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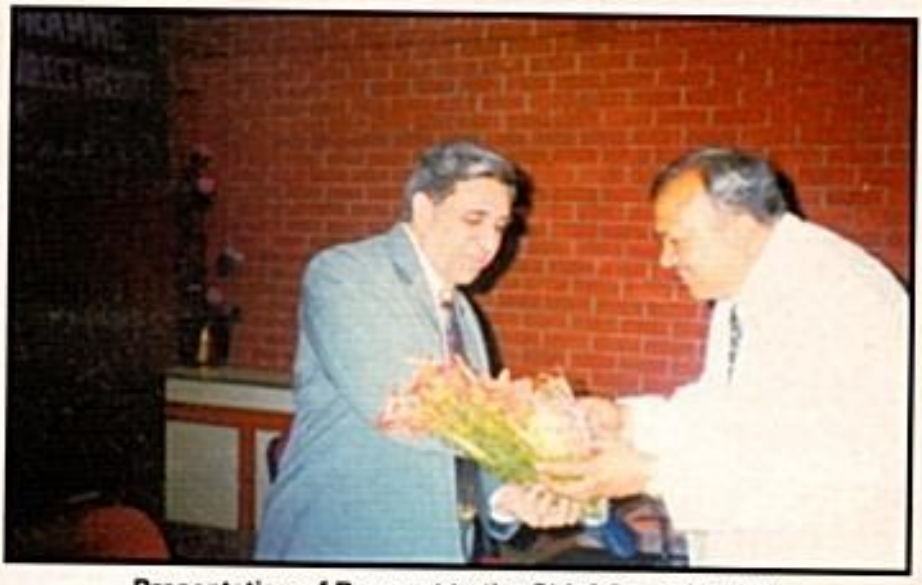

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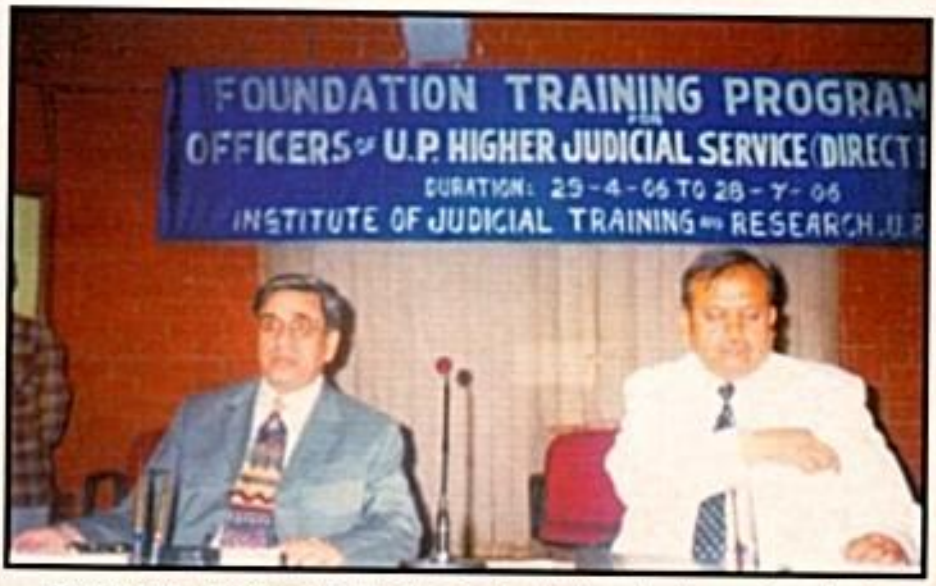

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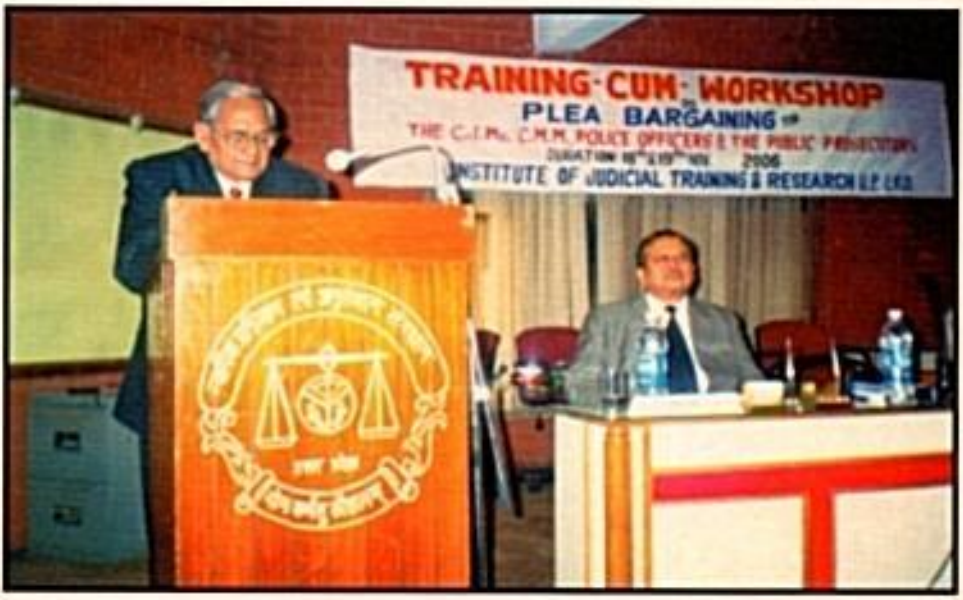

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FROM THE PEN OF THE EDITOR

Plea Bargaining is not a new concept in criminal dispensation of justice system. This has been in vogue in many countries since long and has produced miraculous results in reducing the burden of over bulging docket. This concept attracted the attention of Law Commission of India in 1991 in its 142nd Report. For one reason or the other this could not be made part of Indian Criminal Dispensation of Justice System. Attempts at informal and indirect recognition and application of this concept by various High Courts where negatived by the Apex Court. Hon'ble the Supreme Court had its own apprehensions about this concept and generally speaking it did not favour its inclusion in our system. However, now the Parliament has come out with an Amendment in the Code of Criminal Procedure and now this concept in its limited edition has become part of Indian Criminal Jurisprudence. Serious offences in general and offences affecting economy, children, women and weaker section of the society in particular are excluded from the arena of Plea Bargaining. Besides, the ultimate sentence to be awarded to the accused shall be decided by the trial judge; in offences where minimum sentence has been prescribed by law the sentence can be upto half of the minimum prescribed sentence and in other offences where no minimum is prescribed the maximum sentence that can be awarded would be one fourth of the maximum prescribed by the law. In a sense it can be said that our Plea Bargaining system is largely different from the Plea Bargaining which is operational in other systems and we can call our system as legislative Plea Bargaining. Once successful Plea Bargaining has taken place the quantum of punishment would be determined with reference to different standard as provided by the amended Cr.P.C. In United States of America Plea Bargaining as regards charge is also possible. This aspect of Plea Bargaining has not been borrowed in India. However, we have S. 224 of Cr.P.C. which takes care of this aspect wherein after conviction certain charges can be dropped on the request of Prosecution. The procedure prescribed in our system is quite elaborate and technical and it requires several notices to be issued and served on various persons and officials including investigating officer. Its elaborateness ensures transparency and fare play but technicality dilutes its efficacy. It is common knowledge that one of the major reasons of delay in Criminal Justice Delivery System is non-service of processes issued by the Court. If Plea Bargaining is dependent on service of notices issued by the court it is like birth of a handicapped child. Still we feel that the system should be allowed to grow and its provisions should be given pragmatic and purposive interpretation so that it becomes successful in India. Its success in India is very much needed because on its success depends the future of the whole system which is victim of docket explosion.

We take pride in saying that soon after its inclusion in our system this

Institute in November, 2006, organized a two-day workshop cum training programme on 'Plea Bargaining', perhaps the first of its kind in any State, in which all the Chief Judicial Magistrates/Metropolitan Magistrates of U.P., selected Senior Public Prosecutors and Police Officers participated. This training cum workshop was very well taken by the participants and they felt that they would be able to translate into action the spirit of Plea Bargaining as incorporated by amendment in Cr.P.C.

Plea Bargaining is in its infancy in India and it should receive due protection and care so that it grows well and serves the purpose for which it has been brought here.

VED PAL

Director

Institute of Judicial Training & Research, U.P.,

Lucknow

"MY DREAM OF AN IDEAL JUSTICE DISPENSATION SYSTEM"

Justice Y.K.Sabharwal*

Introduction

It is a great honour to be asked to give a lecture to celebrate the 150th anniversary of the founding of this Government Law College. Thanks for inviting me here today.

