more comprehensive, more universal, in fact more truly human, a life, not for this life only, but a transfigured and eternal life-again I should point to India."

However, that is what India was once upon a time. We cannot, with equal authority, claim this to be present-day India.

In our country judiciary has been entrusted with the task to ensure actualization of the rights granted to citizens, and also with the task of seeing that the other limbs of the government function within the constitutionally ordained parameters, especially when dealing with rights of citizens. It is, therefore, imperative that the judicial system is effective and efficient so that the laws conferring rights, and prescribing norms for the functioning of the executive are not rendered ornate phrases, meaningless in content.

It is in this context that we may now observe some emerging trends that our justice delivery system will face in the near future.

1. Human Rights Jurisprudence

We have long accepted human rights are one of the founding pillars of our Constitution. Part III of our Constitution incorporates many aspects and principles of the Universal Declaration of the Human Rights, 1948 as well as the International Covenant on Civil and Political Rights 1966 which is an optional protocol to Universal Declaration Our judicial system ensures that every citizen shall have an effective remedy for enforcing his rights or freedoms. The legal maxim ubi jus ibi remedium is not an empty promise.

But we need to now focus on a new and developing strain of thought, that is, victimology. Are the victims of crime being adequately rehabilitated

and is the criminal justice system adequately punishing the guilty? These are questions that we need to ask ourselves and try to find an answer. It is often said that criminals are ruling the roost with large-scale crimes, including murders, dacoities and white-collar crimes, which have assumed frightening, and varied proportions. Women are not safe. There are frequent incidents of rape, molestation, and sexual harassment at workplaces, cases of bride burning and dowry deaths. In fact, the crime clock records 25 violent crimes every hour, including murders, culpable homicides, rapes and kidnappings. There is at least one dowry death every hour. Is our judicial system able to cope with the challenges thrown by hardened criminals?

Our criminal justice delivery system bears a big question mark. Only 30 to 35 per cent of all criminal cases end in conviction, while 90 to 95 per cent of matters involving heinous offences end in acquittal. In contrast, when the rate of conviction in Japan in 1997 came down from 99 per cent to 96 per cent, a Commission of Inquiry was set up for the purpose of finding out as to whether more false cases are being registered.

Under these circumstances, does the victim of a crime believe that he is ever going to get justice? We need to think seriously about this facet of human rights jurisprudence and it is the judicial officers of today who have to provide the solutions for tomorrow.

2. Delay in disposal of cases:

The judicial officers of today have to realize that they are inheriting a legacy of huge arrears. The pendency of cases is huge because earlier methods of disposal were not very effective. Therefore, the judicial officers of today have to look at the problem of case disposal differently and to adopt different alternative methods of dispute resolution. To illustrate the point of arrears, I would like to quote from a report in which it is said:

> "Unless a court can start with a reasonably clean slate, improvement of methods is likely to tantalize only. The existence of a mass of arrears takes the heart out of a Presiding judge..... So long as such arrears exist there is temptation to which many Presiding Officers succumb, to hold back the heavier contested suits and

> devote attention to the lighter ones. The turnout of decisions in contested suits is thus maintained somewhere near the figure of institution, while the real difficult work is pushed into the background."

This may appear to be a quotation from report that could have been prepared only yesterday, but in fact it is from the Justice Rankin report of 1925. The situation does not seem to have changed over the last 75 years and that is why some non-conventional methods have to be adopted to tackle the huge pendency of cases.

Our justice delivery system is bursting at the seams and may collapse unless immediate remedial measures are adopted not only by the judiciary but also by the legislature and the executive. It has been said by Lord Devlin:

> "If our business methods were as antiquated as our legal system, we would have become a bankrupt nation long back."

Different wings of the State are plagued with corruption, nepotism, red-tapism. There is hardly any law and order in this society. There are problems of poverty, hunger, malnutrition, and food adulteration. Even after more than 57 years of independence we have not been able to provide safe drinking water to the people of this country. It is in this background that the common people of this country, with a hope that the judiciary will remove these ills with which society is suffering, see our courts as a last resort. However, as mentioned above, today even the judiciary is at cross-road and it is a matter of concern to all of us. People had lost faith in the other two wings of the State much earlier. Unfortunately, the faith of a common man in the judiciary is also being eroded.

We all know that people indisputably have been trying to avoid law courts. Sometimes they are forced to do so as is the case in some of the States where people are forced to take their disputes only to the extra constitutional courts. Should we, being a part of the society, allow this to happen? When for avenging a murder another murder takes place; when a landlord instead of approaching the Court of law hires the services of goons or where the services of the criminals are hired for settling all types

of disputes; can we say that we are living in a civilized society governed by the Rule of Law? Answer to this question must be rendered in the negative.

We have to take remedial steps to prevent this erosion any further, and one of the major requirements for this is to deliver speedy and inexpensive justice to the common man. I would urge all of you to take this seriously because it is not for nothing that it is said that justice delayed is justice denied -and if justice is denied, there will be a collapse of the Rule of Law. Recently in H.P.A. International vs. Bhagwandas Fateh Chand Daswani and Others [AIR 2004 SC 3858, the Supreme Court while deciding a matter arising out the Specific Relief Act lamented the delay in disposal of the suit, thus:

> "2. The facts of the present case should be an eye opener to functionaries in law Courts at all levels that delay more often defeats justice invariably adds complications to the already complicated issues involved in cases coming before them, and makes their duties more onerous by requiring them to adjust rights and equities arising from delay."

3. Inculcating the scientific temper:

New and revolutionary methods and techniques of investigations are being tried out the world over. Are we in the judiciary ready for the advances made in technology? DNA fingerprinting has become commonplace in almost all investigations in Europe and America. This technology has been introduced in investigations in some of the larger cities of India such as Delhi and Bombay. Hyderabad has now established an expert institution of forensic science, which can help DNA fingerprinting of criminals. It is necessary for judicial officers to study the recent trends in investigative skills and to understand some of the problems that would arise with the use of new technology.

Another problematic area that is emerging in the scientific and technological field is that of cyber crimes. Although there are not many such crimes committed in India, it is bound to increase with the use of credit cards becoming a major source of fraud. Very often in cases of this

kind the question of jurisdiction arises. In the international sphere, this has become a major issue of debate because crimes are committed in one country and the effect of that is felt in another country. Such problems are bound to arise within the courts in India, although on a smaller scale but then all judicial officers have to be prepared for this.

Tomorrow, new technologies are going to develop and to understand and appreciate these developments, we have to inculcate the scientific temper mandated by our Constitution. Already in India, e-courts at Mysore have started functioning and other courts will soon follow suit. E-filing in the Supreme Court and in some other High Courts is not a distant dream. Video-conferencing to examine witnesses has now received the approval of the Supreme Court in **The State of Maharashtra vs. Dr. Praful B. Desai JT 2003 (3) SC 382.** The use of digital signatures is being actively considered as a substitute for certified copies.

4. Effects of the international scene:

We are now in the new economic sphere, which includes Information Technology, Entertainment and Communications. Society has become a global village. The face of the corporate sector has completely changed as old economic thoughts and practices have given way to the New Economy and rapid economic changes. In this environment and atmosphere, law cannot remain static and it has to cope up with the fast changes especially on economic matters due to liberalization.

The interpretation of law depends upon the need felt by society at any given point of time. We must take notice of the changes in society and in socio-economic trends. What at one point of time might be possible may not be possible in a changed situation. New areas of law are emerging, for example, intellectual property rights, international law, new interpretative canons and in particular interpretation with reference to the international treaties, declarations and conventions, anti-trust law, competition law, commercial arbitration, new arenas of fundamental rights, human rights, environment and convergence etc.

The new doctrines of interpretation of statutes as, for example, purposive construction or economic interpretation of a statute in the wake of globalization of economy are gaining importance. Courts are frequently

receiving cases where new interpretative jurisprudence is required to be invoked having regard to the international conventions, covenants and protocols. The doctrine of incompatibility in the wake of human rights movement envisaged under various international protocols and conventions as also protection of human rights is gaining momentum.

With the laws being incessantly made, decisions continually rendered, and new theories propounded giving new meanings to old principles, one does need to get out of the court periodically after every few years to lean back in a learning environment and imbibe the developments systematically to think about his own functioning and also to exchange notes with similarly engaged Judges.

And yet, in all this hustle and bustle, traditional disputes must not be overlooked. Speedy resolution of disputes between parties and the involvement of a third party forum has been found imperative in areas of commercial and family law. The new concept of Alternative Dispute Resolution (ADR) mechanisms have been given a thrust and meaning with the amendment of the CPC. This reflects one of the changes being brought about by societal needs for which judicial officers must be prepared. It is worth recalling what Dean Roscoe Pound said:

> "Men count more than machinery in the administration of justice."

5. Juvenile justice and justice for the depressed classes:

Recent trends show that the weaker sections of society need special protection, whether they are children or women or those belonging to the depressed classes. Often they are victims of crime and are unable to speak out and help the investigating agencies in prosecuting the offender. A recent case at hand is a shocking incident of sexual abuse of young children in a juvenile home. In some cases young children themselves become criminals and then it becomes very difficult to deal with their problems except through special training.

One of the advantages of a Judicial Academy such as this is to impart training to judicial officers in certain areas where expertise was earlier not available or even if it was available, it was not utilized to the fullest extent.

Crime statistics upto 31st December 2002 show that almost 20% of

all murders committed in the country are actually committed within the State of U .P. It has to be considered whether young offenders or first time offenders should be kept in jail along with such a large number of alleged murderers. Prison reforms are also needed because sometimes the nature of the offence has also to be considered. Statistics show that 24% of all crimes against Scheduled Caste persons are reported from Uttar Pradesh. Can such persons be dealt with leniently, even if they are first time offenders? This requires a delicate balancing.

6. Case Management Techniques

Today, court management has gained considerable importance because it has been tried and tested in other parts of the world and has been found to be a successful method of controlling the huge backlog of cases. Court management was first introduced in America in 1972 and over the years it has gained so much importance that it has become imperative for all courts to use court management techniques to reduce the caseload. This has now become a science involving not only court management but also case flow management, which is the study of the time taken in various stages in litigation. It is not difficult in India to adopt the strategy of court management because the giving of adjournments and dates is in the hands of the judge and he can control the time spent at each stage of a case. By practicing this method, it is possible to have a case ready for disposal within a specified period of time. Judicial officers now undergoing training will realize the benefits of this if they diligently and vigorously adopt this strategy from the date they start doing judicial work.

It may sometimes be necessary to acquire specialized knowledge for a special post or a special court, or even in respect of a specific skill in performance as a judge or an administrator. It is one thing for ideas and theories to evolve and be tested over the years in the study and the lecture-room, and another thing to judge competing theories in the hot-house of the court room.

7. Judicial ethics:

During this period of your training you must have been stuffed with sermons on moral values; what should be the qualities of a good judge, how a judicial officer should conduct himself inside and outside the court, culture of a judge, do's and don'ts to be practiced by a judge et al.

Therefore, I am not going to give you any such sermon today. Wherever, in the discharge of your duties you are able to redress a wrong, you should not hesitate in dethroning that wrong. You should be a person with high moral fibre. Character, commitment and capacity should be your hallmark. Simplicity and clarity should be your virtues. You have to achieve excellence in the administration of your duties. You have to restore the faith of people in the system.

We require a new vision accompanied by a concrete strategy to accomplish it. The whole emphasis is to develop a legal system, which does not stop at declaring rights but backs it up with concrete steps to enforce them. If you imbibe the qualities and discharge your duties with sincerity and devotion we can hope to restore the credibility into the system. And if every person discharges his duties sincerely we can again put our great nation on the same pedestal as it was.

All the judges owe their allegiance to the Constitution of India, which proclaims in preamble the cherished goals of this fundamental document namely to usher in a Socialist Democratic Republic. In this context, it is apt to quote from the Preamble to Model Code of Judicial Conduct (1990) suggested by American Bar Association.

> "Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the percepts that judges, individually and collectively, must respect and honour the judicial office as a public trust and strive to enhance and maintain confidence in our legal system."

CONCLUSION

The Supreme Court of India recently in All India Judges Association case also laid emphasis on the training to be imparted to the Judicial Officers. The objective behind the judicial training is to develop the skills, knowledge, work culture and attitude in a Judicial Officer with a view to improve the quality and quantity of his output.

A person who is selected to perform as a Judicial Officer discharging judicial functions may not be adequately equipped for this. He may commit errors, unless trained before performance. Those errors may cause gross injustice and irretrievable harm to the person concerned which renders the system unjust at least for those who so suffer. Even then the Judge can correct only if he is made to realize the mistake before he repeats them. This can be taken care of by forearming him with necessary tools of knowledge, skills and attitudes to induce the desired level of performance. Only by careful scrutiny of all of all aspects of the judiciary can we hope to detect, deter, and defeat potential injustices.

This is done by training. It seeks to identify the gaps in the expertise available with a person for performance of a job and filling these gaps to raise the level of the expertise, to equip him to perform effectively. This training is indispensable at the threshold stage before a person starts performing.

Yet the process of training does not end here.

I close with a quotation from Ehrlich, who said:

> "The ultimate guarantee of justice in a court of law is the personality of the Judge."

Again I wish you and my country good luck!

HON'BLE MR. JUSTICE SAGHIR AHMAD,

FORMER JUDGE, SUPREME COURT OF INDIA

Mr. Allah Raham, Director, Institute of Judicial Training & Research, Mr. Kesho Bhai Thakkar, Mr. Afsar, Mr. S.G Misra, Mr. K.K.L. Srivastava, Mr. Mauriya, ladies and gentlemen.

Human Immunodeficiency Virus (HIV) is a virus which is out of control in the sense that the disease caused by it, namely, Acquired Immuno Deficiency Syndrome (AIDS) is, at present, incurable. May be in the near future the Scientists or the Bio-technologists find out a panacea to defeat the horrible disease at the initial stage.

The disease is transmitted either through unprotected sexual intercourse with an infected partner or through transfusion of infected blood or from HIV- infected mother to her infant. Unsterilised needles of drug-abusers is mother source of infection. AIDS is not transmitted either by social contacts or working together or shaking hands or by sharing utensils such as dishes, plates, glasses or cups. But it is a passionate disease. Uncontrolled passion lead to indisciplined sex. A person, just to satisfy his lust, may visit the "Red Light Area" which is the brothel of all kinds of sexually transmitted diseases and may, even on the first visit, get infected. It is rather astonishing that though the profession carried on in the "Red Light Area", namely prostitution, is rated as the oldest profession all over the world, and was at its zenith during the days of Roman Empire or when Cleopatra ruled Egypt, there was neither HIV nor AIDS; nor did it occur even in the most populous States including China, India and Bangladesh where millions of people would indulge in heterosexual activities almost daily. The question arises: Is there any other reason for the genesis of this dreadful disease which raised its ugly head for the first time in early 80's. Yes; the reason is the use of sex for satisfying unnatural lust.

Meenakshi Dutta Addl. Sec. & Project Director, National AIDS Control Organization in her paper presented in the symposium "A world without AIDS" states and I quote her :-

"In the summer of 1981, the Centre for Disease Control (CDC) in the United States reported that five previously healthy homosexual men in Los Angeles were suffering from an unusual type of pneumonia caused by

Pneumocystis carinii, a parasite normally harmless to humans. CDS also reported that 26 previously healthy homosexual men in New York and Los Angeles had developed a rare form of skin cancer called Kaposi"s sarcoma. These reports signaled the arrival of a mysterious acquired disorder of the human immune system, which disabled the body's defences. This, as we know, is how it all began."

The genesis of HIV & AIDS thus lies in the unnatural sexual activity. A person involved in such activity who would become HIV + or a person who had already developed AIDS after having become HIV +, would infect his partner in homo or heterosexual activity and the disease would thus spread its tentacles from person to person to cover a vast segment of population.

We have recently heard of "Cross Border Terrorism". India, unfortunately has fallen a victim of another vicious malady, which is "Cross Border Cultural Invasion". Our country's sublime culture which was free of shameful acts mainly because of its discipline in every phase of life including the dress code for men and women both, is gradually slipping into the grip of foreign culture through various sources including the Electronic Media showing, through Satellite channels, not only films, sometimes bordering on vulgarity, but also club scenes etc., thus, adversely influencing the mind of the Indian youth. The institution of "Gay marriages" which was also projected through satellite channel and Print Media, is today a recognized legal activity in many countries. This institution of "Gay Marriages" is today visible in out country also in some of its Metropolitan cities as, for example, Calcutta and Mumbai.

The overall effect of the cultural invasion is that the HIV + people and those suffering from AIDS far outnumber the patients suffering from other diseases. The disease, within the last two decades has spread to such proportions that Bill Clinton, former President of USA through Clinton Foundation (HIV – AIDS) Initiative and Bill Gates, the Microsoft Billionaire Wizard, have poured in our country, millions of dollars for the help and treatment of HIV + and AIDS people Statistically, it is said that 70% of HIV/AIDS cases are in Africa, followed by India.

AIDS has given rise to many medico-legal and socio-legal problems for example, the problem of discrimination. Even in the All India Institute of Medical Sciences, medical personnel at one time had refused to attend

HIV + patients. Many people have been thrown out of job only on the ground that they were HIV positive. A number of public services which could be availed of by normal persons, were denied to persons suffering from AIDS. For example, LIC policies were denied to such persons. Even the transport services were not allowed for HIV + patients.

In the United States, there is a thinking in a vast section of population that persons who are HIV + or who fall in the HIV Prone group, namely, Drug-users and Gay people should be excluded from schools and work places and that they should not be treated with compassion. This attitude is obviously the by-product of a problem wholly misunderstood. The intervention of the US Supreme Court has, however, cleared the mist as the Court has held that persons with infectious or contagious diseases are qualified for employment if they do not pose a threat of communicating the disease. Similarly, the Court also ruled in favour of HIV positive children that they could be admitted in schools provided the parents of such children agreed to comply with specified safeguards. Many other interesting questions have cropped up in the context of HIV & AIDS. I may mention a few.