The topic "My dream of an ideal justice dispensation system" often lends itself to utopian visions that can seem abstract and dauntingly difficult to implement but I selected this topic and decided to speak on it because my dream begins in a very tangible place here in this auditorium with you.

In my dream lawyers have a critical role to play. It is the students of great institution like this as the next generation lawyers who will be responsible for building upon whatever gains we have made in justice dispensation, repair our errors, and defend those democratic institutions which are needed for justice dispensation. There is no one better suited for this task than lawyers, and so it is on you as lawyers that this responsibility will fall.

Lawyers must view themselves as public servants no matter what their chosen field of practice, no matter what side they take on a case. By learning the law you are given power. Your voice becomes louder and clearer. Through your arguments you can shape and even change the law. You can ensure the law's implementation. It is a power, though, that comes with a duty. The law that you invoke is not yours, it is the peoples. Part of the duty in being a lawyer is working to make sure there is justice not just for some, but all people. I want to talk to you about main challenges that we face for ensuring justice dispensation to everyone in this country. I also want to talk to you about some aspects of legal education that I think you should reflect upon while at law college because I believe that the success and failure of justice dispensation in this country in the years to come would to a large extent depend on you. I am very optimistic. I have no doubt and have full confidence in your ability to provide to the country an ideal Justice Dispensation System

Challenges to Ensuring Justice Dispensation:

When we talk about a justice dispensation system we assume that the ideals of justice are being articulated at some higher level of government be that Parliament or state legislatures, the Supreme Court or lower courts. However, what ideals of justice are articulated at the top of the judiciary are influenced by the access ordinary people have to lower courts. Oliver Wendell Holmes observed "The life of the law has not been logic; it has been

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* Hon'ble Chief Justice of India.

experience." A law that is healthy and vital is shaped from the context in which we live. It is in the individual cases where the hard choices are made, our legal principles crystallized, and our faith in justice reaffirmed. If people do not have access to the courts at all levels of the judiciary then we are missing voices, problems, and perspectives that enrich the ideals of the law enunciated at the top or at any other level of the judiciary. Our ideals of justice are not so much created and refined by logic as they are by experience.

Let me also tell you that the obligation of dispensation of justice is not only of the courts, but also of the government, civil society and the public. Lawyers play an important role in ensuring justice is dispensed in each of these realms. Those trained with legal education can be a part of crafting systems within the government to dispense justice. They can also work to increase legal literacy amongst the people. When people know their own rights they are more likely to successfully assert them without the need of court intervention, and if that is not possible they are likely to bring matters to the court.

The last resort of people is, of course, a court of law. Effective justice dispensation through the courts requires at least three elements:

Access to courts, effective decision-making by judges, and the proper implementation of those decisions.

Let us start with access to the courts. We have made satisfactory success in opening the doors of courts in this country to many for whom earlier it was a dream. The provision of free legal services to the poor through forums under Legal Services Authorities Act and some other legislations have contributed considerably in this field. Further, Public Interest Litigation has allowed civic-minded citizens to file petitions on the behalf of others whose rights are being violated. The judiciary has a track record of actively intervening on the behalf of many of the country's poorest and most disadvantaged.

When we talk of justice, it means a constant and perpetual desire to render everyone, his or her due. This, in turn, means that the court must in every way find legal techniques to provide relief to the one who has been deprived of what was due to him or her. It is, therefore, said that justice is the ultimate objective of law. Our Constitution injects justice, equity and good conscience into Indian way of life.

Despite successes in the sphere of access to justice by opening the doors of courts to the people, it is common knowledge that the judiciary faces a large backlog of cases which in the end results in denial of real access to the courts for far too many on account of delay that takes place in many cases in dispensation of justice.

The belief that when a dispute goes to the Court it will be resolved, in accordance with the existing law, by an independent judge, and justice will

thereby be done to them, prevents people from settling disputes privately by application of force. When we catch a person committing a crime, we, instead of punishing him, hand him over to the police for trial before a court of law, in the belief that the court will administer law impartially and punish the wrongdoer. Similarly, when there is invasion of our civil rights or a civil wrong is done to us, we go to a court of law, for redressal of our grievance, instead of taking the law into our own hands, in the hope and belief that in a reasonable time, we will get justice from the courts.

It is a matter of satisfaction that the public at large continues to hold our judicial institutions in high esteem, despite their shortcomings and handicaps. Yet, there are serious concerns about the efficacy and ability of justice delivery system to dispense a speedy and affordable justice. Questions on the credibility of judiciary are being raised due to mounting arrears of cases, delays in disposal, high cost of obtaining justice and occasionally because of lack of probity in some sections of judiciary. We can rightly take pride for the quality and effectiveness of our judicial system. Yet, we cannot deny that it suffers from serious deficiencies, requiring immediate steps to improve its performance, so as to render prompt and inexpensive service to its consumers. If people loose faith in the justice dispensed to them, the entire democratic setup may crumble down. To retain the trust and confidence of people in the responsiveness and ability of the system, it should be capable of delivering quick and inexpensive justice.

No one can progress unless he dreams. No one can seek reforms unless he imagines. But, there cannot be any progress in dreams and reforms in imagination. Self-realisation, self-criticism and self-judgment are the three angles of any reforms. To reform, one needs a scientific theory with an applied science. One, without other, is infirm. We have philosophy and ideals on the reform of judicial system in abundant measure, but hardly any scientifically analysed proposals with a practical outlay. The need of the hour is to identify the shortcomings and remove them to the extent it is possible.

An Ideal Justice Dispensation System should necessarily have the following attributes:

1. Speedy and affordable quality justice;
2. Independent judiciary;
3. Ethics and honesty in governance;
4. Social relevance, dynamism and pragmatism.

Many a times, many suggestions by many, including me, have been made at different forums. The need is to act upon them swiftly and decisively.

1. Speedy and Affordable Quality Justice:

When we talk of 'delay' in the context of justice, it denotes the time

consumed in the disposal of case, in excess of the time within which a case can be reasonably expected to be decided by the Court. An expected life span of a case is an inherent part of the system. No one expects a case to be decided overnight. However, difficulty arises when the actual time taken for disposal of the case far exceeds its expected life span and that is when we say there is delay in dispensation of justice.

Delay in disposal of cases not only creates disillusionment amongst the litigants, but also undermines the vary capability of the system to impart justice in an efficient and effective manner. Long delay also has the effect of defeating justice in quite a number of cases.

The problem is much more acute in criminal cases, as compared to civil cases. Speedy trial of a criminal case considered to be an essential feature of right of a fair trial has remained a distant reality. A procedure which does not provide trial and disposal within a reasonable period cannot be said to be just, fair and reasonable. If the accused is acquitted after such long delay one can imagine the unnecessary suffering he was subjected to. Many times such inordinate delay contributes to acquittal of guilty persons either because of fading memory or death of witnesses or the evidence is lost or the witnesses do not come forward to give true evidence due to threats, inducement or sympathy. Whatever may be the reason, it is justice that becomes a casualty.

It is high time we make a scientific and rational analysis of the factors behind accumulation of arrears and devise specific plan to at least bring them within acceptable limit, within a reasonable timeframe.

The real problem is that the institution of cases in the Courts far exceeds their disposal. Though there is a considerable increase in the disposal of cases in various courts, the institution has increased more rapidly.

One of the main solutions is increasing the strength of judges in various courts. The existing strength is inadequate even to dispose of the annual institution. The backlog cannot be wiped out without additional strength, particularly when the institution is likely to increase and not come down in coming years. Other measures necessary are - augmenting of infrastructure, introducing shift systems as an experiment in some Magisterial Courts, granting at least limited financial autonomy to the judiciary, concept of Judicial Impact Assessment, introducing Case Management and Court Management, classification and assignment of cases in a scientific manner, more thrust on ADR Methods including Lok Adalats, and modernization & computerization of courts.

Video conferencing is a convenient, secure and less expensive option, for recording evidence of the witnesses who are not local residents or who are afraid of giving evidence in open court, particularly in trial of gangsters and hardened criminals. This is in addition to savings of time and f

expenses of traveling. Recently, Code of Criminal Procedure has been amended in some States to allow use of Video Conferencing for the purpose of giving remand of accused persons thereby eliminating need for their physical presence before the Magistrate. We need to make extensive use of this facility.

Training of Judges and Judicial Staff:

Regular training and orientation sharpens the adjudicatory skills of Judicial Officers. If judgments at the level of trial courts are of a high quality, the number of revisions and appeals may also get reduced. If the Judge is not competent he will take longer time to understand the facts and the law and to decide the case. The training needs to include Court and Case Management besides methods to improve their skills in hearing cases, taking decisions and writing judgments. Carrying out of judicial reforms and implementation of new initiatives require participation of and concerted efforts from not only Judges but also from Court personnel, who manage the system.

Discretionary Prosecution:

It is difficult to enforce the formal system of charge and adjudication in respect of all the offences irrespective of their nature, implication and magnitude. There are simply too many offences, too many offenders and too few resources to deal with them all. In some countries, including U.K., the principle of discretionary prosecution has replaced the principle of obligatory prosecution. A case is sent for trial only if the prosecuting agency is of the opinion that the prosecution of the accused would be in public interest. We can consider and opt the same principle with such modifications as may be deemed appropriate in our circumstances.

Legal Assistance:

A large majority of our people still live below the poverty line and are hardly able to afford two square meals and a shelter on their head. It would be unrealistic to expect them to afford the services of a competent advocate. Efforts have been made by governments from time to time to address the issue of granting legal aid to the poor but, enough has not been done and the system requires further augmentation and strengthening, particularly on giving such people services of good and competent lawyers and not just lawyers. Unless the advocates provided (by legal services authority) are competent and hard working, no useful purpose is served by making their services available to the poor litigants. Legal Service Authorities have to take suitable steps to ensure that they empanel only reputed counsel of proven ability and integrity, in whom the poor litigants may repose trust. There is reluctance on the part of senior counsel to come forward, to provide legal aid to the needy persons. They have to be persuaded to acknowledge their social obligations and provide their service to the weaker sections, without expecting any remuneration either from them or from the Legal Service

Authorities. In developed countries viz. United Kingdom, the Government maintains a panel of very competent and experienced advocates for providing legal aid to the defendants in criminal cases and pays adequate remuneration to them. In our country, the State cannot afford to pay the fee being presently commanded by successful Advocates. It must nevertheless pay reasonable compensation, so as to attract talented and reasonably experienced advocates to legal aid panels. Legal services authorities should ensure that such panels are manned only by service oriented advocates and are not used for the purpose of dolling out favours to the kiths and kins of the powers that be or to advocates who do not want to work hard and join such panels merely for the purpose of earning their livelihood.

Legal Literacy:

The benefits of social welfare legislations have not been able to achieve their intended purpose due to ignorance on the part of the target citizens about the availability of various welfare schemes initiated by the governments from time to time. Legal literacy will make the citizens aware of their legal rights and obligations, including their right to receive legal aid from the State. The services of law students can be effectively utilized in spreading legal literacy and facilitating negotiated settlement of disputes. Legal aid camps are an effective tool for spreading legal literacy, encouraging people to resolve their disputes amicably and availing the benefit of legal aid, wherever required by them. I will urge all the students of this illustrious law college to devote part of their time in attending legal aid camps and spreading legal literacy. Not only will they be able to serve the weaker sections of the society, they will also prove to be better lawyers and better human beings.

2. Independent Judiciary:

An independent judiciary is the backbone of a good judicial governance. Rule of Law and judicial review are the basic features of Indian constitution and independence of judiciary is an essential attribute of Rule of Law. Administration of justice requires judiciary committed to the constitution and law of the land. Judiciary must, therefore, be free from pressures or influence from any quarter. The oath which Judge takes before he enters upon his office, requires him to perform the duties of his office without fear or favour, affection or ill-will. This solemn affirmation is the bedrock of the faith of litigants in the judiciary. The ultimate saviour of an independent judiciary is a brave and fearless judge who truthfully discharges the duties of his office without in any manner being influenced from any quarter. A judiciary manned by judges with vision, wisdom and compassion can do more justice and the welfare to the underprivileged than all the laws and policies we can think of.

Sir Harry Gibbs, Chief Justice of Australia defined an independent judge as:

anything done in the performance of his judicial functions, that Judge who is able successfully to resist pressures of any kind."

The concept of judicial independence, takes within its sweep, independent from any pressure or prejudice. It has many dimensions including fearlessness of other centres, whether economic or political and freedom from prejudice acquired and nourished by the class by which the judge belongs. The judiciary stands between the citizen and the state as a bulwark against executive pressure, excesses and misuse of power by the executive. It is, therefore, absolutely essential that it should be free from executive pressure or influence and our constitution contains elaborate provisions to secure this requirement.

3. Ethics and Honesty in Governance:

Integrity, impartiality and fairness of judiciary are the main sources of public acceptance of its authority. The very existence of judicial institutions depends upon the judges, who constitute the system. They should never forget that they hold the office of a judge as a public trust and therefore, should continuously strive to retain the confidence reposed in them by the people. No system of justice can rise above the ethics of those who administer it. Lord Denning has stated *"when a judge sits to try the case he himself is on trial before his fellow countrymen. It is on his behaviour that they will form their opinion of our system of justice."*

Judges do not have the power of sword or purse. They only have the moral authority based upon the confidence of the public in them and so long as they maintain that authority their orders will be respected and complied. It is necessary to maintain highest standards of integrity, rectitude and impartiality, so as to maintain that confidence.

A Judge should be conscientious, just, impartial, indifferent to private, political or partisan influences, indifferent to public praise and fearless of public clamour. He is expected to administer justice according to law and not allow other affairs of his private interest to interfere with the due performance of his duty, nor should he administer the office for the purpose of advancing his personal aims or increasing his personal popularity.

Our courts have, to a very large extent, justified the confidence reposed in them by the common man. Unlike members of other services, only occasionally complaints are heard against the members of judiciary. At the same time, it cannot be denied that stray complaints have started emerging and showing their ugly face. The instances of corruption, wherever they surface, have to be ruthlessly curbed with a firm hand. A Judge, who is prone or susceptible to corruption cannot have any place in the system, which should not hesitate in weeding out the deadwood, the corrupt and the insolent.

The High Courts should meaningfully and effectively exercise

powers conferred upon them by Article 235 of the Constitution so as to maintain highest level of integrity, honesty and fairness. Action against erring judges should be prompt and effective. I am happy to note that by and large wherever such instances have come to the notice of the High Courts, they have not hesitated in taking a firm stand and ruthlessly curbing such tendencies.

Judicial restraint and discipline are also as necessary to the orderly administration of justice as they are to the effectiveness of the army. The duty of restraint is humility. This quality in decision making is as much necessary for judges to command respect as to protect the independence of the judiciary. A judge ought to be bestowed with the sense of complete detachment and humility. A Judge should never be heard claiming with egotism that a particular judgment was written by him or a particular sentence or decree was passed by him. He should be polite, detached and humble, active in body, but detached in mind.

4. Social Relevance, Dynamism and Pragmatism:

Another aspect to be highlighted is the Latin maxim *Boni Judicis est ampliare jurisdictionem*, that law must keep pace with society to retain its relevance. It must continue to govern our justice delivery system. If the society moves but the law remains static, it shall be good for neither of them.

More than fifteen years back, the Supreme Court in ***Delhi Judicial Service Association v. State of Gujarat***, said: *"... ... ...In interpreting the Constitution, regard must be had to the social, economic and political changes, need of the community and the independence of judiciary. The court cannot be a helpless spectator bound by precedents of colonial days, which have lost relevance. ... ..."*

Lord Denning has beautifully said "every new decision or every new situation is a development of law. Law does not stand still. It moves continually. Once this is recognized, then the task of the judge is put on a higher plane. He must consciously seek to mould the law so as to serve the needs of the time. He must not be a mere mechanic, a mere working masion laying brick on brick, without thought to the overall design. He must be an architect thinking of the structure as a whole building for the society, a system of law, which is strong, durable and just. It is on his work the civilized society depends."

Legal Education:

Students are my architects and, therefore, I now want to address main aspects that I think one should focus on during legal education at the esteemed institution like this. Your legal education will help determine how skilled and what type of a lawyer you become. I think discussing legal education is especially pertinent to today's topic because what education law

students receive will also deeply shape how justice will be dispensed in this country in the years to come. With that in mind, there are five critical components to legal education that I think you should consider. First, work to get a well-rounded, inter-disciplinary education.

You should embrace the inter-disciplinary elements of your education to get a well-rounded perspective on the world. Whether through your classes or your own personal efforts, learn about history, philosophy, science, literature and art. These disciplines will serve you well as a lawyer. The law is grounded in history and philosophy. Many of the biggest controversies in society today involve science. Literature and art will help you learn that the world can be understood in many different ways. An inter-disciplinary, well-rounded education allows you to prepare for whatever you may confront in life whether in the law or outside of it.