In January 2002, the Goa Govt. announced its policy of making HIV testing compulsory before registration of marriage. The National Commission for Women supported the move and even suggested amendments in the Special Marriage Act, 1954 and the Hindu Marriage Act, 1955 with the object of preventing the spread of the disease and saving also the intending "Brides" from being infected by HIV. But the move was discarded in the face of protests from NGOs and Human Rights activists whose principal grievance was that it was an isolationist activity where a commune of uninfected people was being created without taking into account the vital factor that there can be infection even after marriage. This object was also sought to be achieved by the AIDS Prevention Bill 1989, under which it was made compulsory for prostitutes, their customers as also professional Blood Donors to undergo medical test. In Sharda v. Dharampal, 2003 4 SCC 493, the Supreme Court has already held that if a person who is a party to the litigation, is directed to undergo medical test, it would not be violative of his fundamental right under Article 21 of the Constitution. But the Bill which was introduced in the Rajya Sabha has lapsed. The main objection to this Bill was that once the persons, on medical examination were found to be HIV +, they would be segregated and live as "outcast." The proposed medical test was therefore, categorized as "stigmatic"

Litigation with Blood Bank is another problem which has cropped up recently. The recipient of HIV infected Blood, sued the Blood Bank and wanted to know the name of the Donor. The Hospital refused to divulge the name of the Donor on account of there being multiple donors. But in the case of "Single Donor" case, the courts have tried to balance the donor's right of confidentiality and the society's interest in maintaining an adequate "volunteer blood supply" with the rider that the Donor should first be tested for HIV.

Vulnerability of a rape victim to HIV infection is another issue of concern. It has been suggested that any person accused of violent sexual assault be tested for HIV and if the test is positive, the result should be communicated to the victim so that she may take necessary precautions and steps to protect her own health.

In Mr. X v. Hospital Z (1998)8 SCC 296 a question arose that if there were two conflicting fundamental rights, which of it would prevail. Mr. X who was HIV + and was engaged to be married had sued Hospital Z for damages on the ground that the Hospital had leaked his blood report to his fiancée who refused to marry him. Mr. X contended that his fundamental right of privacy was violated but the Supreme Court held that there was another fundamental right, namely, right to life available to the lady who was rightly informed by the Hospital that the person with whom she was engaged to be married was HIV + and thus she was saved from becoming a victim of this disease. (See also (2003) 1 SCC 500).

Examples of complex socio-legal problems can be multiplied but the emphasis which I wish to convey to this august audience is that apart from other precautions which may be taken to contain this disease, efforts should be made to preserve our precious heritage, values and culture by adopting all such modes as would effectively combat the Cross Border Cultural Invasion through Satellite Channels and the Media, Electronic and Print both.

Thank you, Ladies & Gentlemen, for sustaining this invasion on your precious time.

Hon'ble Mr. Justice Pradeep Kant

Judge Lucknow Bench, Allahabad High Court

(On the Inaugural Function of 21st All India Moot Court Competition held at Lucknow University on 28th December, 2004)

For me it's an emotional moment but nonetheless full of pride. It is a matter of great satisfaction and happiness when you are invited by those who had been your teacher, for participating in such a function. When I was pursuing my Law Course, I had never imagined that one day out of those many of my fellow students I would also be one of those privileged students who would be given a chance to be here in this very campus but with a different identity. I owe my existence as it is today, to my teachers and to this great University who has once again given me an opportunity to be amongst you on this memorable occasion.

I am happy to be informed that this time all India Moot Court competition is being organized by the Faculty of Law, Lucknow University. I extend my appreciation to the Bar Council of India for allowing the faculty of law to hold this competition.

Moot Court as you all know; is to give an opportunity to hold discussions in fictitious cases arranged for practicing amongst law students. Purpose is obvious and the object meaningful. The purpose is to make you aware about the Court proceedings, the manner in which cases are to be conducted, the role of the lawyers and that of the Judges and the object is to prepare the students fully accomplished, not only theoretically but in practice also, so that when they enter into the legal profession they are found to be responsible lawyers and useful citizens of the country.

Legal profession does not require only legal knowledge or the segregated qualities of head and heart, but, the character of a complete human being with a legally trained mind.

Every growing child when he attains a responsible age has to choose a career for earning his livelihood and for looking after his family and of

course for achieving success after success and thus reaching the ultimate goal of his/her life, as the case may be. Choosing of a career largely depends on the attitude of a student and his bent of mind, though sometimes career is forced upon a child on the wishes of the parents or his well wishers. Reasons for adopting a career may be diverse but the ultimate objective is the same namely; to fulfill the ambitions once dreamt of and to make a big name in the society.

Choosing legal profession as a career means a little more sacrifice, a little more hard work, and a little more humane approach. A good lawyer or a good Judge has to be humane by heart and must be conscious of the social problems and the need of the distressed and weak, with perfect knowledge of law.

Your attitude towards your fellowmen, towards litigant people , towards the judicial system of dispensation of justice and towards your ownself, all combined will make a person of positive approach and attitude, which is the quintessence of a successful lawyer .

Law is to be followed by 'All', whether, willingly or unwillingly. Law touches every person on earth in one or the other walk of his life. No one can go untouched by law. Rule of law, thus has to prevail on earth, by all means in which the lawyers and the judges play the most significant role. A society which is not governed by rule of law, cannot be said to be civilized but rather it would be a barbaric society. You may find a person who has never been to a Doctor and has never taken any medical treatment but even then has been living happily with no ailment. But you will not find a person in whose life the law has not stepped in. If you are driving a Car, law is there. If you are living in a house, rented or owned, law is there. If you are practising a profession, law is there. If you are in service, laws are there. Examples are innumerable. You will not find even a single human being who is totally spared by law.

The significance of law has been reproduced by ***Hon'ble Mr. Justice Rang Nath Misra, C.J. in the case of All India Judges Association vs Union of India, reported in AIR 1992 SC 165,*** wherein he quoted a part of the funeral oration of Mr. Justice Story delivered more than 150 years back by Danial Webster as follows:

"Justice, Sir, is the greatest interest of man on earth. It is the

ligament which holds civilized beings and civilized Nations together, wherever her temple stands, and so long as it is duly honoured, there is a foundation for social security, general happiness and improvement and progress of your race. And whoever labours on this edifice with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august come still higher in the skies, connects himself in name and fame and character with that which is and must be as durable as the frame of human society."

Justice Krishna Iyer, however, taking into account the scene of the law, in the present era, observed:-

"Law is a means to an end and justice is that end. But in actuality law and justice are distant neghbours; sometimes even strange hostiles. If law shoots down justice, the people shoot down law and lawlessness paralyses development, disrupts order and retards progress."

He called for introspection.

The message is clear that law is to be followed by all with no exceptions, which would mean a society where there is peace and where there is all around development and equality; social, political and economic. Violation or disrespect of law means complete disruption of moral and ethical values in the society, tearing off the entire social fabric and catalyzing anarchy.

Oft repeat do's and don't which can be easily said to be sermons and preaching given to students preparing themselves for entering into legal profession may sound repetitive but the fact is that those values still stand and cannot be ignored and rather have to be adhered to for the betterment of the society and for preserving the nobility of the legal profession.

A lawyer has to learn some basic qualities for becoming not only a successful lawyer but also a good lawyer.

Lord Denning in his book "The *Discipline of Law" has devoted one full Chapter on Command of language. He says " to succeed in the profession of the law, you must seek to cultivate command of language. Words are the lawyer's tools of trade. When you are called upon to address a judge, it is your words which count most. It is by them that you will hope to persuade the judge of the rightness of your cause.* "

The first and foremost quality of a good lawyer is thus his command of language. Lord Denning further says "*obscurity in thought inexorably leads to obscurity in language* ", and therefore, you should be clear in your thought and expression and you must know what you want to plead and convince the Judge. If there is ambiguity in your plea and your thoughts and expression are not coming crystal clear your expression will faulter and you may not succeed in propagating your client's cause though his cause may be right.

A lawyer must know when to speak, how to speak, how to modulate his voice and where to stop. You should put your cause in a manner which is understandable to a Judge, who can easily grasp your point of view so that your argument strikes the right node.

Legal profession requires little patience and it also does not mean success in every case at every point. To quote Edwin C. Bliss: *"Success doesn't mean the absence of failures; it means the attainment of ultimate objectives* ".

It is also true and is rightly said that every problem comes with an equal or greater opportunity. " It is, therefore, my advice, that a lawyer must be patient, polite, well read and not oblivious to the situation prevailing in the society. His every act must strengthen the society and should try to create an atmosphere of safety and security. Where rule of law dominates the subject's fundamental right to live a life of dignity and morality, stands secured and protected and any attempt may be from any quarter, to disrupt the society by undermining the law should be dealt with strictly and checked by all those who have been entrusted with the divine duty of protecting the innocent and punishing the guilty.

Persuasion is an art which does not require hammering or repeating a point but needs a clear polite and confident approach by a lawyer in putting

forward his plea. Here comes the Court Craft, which means to press your point strongly, firmly, but in a pleasant manner so that it may not offend the judge or your adversary .

A lawyer must be well versed with facts and law. If facts are marshalled in correct perspective they make the things clearer in imparting justice. Sobriety on the part of the lawyer as well as on the part of the judge not only upholds majesty of the Court but also maintains the dignity of the system.

Of course constant reading and learning is the pre-requirement of an intelligent lawyer and a Judge.

You must always keep in mind that a person who steps in your Chamber, has come for redressal of his grievance or for getting some wrong, being rectified or for protection of any of his rights and so on and so forth. Your primary as well as moral and legal duty is to hear him patiently and give your bonafide advice. If his case makes out a point for taking to the Court, you can well advise him to do so but if you find that his cause would not succeed within the frame work of law, you must tell him that.

Tendency to cheat, feeling of revenge and injustice as a result of State action or private disputes, would never come to an end, and therefore, the legal profession would always survive and the law courts would function only with the aid and sincere advice of the lawyers. The responsibility thus rests upon you to see that the system of dispensation of justice is not polluted. The relationship between the Bench and the Bar must be cordial and they should be supplement and supportive to each other in upholding the rule of law.

Professor Pannick in his book entitled "Judges" has observed:-

"Judges do not have an easy job. They repeatedly do what the rest of us seek to avoid; make decisions." It should be sure and sincere effort on the part of the lawyer to assist the judge rightly in making the decisions.

In this very book he, has also observed as under: -

" The *barrister who argue the case before a Judge, will 'vary much' in their ability, sometimes they help but often they may be a hindrance to the just determination of the issues...*

.The Judge has burden some responsibilities to discharge. He has power over the lives and livelihood of all those litigants who enter his court... ... His decisions may well affect the interest of individuals and groups who are not present or represented in court. if he is not careful, the Judge may precipitate a Civil war. ... Or he may accelerate revolution. .. he may accidentally cause a peaceful but fundamental change in the political complexion of the country."

"The qualities desired of a Judge can be simply stated: 'that if he be a good one and that he be though to be so.' Such credentials are not easily acquired. The *Judge needs to have 'the steps to put an end to injustice' and 'the faculty that are demanded of the historian and the philosopher and the prophet.* I am confident that many of you would become Judge and would reach the highest echelon of judicial system but whether you be a lawyer or a Judge the qualities discussed by me have to be inculcated and embodied.

During the course of your career building as a lawyer or when you become a full-fledged lawyer you will be charging your fee for doing the work of a litigant. Please be sure, always that your standard of fee should not be an obstacle or a hindrance for needy to approach you and to engage you for pleading his cause and for getting justice though he has full faith in you and for that matter I would say that for the poor and needy and those who cannot afford your fee, you should not close the doors of your chambers and should not make yourself beyond their reach. If the functions of a Judge are utterly divine, the role of a lawyer in getting justice is no less important.

I once again thank you all for giving me an opportunity to interact with you and say few words on this occasion. I wish success to you all.

HON'BLE MR. JUSTICE I.M. QUDDUSI,

JUDGE, LUCKNOW BENCH, ALLAHABAD HIGH COURT,

(IN VALEDICTORY SESSION OF SPECIAL TRAINING PROGRAMME ON CHILD PSYCHOLOGY AND CHILD WELFARE ON 4-9-2004)

It is my immense pleasure to be here on the Valedictory Session of this special training programme on **Child Psychology and Child Welfare** for Judicial Magistrates of Uttar Pradesh organized by IJTR.

In the case of Sheela Barse v. Union of India (AIR 1986 SC 1773) the Apex Court has held that "if a child is a national asset, it is the duty of the State to look after the child with a view to ensuring full development of its personality. That is why all the statutes dealing with the children provided that a child shall not be kept in jail."

First of all the Reformatory Schools Act was enacted in respect of juvenile delinquents in the year 1897. Thereafter, different laws were enacted in different States. In Uttar Pradesh, the U.P. Children Act, 1951 was enforced on 19th February 1952 after receiving assent of the President but it was not fully enforced in whole of the Uttar Pradesh. It was gradually enforced with the preamble to consolidate and amend the law for the custody, protection, treatment and rehabilitation of children and for the custody, trial and punishment of youthful offenders and for the amendment of the Reformatory Schools Act, 1897. In its application to Uttar Pradesh at that time two types of Child Welfare Homes were established under the said Act. One was meant for the under-trials named as Observation Home and the other was Approved School for the purpose to keep custody of the delinquent after finality of their trial by the Juvenile Judge or after passing the final orders regarding custody of the children needing care and protection. The definition of 'Child' was given therein as a person under the age of sixteen years. At that time uniform legislation in the whole country was not enacted because the subject matter of such legislation fell in the State List of the Constitution. But the United Nations Standard Minimum Rules for the administration of Juvenile Justice enabled the Parliament exercising its powers under Article 253 of the Constitution read with Entry 14 of the Union List. The said United Nations Standard Minimum

Rules were adopted by the General Assembly in 1985 and then Juvenile Justice Act, 1986 was enacted which was enforced on 2nd October, 1986, in which the 'Juvenile' was defined as a boy who has not attained the age of 16 years or a girl who has not attained the age of 18 years. By the said Act any law corresponding to that Act enforced in any State was repealed. Thereafter, on 20th November, 1989 the General Assembly of the United Nations adopted the Convention on the Rights of the Child wherein a set of standards to be adhered to by all State parties in securing the best interests of the child was prescribed. The Convention emphasizes social re-integration of child victims, to the extent possible, without resorting to judicial proceedings. The Government of India, having ratified the Convention, has found it expedient to re-enact the existing law relating to Juveniles and for that purpose the Juvenile Justice (Care and Protections of Children) Act, 2000 was enacted which came into force on 1st April, 2001. According to this new Act, the 'juvenile' or 'child' was defined as a person who has not completed 18 years of age. Therefore, difference of age in definition of Juvenile given in the Juvenile Justice Act, 1986 on the basis of the sex was eliminated and now any person, may be a male or female, who has not completed 18 years of age would be a 'juvenile' or 'child', as the case may be.

Now, the question has arisen as to what should be the date on which the age of a person be determined. In this regard in **Section 7** of the said Act, it has been specifically mentioned that when any Magistrate not empowered to exercise powers of a Board, is of the opinion that a person brought before him under any of the provisions of this Act, is a juvenile or the child, he shall record such opinion and forward the juvenile or child and the record of the proceeding to the competent authority having jurisdiction over the proceeding. Therefore, the determination of age of a juvenile or child would be the date on which he is brought before the Magistrate who is not empowered to exercise the powers of the Board. **Section 14** of the said Act also provides that where a juvenile having been charged with the offence is produced before a Board, it shall hold the inquiry in accordance with the provisions of that Act and may make such order in relation to the juvenile as it deems fit. Therefore, in every case the age of a person is to be determined on the date of its production before the Magistrate not having jurisdiction to deal with the juveniles or before

the Juvenile Justice Board. It has also been provided in **Section 3** of the said Act that where an inquiry has been initiated against a juvenile in conflict with law or a child in need of care and protection and during the course of such inquiry the juvenile or the child ceases to be such, then, notwithstanding anything contained in this Act or in any other law for the time being in force, the inquiry may be continued and orders may be made in respect of such person as if such person had continued to be a juvenile or a child. In this new Act Observation Homes, Special Homes and Shelter Homes have been established.

In a recent case of **Rajendra Chandra V. State of Chhatisgarh reported in (2002) 2 SCC 287** the Apex Court relying upon the decision made in the case of **Arnit Das Vs. State of Bihar (2000) 5 SCC 488**, held that if age of the accused is just on border, the settled law is that hypertechnical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he was a Juvenile and if two views are possible on the said evidence, the court should lean in favour of holding the accused to be a Juvenile.

It is also necessary to mention here that the child in need of care and protection as well as the juvenile in conflict with law, has been defined separately. In short, a 'child' is who is not charged for any offence and the 'juvenile' is who is alleged to have committed an offence. Sometimes, the situation may arise that a person who was brought before the court was juvenile and during the pendency of inquiry he crosses the age of 18 years, meaning thereby that he ceases to be a juvenile, then how should he be dealt with. In this regard it is to be mentioned that there is **Section 15**, which provides that if the Board is satisfied on inquiry that a juvenile has committed an offence, then, the Board may allow the juvenile to go home after advice or admonition or direct the juvenile to be released on probation of good conduct.

My intention to draw your attention towards **Section 15** is that in case a situation arises that a juvenile ceases to be a juvenile during pendency of inquiry and after the conclusion of inquiry he is to be released on probation of good conduct, then, of course, the provisions of the Probation of Offenders Act may be applicable in that case.

Apart from this, it is also necessary to draw attention towards **Section**

6 of the Probation of Offenders Act, which provides that "when any person under twenty-one years of age is found guilty of having committed an offence punishable with imprisonment, the court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it would not be desirable to release him on probation.

Therefore, it is necessary for the courts to release a person, in such circumstances, under the age of 21 years on probation of good conduct and in case the court is not inclined to release him on probation, he will have to give reasons for doing so.