Second, think about theory while you are here. When you read a case don't just examine the facts and the holding, but reflect upon the theory and context behind the decision. If a particular issue strikes you research it further and write about it. Consider submitting your work to the law review. There are still many areas of the law that need to be more fully explored by scholars and students like you. Moreover, when you study the theory behind the law you are learning principles you can apply to any case.

Third, learn about law and globalization while at Law College. Dean Harold Koh of Yale Law School asks students to consider three aspects of law and globalization: the law *as* globalization, the law *of* globalization, and the law *in* globalization.[Harold Koh, "Dean's Welcoming Speech 2006" Aug. 30, 2006] Let's examine each of these briefly in turn to get a sense of this relatively new field.

The law *as* globalization. This means that the spread of law worldwide is a feature of globalization just like global communication or global culture. Of course, the sharing of legal knowledge between countries is not new. India has looked abroad for inspiration for its law since independence. The Indian Constitution's political structure was influenced by Great Britain, the Fundamental Rights by the United States, the Directive Principles by Ireland, and its federalism by Canada and Australia. When drafters of constitutions in other countries undertook their task, they too looked to other countries for inspiration. Recently, the drafters of the South African Constitution deliberately cast their gaze to constitutions across the world for inspiration for their own constitution.

Similarly, courts of different nations look to the decisions of other courts for insight or guidance to a topic before them. This too is not new. What is new is that the decisions of courts from around the world are now just a mouse click away. This increased interconnectivity brings advantages and disadvantages. It is an advantage because we can learn from the experiences of other countries and when applicable have our discussions

shaped by the reasoning of courts in similar situations. However, there are also potential pitfalls. There can be literally hundreds of decisions on any given topic from other countries around the world. We can become overwhelmed by the shear immensity of information we are presented with. Furthermore, many of the experiences of other countries may be only partly relevant or not relevant at all. It is learning to discriminate amongst all the information presented in a globalized world that makes a good lawyer.

Let's now turn to the law *of* globalization. This means that globalization comes with its own unique set of laws and legal institutions, whether it is human rights treaties or WTO trade law. An increasing number of cases involve or are informed by this law *of* globalization. It is imperative that we understand and shape this emerging law.

This brings us to the law *in* globalization. Here, the word "law" is used normatively, in that law is not just a set of rules dictators and tyrants can impose those through force but instead law has a moral authority, law brings justice. We must understand how we can use the law to blunt the harsh edges and control the dark sides of globalization. As long as people have humanity so must their law, this is no different in a globalized world.

Turning from globalization and the law, let me discuss a fourth aspect. I think that before you go out of the law college, you should engage in public service as part of legal education while you are here. There are a number of ways of doing this. One is working at the legal aid clinic at the Government Law College. Such work not only trains you in skills you will need to be a successful lawyer, but also allows you to give back to the community around you. You will discover challenges in public service work. You will also develop a greater understanding of the perspectives of those you help. That greater understanding will in turn increase your desire to help.

This brings me to the fifth and last aspect of your legal education. Reflect upon your values while at law college. What will you stand for? What will you fight for?

Gandhi and Nehru were trained in the law, as were many of our other independence leaders including Dr. Ambedkar, a distinguished alumni of this school. So were great leaders for freedom and equality in countries around the world. The challenges our country faces today may be different than those it faced at the time of our founding fathers, but the need for lawyers committed to the public service is no less, need for values is no less and the need to improve the reputation of lawyers as a class, is no less. Final judgment is yours.

Conclusion

It is important that we are asked to dream of utopias. To ask not just what is, or what seems possible, but what could be. In the first part of this lecture I outlined some of the challenges facing justice dispensation in our

country, and hinted to some answers. I limited my grand pronouncements about the future and instead chose to spend the second half of my talk on discussing legal education. I did so because lawyers will be important practitioners and in many ways the architects of justice dispensation in the future. If we have good lawyers by which I mean well-rounded lawyers, grounded in theory and research, adaptive to a changing world, committed

to the public service, and motivated by strong values then we have reason for great hope. Whatever utopias we strive to reach that journey begins here. That is why I am so thankful that I was asked to come today to celebrate the 150th anniversary of this illustrious institution that has already produced so many distinguished alumni. The strength of institutions like the Government Law College and the potential of students like yourself gives us confidence that the future of justice dispensation in this country is bright.

Let me end by acknowledging that it is difficult to achieve the perfection but one can always strive to excel and if one continues to walk on this path tirelessly, many, if not all, problems could be overcome. Many thanks and best of luck.

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SPEECH AT THE FOUNDATION LAYING CEREMONY OF THE NEW BUILDING OF UP HUMAN RIGHTS COMMISSION AT LUCKNOW

Justice Y. K. Sabharwal*

The growth and development of mankind depends on how well the human societies regulate their internal affairs and how they work for common welfare on one hand and dignity of each individual on the other. The theory of natural law of existence, in the context of human race depends largely upon the concept of inalienable and innate rights of man, commonly known as human rights. It is primarily for this reason that human rights are generally rooted in the cultural and political ethos of each free modern State in the present times.

India gained independence after a long struggle against the lien rule. In the course of the freedom movement, Indians had raised voice against human rights violations and deprivation of basic civil, political and economic rights. The Universal Declaration of Human Rights made its appearance in the international human rights regime in 1948 at most opportune time for our country since it coincided with the drafting of the Constitution of India by our founding fathers. The members of our Constituent Assembly were great visionaries. They were fully convinced that respect for human rights not merely in theory but in practice from the standpoint of good governance was the only lasting solution that would guarantee peace and tranquility in independent India. India at that stage was in its infancy, trying to comprehend and grapple the issues of extreme poverty, deprivation, struggle for existence, its miseries having been further multiplied by casteism and communalism from which society suffered considerably.

India gave to itself the Constitution that assured one and all that it would be a Democratic Republic aiming to secure to all its citizens Justice, Liberty and Equality while promoting dignity of the individual. The Constitution guaranteed Justice not merely in abstract but Justice of broad spectrum covering social, economic and political rights. The liberty guaranteed to the citizens of India was assured to be inclusive of liberty in the matter of thought, expression, belief, faith and worship. Similarly, the right to equality was meant to be not merely of status but of opportunity. Our founding fathers, thus, laid down as part of the basic structure of the paramount law of this country, a set of civil and political rights under the nomenclature of justiciable Fundamental Rights that could be enforced through the judicial machinery. The economic, social and cultural rights were included in a separate chapter titled Directive Principles of State policy. As clarified in Article 37, they were considered to be "fundamental in the governance" of the country. These two separate group of rights, one made justiciable and

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* Hon'ble Chief Justice of India.

enforceable and the other made subject matter of the "duty" of the State to apply, were conceived not as mutually exclusive but rather interdependent and intertwined, the objective of both being common - the welfare of the individual on one hand and of the society as a whole on the other.

The Covenant on Civil and Political Rights adopted by the UNO in 1966 was thus already part of the human rights regime in India since 1950. Similarly, the contents of the Covenant on Economic, Social and Cultural rights adopted by the UNO in 1966 were basically resonating what had been all along espoused by India as matters guiding State policy since 1950.

The International Human Rights regime has gone beyond what was mentioned in the said two Covenants or in the Universal Declaration of Human Rights in the name of "statement of goals and aspirations". Concerns for the protection of ecology and pollution free environment have brought under sharp focus the goal of "sustainable development" rendering it a subject matter of basic human rights resulting in inclusion of the duty to protect and improve the environment as part of the State policy under Article 48-A.

The Declaration adopted on 8th September, 2000 setting out the Millennium Development Goals at the United Nations Millennium Summit was the conversion of human development and human rights in action in the form of resolves among nations to end human poverty, promote dignity and equality and to take steps in furtherance of the attack on widespread hunger, gender inequality, environmental deterioration, lack of education and health care etc.

Over the years, a paradigm shift from human development as seen in terms of economic development to human development as a basic human right has been perceptible. The world is veering round to the view propagated by Hon'ble Dr. Justice A.S. Anand, Chairperson of National Human Rights Commission. In his Address in June 2006 at the inaugural session of United Nations Human Rights Council in Geneva, he said that "universality of human rights demand eradication of global inequalities" since "human rights are interdependent and interrelated and have a direct relationship with human development" and because massive inequalities and social evils flowing from poverty render "the enjoyment of human rights rather illusory".

I have given brief history and background since, it has become indispensable for all concerned to fully grasp & appreciate the significance of the law governing the object of protection of human rights in our country. India is a party to both the Covenants; the one concerning civil and political rights as also the one stating economic, social and cultural rights. Though the human rights embodied in the said two Covenants stand substantially protected by our Constitution, a need was felt — also as a result of our obligation under UN General Assembly Resolution of December 1993

establish Institutions designed to provide "guidance and directions" for affording "better protection of human rights". It was, thus, with a view to strengthen the dominion of human rights in India that the Protection of Human Rights Act, 1993 came to be enacted and brought in force. The law envisaged Human Rights Commissions at two levels. One had to have a Pan-India role since responsibility of protecting and promoting human rights of the citizens for ushering in good governance is part of the constitutional obligation of the State as a whole. The second rung of human rights apparatus was mooted in the law at the level of each State, creating an obligation on the State Governments to constitute, provide for and sustain State Human Rights Commissions. The functions of both kinds of Commissions, whether National or State, are substantially common, as set out in Section 12 of the Act. In this view, the role assigned to National and State Human Rights Commissions is participative, supplementary and collaborative, the only difference being in the area of jurisdiction.

National Human Rights Commission was set up by the Central Government almost immediately after the adoption of the law. The task of setting up of State Commissions, however, has been tardy, the dawning of realization of the importance and supportive role of such machinery in matters of effective and good governance being rather slow.

The example of UP Human Rights Commission is often quoted as one such instance in this context. The establishment of the Commission was notified by the State Government on 7th October, 2002, in the wake of setting up of a Committee under the Chairmanship of Justice (retired) A.K. Srivastava by Allahabad High Court for carrying out the task of monitoring the compliance with the "requirements" concerning welfare of the arrestees, ordinarily assigned to the State Human Rights Commissions by the Supreme Court of India in the case of **Dilip K.Basu Vs. State of West Bengal** as per order dated 19th October 2001. There were reasons to doubt if the State Commission had actually become "fully functional" even in May 2003. Therefore, the Supreme Court was constrained to direct Justice Srivastava Committee to "continue with the investigation of such incidents of human rights violation" as had been brought to the notice. It appears the State Commission set about its task with a skeletal staff, from a rented accommodation that would hardly meet the requirements of bare minimum and in the last four years has devoted its prime energies, more for persuading the State executive to take care of its needs than to the statutory functions for which it has been fashioned.

Setting up a State Human Rights Commission is statutory responsibility of each State Government. The duty of the State does not end merely with the initial establishment of the Commission. Such a machinery, if it is expected to fulfill its duties, has to be provided with requisite infrastructure, optimum staff, appropriate sensitization in the matter of cooperation with it on the part of other agencies of the State Government and

by requisite assured financial sustenance and autonomy. It appears to be the experience of many State Human Rights Commissions that progress on each of these fronts has been very slow, rendering its task very difficult. One example in respect of the present Human Right Commission that can be quoted in this context is the vacancy of one member that remained unfilled for almost one year.

It was for such experiences, besides others, that the National Human Rights Commission in its Annual Report for 2003-04 recorded its regret over the delay on the part of the State Governments in setting up or "providing necessary staff and infrastructure support" for the smooth functioning of the State Commissions and impressed upon the State Governments the vital need to realize that it was "insufficient merely to designate or establish" the State Human Rights Commission, since it was absolutely indispensable that their "quality must be ensured, both in terms of personnel and financial autonomy" and "they must be extended the support that they need if they are to fulfill the purposes envisaged for them" under the law.

With the allocation of this large tract of land in Vibhuti Khand, Gomti Nagar and release of funds for construction of an independant office complex, a long pending demand of UP Human Rights Commission has been met. With the laying of foundation stone of the superstructure today, hopefully the building would come up expeditiously with no compromises made on quality. While the State executive discharges its obligations in this regard, the State Human Rights Commission cannot afford to sit idle or fail to discharge its duties towards the people of the State in the matter of protection of their human rights.

I have had the advantage of learning about the activities of the State Human Rights Commission over the last about four years. Undoubtedly, within the extant constraints of resources the Commission has made endeavours to deal with issues of human rights coming up before it in various forms mainly under the forum of complaints. Though a large number of complaints have been handled, some resulting in directions in the nature of award of compensation or recommendation for disciplinary action against the errant public servants, what appears to be a matter of concern is the mounting deficit. As appears to me to be a well considered policy adopted by the National Commission, which also finds reflection in Chapter 14 of its Annual Report for 2003-04, the burden of complaints of alleged human rights violations would slowly and gradually shift on to the shoulders of the State Commission so as to reduce to some degree the work of the National Commission that hopes to take on the larger and more challenging role of providing "guidance and directions" to the human rights movement in the country as a whole. What I am trying to underscore is the fact that with increased awareness of rights, shifting of focus from "welfare" to "rights" of persons with disability, added emphasis on the worth of human dignity, acute abhorrence of discrimination of any kind, in a system of "inclusive

democracy" that we have adopted, wherein, all sections of the society demand their legitimate place under the sun and cry for equality not merely of status & opportunity but in the share in fruits of development in an economy that is already on fast track, the resultant conflicts of interests are bound to generate more and more complaints of human rights violations that are destined to geometrically multiply in the days to come. As it is, Uttar Pradesh generates, by conservative estimates, the largest number of such complaints.

The outcome that I can foresee is that you will have your hands full in very near future. The areas of your interest and focus will undoubtedly include not only the traditional subjects of custodial deaths; custodial rapes; encounter deaths; rights of arrestees; human rights and prisons; rights of women, children or other such vulnerable sections of society, but given the direction in which human rights law is heading, and for which policy the National Human Rights Commission of India is also to be given credit, the State Commission would be expected to shoulder the responsibility in the areas as varied as right to health care, right to gainful employment, right to corruption-free governance, right to relief in times of man-made or natural disasters, right to food and potable water, right against trafficking in human beings, right against sexual harassment or abuse, rights against child labour and child marriage etc.

I am sure that, in carrying out your responsibilities, you would seek assistance from the system of "District Human Rights Authorities" that the National Human Rights Commission has been

attempting to set up for better focus at the grass root levels. I am also confident that in discharging your duties you will have the benefit of coordination and sharing of information with the National Human Rights Commission. But in order to redeem your pledge, you would have to do something more and beyond what have been your prime concerns thus far.

The starting block may be by making yourself more accessible through Internet connectivity. Your emphasis on "Human Rights education" right from the primary school level upwards would have to be followed up by effective action at your own level rather than dependence on half-hearted execution at the hand of other State agencies. I understand that the State Commission had made certain recommendations for amendment in the Criminal Procedure Code. Since the said law has an All-India effect, it would be proper to generate wider public opinion on the subject, maybe through debates and workshops, so that we can continue with uniformity across the length and breadth of the country in such matters. I am also sure that you would find a number of well meaning Non-Governmental Organizations ready to lend a helping hand in the myriad activities that you would like to undertake to account for all the functions that are assigned by the law to the State Commission, and in which you are yet to make foray.

Before I conclude, while joining in the expression of gratitude felt by the State Human Rights Commission for clearance of this project, I would like to impress upon the State executive that by augmenting the human rights protection machinery in the State, the Government is, in fact, acquiring a partner in good-governance. I hope and trust the State Government would do all it can to reinforce this partnership for the common good of the people of the State. In this context, I hope the State Government would abide by the provisions of protection of Human Rights Act in letter and spirit, including in the matter of appointments to the Commission.

We should all be proud of the approach of Indian judiciary in protection of human rights. Members of Human Right Commissions anywhere in this country have to keep close to their hearts & minds, the proactive approach adopted by judiciary to scrupulously and over-zealously guard the rights fundamental for human existence. The orders and directions of Human Right Commissions should secure to the common man the enlarged scope of right to life so as to include within it the right to live with dignity, healthy environment, humane conditions of work, right to education, shelter and social security, right to know, adequate nutrition & clothing, pollution free water & air and many other such rights.

I will end up by quoting words of Justice V.R. Krishna Iyer, who in his inimitable beautiful style once paraphrased the general cynicism, with which human rights law in its nascent years was viewed. He said this: -

"An optical illusion, cosmetic colouration, opium for the people at home and brown sugar for countries abroad, a legislative camouflage, a verbal wonder which conceals more than it reveals. An ineffectual angel which beats its golden wings in the void in vain".

The aim of us all has to be to prove this cynicism wrong. I wish you all the best in your efforts!