Since in the Juvenile Justice (Care and Protection of Children) Act, 2000, a restriction in Clause (3) of Section 4 has been imposed to the effect that no Magistrate shall be appointed as a member of the Board unless he has special knowledge or training in child psychology or child welfare, I think this training programme on **Child Psychology and Child Welfare** has been organized. Now, you have special knowledge in child psychology and child welfare. I hope you will conduct your job as a Principal Magistrate of the Juvenile Justice Board and the children who are the national asset will get justice from your decisions. My good wishes are with you.

Thanks to all of you.

ARTICLES

IT: THE ROAD TO SPEEDIER JUSTICE

Justice Yatindra Singh*

1. Fair, inexpensive and quick dispensation of justice is the ultimate aim of every legal system. However, it is not so. In the novel 'Bleak House' by Charles Dickens, it is said, 'This is court of chancery – which so exhausts finances, patience, hope'. In recent times, it has been repeated by Lord Denning in his own way **{Allen Vs. Alfred Mc Alpine 1968 (1) All ER 543}**, 'Law's delays have been intolerable ... They have lasted so long as to turn justice sour'; so true of our legal system. Is information technology panacea for soured justice? What role can computers have in justice delivery system?

2. Roger Penrose is Rouse Bell Professor of Mathematics at Oxford. He wrote a best seller (The Emperor's New Mind) in 1989 to prove that neither human beings are computers nor can they be replaced by the computers. Nevertheless the computers can do one thing very well i.e. sift and analyse data; monitor the progress; and improve time management. Computers and information technology though utilised in some legal systems are yet to be fully utilised by us. They can help in the following areas that in turn will help in reducing arrears.

(i) Case Management

(ii) Court Administration

(iii) Self Improvement

Case Management

3. It is a very old saying, 'If you have to cut a tree in eight hours, you don't chop it all the time: sharpen your axe for six hours'. In order to sort out any problem, its magnitude, causes of the problems should be found out first and then the solution. The magnitude and causes of the problem can not be found out by general impressions but by analysis of the data.

4. A civil case broadly has following stages:

* Judge Allahabad High Court, Allahabad)

STAGE-1

i. Registration; Notice to the other side; exparte miscellaneous applications.

ii. Issues; hearing of miscellaneous applications after opportunity to the parties.

STAGE-2: Plaintiff's evidence.

STAGE-3: Defendant's evidence.

STAGE-4: Arguments.

STAGE-5: Judgement.

5. A criminal case (except a summary trial) on police report in the magistrate's court broadly has following stages.

STAGE-1

i. Remand and Bail.

ii. Filing of police report/ challan/ Registration.

iii. Appearance of the accused;

iv. Preparation and Supply of documents (Section 207 CrPC).

v. Summon trial: Substance of accusation to be stated (section 251 CrPC); Warrant trial: Framing of charges by the Magistrate; Session trial: Committal of a case to the Session Court.

STAGE-2: Prosecution evidence: witnesses other than formal witnesses.

STAGE-3: Prosecution evidence: formal witnesses.

STAGE-4:

i. Statement u/s 313.

ii. Defence evidence.

STAGE-5: Arguments.

STAGE-6: Judgement/ Sentence.

6. Similarly in a criminal case (except a summary trial) on a

complaint in the magistrate's court broadly has following stages.

STAGE-1:

i. Filing of complaint/ Registration.

ii. Enquiry (section 200 to 203 CrPC).

iii. Cognizance (section 190 CrPC).

iv. Appearance of the accused, remand and bail.

v. Preparation and Supply of documents (Section 207 CrPC).

vi. Summon trial: Substance of accusation to be stated (section 251 CrPC); Warrant trial: Complainant's evidence (section 244 CrPC), Framing of charges by the Magistrate; Session trial: Committal of a case to the Session Court.

STAGE-2: Complainant's/ Prosecution evidence: witnesses other than formal witnesses.

STAGE-3: Complainant's/ Prosecution evidence: formal witnesses.

STAGE-4:

i. Statement u/s 313.

ii. Defence evidence.

STAGE-5: Arguments.

STAGE-6: Judgement/ Sentence.

7. A criminal case in the session court starts from the stage of committal by the magistrate and **STAGE-1** could consist of committal/ registration and framing of charge. The rest of the stages may be similar to as in the magistrate's court.

8. The 2002 amendment in the CPC provides time limit for different stages in a civil case however the relevant point to note is that different stages require different period of time to be spent at these stage. Recording of evidence and hearing arguments requires more time than registration or passing order regarding service or framing issues. It is equally true for the criminal cases. Apart from it, a case fixed for recording of evidence and where witnesses are also present, may not be adjourned

however similar strictness may not be observed at other stages.

9. In order to have more efficient management of criminal cases and tracking of criminal files, the registration of criminal cases should be from the stage of remand rather than from the stage of filing of police report. The bail applications may be treated as applications in the case. It would save unnecessary waste of time in tracking the files, bail bonds, FIR and other papers. The criminal case number in magistrate's court also changes with change of court. This may not be done and should remain the same irrespective of change of the court like civil cases. This may be done by allotting a computer number or tracking a case by crime number.

Report-I (List): The list of every court should be stage wise. A judge is master of his own court and can fix cases of different stages according to the availability of time and his capability. Generally in civil cases, the heading final hearing includes STAGE-2 and 3 mentioned above. This heading may be further subdivided as indicated above. If possible the appropriate time to be taken up in a case may also be indicated. This list may be available on the Internet. This will also help us generating list of the criminal cases that are at the stage of preparation and supply of documents and dealing them more effectively.

Report-II (Time spent report): This is a study report and should indicate time taken at different stages of a case. This will help in identifying the problems and problematic areas. They in turn could be more effectively dealt with.

10. Often a case is not taken up as more cases are listed than can be taken up. Some margin (about 25%) should be given while listing the cases, expecting that some will be adjourned. The list as indicated in Report-I will help the Judges in managing their list better.

11. We have the data: some of it is in the digital form and some in the record books. It can be easily analysed if it is updated and appropriate reports are generated. Let's consider the following reports. These reports may be weekly, monthly, or yearly as the circumstances demand.

Report-III {Formal witnesses (Criminal case) Report}: This report

may contain names and addresses of the formal witnesses (doctors and IOs) with details regarding criminal case in which their evidence is required and court where these cases are pending. The addresses may be updated from the headquarters every year as it takes lot of time to track them. This will also help in listing those cases together where same formal witness has to give evidence in many cases.

Report-IV (Undertrial report): This report should include details of the pending cases where there are undertrials with length of their detention and the details of the courts where there cases are pending.

Report-V (Case wise pendency report): It should include following information regarding pending cases in a judgeship.

- The date of filing of a case.
- Type of the case (whether it is an original suit or an application or an appeal or a revision etc).
- Nature of the case (whether it relates to declaration, divorce, guardianship etc).

Report-VI (Court wise pendency report): This should include cases pending in every court in a judgeship with break up of type and nature of cases.

Report-VII (Clearance report): This report should contain ratio between cases decided divided by cases filed in percentage. It should be for all cases as well as court wise with break up regarding different types of cases.

Report-VIII (Disposal report): The decided cases fall in following categories:

(i) Without contest but not on merits i.e. dismissed for default; dismissed as not pressed or withdrawn.

(ii) Without contest on merits i.e. exparte decisions, or on the basis of compromise.

(iii) After contest.

This report should indicate number of cases decided by the judges in the above mentioned three categories along with the number of days the Judge was on duty. Apart from the others this report will help the Judges to understand their capability better and will also truly reflect their ability.

Report-IX (Stayed cases report): This report should include details of the cases that are not proceeding. This may be due to the reason that further proceeding of the case has been stayed or the records have been summoned by the higher courts or it could be for any other reason. This report should also include the reason and the details of the cases in the higher courts due to which the cases in the lower court are not proceeding. This report should be lower court wise as well as higher court wise.

Report-X (Caveat Report): This should contain the caveat filed in the judgeship.

12. The above mentioned reports will help us in finding problems and solving them by:-

i. Understanding the stage that delays disposal of a case and finding its solution

ii. Getting updated report every year regarding posting and addresses of the formal witnesses from the head quarters of that department.

iii. Helping in fixing dates in different cases for recording evidence of formal witnesses on the same day.

iv. Expediting criminal cases relating to undertrials.

v. Fixing priority in the old cases and expediting the same.

vi. Equally distributing the old cases among the judges available.

vii. Understanding the capability of the judges.

viii. Getting information regarding cases from the higher courts due to which any case in the lower court is not able to proceed. And if the case in the higher court has not been decided then request may be sent to the higher court to decide it expeditiously.

ix. Deciding the cases on priority due to which a case in the lower court is not able to proceed.

x. Understanding the needs of the judgeship better.

Court Management

13. There is delay in issuing certified copies of the judgements. All judgements may be uploaded on a server and their uncertified copy or certified copy may be issued from printing the same. Till this is achieved, every judgement should also have two carbon copies so that certified copy can be issued immediately or certified copy may be issued by issuing Photostat copy. This practice is being followed in most of the judgeships. The following report may be generated in order to have better control and to see whether certified copies have been issued or not.

Report-XI (Certified copy report): This report should contain date of application, date of issuance of certified copy, and the details of the cases in which certified copy have not been issued along with the length of pendency of applications for obtaining certified copy.

14. The following other reports may be generated in order to have better grip on the court management in a judgeship.

Report-XII (Money deposit report): This report should contain the details of money deposited in the court in pursuance of the orders of the higher courts; their investment in fixed deposit; and the reminder date for the renewal of the same.

Report-XIII (Budget report): This should contain budget allocation and its utilisation including break up under different heads.

15. Following Database may be prepared.

I. Indexing of the library books.

II. Service records of the employees including details regarding leave, provident fund, etc. The employees may also log on the server to find out personal details. They may also point out the mistakes if any; it will help in obtaining post retirement benefits quickly.

III. List of the Advocates: every advocate has unique number namely

his enrolment number. It should be recorded in every Vakalatnama. A list of names of advocate practising in a judgeship be prepared by their enrolment number. This list may also be on the server. The list of cases may be send to the advocates by emails. This will help the lawyers to arrange their work better. It will also help in identifying persons who are not entitled to practise and are illegally practising.

IV. Judgements and status of a case (brief order sheet) may be available on the Internet for public to view.

16. Communication and information to the Judges and officers may be made through emails. Meetings may be conducted by video conferencing. This will save funds and time. In Allahabad High Court all notifications to the Judges and officers are sent through emails. They are also available on the home page of the court on the Internet. All meetings of computer section between Allahabad and Lucknow bench are conducted by video conferencing.

SELF IMPROVEMENT

17. Information technology, as the name suggests, offers easy mode of acquiring knowledge. The judges by profession seek knowledge and it can be utilised for seeking knowledge and improving oneself. Some examples are as follows:

(i) The judgements of the higher courts are available on the Internet. They are located on the website of that court. They can be accessed and seen.

(ii) Every Judge in the Allahabad High Court has to give a certificate whether the judgement is approved for reporting (AFR) or not approved for reporting (Non-AFR). Copies of AFR judgements are issued on subsidised rates for reporting in the approved journals. The journals also publish them with their head notes. The reproduction or publication of judgement or order is not infringement of copyright {Section 52(1)(e) and 52(1) q (iv) of the Copyright Act}. However, in certain circumstances, the owner of the journal or the writer of a head note may have copyright over the same.

18. The Allahabad High Court publishes Indian law Reports (ILR), makes its head notes, and has copyright over the same. Since 1996, the

AFR judgements of the Allahabad High Court are already in the digital text format. The judgements prior to this date are only on the ILR Journal. The Allahabad High Court is converting them into digital text format with the help of scanner and optical character reader software (OCR) and will be distributing it to the Judges on a CD. It is space saving as well as inexpensive. OCR is not 100% accurate and converts up to 95% of the printed text into digital text yet this will broadly indicate the law on the point.

Internet

19. Many websites send free emails/ newsletters. One has to register oneself on their website. This registration is without any price. They send their newsletters with summary of the news/information. In case it is useful then its details may be seen on the Internet by clicking on the web address. This facility may profitably be utilised. The details of some of the good websites are as follows:

http://www.gigalaw.com/index.html This website is about legal information regarding Internet, cyberlaw.

http://economictimes.indiatimes.com/ This is home page of the Economic times. Apart from other information, this website sends e-mails regarding technology news.

http://www.nytimes.com/ This is home page of New York Times. Apart from other news, the emails include information regarding law and technology news (generally of US).

http://www.qlinks.net/ This website sends newsletters regarding legal and regulatory aspects of market and technology. It also includes information regarding Intellectual property Rights (IPR). This offers good information regarding cases in Europe.

http://scitechdaily.com/ This website as the name suggests sends email regarding information on science and technology.

http://www.aldaily.com/ This website does not send any email or newsletter but contains excellent information regarding book reviews and articles on the web. They relate to law, philosophy, and literature that offer new ideas, breakthrough, and trends.

TV Programmes

20. Following half an hour programmes on BBC and CNBC offer good insight into Internet, e-commerce and new developments. These programmes may be seen.

i. 'Click of line' on BBC at the following time:

Monday – 10pm; Wednesday – 7pm; Friday – 1am; Saturday – 12pm

ii. 'e' on CNBC at the following time :

Monday to Thursday - 7.30pm

iii. 'generation e' on CNBC at the following time

Friday 7:30pm; Saturday 7:30am, 7pm, 9 pm; Sunday 8:30am, 7:30pm

FUNDS

21. Information Technology requires infrastructure and we have limited funds. We have to make best use of our limited resources. This could be done by using open source software (OSS) rather than any proprietary or close source software. No royalty is required to be paid for OSS; however, money could be charged for services. OSS is as good as any proprietary/close source software. Some of the successful and commonly used OSS are as follows:

I. Linux: it is an operating system (OS) like windows. It is as easy to operate as windows.

II. OpenOffice.org suite: it is an office suite similar to Microsoft office suite. It is normally used for word processing, data base programmes, and making presentations.

III. Mozzilla: it is an Internet browser and manages emails. It is similar to Internet explorer and outlook Express put together. It has come out with,

- Mozilla Firefox - an Internet browser, similar to Internet explorer;
- Mozilla Thunderbird - an email manager, similar to Outlook express.

IV. Ximian Evolution: it manages emails and is an e-manager. It

reminds birthdays, marriage anniversaries and other important dates. It is similar to Microsoft outlook.

OpenOffice.org, Mozilla, Mozilla Firefox, and Mozilla Thunderbird work in Linux as well as in windows, however Ximian evolution works in Linux only.

CONCLUSION: CHANGE IN ATTITUDE

22. Michael Crichton (of '*Jurassic Park*' fame) in the book *Electronic life* says that Computers are like 'English butlers'. They have to be told what to do and they do it in that way and no other way. Computers love routine and are never bored. But to achieve any success the minds of the judges, lawyers, and court employees have to be streamlind into a method. One has to leave individualism[1]. The reports can not be generated unless data is fed into computers; they will not have any meaning unless they are utilised and goals are fixed. And above all, if there is no will to change, no orientation to the work culture, then nothing can work.

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[1] Shah Committee Report (1972) had suggested each puisne judge may be required by the Chief Justice, as in America, to file a strictly confidential detailed weekly report of 'the number of hours he spent on the bench each court day, the number of cases and motions he heard and disposed of, with reasons'. Sri Upendra Baxi in his book 'The Crisis of the Indian Legal System' (page 72) has this to say about it. 'Organisationally, this is an ideal suggestion, although, given the individualism of Indian Judges, one wonders whether such a suggestion can really be put into practice.'

RIGHT TO HEALTH

Justice Sunil Ambwani *

The health status of a society is measured by general mortality, infant mortality and life expectancy, as the primary determinants. With the decline in death rate the life expectancy in India has almost doubled from 32 years in 1897 to 62 years in 1995. The infant mortality rate (annual number of deaths of infants under one year of age per 1000 live births; widely recognized as a sensitive indicator of the general health status of the population) has declined from 146 infant death per 1000 live births in 1947 to 74 in 1995.

With the second largest population in the World, our country needs greater attention to the health of its people. In the last five decades the State with National Health Programmes have reduced the incidents of Plague, Malaria, Tuberculosis, Polio and the epidemics, namely, Viral Encephalitis, Meningitis, Kala Azar, Infectious Hepatitis etc. The public health care in our country, however, is far from satisfactory.

The health care by the State has not matched with the growth of population. We are spending far less amount on health in our budget as compared to other countries. The rural health services are almost non-functional. The people living in rural areas of the country continue to face the neglect of state health care. Although in the last five decades 1,32,285 Sub-centres, 21,802 PHC (Primary Health Centre) and 2401 CHC (Community Health Centre), have been established in rural areas, the lack of infrastructure and the poor attendance of Doctors and Paramedics have made these efforts useless. The Sixth five years plan visualized a Sub-Centre for 300 persons and one PHC for 20,000 persons. These figures need to be revised. The December 1995 bulletin of rural health statistics in India issued by Rural Health Division, Directorate General of Health Services published the facts that out of 31802 PHCs, 416 are functioning with four doctors, 777 with three doctors, 4062 with two doctors and 7802 with one doctor. The figure for remaining 7602 PHCs were not disclosed.

In Uttar Pradesh most of the PHCs are without any doctor and even the CHC's at block levels do not have sufficient number of Doctors to take

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care of bare minimum rural health care. This gap is exploited by unqualified and unregistered persons masquerading as Doctors. In U.P. with the population of about 16.61 crores (based on Census 2001) there are only 49,107 Registered and Qualified private practitioners (which include 33,731 Doctors, 1,248 Hospitals, 1,448 Nursing Homes, 501 Maternity Homes, 10,272 Medical Clinics, 846 Pathology Labs and 1,061 Diagnostic Centres), and about 9000 government doctors (as against about 11,000 sanctioned posts). Taking into account the non-availability of para medical staff, infrastructure, non-functional facilities, dilapidated building, insensitive staff, and shortage of medicines at Sub-centres, PHCs and CHCs, the situation is alarming.