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RIGHT OF ACCUSED TO KNOW DURING INVESTIGATION

Dr. Justice B.S. Chauhan*

How much information can be given to a person who is accused of an offence regarding the investigation? Can he get copy of the whole case diary prepared by the Investigating Officer during investigation or of relevant part of it even before the Charge Sheet has been submitted to the court? Often during the investigation the Investigating Officer finds evidences and materials even against those persons who are not named in FIR. In such cases those who are not named in FIR are either arrested by the Police or they themselves surrender before the Magistrate concerned. Such persons try to get copy of case diary before hand so that they could know about the material collected by the Police against them. This is very crucial for them for in absence of the knowledge about these materials collected by the police against them, it may not be possible for them to make out a good case for bail. They being not named in FIR, copy of it does not serve any purpose. The question arises can they get copies of case diary or what information can they demand as a matter of right in respect of investigation. The answer to these questions rests upon the scope of investigation and rights of accused persons to get information during investigation.

Section 2(h) Cr.P.C. defines investigation and it includes all the proceedings under the Code for the collection of evidence conducted by a Police Officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf. During investigation, the police has to maintain the case diary keeping the entire information in respect of the investigation as required under Section 172 Cr.P.C. The investigation comes to an end with the formation of the opinion as to whether on the material collected, there is a case to place the accused before a Magistrate for trial and if so, taking the necessary steps for the same by filing of a charge sheet under Section 173 Cr.P.C. Therefore, it is evidence that the investigation comes to an end only when the police report is submitted before the Court concerned under Section 173 Cr.P.C. and in case the Magistrate further directs the Investigating Agency to investigate the case further in exercise of power under clause (8) of Section 173 Cr.P.C., the collection of evidence in pursuance thereof shall also be a part of the investigation. (Vide H.N. Rishbud Vs. State of Delhi, AIR 1955 SC 196; State of U.P. Vs. Bhagwan Kishore Joshi, AIR 1964 SC 221; and Union of India Vs. Prakash P. Hinduja, AIR 2003 SC 2612).

Section 172 Cr.P.C. deals with the diary of proceedings in investigation and the same reads as under:-

"172. Diary of proceedings in investigation.-(1) Every police ation,

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* Hon'ble Judge, Allahabad High Court, Allahabad.

officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

(2) Any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.

(3) **Neither the accused nor his agents shall be entitled to call for such diaries,** nor shall he or they be entitled to see them merely because they are referred to by the Court; but, if they are used by the police officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer, the provisions of section 161 or section 145, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872), shall apply." (Emphasis added).

The provisions of Section 172 Cr.P.C. had been subject matter of consideration before the Courts from time to time.

The purpose of maintaining the case diary is that the Court may examine as to whether the investigation has been made promptly/efficiently and in accordance with law. The entries in the case diary are to be made with scrupulous completeness and efficiency. (Shri Bhagwan Singh Vs. Commissioner of Police, Delhi, AIR 1983 SC 826).

Case diary cannot be used as evidence by either side. [Vide State of Bihar Vs. P.P. Sharma, AIR 1991 SC 1260; and Malkiat Singh & Ors. Vs. State of Punjab, (1991) 4 SCC 341].

The accused can peruse that particular part of the case diary in the context of Sections 145 or 161 of the Evidence Act (a) if it is used by the police officer concerned to refresh his memory or (b) if the Court uses it for contradicting the official concerned. (Vide Mukund Lal Vs. Union of India & Anr., AIR 1989 SC 144).

In Mukund Lal (supra), the Hon'ble Supreme Court placed reliance upon the judgment of this Court in Mahabirji Birajman Mandir Vs. Prem Narain Shukla, AIR 1965 Alld. 494, wherein this Court while explaining the nature of case diary has observed as under: -

"These reports are of confidential nature and privilege can be claimed thereof. Further the disclosure of contents of such reports cannot help any of the parties to the litigation, as the report invariably contains the opinion of such officers and their opinion is inadmissible in evidence."

The Hon'ble Supreme Court observed as under: -

"The public interest requirement from the stand point of the need to

ensure a fair trial for an accused is more than sufficiently met by the power conferred on the Court, which is the ultimate custodian to the interest of justice and can always be trusted to be vigilant to ensure that the interest of accused persons standing the trial, is fully safeguarded. There would be no prejudice or failure of justice to the accused persons since the Court can be trusted to look into the police diary for the purposes of protecting his interest."

The Hon'ble Supreme Court also cautioned not to disclose the contents of the case diary to the accused for the reason that it may disclose the identity of the informant who gave some information which resulted in investigation into a particular aspect. The public interest demands that such an entry is not made available to the accused which might deter the informant from giving any information to assist the Investigating Agency.

The case diary cannot be used either as substantive or as corroborative evidence in the trial. (Vide Dawarkanath Varma & Anr. Vs. Emperor, AIR 1933 PC 124; and Habeeb Mohammad Vs. State of Hyderabad, AIR 1954 SC 51).

The case diary is primarily meant as aid to the Court during the trial. [(Vide Karan Singh & Ors. Vs. Emperor, AIR 1928 All 25; State Vs. Fateh Bahadur & Ors., AIR 1958 All. I; and K. Abdul Rahiman & Ors. Divisional Forest Officer & Anr., AIR 1989 Ker. 1 (FB)]

The case diary may be used to suggest means for further elucidating by legal evidence points that need clearing up. [(Vide Habeeb Mohammed (supra)].

It is the Court and not the accused person or his agent that can use the case diary for the purpose of contradicting the police officer who prepared it. [(Vide (1897) 11 All 390 (FB)].

The case diary can be used for the purpose of refreshing the memory and for the purpose of contradicting the Police Officer who prepared it. (Vide Shamsul Kanwar Vs. State of U.P., AIR 1995 SC 1748).

The another purpose is that Court may satisfy itself as to whether the investigation has been made in accordance with the required procedure. (Vide P.P. Sharma (supra).

Case diary cannot be used by defence to contradict the prosecution evidence. Therefore, the defence cannot place any reliance on it. Nor it is admissible in evidence. [(Vide Malkiat Singh (supra)].

In T.T. Antony Vs. State of Kerala, AIR 2001 SC 2637, the Hon'ble Supreme Court held that a "just balance between the fundamental rights of the citizens under Articles 19 and 21 of the Constitution and the expensive power of the Police to investigate a cognizable offence has to be struck by the Court."

Article 21 of the Constitution comes to the rescue of an accused to challenge only that investigation has not been done in accordance with the procedure established by law. Thus, the accused has to establish that investigation has not been concluded with due observance of the procedure established by law. [(Vide State of Bihar Vs. P.P. Sharma (supra)].

In Kukund Lal (supra), the Apex Court held that in view of the safeguards where the Court itself takes care of the interest of the accused, it cannot be held that the provisions of sub-section 3 of Section 172 Cr.P.C. would fail to meet the test of reasonableness.

The Rajasthan High Court has examined the validity of the provisions of sub-section (3) of Section 172 Cr.P.C. in Subash Chandra Vs. Union of India, 1988 Cr.L.J. 1077 and held that when in the enquiry or trial, everything which may appear against the accused has to be established and brought before the Court by evidence other than the diary and the accused can have the benefit of the cross-examination of the witnesses and the Court has power to call for the diary and use it, of course not as evidence but in aid of the enquiry or trial, the provisions under Section 172(3), cannot be said to be unconstitutional.

In Darya Singh Vs. State of Punjab, AIR 1965 SC 328, the Court held that in case the Court start scrutinizing the case diary and preparing the list of witnesses whom the prosecutors must examine, is virtually to suggest that the Court should itself take the role of a prosecutor. Therefore, the case diary cannot be held to be a much relevant document for trial unless the prejudice is caused to the accused. The diary can be used even by the Court for a very limited purposes as explained hereinabove.

The provisions of Section 173 Cr.P.C. provide for filing the report of a Police Officer on completion of investigation and the relevant part for our purpose reads as under:-

"173. Report of Police Officer on Completion of investigation. (1). .....

(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate alongwith the report

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;'

(b) the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note

requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.

(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in sub-section (5)."

The statutory requirement is that when the investigation stands concluded and the police report is submitted only at that stage the accused or the complainant shall be entitled to have the copies of the documents which are to be relied upon by the prosecution during the trial.

In Gurbachan Singh Vs. State of Punjab, AIR 1957 SC 623, the Hon'ble Apex Court explained the scope of the provisions of Section 173 Cr.P.C. observing that the documents to be relied upon by the prosecution, are bound to be supplied to the accused and the object of this provision is to put the accused on notice of what he has to meet at the time of enquiry or trial.

In Narayan Rao Vs. State of Andhra Pradesh, AIR 1957 SC 737, the Hon'ble Supreme Court again considered the scope of provisions of Section 173 read with section 207 Cr.P.C. and held that the provisions are not even mandatory and are directory. Non-compliance of the provisions would not vitiate the proceedings rather it is merely an irregularity which can be rectified and once the documents to be relied upon by the prosecution against the accused have been supplied to him, the trial will proceed further and the evidence etc. shall be recorded. While deciding the said case, the Hon'ble Supreme Court placed reliance upon the judgment of the Privy Council in Abdul Rehman Vs. Emperor, AIR 1927 PC 44, wherein it had been held that such an omission was merely an irregularity which could be rectified under the provisions of Section 537 Cr.P.C.

In Jogendra Nahak & Ors. Vs. State of Orissa & Ors., AIR 1999 SC 2565, the Hon'ble Supreme Court again explained the scope of the provisions of Section 173 observing as under:-

"Section 173 says that on completion of investigation, the office-in-charge of police station shall forward a report to the Magistrate, stating, inter-alia, the names of the persons who appear to be acquainted with the circumstances of the case. Sub-section (5) of Section 173 requires that the police officer shall forward to the Magistrate alongwith the said report (a) all documents or relevant extract thereof on which the prosecution proposes to rely, and (b) the statements recorded under Section 161 of all the persons whom the prosecution proposes to examine as its witnesses. Even when a further investigation, as required under sub-section (8) is conducted by the police, they have to comply with all the requirements contained in the preceding sub-sections."

A similar view has been reiterated by the Apex Court in Central Bureau of Investigation Vs. R.S. Pai, AIR 2002 SC 1644, wherein explaining

the scope of sub-sections (5) and (8) of Section 173 Cr.P.C., the Court held that the word "shall" used in sub-section (5) for requiring the Police Officer to forward to the Magistrate all documents is directory and not mandatory. If some mistake is committed in not submitting all the documents at the time of submitting the charge sheet, it is always open to the Investigating Officer to produce the same with the permission of the Court at a later STAGE. The Court held that there is no statutory bar for the prosecution to file the documents which could not be filed at the earlier stage, later on.

A Constitution Bench of the Hon'ble Supreme Court in Assistant Collector of Customs, Bombay & Anr. Vs. L.R. Melwani & Anr., AIR 1970 SC 962, elaborately examined the scope of Chapter XIV of the Cr.P.C., which also contains Section 173, and held that the requirement of the provisions of Section 173 is to provide a fair trial to the accused as by furnishing the documents which can be relied upon against him, so that he may defend himself effectively. Unless there are compelling circumstances, the High Court should not exercise its discretion in such a case and the trial Court should be permitted to proceed in accordance with law otherwise it would unnecessarily impede the progress of the trial. However, the High Court must interfere in a case where it comes to the conclusion that omission on the part of the Investigating Agency or the Court below has caused prejudice to the accused.

Thus, in view of the above, the inference can be drawn that the accused are not entitled to seek the copy of the statement of any witness recorded under Section 161 Cr.P.C. or any other part of the evidence collected by the Investigating Officer prior to reaching the stage of filing the charge sheet. The accused cannot ask for the copy of the case diary at any stage. He is entitled only for receiving the copy of the documents which are being relied by the prosecution against him.

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RIGHT TO INFORMATION ACT, 2005

Dr. Justice B.S. Chauhan*

The word "Information" has been derived from the Latin words "Formation" and "Forma", which mean giving shape to something and forming a pattern, respectively. Information is required to add something new to our knowledge; enhance awareness; and remove the vagueness of our ideas. Information is knowledge, which in this era, means "Power". "Power" is to be shared with the humblest citizens as the goal of achievement of our constitutional obligations, or to empower the weakest.

Information is always subject to use, abuse and misuse. Lord Krishna advised Pandavas to seek information from Bhisam Pitamah as how he could be killed. Bhisam Pitamah revealed that if Shikhandi comes as a Chariot Driver, he would not use his arms. Pandavas used this information against him. The death of Bhisam Pitamah tilted the balance of Mahabharat in favour of Pandavas. Does it amount to dissemination of information, or suicide, which is punishable under Section 309 of the Indian Penal Code.

Maharaja Dashrath told Maharani Kaikai that he would have incarnation of Ram on the next day. The queen was too happy a person; she passed on this information further to Manthara, who succeeded in hatching a conspiracy; and Ram was sent to exile for 14 years. Therefore, the question does arise as to whether information should be made available to a person who does not deserve or who can use it for ulterior purpose.

Swedish people as early as in 1766, recognized that every citizen has a right to seek information from the State, and its instrumentalities. Specific Act containing the same provisions was passed for this purpose in 1810, which was subsequently replaced by another Act in 1949. Every Swedish citizen has a right to have access to virtually all the documents kept by the State or Municipal Agencies. Other States have also taken lead from it and large number of countries have enacted law for providing information to its citizens. United Kingdom is the only country which recognises the right of foreigners also to seek information.

Basically, right to information was initially considered to be a fundamental human right in view of the provisions of Article 19 of the Universal Declaration of Human Rights dated 10/12/1948 made by the United Nations which provides that every one has a right to freedom of opinion and expression; which includes the right to seek, receive and impart information and ideas. In 1960, the Economic and Social Council of the United Nations adopted a declaration of freedom of information. This information basically relates to the affairs, administration or decision of a public authority.

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*Hon'ble Judge, Allahabad High Court, Allahabad.

There are three wings of the State; Legislature, Judiciary and Executive. The first two pillars are always open to public as everything is decided by them through public debate in open houses. Both the said wings enjoy autonomy under the laws of the parliamentary privileges and there is a serious difficulty in this regard with the working of the Executive wing of the State.

Generally information relating to the following matters are withheld by the State Authorities:

- International relations and national security;
- Law enforcements and prevention of crimes;
- Internal deliberations of the Government;
- Information obtained in confidence from some sources outside the Government;
- Information which, if disclosed would violate the privacy of individual;
- Information relating to economic affairs, which if disclosed would confer an unfair advantage on some person or subject or Government; and
- Information about scientific discoveries, inventions and improvements, particularly in the field of weapons.

Information received by the counsel from his client in confidence, is also withheld for the reason that such a disclosure is prohibited under the provisions of Sections 121 to 131 of the Evidence Act.

The reason for not furnishing the information may be because of the prohibition contained in Statutes itself. The Indian Evidence Act, 1872 contains Sections 123 and 124 where the information furnished to an officer in confidence in exercise of his official duty, cannot be obtained from him, and the State has been given the right to claim privilege regarding certain documents and a right to withhold production of the said document in evidence in Court. Similarly, under the provisions of Official Secrets Act, 1923, a person in possession of certain information remains under a legal obligation not to disseminate the same, and disclosure of the same is a punishable offence. This principle is based on legal maxim "Salus Populi Suprema Lex", which means that the safety of the people or public welfare is the supreme law. Obviously, a private litigant cannot be given access to papers relating to State Secret, National Defence, or correspondence about the diplomatic relations, or the minutes of a cabinet meeting, or information relating to preparation of budget by the Finance Ministry.

Under Section 123, discretion is given to the Head of the Department concerned as to whether in respect of a particular document, privilege should be claimed, and it is for the Court to decide whether privilege so claimed is justified.

In the case of State of U.P. & Ors. Vs. Raj Narain, AIR 1975 SC 865, the question arose as to whether unpublished Blue Book containing security arrangements on tour programme of the then Prime Minister Smt Indira Gandhi could be held to be a privileged document. The Hon'ble Supreme Court held that in such a case the Court must have the fullest possible opportunity to examine all the relevant materials, and it would determine as to whether its disclosure would cause any injury to the public interest. The document can be withheld only in public interest and not otherwise.

A mere label given to the document by the administration is not a conclusive proof, if after having its inspection the Court comes to the conclusion that the document does not relate to the affairs of the State at all and its disclosure would not injure any public interest. The Court will then be free to disclose the same.

The question of "Crown Privilege" or "Crown Prerogative Right" was again considered by the larger Bench of the Hon'ble Supreme Court in S.P. Gupta Vs. President of India & Ors., AIR 1982 SC 149, wherein the Apex Court held that the concept of our open Government means, and which seems to be, the right to know, and it is implicit or inbuilt in the right of free speech and expression guaranteed under Article 19 (1) (a) of the Constitution. So in this very judgment, right to information was considered to be fundamental right of the citizens. By this judgment, the Supreme Court overruled its earlier judgment in State of Punjab Vs. Sodhi Sukhdev Singh, AIR 1961 SC 493, wherein, it had been held that the right to disclosure is a private interest and not a public interest.

In 1986 the Bombay High Court in Bombay Environment Action Group Vs. Poona Cantonment Board, made a distinction between the ordinary citizen looking for information and group of social activists and held that the right to inspection of documents flows freely from the fundamental right enshrined in Article 19 (1) (a) of the Constitution.