The recent surveys carried out under the directions of the High Court in a Public Interest Litigation in Contempt petition No. 820 of 2000 between Rajesh Kumar Srivastava Vs. A.P. Verma and others have revealed that apart from the National Health Programmes and Family Welfare Programmes, the basic medical care in Sub-Centres, PHCs and CHCs was almost absent. In one CHC the occupancy of beds and availability of medicines in a 20 bedded CHC in a year, was almost nil, and that only two doctors out of six attended the center for a few days in a month. In U.P., there are 4236 Allopathic, 2210 Ayurvedic and Unani and 1342 Homeopathic Health Care Centres (the information Diary published by the State Government, 2004).

In this background, if we examine the right to health guaranteed by the Constitution of India, we find that Article 47 in Part IV (Directive Principles of States Policy) declares that "State shall regard the raising of level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties". In addition to right to health also has its reference in Article 38 (Social order to promote the welfare of the people), Article 39(e) (Health of workers men, women and children must be protected against abuse), Article 41 (Right to public assistance in certain cases including sickness and disability), and Article 48-A (the State duty to protect the environment). The Supreme Court has addressed the importance of health and found it to be included as a fundamental right in Right to Life in Article 21 of the Constitution of India. In a series of cases dealing with substantive and potent content of right to life, the Supreme

Court has found that the right to live with human dignity includes right to good health.

In **Consumer Education and Research Centre v. Union of India (1995) 3 SCC 42,** the Supreme Court explicitly held that the right to health is an integral facet of meaningful right to life. In this case the Supreme Court was concerned with the occupational health hazards faced by workers in asbestos industry. In Paschim Banga Khet Mazdoor Samity v. State of West Bengal (1996) 4 SCC 37, the Court addressed the issue of adequacy and availability of emergency medical treatment. Hakeem Sheikh, a member of the Samiti had fallen off a train and suffered serious head injuries. The State Hospital including PHC and specialist clinics were unable to provide emergency treatment because of lack of bed space and trauma and neurological services. He was finally treated in a private hospital. The Samiti filed a petition before the Supreme Court and sought compensation. The Supreme Court held that Article 21 of the Constitution casts an obligation on the State to take every measure to preserve lives. The Supreme Court held-

"But at the same time it cannot be ignored that it is the constitutional obligation of the State to provide adequate medical services to the people. The Court recognized that substantial expenditure was needed to ensure that medical facilities were adequate. However, it held that a State could not avoid this constitutional obligation on account of financial constraints. Whatever is necessary for this purpose has to be done. In the context of the constitutional obligation to provide free legal aid to a poor accused this Court has held that the State cannot avoid its constitutional obligation in that regard on account of financial constraints. The said observations would apply with equal, if not greater, force in the matter of discharge of constitutional obligation of the State to provide medical aid to preserve human life."

In **Murli S. Deora v. Union of India (2001) 8 SCC 765** the Supreme Court prohibited smoking in public places in the entire country on the ground that smoking is injurious to health to both smokers and passive smokers. In **Parmanand Katara v. Union of India (1989) 4 SCC 286** the Supreme Court held that Article 21 of the Constitution casts the obligation on the State to preserve lives. The patient whether he is

innocent or a criminal liable to punishment, is under obligation of the State to be protected. Every doctor whether at a government hospital or otherwise has professional obligation to extend his services with due expertise for protecting the life. The obligation is total, absolute and paramount, and that the laws of procedure whether in statutes or otherwise, which would interfere with the discharge of this obligation cannot be sustained and must therefore give way. The Supreme Court issued directive in the matter of Medico Legal Cases, placing the burden on the doctor to inform the police. A mandate was issued to all the hospitals, public or private not to deny treatment to an accident victim. It was held that the duty to attend to a person hanging between life and death is a duty coupled with human instincts, which needs no decision nor any code of ethics or any rule of law. It was also directed that in such cases the persons in medical profession should not unnecessarily harassed for interrogation and for giving evidence.

In **M.C. Mehta v. Union of India & Ors (1999) 6 SCC 9,** the Supreme Court reiterated that right to life includes right to good health. In this matter the court enforced directions for sale of un-leaded petrol and conversion of old vehicle and use of CNG.

The right to health and consequently access to medical treatment is a part of right to life under Article 21 of the Constitution of India. A positive obligation has been imposed upon the State, by a dynamic interpretation of Article 21 to ensure to an individual a better enjoyment of his life and dignity. The judiciary as such has to play a potential role to enforce constitutional social rights. Where the State, alleging lack of financial resources and constrains plead innocence to fulfill constitutional roles, the courts have to step-in and make way for realization of constitutional rights including to right to health.

In the year 1993 according to World Bank survey our country had 41 doctors to the population of one lac as against 137 in China. The total health expenses per capita was 21 US $ (about Rs. 1000/- per person) which is 1.3% of GDP as against 2.1% by Nepal. Only 12.21% people in our country use public hospitals due to lack of infrastructure and total apathy and insensitiveness of the health personnel in State run hospitals. The common man, even at the cost of selling his belongings and properties prefers to be treated in private hospitals. The accessibility to public health care facilities has been considerably reduced due to lack of infrastructure,

Doctors and their poor attendance. The State Governments prefers to announce investment in private and referral hospitals, providing tertiary medical care rather than increasing the basic health services in rural areas.

In State of U.P. out of 7,824 sanctioned posts of Doctors (Male), 1,428 posts are lying vacant, and out of 1,392 sanctioned post of Doctors (Female) 491 posts, all in group 'B' are lying vacant. About 15% Doctors are holding administrative positions and are not attending duties in Hospitals. This leaves only about 7000 Government Doctors to take care of the needs 16.61 crores of the population, which comes to about one Doctor for about 22,000 persons.

The entire thrust by the State is to provide medical care in urban areas, where the private medical care is available. There is need to shift the focus to the basic health care in rural areas. The State must ensure the availability of Doctors, Para Medical Staff and to maximize the use of infrastructure. The emphasis should be on a low cost, high quality medical care. We need many more medical colleges and training centers for nursing and para medical staff. The Government Doctors and Paramedics should be trained further to provide man power resources in rural areas. We need committed and dedicated Doctors in Government service, with a strong sense of service and sacrifice.

Life has little meaning for sick and infirm. We cannot carry millions of sick persons to any targeted point in development. There is a need for a larger investment in health and to maximize the use of infrastructure and services. Let us make our country a better place to live, and for that we need a better, and responsive health care system.

PATENTS: THE TASK AHEAD

Justice YATINDRA SINGH*

1. Agreement on the Trade related aspect of intellectual property rights (TRIPS) is one of the agreements of the World Trade Organisation (WTO) document. We being members of the WTO have to accept it. It talks about following seven kinds of Intellectual Property Rights.

1. Copyright and Related Rights.
2. Trademarks
3. Geographical Indications
4. Industrial designs
5. Patents
6. Layout – designs (Topographies) of Integrated Circuits
7. Protection of Undisclosed Information

2. TRIPS provides minimum standard to be observed by the members. We have to amend our laws to bring them in conformity with the TRIPS. The time limit to do so is provided in Article 65 Part VI (TRANSITIONAL ARRANGEMENT) of the TRIPS. Under this provision, the laws have to be amended by 31.12.2004.

3. Patent (dealt under Article 27 to 34 (Section 5 Part II) of the TRIPS) is most powerful of all intellectual property rights. It can prevent a process or manufacture of a product. It is an exclusive right given by law to the inventors to make use of, and exploit their inventions for a limited period of time in exchange for a full description of how to perform the invention. Patents will play important role after 31.12.2004. It's important to understand its implication and prepare for the same. But first some words about patents.

HISTORICAL BACKGROUND

4. Historically, the word 'patent' has come from the Latin phrase 'litterae patents' literally meaning letters patent. Patent means open and letters patent was used to refer to open letters conferring privileges, rights,

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ranks, or titles by sovereign bodies/rulers.[1] They were official documents and were 'open' as they were publicity announced.

5. Initially, these letters were issued (around sixth century) in Europe for discovery and conquest of foreign lands on behalf of the ruler. Patents came to be related with inventions around 15th Century and in this century (March 14, 1474) the first patent law – as we understand it today – was passed by the Venetian Senate (for details see below)[2].

6. The grant of exclusive privilege to inventors spread from Italy to other European nations. Countries (that lacked technology) started granting exclusive patents (rights) to foreign inventors in exchange of introducing the technological innovation in that country. However, unlimited duration of exclusive rights created unfair monopolies, and the British Parliament enacted the Statute of Monopolies in 1623. It prohibited royal monopolies but it reserved the right to grant "letters patent" for inventions up to 14 years.

7. In the United States, Article 1 Section 8 of the Constitution authorizes Congress to create a national patent system to promote the Progress of Science and useful Arts: by "securing for limited times to.... Inventors the Exclusive Right to their respective... Discoveries." Congress passed the first US Patent Statute in 1790. France enacted its patent system the following year. By the end of the 19th Century many countries, including India, enacted patent laws.

8. The first Patent Act in India was Act no. VI of 1856. It was an Act for granting exclusive privilege to inventors. It received assent of the Governor General of 25th February 1856. This Act was repealed by Act no. IX of 1857 on the ground that it was passed without obtaining the previous sanction of her majesty. This is the reason indicated in the

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[1] In the nineteenth century the British Parliament had enacted an Act for establishing High Courts, in India. It was among the other things enacted that it should be lawful for Majesty to erect and establish a High Court by letter Patent under the Great seal of the United Kingdom. The High Court of Calcutta, Madras, Bombay and Allahabad were established by issuance of Letters Patent.

[2] The law passed by Venetian Senate stated,

'We have among us men of great genius, apt to invent and discover ingenious devices.... Now, if provisions were made for the works and devices discovered by such persons, so that others who may see them could not build them and take the inventors' honour away, more men would then apply their genius, would discover, and would build devices of great utility for our common wealth.'

preamble of the Act no. 15 of 1859 (for preamble see below)[3], which was passed by the Legislative Council of India to encourage inventions of new manufacturers and for protecting their privileges.

9. Act no.15 of 1859 was replaced by Act no.5 of 1888 called Inventions and Designs Act, 1888. This was further replaced by the Indian Patents and Designs Act, 1911 (Act no.2 of 1911). In 1967 the Government of India, introduced a patent bill that culminated in the Patents Act, 1970 (the Act).

10. The Act has been amended by two amending Act, namely Act no.17 of 1999 (the 1999 Amendment) and Act No.38 of 2002 (the 2002 Amendment). The 1999 amendment has been enforced and most of the 2002 amendment was enforced with effect from 20.5.2003. These amendments are of some importance and I will refer to them later.

GRANT OF PATENT-PROCEDURAL SIMPLIFICATION

11. Every country has its own patent law. In general, inventors must apply for patents in each country where they wish to manufacture, use, or sell their inventions. International efforts have been made to facilitate this process. The details are as follows:

- The first effort to ease multinational patent differences was the International Convention for the Protection of industrial Property. It was adopted in Paris in 1883. It was amended several times. It gave inventors, who file an application in one member country, the benefit of using that first filing date for applications in other member states.

- The Patent Cooperation Treaty (PCT) (1970) simplifies the filing of patent applications on the same invention in different countries by providing, among the other things, centralized filing procedures and a

3 The preamble of the Act narrates the reason for repealing the earlier Act no. VI of 1856 and enacting this one. It is as follows:'

'Whereas Act VI of 1856, entitled "An Act for granting exclusive privileges to Inventors," was passed by the Legislative Council of India without the sanction of Her Majesty to the passing thereof having been previously obtained and signified in pursuance of the Statute passed in the seventeenth year of the reign of Her Majesty, entitled "An Act to provide for the Government of India:" and whereas Her Majesty's Law Officers having given it as their opinion that the Legislative Council of India was not competent to pass Act VI of 1856 without previously obtaining the sanction of the Crown, and the Court of Directors of the East India Company having in pursuance of the power vested in them by law disallowed Act VI of 1856 and having signified to the Governor general of India in Council their disallowance thereof, the said Act was repealed by Act IX of 1857; and whereas it is expedient, for the encouragement of Inventors of new manufacturers that certain exclusive privileges in their inventions should be granted to them in India, and that exclusive privileges obtained under the said Act should be protected: It is enacted as follows (The Sanction of her Majesty to the passing of this Act having being previously obtained and signified in pursuance of said Statute).'

standardized application format. We have accepted the PCT on 7.12.1998 with declaration on 'Reservations' detailed in sub article 5 of Article 64.

- The European Patent Convention, implemented in 1977, created a European Patent Office that can issue a European Patent, which acquires the status of a national patent in each of the member nations designated by the applicant.

- World Intellectual Property Organisation (WIPO) has framed Patent Law Treaty (PLT). It was adopted on June 1,2000. We have so far not signed it. PLT is subject to the PCT and attempts to further simplify procedurals requirement for obtaining patents in different countries. It is not intended affect to the substantive law relating to patents.

INVENTIONS

12. Patents can be granted for inventions. The word 'invention' {section 2 (1) (j) of the Act} read with the word 'inventive step' {Section 2(ja) of the Act} means a new product or process that is capable of industrial application. Invention must be novel and useful. It should not be obvious to a person skilled in the art. It must be significant advance in the state of the art and should not be an obvious change from what is already known. Section 4 of the Act is an exception to grant of Patent. It excludes grant of patents for inventions relating to Atomic Energy.

PATENTS -RIGHTS AND LIABILITIES

13. Patents could be for process or product. If a patent is taken out for a process in arriving at a known product, any other person may take out a patent for another process for arriving at the same known product. But when a patent is taken out for a new product which was not known before and the patent describes one specific process in making the new product, then the patent is entitled to protection against any other process in making the same product. Any person who even adopts a different process in arriving at the same product infringes the patent (Section 48 of the Act). Should this be the law? Should a person arriving at same product by different process be also prohibited? Will economy be better served if such patent is not granted? It is for the policy makers to decide.

14. In the earlier times, patents were granted for fourteen years

presumably due to the reason that it took about seven years to train the trainees and fourteen years to train two generations of trainees. In England it was increased to sixteen years in the early part of the twentieth century. We followed the suit and sixteen year period was provided in the previous Act dealing with Patents. In the Act the period was 14 years except for some categories where norm was five or seven years (section 53 of the Act). TRIPS mandates protection of patents for twenty years. We have also provided the same by the 2002 amendment. The field of Information Technology is moving with geometrical progression. In the field of medicine and drugs, often the question is between life and death and many nations are still developing. Is period of twenty years in all fields a reasonable one. Will it better in case shorter period is provided? This is again for the policy makers to decide.

15. Patents can be inherited by the heirs of a patentee. A patentee may sell (assign) or mortgage a patent. They have right to exclude others from making, using, or selling the invention and may authorise others to do any of these things by a licence and receive royalties or other compensation for the privilege (Chapter **XIII REGISTER OF PATENTS** of the Act).

16. A person, making unauthorised use of a patented invention, may be sued by the patentee for damages and can be injuncted to prevent further infringement however, we have not provided criminal prosecution for the infringer (Chapter **XII SUITS CONCERNING INFRINGEMENT OF PATENTS** of the Act).

17. A patentee may not market an invention or even licence it to someone who wants to market it. Such a situation might keep a useful invention from being of service to the public. Thus in many countries patent law includes a clause that stipulates compulsory working of an invention. This means that the patentee must manufacture/utilise the invention or licence it to someone who will. In India it is dealt in Chapter **XVI 'WORKING OF PATENTS, COMPULSORY LICENCES AND REVOCATION' of the Act.**

18. TRIPS has provided minimum protection that should be granted in the patents and other intellectual property rights. WIPO is

sponsoring Substantive Patent Law Treaty (SPLT) to further harmonise substantive part of patent law. It is still in formative stage. This may change the International opinion about patents. We should participate and protect our interests.

PATENT: PRODUCT-PROCESS

19. Generally in the developing countries patent for product in medicine, or drugs or substances produced by chemical process is not granted. In India also section 5 provides that patent for processes only-and not for the product-may be granted for the following substances,

(a) Intended for use or capable of being used as food or as medicine or drug,

(b) Prepared or produced by chemical processes.

20. TRIPS does not make any such distinction. The distinction has to be removed by 31.12.2004. However in the meantime, in view of Article 70(7) and 70(8) of the TRIPS, a provision has to be made for filing patent applications and creation of exclusive marketing rights (EMR) in respect of these products. This has been done by the 1999 Amendment by amending section 5 and addition of Chapter IV-A (EXCLUSIVE MARKETING RIGHTS) in the Act. Section 5 now provides that a claim for patent of an invention for a substance itself intended for use, or capable of being used as medicine or drug {except for medicine or drug specified under sub-clause (v) of clause (I) of sub-section (1) of Section 2 of the Act} is to be dealt with under chapter IV-A of the Act.

21. Grant of product patent-in respect of those substances where no patent could be granted earlier-will affect the prices of these products, and the economy of our country. We should find appropriate solutions within the TRIPS. This can be done under article (2) and (3) and Article 27 of the TRIPS.

22. Article 27 (2) and 27(3) of the TRIPS provide which inventions may be excluded from patentibility. Article 27(2) permits exclusion from patentibility of invention whose prevention of commercial exploitation is necessary on the following grounds:

i. to protect ordre public (pubic order) or morality

ii. to protect human, animal or plant life or health

iii. to avoid serious prejudice to the environment.

23. Article 27(3) also permits exclusion of following items from patentability:

- Diagnostic therapeutic and surgical methods for treatment of humans or animals.
- Plants and animals other than microorganisms.
- Essentially biological processes for the production of plants other than non- biological and microbiological processes.

However, plant varieties have to be protected by patents or an effective sui generis system or by combination of both. The protection for plant varieties has been done in our country by enacting separate Act titled as 'The Protection of Plant Varieties and Farmers' Rights Act 2001' (Act No.53 of 2001).

24. Some steps have already been taken. The patent Act has been further amended by the 2002 Amendment. As the preamble states, it has been done, 'to make the law not only TRIPS compliant but also to provide therein necessary and adequate safeguards for protection of public interest, national security, bio-diversity, traditional knowledge, etc.'

25. Section 3 of the Patent Act is titled 'what are not inventions'. It provides exception to the inventions. It was amended by the 2002 Amendment. Among the others it substituted section 3(b), amended 3(i) and added sub-section (j) to (p).

- Substituted section 3(b) provides for exclusion of inventions whose primary or intended or commercial exploitation could be contrary to public order or morality or which could cause serious prejudice to human, animal or plant life or health or to the environment {Article 27(2) of the TRIPS}.
- Amended section 3(i) provides for exclusion of any process for the medicinal curative prophylactic diagnostic therapeutic or other treatment of human beings or any similar process for a similar treatment of animals or to render free of disease or to increase their economic value or that of their product {Article 27 (3) of the TRIPS}.
- Section 3(j) provides for exclusion of plants, animals including seeds,

varieties and species and essentially biological process for production or propagation of plants and animals.

- Section 3(k) provides for exclusion of mathematical or business method or a computer programme per se or algorithms.

- Section (p) provides for exclusion of inventions that are in effect traditional knowledge or are aggregation or duplication of known properties of traditionally known components.

26. Exclusions mentioned in section 3(b) and 3(j) are in the TRIPS. However some exclusions-mentioned in section in section 3(k) (relating to business method or computer programme) and exclusion mentioned in clause 3(p)-are neither part of the TRIPS nor part of patent laws of some countries. This has led to difficulties and allegation of bio-piracy. This has to be ironed out.

PROBLEMATIC AREAS: GLOBAL SOLUTIONS

Computer Programme and Business Methods

27. In the US neither computer programmes {See Gottschalk Vs Benson (409 US 63=34 L Ed 2d 273} nor business methods could be patented. However in Diamond Vs Diehr {(1981) 450 US 175= 67 Led 2d 155} the US Supreme Court held that a patentable claim does not become unpatentable merely if it uses a mathematical formula, or a computer programme. So a computer programme in US is patentable as a part of an industrial process.

28. The US Patent and Trade Office (USPTO) has issued a Manual of Patent Examining Procedures containing guidelines for patenting inventions. Its earlier policy for computer related inventions regarding business methods {Paragraph 706.03(a)} was as follows:

'Though seemingly within the category of a process or method, a method of doing business can be rejected as not being within the statutory classes.'[4]

29. The aforesaid paragraph was substituted by the following new, paragraph {706.03(a)},

4 {See Hotel Security Checking Co. v. lorraine Co., 160 F. 467 (2nd Cir. 1908) and In re Wait, 24 USPQ 88, 22 CCPA 822 (1934)

'Office personnel have had difficulty in properly treating claims directed to methods of doing business. Claims should not be categorized as methods of doing business. Instead such claims should be treated like any other process claims.'

30. This change was noticed by the court of appeal in the US in State Street Bank vs. Signature financial group.[5] The court held that,

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

The court further held that,

'To be patentable an algorithm must be applied in a "useful" way.

We hold that the transformation of data, representing discrete dollar amounts, by a machine through a series of mathematical calculations into a final share price, constitutes a practical application of a mathematical algorithm, formula, or calculation, because it produces a useful, concrete and tangible result'

31. In short the law in the US is that, an abstract idea by itself never satisfies the requirements of Patent law. However an abstract idea when practically applied to produce a useful, concrete and tangible result satisfies it. Today, USPTO has one chapter on Patent Business Methods and is granting patents to software techniques for business methods and data analysis if they are useful. Australia and Japan have also followed suit. Some examples of patents of business methods are:

- Single click to order goods in an on-line transaction
- An on-line system of accounting
- On-line rewards incentive system;
- On-line frequent buyer programme; and
- Programmes letting customers setting their own prices for hotel booking etc.

32. In the US 'Business Method Patent Improvement Act of 2000'[6]

5 (149 F. 3d 1352. Text is also available at http://www.ll.georgetown.edu/Fed-Ct/Circuit/fed/opinions/97-1327.html.

6 The text of the bill is available at: http://www.techlawjournal.com/cong106/patent/bus_method/berman.asp

was introduced in the Congress on October 3, 2000 and would apply to all pending applications as well as to all patents issued. It will restrict the ability of the USPTO to issue business method patents. Among the others it would create a presumption of obviousness where a computer has been used primarily to implement a known business method. It has not yet been passed and many feel that it may never be passed.

33. **The EUROPEAN PATENT CONVENTION 1973 (EPC)** specifically states that 'schemes, rules and methods for performing mental acts, playing games or doing business, and programmes for computers' will not be regarded as inventions {Article 52(2)(c) of the EPC}. This is also the law of the member countries of the EPC and computer programmes and business methods cannot be patented there.

However, in practice, the approach has changed. The applications for patents are now considered if presented as producing technical effects (i.e. programme for speeding up image enhancement) rather than as claiming abstract programmes or business methods. European Union is debating to change their policy regarding patenting of computer software and in near future it may permit to do so openly.

34. The law regarding patentability of computer programmes in conjunction with business methods is still in flux. We may not be able to patent them as we have amended our patent law: we could be left behind in case others are permitted to patent them. This question should be settled globally. In any case we must publish them on the website. This would indicate prior art and at least others would not be able to get it patented.

PLANT V ARIETIES AND BIODIVERSITY

35. Patents can not be granted on anything that occurs in nature or on its properties. However, a product, obtained through an inventive step from a thing in nature, may be patented. A process or product in public or traditional knowledge can not be patented as it is not an invention; so also aggregation or duplication of known properties of traditionally known components: in both cases, prior art exists.

36. In our country patents could not be granted on substances intended for or capable of being used as food, or medicine, or drug, or prepared or produced by chemical processes. This does not mean that these substances were not in existence or use in our country.

37. Patents, for some of the aforesaid products or the ones based on traditional knowledge have been granted in different countries in ignorance of prior art though some of them have been cancelled too. However in the post WTO era this may cause problems. We have already enacted the Biological Diversity Act, 2002 and as the preamble indicates, it has been enacted to provide,

- Conservation of biological diversity,
- Sustainable use of its components, and
- Fair and equitable sharing of the benefit arising out of the use of biological resource knowledge.

However, we should consider about the patents already granted.

Basmati Rice

38. Rice Tec Inc, a Texas based US company, was selling rice under the brand name of Kasmati and Taxmati without much success. In 1994 Rice Tec filed an application in the US Patent and Trade Organisation (USPTO) claiming patent for 20 Basmati rice grains. USPTO granted patents to in all claims in 1997. We filed an application for re-examination of three patents in April 2000. The Rice Tec withdrew three that were objected to by India and a fourth one also. Later on they were asked to withdraw 11 others that they did. Rice Tec was also ordered to change the title of its patent from "Basmati Rice Lines and Grains" to "Rice Lines Bas 867RT1121 and RT 117"[7]. Ultimately they were granted patents on five in August 2001.

39. Basmati Rice is grown in the foothills of Himalayas. This is how it acquired its label and fame. It is not grown in any other part of the world. The same variety grown anywhere else may not be claimed as Basmati; it is a geographical indicator. We had filed objections against the patent application of Rice Tec but Basmati was not claimed as a 'geographical indicator'. Rice Tec can still sell its rice-grown in the US-calling it Basmati. The official site of Rice Tec[8] states that Texmati is

7 Public Interest Litigation (PIL) are like alarms. they remind the government to wake up before it is too late. One such PIL in the Basmati controversies Research Foundation for Science, Technologies & Ecology vs Ministry of Agriculture: 1999(1) SCC 655

8 http://www.ricetec.com/consumer_rice.asp

no.1 selling Basmati rice in America. We have already enacted the Geographical Indication of Goods (Registration and Protection Act), 1999. We may consider claiming Basmati as a geographical indicator so that no one is able to take any advantage of its name.

Wheat

40. Monsanto has obtained a patent from European Patent Office on genetically modified wheat strain. This variety, called Galatea, was bred by Unilever. Monsanto acquired Galate, when it brought Unilever. It is said that it possess genetic characteristic derived from a common variety in our country known as Nap Hal which is used to make Chapati. Nap Hal has less gluten than other wheat varieties, which gives it lower viscoelasticity, meaning it expands less during baking. This makes it perfect for crisp breads such as Chapati.

41. Greenpeace with support of NGOs has filed legal opposition to the patent in the European Patent Office. A PIL[9] has been filed in the Supreme Court for not taking any action on the grant of wheat patent. Notices have been issued in this petition.

Neem: Azadirachta Indica

42. Neem (Azadirachta Indica) is Sarva Rog Nirvarini - curer of all illness. Numerous patents have been granted on products using Neem or utilizing its properties. Some of them are to Indian companies also. One such patent has been cancelled.

43. A patent was granted to WR Grace and US department of Agriculture for extending shelf life of Neem oil (azadirachtin). This was done by crushing the seeds into an aprotic solvent. Broadly aprotic solvents are those that do not exchange hydrogen ion (protons) with the substances dissolved in them; they do not participate in hydrogen bonding (for example ethers, ketones, benzene). Protic solvents have hydrogen attached to electronegative atoms such as oxygen and nitrogen and participate in hydrogen bonding (for example water and alcohols).

44. A coalition of Environmental groups challenged the patent. This challenge was upheld and European Patent Office cancelled the patent

9 Research Foundation for science, Technology and Ecology vs. nion of India WP (Civil) No. 67 of 2004

granted on 10.5.199 on the ground that the invention was not novel and was in public use in India.

Haldi:Turmeric

45. Many patents using turmeric have been granted for treating degenerative musculoskeletal diseases such as rheumatoid and osteoarthritis. One patent was granted in March 1995, two expatriate Indians at the University of Mississippi Medical Centre, Jackson, US for use of turmeric to heal wounds. We filed an objection with the USPTO challenging the patent on the grounds of 'prior art'. This objection was upheld and the patent was cancelled.

Isabgol: Psyllium Husk

46. Patents have been granted on various uses of Psyllium husk. These patents have been granted to inventors in the US and in Japan. These patents are for use of psyllium husk in pharmaceutical/drug composition to reduce cholesterol, improve bowel movements, laxatives, and improve palatability.

Saunf: FENNEL

47. Patents have been granted on various uses of fennel to inventors in China, Japan, Germany, France, Russia, U. K. and Canada. These patents are for use of fennel,

- in various pharmaceutical composition for treatment of colic, female infertility, other gynaecological disorders, burns, hernia, promoting hair growth, treating skin diseases as a breast enhancer;
- in mouthwash composition and to prevent snoring;
- in food stuffs for seasoning of food, adding taste and flavor to sauce and liquor;
- as food supplement (fennel tea) and mouth freshener;
- as herbal mixture in cigarettes as a substitute to tobacco to avoid nicotine addiction;
- as house perfume/deodorant; and .as natural pesticide composition.

Dhania: CORIANDER

48. Patents have been granted for use of coriander to inventors in Russia, Japan, China, and the US. These patents are for use of coriander,

- as spices and condiments in food stuff to add flavour to curries, sauce, vegetable seasoning and to reduce food odour.
- in herbal drink composition like vodka, sedoi kavkav, etc;
- in pharmaceutical drugs/compositions for improving haematopoietic functions, treatment of microbial infection of farm animals;
- as herbal nutritional supplement (for aphrodisiac); and
- in artificial fire log.

Jeera: CUMIN

49. Patents have been granted for use of cumin;

- as spices/condiments in flavouring and seasoning of food stuffs;
- as a mouth freshener;
- for use in pharmaceutical composition as a blood flow enhancer; and
- for treatment of psoriasis, arthritis, gout and high cholesterol.

Surajmukhi: SUNFLOWER

50. Patents have been granted for various use of sunflower to the inventors in, Germany, Spain, Russia, France and US. These patents are for use of sunflower,

- as preparation of lubricant/varnish (surface active lubricants, spinning lubricants, reagents for drilling oil/gas wells and wood/metal varnish, anti - wear agent for engine fuel system, sealing liquid and additive promoting hydrocarbon combustion);
- in pharmaceutical compositions (hair growth agent, teeth/gum care composition, anti-snoring mixture, treatment of burns and skin diseases, decreased loss of tocopherols, oral drench mixture for treating parasitic diseases) as dietary supplement for animals to prevent shedding);

- in cosmetic compositions for skin care (anti-wrinkling cream, nail cream, anti-aging composition and use in preparation of soaps, margarine, etc.);
- in food stuffs (like vegetable oil for stir-frying, anti-adherent liquid for tortillas, slowing crystals for improving quality of condensed milk, fat substitute and as filler for low fat sandwich cookies); and
- in insect control formulations.

Moongphali: PEANUT

51. Patents have been granted for various uses of peanut. These patents are for use of peanut,

- in food stuffs and consumables like oil quality, butter, protein cake, nut spread with less stickiness and increased flavour, blended nut spreads and creamy chocolate flavoured nut spread;
- in agriculture for plant improvement and in plant protection compositions;
- in pharmaceutical drugs;
- for preparing lubricant/grease, coating material, for removing colour from sugar, separating agent for dusting solder oxides, cosmetic composition, antibody against peanut agglutinin, etc.;
- for pesticide compositions and environmentally safe well fluid for drilling; and
- in enhanced peanut plant line (plant improvement).

Arandi, Reri: CASTOR

52. Patents for various uses of Castor have been granted to inventors in United States, Japan and Germany. Some inventors in India have also been granted some patents. These patents are for use of castor ,

- in various pharmaceutical compositions as a surfactant, solvating agent, as oil in water emulsion for soft gelatine capsules, sustained release pharmaceutical tablets with tramadol base, long acting injectable formulations containing hydrogenated castor oil, aqueous preparations containing hardly soluble drug;

- for treatment of various skin/eye/ear disorders, promoting hair growth, and cure of diabetes, cancer, HIV, arthritis, trest infestation, blood pressure, etc.

- in preparation of polyurethane resins, polyurea elastomer systems with improved adhesion to substrates, foam able polyurethane compositions with a good flow behaviour, rigid polyurethane foams, polyurea elastomer with increased adhesion, low viscosity polymer polyols, waterproof plastic foam, other coating materials and foams;

- in cosmetic compositions, low residue solid antiperspirant, gelling agent, hydro alcoholic cosmetic micro emulsions, softening agents, solvating surfactant, etc., personal care products, soaps, skin tanning, nail, anti- perspirant composition;

- in agricultural compositions in pesticides/insecticides and for coating of fertilizers;

- in products like ink/dyes/paints, lubricant/grease, rubber composition, detergent composition, cleaved products, etc.

- in preparation of polyurethane resins, in textile dyes and in agro- product (pesticide composition) and Bayer AG (8) for use in injectable formulations of agricultural use, polyurethane compositions with low viscosity;

- in antiperspirant composition and desensitizing dentifrice with reduced astringency;

- in pharmaceutical medicants for coating of capsules.

Karela (Bitter gourd), Jamun and Brinjal

53. Cromak Research Inc, a New Jersey-based company in US has obtained an American patent for an edible herbal mixture comprising karela, jamun, and brinjal for use of cure in diabetes.

Jar Amla: Phyllanthus Niruri

54. Fox Chase Cancer centre USA has applied for grant of patent for the use of phyllanthus Niruri for curing hepatitis.

CONCLUSIONS

55. The questions concerning patents have to be sorted out

globally. Sooner it is done better it would be. Till then, here are some suggestions. We should,

(a) Examine the reasons of,

i. granting product patent in case it can manufactured by a process different than that prescribed when patent was granted and,

ii. period of patent

And in case our interest requires otherwise then we should work towards that end.

(b) Keep our traditional/public knowledge on website with documentary details. This will show prior art and will prevent patents being granted in their ignorance.

(c) Examine patents already granted and if necessary objections may be taken.

(d) Work towards substantive harmonization of patents regarding exceptions to inventions.

VICTIMS - THE VICTIM OF APATHETIC LEGAL & SOCIETAL NORMS

Vijai Varma, H.J.S.*

It is astonishing as also ironical that in the criminal justice system there is an all out effort on the part of all the agencies involved in the administration of justice to take care of the perpetrator of the crime, where as there is total lack of support for the sufferer or the victim of the crime perpetrated. It is true that the crime is supposed to be against the society and not against one individual only. But the entire focus of the criminal justice system being on the offender is something which shocks the conscience of the thinker. It is quite understandable that the offender be punished for the crime but what baffles is the sympathetic attitude towards the offender and the apathetic attitude towards the victim. The moment a person commits a crime, it appears the entire system takes up cudgels to 'take care' of the offender. He is taken into custody and sent to jail and starts enjoying the benefits of shelter, food, medical care, education etc. But does any one care to look for any support to the helpless victim who was the target of the crime committed by the offender and one who is suffering in silence whereas the offender is enjoying the facilities at the expanse of the state exchequer. So if a person takes to crime because of poverty if he is successful in his criminal activity, then his poverty is eliminated and if he has not, then the state takes care of him, so he need not bother in either case. But is there any system to take care of the victim of the crime whose entire property has been stolen or who has been incapacitated by the robbers or whose only bread earner has been murdered by the offender.

It is a thing to ponder about as to why there is miniscule literature with regard to victims of crime or the support system for victims. I find that since crime is said to be against the society, the interest of the individual i.e. the victim is ignored. It appears that the law channelizes its energies in apprehending, investigating, putting the criminal on trial and thereby trying to secure for the punishment of the offender and thereafter it feels that it has fulfilled its obligation towards the society. But can the

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goals set up of the justice delivery system be achieved just by securing punishment for the offender or the society has something more at stake i.e. to take care of the victim also. There can't be any substantive justice unless and until the criminal is punished and the victims gets its due in society.

Before going in depth into the support system for victims, it is essential to understand the meaning of the word 'victim'. The word 'victim' comes from the Latin word 'victima'. The term used to designate a creature sacrificed to the Gods'. Of course the meaning has got tremendous change over the years and now it is used to designate any one who suffers a negative out come, any kind of loss, injury in terms of material, fiscal or psychological manner. Thus there are victims of crime such as accidents, war, natural disasters etc. There are also victims of disease such as Cancer and victims of society such as those suffering from poverty etc. The meaning of the word 'victim' in criminological language or victimology is still not very clear. However the connotation of the term victim in criminal parlance is one who has suffered from the hands of the perpetrator indulging in an offence.

United Nations on November 29, 1985 adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. In this Declaration recommends measures to be taken on behalf of victims of crime at the international, regional and national levels to improve access to justice and fair treatment, restitution, compensation and assistance. It also outlines the main steps to be taken to prevent victimization linked to abuses of power and to provide remedies for the victims.

As set forth in the Declaration, "victims" are defined in the broad sense as persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are violations of national criminal laws or of internationally recognized norms relating to human rights.

In traditional justice systems, victims of aggression have usually found support and assistance from their family, village or tribe. The informal social network softens the impact of victimization and assists the victim in

recovery. This same network often assists in the resolution of the conflict and in ensuring that any decisions made are, in fact, implemented. Within this framework, it is taken for granted that the victim (and his or her kin), the victimizer (and his or her kin) as well as the entire social group will share the burden of dealing with the conflict.

With the increasing complexity of society and the evolution of systems of justice, in many parts of the world the State has gradually assumed a dominant role in the justice process. Specific forms of behavior are defined by the State as crimes, which have come to be seen as crimes against the State more than as violations of the victim's rights. In time, the State took over the responsibility for the investigation of the offence, the prosecution of the suspect, adjudication and enforcement of the sentencing decision. The victim was afforded fewer opportunities for direct participation. Although it was often the victim who reported the offence to the authorities, subsequent decisions came to be made more with the interests of the State and the community in mind than those of the victim.

By the middle of the present century in many societies the victim could aptly be called the "forgotten person" in the administration of justice. Since the state was assumed to be representing the interests of the victim and there was thus not seen to be a need for direct victim involvement in the proceedings. Since the early studies in the 1940s by Beniamin Mendelsohn and Hans von Hentig attention has been turned to the problems faced by victims, both in society in general and in their interaction with the criminal justice system in particular. Many victims face insensitive treatment by the police, prosecutors and court officials causing a "second injury". This applies particularly to certain especially vulnerable categories of victims, such as migrants, minorities and victims of sexual offence as well as refugees, prisoners of war and civilian victims of war and civil strife. Even if the offender is apprehended such victims do not have the opportunity to involve into the judicial processes and even if the offender is convicted such victims do not have any other satisfaction than of seeing the offender punished.

One of the earliest calls for reform came from Margery Fry in the U.K., who during the early 1950s argued for shelters for battered women and for state compensation schemes for victims of crime, as well as for

reconciling the victim and the offender. The first state compensation scheme for victims of violent crime was adopted in New Zealand in 1963. Other examples of early reforms include the 1955 child protection legislation in Israel and the establishment of shelters for victims of domestic violence and crisis centers for victims of sexual assault in the U.K. during the early 1970s.

The first major international meeting focusing specifically on victims was the first International Symposium on Victimology, held in Israel in 1973, which led to the establishment in 1979 of the World Society of Victimology. A number of other international entities have since dealt with core issues related to victims of crime and abuse of power. On the intergovernmental level, the work of the Council of Europe led to the adoption of the Convention on State Compensation to Victims of Violent Crime (1983; in force in 1988), to the 1985 recommendation on the position of the victim within the framework of criminal law and procedure, and the 1987 recommendation on assistance to victims and the prevention of victimization.

The adoption by the United Nations General Assembly of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) is by no means the only example of United Nations activity in this field. The work of the United Nations in preventing abuse of power and violations of human rights is long-standing, and among the results have been the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the Convention on Elimination of All Forms of Discrimination against Women.

Assistance to victim counters deleterious effects, reaffirms social solidarity and thus also benefits the community at large.

The manner in which a victim suffers

Now it is to be seen as to in what manner a victim suffers on account of injury caused to him by the perpetrator of the crime. Mainly the

consequences of a criminal activity on victim are first physical and financial injury, second psychological injury.

Physical and financial injury may be in the form of some injury caused to the victim by the use of force by the criminal. The bodily injury could be anything to the extent of causing death to the victim. The financial injury may be in the form of loss of property, expenditure on health services, costs incurred in criminal justice system, taking time off work, causing loss of remuneration etc.

Victim also suffers psychologically as crime is usually experienced as more serious for it is difficult to come to terms with the fact that loss and injury have been caused by the deliberate act of another human being. There is tremendous psychological disorder in case of certain serious offences committed on the victims.

Stages whereby a victim of crime conceptualizes common reactions to crime. Firstly, the reaction is one of shock, fear, anger, helplessness, disbelief and sometimes guilt. Then comes the period when the victim feels the depression, loss of confidence and esteem. Life may seem meaningless beliefs and faiths may not provide comfort. There may be behavioural responses such as avoidance of people and social withdrawl. Then there is a period of acceptance where the victim comes to terms with the problems. In this period the victim accepts the reality of the situation, it is not necessary that every victim behaves in a particular manner. However it is very clear that there are offences wherein the victim is traumatized. The American Psychiatric Association in 1980 specified the Post-Traumatic Stress Disorder (PTSD) which is defined as the consequence of a "traumatic event" and is supposed to be delayed or protracted response to an exceptionally stressful event. It is in opposition to the acute stress reactions, which appear within minutes of an exceptional stress and disappear within a few hours or a few days.

For individuals with PTSD, the traumatic event remains sometimes for decades or a lifetime, a dominating psychological experience that retains its power to evoke panic, terror, dread, grief or despair as manifested in day time fantasies, traumatic nightmares and psychotic reenactments known as PTSD flashbacks. The psychological injury in the form of PTSD

occurring mostly in cases of rape is an injury, which the victim needs to be strictly taken care of.

Then there are other types of injuries such as secondary victimization from the criminal justice system and the society. It occurs because those responsible for ordering criminal justice processes and procedures do so without taking into account the perspectives of the victim.

Then comes the necessity of assessing the needs of the victim. The goal of a victims service programme is to assist victims in dealing with emotional trauma, participating in the criminal justice process, obtaining reparation and coping with associated problems.

The first and foremost stage for achieving the goals of a victims assistance programme which the concerned government and community agencies is to establish, should be such victims service programmes which are dedicated to providing services to victims and helping them cope with the traumatic effects of the act. For fulfilling societies obligations to the victims of crime, it is necessary to have indepth knowledge of the consequences and impact of the crime on the people who are victimized. It is very essential for victims services, victim assistance and compensation programmes for being effective to have sufficient knowledge and data of the different types of needs or different types of victims, a better understanding of victims, victims refusal and unwillingness to cooperate with the system.

Whatever the kind of victims, it is imperative for ameliorating there lot that there has to be a solid victims support system.

The first victim support scheme was established in Bristol in 1974, the annual report of NAVSS (1986-87) states that there were 305 schemes which dealt with more than a quarter of a million new victims of crime in that year. The schemes were to help people cope with the crime that they had experienced. Rebes (1985) outlines victim support in U.K. and emphasizes the community bases of the schemes.

For starting a victim assistance programme an assessment is to be made of the needs and resources available. For proper assessment, there

has to be advisory groups and also victimization surveys.

It is necessary to have advisory group for assisting the victim. The advisory group might include representatives from police, prosecution, health and mental health care professionals, academic circles, local government, representatives of people working with offenders and from the community at large. Such a group facilitates, information gathering and data collection about the needs of the victim. Then we can have victimization surveys.

A study by the Bureau of Justice Statistics at the U.S. Department of Justice found that in 1992, American crime victims lost $17.6 billion in direct costs, which included losses from property theft or damage, cash losses, medical expenses, and amount of pay lost because of injury or activities related to the crime.

These kinds of surveys are quite helpful in assessing the financial injury caused to the victims and the finances which will be required for compensating the victim.

Then there is the need for supplying information to the victim. Victims need to be packed with information which are required by them with regard to the crisis involved or for support during investigation of a crime, trial of the case and even after disposal of the case in the court.

While the needs of the victim are to be addressed, it is the first concern of any crisis intervener to take care of physical safety of the victim. If the victim is in need of any emergency medical aid then that should be first provided before any other issue is taken up. After taking care of the medical aid to be provided to the victim, next comes the issue of safety of the victim. The victim may not feel safe in certain circumstances such as when the victims is being interviewed in the same area where an attack took place, when the assailant has not been apprehended and has threatened to come back or when the victim's family, friends or witnesses are threatened. Any of these situations may make the victim feel unsafe. Whatever be the circumstance, the victim needs to be reassured of their safety before any other support is provided to him.

With regard to financial injury there has to be a provision for victim compensation and also restitution. The compensation can be provided by the government and/or by the non governmental organizations.

State Compensation

Several models of State compensation programs exist. Although the idea of victim compensation can be traced back as early as the Babylonian civilization before 2380 B.C. and indigenous groups in Latin America and elsewhere have utilized informal community justice procedures for hundreds of years, the New Zealand scheme of 1973 is often cited as an example for other jurisdictions to follow. It provides victims of crime with the same level of awards as the victims of industrial and motor vehicle crashes. Programs such as the one in Quebec, Canada provide the possibility of emergency payments pending the final determination of the award. Poland has established a Foundation for Assisting Victims of Crime as a special public compensation fund.

Restitution

Restitution should be used to provide a way of offsetting some of the harm done to the victim and also to provide a socially constructive way for the offender to be held accountable while offering maximum opportunity for rehabilitation. All the restitution may be of the form of financial restitution, individual service, community service and restitution fines.

There has to be a supportive role by the police, prosecutors, legal aid providers and other victim's advocates to assist victims during investigation and/or trial.

The judicial role in justice for the victim

The judiciary has to be an impartial entity that oversees the progress of a criminal action. Judges should weigh and protect the rights of all parties involved in criminal proceedings.

Judges should provide essential protection to victims. In cases involving children, for example, accommodations such as allowing the victim to testify through close circuit television can also be ordered when applicable and possible. Granting orders requiring defense counsel to meet

the child's eye level and not raise his or her voice, as well as other methods of making the courtroom less intimidating to a child may also be ordered, when applicable and possible.. Judges should also expedite trials so as not to further victimize the crime victim by additional delays during an already difficult process.

Respect and Recognition for Victims

Judges have a leadership role in ensuring that victims and witnesses are treated with courtesy, respect and fairness, in order to ensure that :

· victims and witnesses are provided with information regarding the rights and prerogatives, available, and about the physical layout of the courthouse,, witness fees, compensation funds, and other available financial assistance;

· court administrators establish reception areas and provide victims and witnesses information about public and community services.

Providing victims with information

Judges have a leadership role in ensuring that victims and witnesses are fully informed about the criminal justice proceedings, in order to ensure that:

· victims should be able to obtain from appropriate court personnel information concerning the status of their cases;

· if requested and if possible, appropriate officials should give victims of serious crimes timely notice about the release of the defendant from custody, pre-trial and post- trial.

Special services and support

Victims and witnesses may require special services and support, both material and psychological. Judges may, whenever possible, encourage, to in promoting for example the following in their jurisdiction:

· separate waiting areas for the defense and for witnesses for the prosecution, including victims;

· the expeditious recording of evidence;

· the availability of special transportation and protection to and from the courthouse when the safety of witnesses is a consideration;

· informing the public of the importance of supporting the participation of victims and witnesses in court proceedings;

· child care services for victims and witnesses;

· crisis intervention, counseling and other support services for victims.

The ordering of restitution

Wherever possible under the law, judges should order restitution unless there is an articulated reason for not doing so, regardless of whether the offender is incarcerated or placed on probation.

Victim participation

Wherever possible under the law, victims should be allowed to participate and, where appropriate, to give input through the prosecutor or to testify in all stages of judicial proceedings, including:

· pre-trial release or bail hearings;

· the scheduling of court proceedings;

· continuances or delays (judges should state on the record the reason for granting a continuance);

· plea and sentence negotiations, where these are conducted;

· sentencing; and

· victim-offender mediation, when appropriate.

Persons accompanying victims

To encourage victim participation, whenever possible, victims should have a supportive person in the courtroom with him or her; victim impact statements prior to sentencing should be encouraged and considered; and victims or the victim's family should be allowed to remain in the courtroom.

Protection of the victim

Judges should use their judicial authority to protect victims and witnesses from harassment, threats, intimidation and harm.

Protection of Special Categories of Victims

In order to protect particularly vulnerable victims (e.g. minors, victims of sexual abuse, families of homicide victims, the elderly, persons with disabilities, and victims of organized crime and repression) judges should consider the following:

· the expediting of trials in cases involving particularly vulnerable victims;

· encouraging specially designed or equipped courtrooms to protect vulnerable victims;

· permitting the use of videotaped depositions in cases involving vulnerable victims;

· allowing vulnerable victims to have an individual of their choice accompany them in closed juvenile proceedings, closed criminal proceedings, and in camera proceedings, and

· if a defendant is conducting his/her own defense, preventing the defendant from directly questioning the victim.

Use of Space in Court Buildings

Efforts should be made to create separate facilities for victims and other witnesses for the prosecution, and offenders and other witnesses for the defense, especially in providing separate waiting rooms.

Victim Assistance and Hospitals

Doctors, nurses and other hospital personnel may provide tremendous assistance to victims of crime. In addition to police officers, medical personnel who are often also available 24 hours a day are commonly the first ones to come into contact with crime victims. All victims should be treated with dignity and respect by hospital staff. They should be treated with sensitivity.

Special care is to be taken by the experts and psychiatrist for dealing with problems faced by the victims with regard to stress disorder or PTSD. The injury caused to the victim on psychological front should be taken care of property for it is this injury which is more harmful to the victim

than the physical or financial injury.

Role of Media

The media has also an important role in a victim assistance programme. They must observe a code of ethics and should :

· present details about a crime in a fair, objective, and balanced manner, avoiding over-dramatized news,

· provide a balanced perspective relevant to a criminal act that reflects the concerns of the victim and offender,

· never report rumors or innuendoes about the victim, the offender, or the crime unless such information has been verified by reliable sources,

· in crimes other than homicide, identify the victim by age and area where the crime occurred, omitting names, street addresses and block numbers,

· never publish the identity of a sexual assault victim without their prior consent, regardless of whether the case is in the criminal or civil courts,

· never publish the identity of a child victim,

· never identify alleged or convicted incest offenders when such actions could lead to the identification of the victim,

· in cases of kidnapping where it is determined that the victim has been sexually assaulted, stop identifying the victim by name once a sexual assault has been alleged,

· never, without the victim's prior consent, identify the names of victims of frauds or other crimes that tend to humiliate or degrade the victim.

The Role of Non Governmental Organizations

The non governmental organizations have to play an effective role in the victim assistance programme.

International Scientific and Professional Advisory Council of U.N. has a technical committee on victimization prevention and the protection of victims, which organized expert group meetings (Onati 1993, Cairo

1995) that made far reaching recommendations which have yet to be carried out as do those of the United Nations expert group meeting convened in Vienna in December, 1995.

In both preventive efforts and the provision of remedies for victims, the United Nations Crime Prevention and Criminal Justice Program has a lead role to play. The United Nations Declaration of Basic Principles for Victims of Crime and Abuse of Power contains essential provisions that, applied in practice, could really be a "Magna Carta" for victims, which it has often been called.

Whenever there is the debate as to whether victims need to be provided with financial and moral support, the fact of lack of funds has always been brought into the debate. One of the ways of finding funds is to utilize fines imposed on the offenders. Several countries are providing extra fines on offenders. Through an amendment to the criminal code, the judges are empowered to order a special fine that will place the payment in a fund that can only be used for services to victims. In the U.S.A., the Federal Crime Victims Fund is derived from tax, fines and penalties paid by Federal criminal offenders. $530 million were contributed through this device in 1996. The fund is administered by the office of victims of crime. About 90% of the money collected and is distributed amongst the state to utilize the fund for their victim assistance and compensation programmes. Federal victims assistance funds help to support over 2,500 local victims services agencies such as domestic violence shelters, children's advocacy centers and rape treatment programmes. Compensation funds provide reimbursement to the victims for out of pocket expenses resulting from crime including medical and mental health counseling costs, lost wages and funeral expenses. Some countries also use the money seized from organized crime. The seized property is also sold and the proceeds are used for programmes for services to victims.

Then there are offences against women in particular serious offences such as that of rape in India, greater attention is now being paid to rape victims as they deserve the maximum consideration in view of the psychological problems involved. Then there are female victims such as those involved in dowry cases, which require a special attention. Then there are minor groups and weaker sections victims who are the result of

the social, economic imbalances and are the worst sufferers. Caste and community factors play a heavy role for victims of such kind. Then there are consumer victims such as victims of unscrupulous practices of manufacturers, traders etc. The importance of redressal problems were to a great extent on the victims perception regarding efficiency of the police and unlikely response from them. In India, the police is not regarded as a body which is humane to the interest of the hopeless victims but is seen as a utterly corrupt group of people and to contact with them for the redressal is utterly futile.

In Indian context there is the provision for compensation to crime victims. Sec. 357 of the Cr.P.C. provides for that. However there is a very limited discretion U/s. 357(1) of the Cr.P.C. as the compensation is to be paid only out of the fine if imposed on the offender. The court has however much discretion, under sub section 3 of Sec. 357, though only if fine does not form a part of the sentence. While awarding compensation to the victims, the issues raised in an international symposium held in Israel must be considered and they are as follows-

1. Should there be a maximum and/or minimum level for compensation?

2. What is the nature of the losses that should be recompensed, e.g., direct damage, loss or earnings, pain and suffering?

3. Should consideration be given to the victim's conduct at the time of the offence and/or to his general character in determining the question of compensation?

4. Should payment be by right and denied only for stated reasons by the court?

5. Should present day schemes be extended to include crimes against property?

6. Should the State be entitled to claim reimbursement from the criminal and/or should the State be empowered to compel criminals to give part of their earnings to the State?

7. Should states set up compulsory insurance schemes for certain professions whose exercise relies upon an element of fidelity and trust in order to cover damage caused by one of their members to stock exchanges?

8. Should compensation schemes contain opportunities for appeal?

9. Should bystanders attempting to aid victims be entitled to compensation for damage or losses suffered?

10. Should the victim be entitled to immediate partial compensation in order to tide him over initial expenses, the determination of the final sum to be made subsequently by the compensation board?

11. Should an accused person who is found not guilty be entitled to compensation for court costs incurred and/or for other losses?

12. Should a judge in a criminal trial be entitled to order compensation by the State concurrently with his verdict?

13. Should the office of ombudsman be set up to provide direct focus on the needs of the victim, with special concern for mitigating immediate trauma, prevention of further stress at the hands of society, as well as offering treatment for victims-recidivists?

Hon'ble Supreme Court in State of Gujarat v. Hon'ble High Court of Gujarat, (1998) 7 SCC 392 has laid down a unique form of mode of compensation to be given to victim and his family. The Hon'ble Court laid down – Victim of the crime or his family members should be compensated from the wages earned in prison by the perpetrator of the crime by doing hard work pursuant to sentence of RI awarded by court – Appropriate legislation/rules should be made in that behalf to disburse through a fund keeping in view the sensibilities of victims and provisions of Art. 300-A. Thus Hon'ble Supreme Court has shown its concern for the plight of the victim & the form in which this problem can be addressed.

Though there are the provisions for compensating the victims, but these are certainly not sufficient enough to take care of the plight of the victim. There has to be a sustained effort to augment the sources for funding the victim assistance programmes in India, so that the victims of crime get enough aid to secure themselves physical, material, moral, medical support, so that he/she is able to get back his/her rightful place in the society. For this, governmental and non-governmental agencies have to come up with the strong will and conviction to work in tandem for solid support system in the victims particularly of crime. For this, it is to be understood that it is more essential to take care about the rehabilitation of

the victim than to take care of the rehabilitation of the offender. No one denies that there is the need for understanding the psyche of the offender and work for his rehabilitation, but this need is all the more necessary and important for the victim. If the state takes care of the offender why should it lack in taking care of the victim for the victim needs, the care more than what the offender needs it.

I would like to conclude with the words of Brent Turvey-

> "In the rush to examine a criminal's behavior, it is not difficult to become distracted by the dangling carrot of that criminal's potential characteristics and forget about the value of understanding his victims"

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Interpretation Of Penal Provisions Of Remedial Statutes - Emerging Trend

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In modern times we come across with a number of statutes, which are enacted to cure some immediate mischief or to bring about some social reform. Such statues are generally called remedial, welfare or social justice oriented legislations. Factories Act, Minimum Wages Act, Forest Act are some of such statues. These legislations prohibit certain acts by declaring them illegal and provide for redress or compensation to the aggrieved persons. As regards interpretation of social justice oriented legislations, judicial trend has been to interpret them as broadly and as liberally as possible. Courts tend to give widest possible operation to the provisions of such statutes, which is permitted by the language used. The words are so construed as to give the most complete remedy, which the phraseology permits. Efforts are made to ensure that the relief contemplated by the statue is not denied to the persons intended to receive it by the legislature.

If the legislation is a social justice oriented legislation pure and simple no difficulty arises as far as interpretation of various provisions of these statutes is concerned. However difficulty arises when such statues also contain penal provisions. One of the basic rules of the interpretation is that penal provisions should be construed strictly. The question arises how to construe penal provisions of social justice oriented legislation. Should they be interpreted strictly like any other penal provision or the courts can construe them somewhat liberally having regards to the purpose for which the legislation has been enacted. An attempt has been made in this write up to analyze the judicial trend in this regard.

Trend in earlier cases

Generally speaking, in fifties and early sixties the judicial trend as regards interpretation of penal provisions of social justice oriented legislations was to interpret them restrictively. Generally the object of the legislation and the mischief sought to be remedied was not taken into

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consideration while interpreting penal provisions of these types of statutes. **Tolaram V. State of Bombay, AIR 1954 S.C. 496** can be cited as a representative case. In this case Section 18 (1) of Bombay Rent Restriction Act, 1947 came in for interpretation before the Apex Court. Section 18(1) of Bombay Rent Restriction Act, 1947 provided that if any Land Lord receives any premium etc. other than standard rent in respect of grant, renewal or continuance of a lease of any premises, he would be punished. In this case the premium was received by the Land Lord from the prospective tenant much before the completion of the building. The question arose whether acceptance of premium in respect of an agreement between the owner of an incomplete building and the prospective tenant would come within Section 18(1) of Bombay Rent Restriction Act, 1947. Hon'ble the Supreme Court construed Section 18(1) restrictively and held that since simultaneously with acceptance of premium or soon thereafter possession of the flat was not given to the tenant, hence it could not be said that the premium was in respect of grant, renewal or continuance of a lease. The Supreme Court observed

> "In our opinion the language of the section in respect of the grant, renewal or continuance of a lease" envisages the existence of a lease and the payment of an amount in respect of that lease or with reference to that lease. Without the existence of a lease there can be no reference to it. If the legislature intended to punish persons receiving pugree on merely executory contracts it should have made its intention clear by use of clear and unambiguous language.

Hon'ble the Supreme Court explaining the law of interpretation in this regard has observed at page 498:

> "It may be here observed that the provisions of section 18(1) are penal in nature and it is a well settled rule of construction of penal statutes that if two possible and reasonable constructions can be put upon a penal provision, the court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty. It is not competent to the court to stretch the meaning of an expression used by

the Legislature in order to carry out the intention of the Legislature."

The High Court in this case had given somewhat liberal interpretation to the expression "in respect of" as used in Section 18(1) of the Act. The High Court has observed:

> "It is relevant to observe that the Legislature has advisedly not used the expression "for" or "in consideration of" or "as a condition of" the grant of a lease. It has used an expression which has the widest connotation and the expression used is "in respect of". "In respect of" means in its plain meaning "connected with or attributable to", and therefore it is not necessary that there must be a simultaneous receipt by the landlord with the grant of the lease. So long as 'some connection' is established between the grant of the lease and the receipt of the premium by the landlord, the provisions of the section would be satisfied."

Clearly, the Rent Restriction Act, 1947 was a remedial statue; its object being to eradicate the malpractice of pugree system which was prevalent at that time. If the object of the legislation was kept in mind the interpretation given by the Bombay High Court could be preferred. But Hon'ble the Apex Court preferred the strict construction rule because the provision was a penal provision.

"Lord Macmillan in – **L & N.Es. Rly. Co. v. Berriman', 1946 AC 278 at p. 295(B),**

> "Where penalties for infringement are imposed it is not legitimate tostretch the language of a rule, however beneficient its intention, beyond the fair and ordinary meaning of its language".

Similarly, in **W.H.King v. Republic of India, AIR 1952 S.C. 156** restrictive construction was placed on penal provisions of Bombay Rents, Hotels and Lodging Houses Rates (Control) Act, 1947. In this case the tenant was charged for having received a sum of Rs. 29500.00 by way of pugree for relinquishment of his tenancy. Section 19(1) of the aforesaid Act provided that it shall not be lawful for the tenant to receive any sum or

consideration as a condition to relinquishment of his tenancy. In this case possession of the flat was not given to the landlord but it was handed over to one Mr. Moolchand Kodomal Bhatia. The Supreme Court observed

> "The distinction between an assignment on the one hand and relinquishment or surrender on the other is too plain to be ignored. In the case of an assignment, the assignor continues to be liable to the landlord for the performance of his obligations under the tenancy and this liability is contractual. While the assignee becomes liable by reason of privity of estate. The consent of the landlord to an assignment is not necessary, in the absence of a contract or local usage to the contrary. But in the case of relinquishment, it cannot be a unilateral transaction; it can only be in favour of the lessor by mutual agreement between them. The relinquishment of possession must be to the lessor or one who holds his interest."

Recent trend

The recent cases however, show a different trend. In State of West Bengal and others v. Sujit Kumar Rana, 2004 (3) Crimes p. 195, Hon'ble the Supreme Court has observed that "... the courts must give purposive construction to such statutes which have been framed in public interest keeping in view the object thereof." Case under Negotiable Instrument Act, Forest Act, Wild Life Protection Act, the Environment Act and other similar Acts show that now the courts referred to the object of the statutes and penal provisions of social justice oriented statutes are also interpreted somewhat liberally so that the object of the Act is achieved.

In **Indian Handicrafts Emporium and others v. Union of India, (2003) 7 S.C.C. 589** The Supreme Court given broad interpretation to the provisions of Wild Life Protection Act. The statute prohibited trade in animal articles. Earlier ivory was legally imported but trade of ivory was banned by an amendment in the Act. But the Act did not contain the provision for vesting of already imported ivory in Government. The Supreme Court by applying the purposive construction rule held that if trade is prohibited, the logical consequence would be that he must be deprived of the possession of animal articles including imported ivory. The Supreme Court

held that the trader had no right to possess the imported article after the amendment in the Act. Similarly, in **Balram Kumawat v. Union of India & Ors. [(2003) 7 SCC 628],** this Court applied the dictionary meaning to the term 'ivory' to hold that even 'mammoth ivory' will come within the purview thereof holding that the 'rule of strict construction' of a regulatory/ penal statute may not be adhered to, if thereby the plain intention of the Parliament to combat crimes of special nature would be defeated.

. In **Kanwar Singh v. Delhi Administration, AIR 1965 S.C. 871** while interpreting Section 418 (i) of Delhi Municipal Corporation Act, 1959 The Apex Court has observed

> "It is the duty of the court in construing a statute to give effect to the intention of the legislature. If, therefore, giving a literal meaning to a word used by the draftsman, particularly in a penal statute, would defeat the object of the legislature, which is to suppress a mischief, the court can depart from the dictionary meaning or even the popular meaning of the word and instead give it a meaning which will 'advance the remedy and suppress the mischief'".

In **International Ore and Fertilizers (India) (P) Ltd. v. ESI Corpn. AIR 1988 S.C. 79** the Supreme Court referred and oft quoted passage of Lord Denning from the decision in the case of Seaford Court Estates Ltd. v. Asher wherein it has been observed:

> "The English language is not an instrument of mathematical precision. Our literature would be much poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticized. A Judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with diving prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame

> the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statue, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature .....A judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do so as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

Cheque dishonour cases:- Cases under Negotiable Instrument Act relating to dishonour of cheques are good examples of recent judicial trend as regards interpretation of penal provisions in remedial statutes. Chapter XVII of Negotiable Instrument Act containing Sections 138 to 142 was introduced by an amending act in the year 1988. Section 138 of the Act has created a contractual breach as an offence wherein dishonour of cheque has been made penal offence under certain circumstances. Earlier dishonour of cheques was not an offence and the aggrieved payee could only bring a civil action to recover the amount of cheques. The object behind this amendment was to inculcate faith in the efficacy of banking operations and to give credibility to negotiable instruments in business transaction. Section 138 of N.I. Act provides that if the cheque has been dishonoured due to insufficiency of fund in the account of the drawer of the cheque it would attract criminal liability. In **N.E.P.C. Micon Ltd. v. Magma Leasing Ltd., (1999) 4 S.C.C. 253** the cheques were dishonoured because the drawer had closed his account It was argued that the dishonour of cheque was not due to insufficiency of the fund in the account, it would not attract criminal liability under Section 138 of N.I. Act. The Apex Court, while holding that dishonour of the cheque by a bank on the ground that the account is closed would be covered by the phrase "the amount of money standing to the credit of that account is insufficient to honour the cheque," has observed as under:

"Learned counsel for the appellants, however, submitted that Section 138 being a penal provision, it should be strictly interpreted and if there is any omission by the legislature, a wider meaning should not be given to the words than what is used in the section. In our view even with regard to penal provision, any interpretation, which withdraws the life and blood of the provision and makes it ineffective and a dead letter should be averted. If the interpretation, which is sought for, were given, then it would only encourage dishonest persons to issue cheques and before presentation of the cheque close "that account" and thereby escape from the penal consequences of Section 138. "

In **Anil Kumar Sawhney v. Gulshan Rai, 1993 (4) SCC 424** Hon'ble the Supreme Court was concerned with the question of limitation as provided in proviso (a) to Section 138 of the Negotiable Instrument Act. This proviso requires that a cheque should be presented to the Bank within a period of six months from the date on which it is drawn or within the period of its validity., whichever is earlier. The cheques in question in Sawhney's case (supra) were dated 15-12-1991 and 15-5-1991. These cheques were handed over to the payee in a settlement arrived at in a court case on 5th march, 1990. These cheques were returned by the Banker with the endorsement "not arranged for – no fund". The payee thereafter issued notice as contemplated under Section 138of the Act followed by complaint under Section 138 being filed in the Court of the Chief Judicial Magistrate at Karnal. The question for consideration was as to the date on which the cheques in question could be taken as drawn, in other words, what is the starting point of limitation of six months provided in proviso (a) to Section 138 of the Act. According to the drawer the cheques were drawn in March, 1990 when they were written and handed over to the payee. The cheques were post - dated and bore the dates mentioned hereinbefore. Proviso (a) to Section 138 uses the words "the date on which it is drawn". The cheques were drawn in March, 1990 and were presented for encashment in the year 1991 which was beyond the period of six months provided in proviso (a) to Section 138 and therefore, no offence was said to be made out under Section 138. Keeping in view the object of Section 138 i.e. to enhance the acceptability of cheques by making the drawer liable for penalty in case the cheque is dishonoured, it was felt that drawer of a post dated cheque could defeat Section 138 of the Act by showing a date beyond six months

of its delivery. An interpretation which supports the object of the provision had to be adopted. Therefore, it was held that a post dated cheque for purpose of clause (a) of the provision to Section 138 has to be considered to have been drawn on the date it bears. On the basis of Sections 5 and 6 of the Act, it was observed that "post-dated cheque is only a bill of exchange when it is written or drawn, it becomes a cheque when it is payable on demand. The post-dated cheque is not payable till the date which is shown on the face of the document. It will only become cheque on the date shown on it and prior to that it remains a bill of exchange under Section 5 of the Act. As a bill of exchange a post-dated cheque remains negotiable but it will not become a cheque till the date when it becomes payable on demand." The ratio of the decision in Sawhney's case is found in the following words:

> "One of the main ingredients of the offence under Section 138 of the Act is, the return of the cheque by the bank unpaid. Till the time the cheque is returned by the bank unpaid, no offence under Section 138 is made out. A post-dated cheque cannot be presented before the bank and as such the question of its return would not arise. It is only when the postdated cheque becomes a "cheque", with effect from the date shown on the face of the said cheque, the provisions of Section 138 come into play. The net result is that a postdated cheque remains a bill of exchange till the date written on it. With effect from the date shown on the face of the said cheque it becomes a "cheque" under the Act and the provisions of Section 138(a) would squarely be attracted. In the present case the postdated cheques were drawn in March 1990 but they became "cheques" in the year 1991 on the dates shown therein. The period of six months, therefore, has to be reckoned from the dates mentioned on the face of the cheques".

In **Goaplast Pvt. Ltd. v. Shri Chico Ursula D'Souza & Anr., 2003 (2) Crimes 55 (S.C.)** the matter was the other way round. It this case post-dated cheques were given by the accused and before the due date of payment instructions were issued to the bank not to pay the amount

of cheques if presented for payment. Requests were also made to the payee not to present the cheques for payment. Drawer of the cheque countermanded the payment on the ground that the cheques were issued under a mistaken belief and no amount was due to the payee of cheque. The question is arose as to whether Section 138 of N.I. Act can apply to a case in which a person issuing a post dated cheque stops its payment by issuing instructions to the drawee bank before the due date of payment. The argument was that in view of Sawhney's case the cheque in question were only a "bill of exchange" and hence it could not be said that the accused had countermanded the payment of cheque. The High Court took the view that the accused had only countermanded a bill of exchange on the date the accused wrote the letter about stopping payment of the cheques. Before the due date the instruments were merely bills of exchange and not cheqes. Hon'ble the Supreme Court observed:

" ... In **Sawhney's** case the point for consideration was the date from which the period of six months provided in proviso (a) to Section 138 should be counted. The Court clearly held that a post- dated cheque becomes a cheque only on the date it bears when it becomes payable on demand, and therefore, limitation will start from that date. In the present case the issue is very different. The issue is regarding payment of a post-dated cheque being countermanded before the date mentioned on the face of the cheque. For purpose of considering the issue, it is relevant to see Section 139 of the Act which creates a presumption in favour of the holder of a cheque. The said Section provides that "it shall be presumed that, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, or any debt or other liability". Thus it has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the Act which is to promote the efficacy of banking operation and to ensure credibility in business transactions through banks persuades us to take a view that by countermanding payment of post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act. A contrary view would render Section 138 a dead letter and will provide a handle to persons trying to

avoid payment under legal obligations undertaken by them through their own acts which is other words can be said to be taking advantage of one's own wrong. If we hold otherwise, by giving instructions to banks to stop payment of a cheque after issuing the same against a debt or liability, a drawer will easily avoid penal consequences under Section 138.

Goaplast's case can be said to be representative case depicting the recent trend of interpretation of penal provisions of remedial statutes. In this case the object of Act and the mischief it tried to get rid of was taken note of by the Apex Court while interpreting the penal provisions of Negotiable Instrument Act. We can see the operation of interpretive exercise in full swing in order to ensure the realization of object of the statue the Court has held that sections 138 to 142 of the Act are intended to discourage people from not honouring their commitments by way of payment through cheques. It is desirable that the court should lean in favour of interpretation which serves the object of the statute.

Conclusion

It is by now almost settled that the courts give purposive construction to the penal provisions of remedial statutes. They do not adhere mechanically to the rule of strict construction of penal provisions. But at the same time they are not oblivious that these provisions do make serious inroads on the rights of life and liberty of the subject and that unnatural stretching of language must not be done in the name of upholding the purpose and object of the statute. The analyses of the cases reveal that courts tend to delicately balance the individual's right to property and liberty and the object of the statute in which the penal provisions are contained.

ALTERNATE DISPUTES RESOLUTION UNDER THE PROVISIONS OF SECTION 89 OF THE CIVIL PROCEDURE CODE 1908: PAST AND FUTURE

Dr. K.N. Chaturvedi*

The Indian Constitution in the governance of the civic society accords the place of prominence to the judiciary. It deals elaborately with the constitution, powers and authority of the Supreme Court and of the High Courts and leaves the constitution, powers and authority of the subordinate courts to the Central enactments and State enactments. The Supreme Court exercises original, appellate, writ and advisory jurisdiction. The High Courts also exercise original, appellate, revisionary, writ and supervisory jurisdiction over all courts and tribunals in the State where it is situated. Subordinate courts in a State are civil courts and criminal courts wherein disputes of civil nature are tried and decided in the civil courts and criminals are prosecuted through the criminal courts. Certain civil disputes have been transferred from civil courts to the tribunals such as Railway claim tribunals, debt recovery tribunals, administrative tribunals (for service matters), etc. The courts follow the Code of Civil Procedure and Evidence Act whereas tribunals are not bound by the Code of Civil Procedure and the Evidence Act but follow the rules of natural justice. The courts and tribunals adjudicate large number of cases. Recently, the Chief Justice of India while inaugurating an International Conference on ADR – Conciliation and Mediation at Mumbai on 22nd November, 2004 gave the statistics of cases filed and disposed of on an average every year. Hon'ble Chief Justice of India gave the figures which are as follows:

> "In the Supreme Court, the number of cases filed is 42,000 whereas the number of cases disposed of is 40,500. In the High Courts, the number of cases filed

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is 11.5 lakhs whereas the number of cases disposed of is 10.5 lakhs. And in the subordinate courts, the number of cases filed throughout the country is 1.4 crores whereas the number of cases decided is 1.3 crores."

Thus, the above figures clearly demonstrate that the role of courts in adjudicating and deciding such large number of cases reinforces the faith of the common men in the judiciary. The courts also keep under control the various agencies of the Government through the vast powers conferred on it by the Constitution (Writ Jurisdiction), the powers conferred on it by the statutes (Contempt of Courts Act) and the powers assumed by it through judicial law making (Public Interest Litigation). Such vast and unlimited powers also impose onerous duty on the courts to provide expeditious justice to the people. However, for various reasons, the courts have not been able to cope up with ever increasing number of cases coming before it.

The New York Times gleefully reported recently that in a case of dispute between two neighbours in Moradabad (UP) regarding a dividing wall between houses was remanded by the High Court **after 38 years of litigation with fresh disposal by the trial court.**

The newspapers which we daily see quite regularly report the long delay in trial of cases and it is acknowledged by all now that the biggest challenge before the Indian judicial system is dispensation of quick justice. The regular hierarchy of courts have proved to be insufficient to deal with heap of cases that has piled up over the years due to increasing litigation between the ever increasing population of the country. As reported recently the pendency of cases as on March 31, 2004 was of 27,285 cases in the Supreme Court, 29.7 lakhs cases in the High Courts and 2.4 crores cases in the subordinate courts.

NECESSITY OF ADR:

Over the years, the problem of delay in disposal of cases has shaken the confidence of the people in the capacity of the courts to redress their grievances and grant adequate and timely relief. The issue has been the subject-matter of study and examination by the various committees and commissions, notably among them are Rankin Committee (1925); The High Courts Arrears Committee (1949); The High Courts Arrears Committee

(1969) and a number of reports of the Law Commission of India.

The Law Commission of India went into all aspects relating to reform of judicial administration in its 14th Report and some of the reports of the Law Commission of India which deal with the measures for reducing delay at various stages of trial both in civil and criminal cases are 27th Report, 54th Report, 55th Report, 70th Report, 77th Report and 129th Report.

On the lines of the recommendations of the 27th Report, 54th Report and 55th Report, the Code of Civil Procedure, 1908 was comprehensively amended by enacting the Code of Civil Procedure (Amendment) Act, 1976. However, the problem continued and so also the appointment of committees and commissions. The subject of pendency of cases used to be discussed in the annual conference of Chief Justices of High Courts. In the Conference held in 1983, a Committee under the chairmanship of Justice Satish Chandra was constituted. Later on, on the recommendations of another Conference of the Chief Justices held in 1987, the Government of India constituted a Committee in the year 1989 known as Justice Malimath Committee.

The necessity of ADR, however, was echoed in the Conference of Chief Justices of the High Courts and of the Chief Ministers of the States in the year 1993. The then Prime Minister also observed:

> "The Chief Ministers and Chief Justices were of the opinion that courts were not in a position to bear the entire burden of justice system and that a number of disputes lent themselves to resolution by alternative modes such as arbitration, mediation and negotiation. They emphasized the desirability of disputants taking advantage of alternative dispute resolution which **provided procedural flexibility, saved valuable time and money** and avoided the stress of a conventional trial."

Later on it was in 1997 that the Code of Civil Procedure (Amendment) Bill, 1997 was introduced. The said Bill contained insertion of new section 89 in the Code to provide for settlement outside the court. It may be recalled that the Code of Civil Procedure, 1908, as originally enacted, contained section 89 which provided for court controlled arbitration in a

suit before it. However, on enactment of the Arbitration Act, 1940 (since repealed and reenacted by the Arbitration and Conciliation Act, 1996), the section 89 of the Code was omitted. The text of section 89 as it stood originally may be seen as ANNEXURE to this paper.

The provisions of the Code of Civil Procedure, 1908, as amended by the Code of Civil Procedure (Amendment) Act,1999, and the Code of Civil Procedure (Amendment) Act, 2002, were considered by the Supreme Court in Salem Bar Association vs. UOI, 2002 (8) SCALE 146, wherein the Bench of 11 Judges headed by the then Chief Justice of India Mr. Justice Kirpal, upheld the constitutional validity of the amended provisions of the Code. The Court also appointed a committee under the chairmanship of Justice M. Jagannadha Rao, presently Chairman, Law Commission of India, to prepare a model draft rules for alternate dispute resolution and draft rules for mediation. The report has been submitted to the Supreme Court and the Court is likely to take up the issue in the near future. Now, at this stage, it is appropriate to understand in brief the mechanism of alternate dispute resolution, i.e. arbitration, conciliation and mediation.

Dispute resolution is as old as history and as new as to-day's problem. More and more individuals and organizations caught in conflict are finding that ADR methods can produce positive results more swiftly, effectively and economically than resorting to litigation. A foray into the world of ADR on behalf of client will not only serve the bar and the client but will improve the lawyers image, "we do not encourage dispute, we resolve them".

ARBITRATION :

Arbitration means the process by which an arbitrator adjudicates the dispute between the parties to the suit and passes an award by the application of the provisions of the Arbitration and Conciliation Act, 1996. Recently, the Law Commission of India considered the various aspects of the aforesaid Act in its 176th Report titled "The Arbitration and Conciliation (Amendment) Bill, 2002. On the recommendation of the Law Commission a Bill namely, the Arbitration (Amendment) Bill, 2003, was introduced in the Parliament. The said Bill is pending before the Standing Committee of the Parliament.

CONCILIATION :

Conciliation means the process by which a conciliator conciliates a dispute between the parties to the suit by the application of the provisions of the Arbitration and Conciliation Act, 1996 by making proposals for a settlement of the dispute and by formulating and reformulating the terms of a possible settlement. Presently, conciliation is accepted as a means of settling the disputes under the Industrial Disputes Act, 1947. Conciliation is also used in settling family disputes under the Hindu Marriage Act and also under the Family Courts Act, 1984.

MEDIATION :

Mediation facilitates the discussion between the parties directly and assists parties in identifying the issues, reducing misunderstanding, clarifying priorities, exploring areas of compromise and generating options in a trial to solve the dispute. Mediation is being used in USA at a large scale in settling business and family disputes. Mediation as an alternative to divorce litigation in USA has gained increasing popularity in recent years as private mediation services offered by attorneys, social workers and mental heath professionals have appeared all over USA. This is so because the traditional process of divorce is inadequate because the courts focus primarily on "objective" issues, being unable to deal with spouses personal emotional concerns. There appears to be growing feeling and increasing evidence that the adversial system is not the best forum for resolving dispute concerning divorce. The problem with the adversial process include increased trauma and escalated conflict; low commitment to an eventual agreement or judgment; spouses encouraged to take extreme positions that are at times unnecessarily divisive; failure to enhance co-operation and communication; increased delay in dispute resolution and requiring the involvement of persons who are neither trained nor privy to the interpersonal relationships and nuisance involved in the decision making process concerning the dissolution of marriage.

FUTURE PROSPECTS OF INDIA:

The institutional mechanism for settling disputes outside the court was created by the enactment of the Legal Services Authority Act, 1987. This Act enables the constitution of Lok Adalat to settle disputes with a view to lessen the burden of the courts. Lok Adalats have been very

successful in settling disputes outside the courts. With the insertion of new section 89 in the Code of Civil Procedure, 1908, it shall be the duty of the court to make a reference to alternate modes of resolution in terms of that section. However, many issues are to be addressed before the ADRs may be used at all India level to reduce the burden on the courts. Firstly, this requires training of Judges and lawyers who can understand the significance of the alternate modes such as conciliation and mediation. Secondly, awareness and popularization of mediation and negotiation at a large scale is also necessary. Thirdly, the funds are also required for popularizing the arbitration and conciliation as a method for resolving disputes and also for training of judges and lawyers.

At present, the Indian Council of Arbitration of the Federation of Chambers of Commerce, New Delhi also entertains and disposes of arbitration cases. Bombay Chamber of Commerce and Industry at Bombay is another institution which handles arbitration cases. In Delhi, the International Centre for Alternate Disputes Resolution (ICADR) funded by Government of India handles arbitration and conciliation matters and also conducts programme for training of arbitrators and conciliators. The ICADR in collaboration with national academy of legal research (NALSAR), Hyderabad conducts post-graduate Diploma in ADR and Family Counselling. The training at a large scale is necessary as most of the arbitration cases at present are handled by retired Judges of the Supreme Court and of the High Courts. There is an urgent need to broaden the base of resource persons who can be arbitrators, conciliators and skillful mediators by including therein the retired officials from the subordinate judiciary psychologists and sociologists to deal with family matters and retired banking officials to deal with the money matters.

ANNEXURE

Section 89 (1) – Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any references to arbitration whether by an order in a suit or otherwise, and all proceedings there under, shall be governed by the provisions contained in the Second Schedule.

(2) The provisions of the Second Schedule shall not affect any arbitration pending at the commencement of this Code, but shall apply to any arbitration after that date under any agreement or reference made before the commencement of this Code.

SECOND SCHEDULE

1. (1) Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference.

(2) Every such application shall be in writing and shall state the matter sought to be referred.

"18. Where any party to any agreement to refer to arbitration, or any person claiming under him, institutes any suit against any other party to the agreement, or any person claiming under him, in respect of any matter agreed to be referred, any party to such suit may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to the Court to stay the suit; and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration, and that the applicant was, at the time when the suit was instituted and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the suit."

AMENDMENTS REQUIRDE IN SECTION 27 OF THE INDIAN CONTRACT ACT, 1872 SO AS TO INCORPORATE THE CLAUSE OF REASONABILITY

Abhijeet Swaroop
Smarika Singh *

Section 27 of the Indian Contract Act, 1872 specially provides that every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void. Point to be noted in this regard is that in India even reasonable restraints are void unless they fall within the statutory exceptions.[1] It is quite pertinent to note at this juncture that that the Indian Contract Act owes its origin to the English Contract Act where contracts in restraint of trade are upheld if the degree of restraint is reasonable.[2]

The question, which we are trying to address in this article, is that there is a need to amend Section 27 of the Indian Contract Act so as to incorporate the clause that the covenants in restraint of trade if reasonable are valid and enforceable in law.

The basic premise of this article revolves around service contracts, which are signed between employers and employees and are generally termed as restrictive service covenants. Under Indian Contract law, there are two kinds of exceptions which are upheld, first category is of those which are specifically mentioned in the statues and the second is of those which are created by the judiciary vide its judgments.

With regards to our basic premise i.e., restrictive service covenants the position in India is that a restrictive covenant between master and servant operative during the period of employment is valid and enforceable in law.[3] The reasoning given by the Apex Court while upholding such covenants is that it is reasonable and necessary to protect the employer's interest.

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1 The Indian Contract Act, 1872 specifically provides that restraints put by virtue of covenants entered into at the time of Sale of Goodwill, at the time of Dissolution of firm or at any time of partnership Deed are not considered to be in restraint of trade.

2 Halsbury Laws of India, Chapter 5 pg. 337

3 Niranjan Shankar Golikari v. Century Spinning and manufacturing Co. Ltd. (1967) 2 SCR 378.

The principle contention raised in this article is that even a post service restrictive convent, if reasonable, qualified and limited in operation both temporally and spatially should also be taken as valid and enforceable, alike any other convent which is operative during the course of employment as it is also necessary for the protection of employer's trade interest.[4]

The above raised point has been argued at length many a times before the India courts. The Hon'ble Supreme Court in the case of ***Niranjan Shankar Golikari v. Century Spinning and Manufacturing Co. Ltd.***[5] has categorically opined that, "the agreements entered into by the employers and the employees in the protection of trade secrets and other commercial interest of the company and which is restricted as to time and nature of employment can not be said to be too wide or unreasonable or un necessary for the protection of trade interest". This clearly indicates that the statutory provisions are not exhaustive[6]

It is to be noted that even the case of a restrictive convent operative during the course of employment has not been provided as an exception under Section 27 of the Indian Contract Act, 1872, but even then the judiciary has accepted it as an exception, on the grounds of it being necessary for the protection of employer's trade prospects.

Placing our reliance on the reasoning given by the apex court, it is an endeavor on our part to demonstrate that the courts should not readily reject the post service restrictive convents on their very face but should on the contrary leave it on the parties favoring the contract to show that the restrictions imposed are reasonably necessary for the protection of trade secrets. Similarly, the onus of proving the contrary, i.e., the convent is injurious should be on the party attacking it.[7]

The current position in India is that whether an agreement is void or not under Section 27 of the Indian Contract Act is decided strictly on the

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4 The Law Commission of India in its 13th Law Report has also recommended that Section 27 of the Indian Contract Act, 1872, should be suitably amended to allow such restrictions and all contracts in restraint of trade general or partial, as were reasonable in the interest of the parties as well as of the public.

5 (1967) 2 SCR 378

6 Superintendence Co. of India Ltd. v. K. Murgai, (1981) 2 SCC 246

7 The Hon'ble Supreme Court in the case of Niranjan Shankar Golikari v. Century Spinning and Manufacturing Co. Ltd. opined "where an agreement is challenged on the ground of it being a restraint of trade the onus is upon the party supporting the contract that the restraint is reasonably necessary to protect the company's interest. Once this onus is discharged the onus of showing that the restraint is nevertheless injurious to the public is upon the party attacking the contract."

wordings of the section and as there is nothing in the wordings to suggest that the principle stated therein does not apply when the restraint is for a limited period only or is confined to reasonable limits, the agreement is struck down as a whole solely on the ground of it being a post service restrictive covenant.

Therefore, it is suggested that Section 27 should be amended so as to incorporate the reasonability clause. This would give the business houses and employer's a better chance to prove their case with respect to post service restrictive covenants.

Another point of consideration for deciding the validity of the covenant is that it should not matter whether the covenant is to operate during the period of employment or after the period of employment, what should matter is that what the covenant is trying to protect and if such protection is found to be necessary in the interest of the employer then the covenant should be upheld as a valid one..

Generally these kind of restrictive covenants are found in business and trade practices where trade secrets and confidential information play an important role or where technical know-how is involved. In the present market structure scenario if an employee is party to various trade secrets and confidential information of the company by virtue of his position, is left free to join any other rival firm, then it might damage, the future commercial prospects of the parent company, and therefore, if the parent company asks an employee, holding an important position in the company to execute a service convent, then this should not be treated as a restraint of trade as it is not a restraint of trade but in fact is in furtherance of trade.

As far as the disclosure of confidential information and applicability of restrictive covenants, is concerned it should be noted that the Hon'ble Supreme Court in the case of Niranjan Shankar Golikari v. Century Spinning and Manufacturing Co. Ltd.. has granted a perpetual injunction upholding the validity of the confidentiality clause of the agreement and treating it as in furtherance of trade[8].

8 The Supreme Court in the Golikari case granted a perpetual injunction upholding the validity of the confidentiality clause of the agreement and has held "that the information to which the employee was party was of the nature of confidential information which requires due protection."

It is also to be noted that the validity of the confidentiality clause and the importance of trade secrets in business is not only acceptable in India but also in other jurisprudences[9]. It is quite pertinent to note at this juncture that no specific statutory provision is available for protecting the trade secrets in India. Therefore any protection which is sought for is obtained from The Common Law, civil actions enforcing private contractual rights. Therefore it is suggested that if the law in our country is in the initial stages then it is not harmful for us to transplant foreign law doctrines where the law has already been expounded and is in pari materia. Even the courts in India have agreed with this fact and the Delhi[10] and the Bombay[11] High Courts have resorted to common law doctrines to resolve conflicts relating to domain names.

Lastly we would like to mention that the provisions of Section 27 of the Indian Contract Act, 1872 are lifted from the Hom David D. Field's Draft code for New York based upon the old English Doctrine of restraint of trade, as prevailing in olden times. The point, which we are contesting, is that when the basic structure of the section is transplanted from the old English doctrine of restraint of trade then if we are referring to the test of reasonableness applied and accepted there, then the concerned authorities should definitely and positively take into cognizance this point.

9 The U.S.District Court in Kewanee Oil Co. v. Bicorn Corp., 1974 U.S. Lexis 134 has applied the law of Ohio Trade Secret and granted a permanent injunction against disclosure.

10. Yahoo Inc. v. Akash Arora, 1999 PTC (19) 201

11. Rediff Communication ltd. v. Cyberbooth, AIR 2000 Bom. 27