Similar view has been reiterated by the Supreme Court time and again as is evident from the judgments in Indian Express Newspapers (Bombay) Private Ltd. Ors. Vs. Union of India, AIR 1986 SC 515; Dinesh Trivedi & Ors. Vs. Union of India & Ors., (1997) 4 SCC 306; and Secretary, Ministry of Information and Broadcasting, Government of India Vs. Cricket Association of Bengal & Ors., AIR 1995 SC 1236. Therefore, the right to have information has been held to be an integral part of the right to freedom of speech and expression, which includes the right to be educated; informed and entertained. It is, however, subject to overriding interest of public security and secrecy.

Collecting information from sting operation or by bribing the persons working in the Call Centres regarding economic affairs of other companies and offences against cyber law are serious matters.

In a given case, details of an immovable property, returns of an assessee may be sought and the disclosure of the same may cause unwarranted invasion of privacy of an assessee. Another person can ask to disclose PAN and TAN Numbers of an assessee without making out a bonafide case as to why such a disclosure is necessary and why such information should be furnished to him.

The liberty to obtain any classified information is of wide amplitude. It can open a Pandora Box by making personal and Corporate Tax information available to disgruntled citizens.

> *In some part of a country, kidnapping is an industry. Kidnapper may seek information from the Revenue Department itself and the information so received may assist him to bargain the amount of ransom.*
>
> *In Collector of Gorakhpur Vs. Ram Sundar Mal & Ors, AIR 1934 P.C.157, it was observed that certified copies of documents are by statute deemed to original. A public document may be proved by production of the original like any other document and it is on the ground of convenience that a public document is allowed to be proved by a certified copy.*
>
> *The document being a certified copy of a public document need not be proved by calling a witness (Vide Madamanchi Ramappa & Anr. Vs. Muthaluru Boljappa, AIR 1963 SC 1633).*
>
> *Any tax assessment order is a public document and admissible under Section 76 and 77 of the Evidence Act (vide Rama Rao Vs. Chitluri Venkataramayya, AIR 1940 Mad 768 (F.B.); and Suraj Narain Vs. Seth Jhabbu Lal & Ors., AIR 1944 Alld 114.*

In Allah Bux Vs. Ratan Lal Jain, AIR 1958 Alld 829 the Court held that assessment order passed by the Sales-Tax Officer is a public document and the sales-tax return filed by the assessee is also a public document.

Disclosures of such information i.e. about the assessment of an assessee under the Income Tax Act may violate his right of privacy. Even in Income Tax under Article 132 of the Act, search if committed in breach of any statutory requirement would amount to violation of right of privacy. (Vide Income Tax Officer, Special Investigation Circle 'B', Meerut Vs. M/s. Seth Brothers & Ors, AIR 1970 SC 292.)

The right of privacy has been held to be a fundamental right of the citizen being an integral part of Article 21 of the Constitution of India, by Hon'ble Apex Court in R. Rajagopal Vs. State of Tamil Nadu & Ors., AIR 1995 SC 264; Mr. X Vs. Hospital Z, (1998) 8 SCC 296; People's Union for Civil Liberties (PUCL) & Anr. Vs. Union of India & Anr., AIR 2003 SC 2363; and Sharda Vs. Dharmpal, (2003) 4 SCC 493.

In District Registrar/Collector & Ors. Vs. Canara Bank & Ors., AIR 2005 SC 186, the Hon'ble Supreme Court upheld the judgment of the Andhra Pradesh High Court, by which the amendment in Section 73 of the Stamp Act, 1899 by the State of Andhra Pradesh, authorizing the designated officer to impound and seize the under-stamped documents after notice, to make good the deficit of stamp duty, if the required stamp duty is not paid, had been declared ultra vires and unconstitutional. The Hon'ble Apex Court held that right of privacy is a personal right distinct from a right to property. Intrusions in it by the legislature, is to be tested on the touchstone of reasonableness and for that purpose the Court can go into the proportionality of the intrusion vis-à-vis the purpose, sought to be achieved, as "right to privacy" is part of the life enshrined in Article 21 of the Constitution of India.

The principle of claiming privilege in respect of documents is based on public policy i.e. public interest for the reason that confidentiality of documents relating to authorities of Government or its instrumentalities must be safeguarded. The information that a Government servant learns in the course of his work is treated officially regardless of its nature or importance and a person is not supposed to leak out the information or supply the copy of the document unless it is his duty to do so.

This disclosure, though not prohibited by law may still amount to violation of the provisions of Official Secrets for the reason that the disclosure was likely to cause damage to the State and therefore disclosure of the information itself was an offence. The Official Secrets Act is not restricted to the activities connected with national security and disclosure may itself be a criminal offence. The fact that information was obtained from a Government Servant was sufficient, so long it was acquired by him during the course of his employment. It is totally immaterial as what was the motive of the disclosure and whether the disclosure was prejudicial to the State by any manner as it amounts to breach of confidence and application of confidence need not be expressed, but could be implied also. Such matters gain importance in tax matters and preparation of Budget etc. (Vide R. Vs. Fell (1963) C.L.R 207; Coco Vs. A.N. Clark (Engineers) Ltd., (1969) R.P.C.41; Attorney General Vs. Jonathan Cape Ltd., (1976) I Q.B. 752; R. Vs. Crisp and Homewood (1919) 83 J.P. 121.).

In Sunil Ranjan Das Vs. The State, 77 Calcutta Weekly Notes 1061, the project report for the preservation of the port of Calcutta which had been opened for 'Official use' only and was not marked 'Secret' was leaked and the person who had leaked it unauthorisedly was prosecuted and convicted under the Official Secrets Act. His defence that it was not a secret document as the same had been exchanged with the Government of Pakistan was rejected.

In State of Kerala Vs. B. Balakrishna, AIR 1961 Ker 25, the Court held that disclosure of information regarding budget was violation of the provisions of Official Secrets Act.

In Krishna Murari Pandey Vs. State of U.P. (1996) 2 U.P.L.B.E.C. 811, the Allahabad High Court held that getting the photo copy of the question paper of Central Services examination was a breach of Official Secrets Act, even though the question paper had been distributed to several lakhs candidates appearing in the test, as it remained secret to the remaining world. The Act of the offender was in violation of the instructions issued for that purpose.

The 1923 Act makes provisions against espionage as also against communication of official information to outsiders. The Act makes it a penal offence for any person holding office under the Government to willfully communicate any official information to anyone other than an authorized person. It is equally an offence for any person to receive such information.

Rule 11 of The Central Civil Services (Conduct) Rules, 1964 reads as under:

> *"No government servant shall, except in accordance with any general or special order of the Government or in the performance in good faith of the duties assigned to him, communicate, directly or indirectly, any official document or any part thereof or information to any government servant or any other person to whom he is not authorized to communicate such document or information."*

The Manual of Office Procedure provides that only ministers, secretaries or other officers specifically authorized by the minister may give information or be accessible to the representatives of the press. Other officers, if approached by a representative of the press, must refer the latter to Principal information Officers of the Government of India.

Every consumer is entitled to get educated, and informed about the quality of the goods likely to be availed by him. In Ozair Husain Vs. Union of India & Ors., AIR 2003 Del 103, the Court held that it was the fundamental right of the consumers to know the ingredients of vegetarian/non-vegetarian food products, cosmetics and drugs as it may be violative of their rights guaranteed under Articles 19, 21 and 25 of the Constitution.

In Union of India Vs. Association of Democratic Reforms, AIR 2002 SC 2112, the Apex Court held that every voter has a fundamental right to know about the antecedents of the candidate for whom they are going to vote and this right to know the antecedents includes criminal past of the candidate contesting the election, as it is necessary for survival of democracy. "The little man may think once before making his choice of electing law-breakers as law-makers."

The right guaranteed under Article 19 (1) can have limitation only under Article 19 (2) and not otherwise. Therefore, a reasonable restriction can be imposed on the rights of the citizens within that limitation, and certainly not beyond it. Therefore, it may be necessary to impose such a restriction in the larger interest of the society, and the security, safety of the country. The basic purpose of such a right is that the democratic rights of the little Indians, the poorest of the poor, must be given an opportunity to participate in governance of the country, as they are the worst adversely affected persons. It may be so necessary to eradicate poverty, remove corruption and nepotism at all levels.

By virtue of the provisions of Section 22, the Act has an overriding effect on the Official Secrets Act, 1923, or any other law for the time being in force. Thus, the Act confers statutory right to citizens for seeking information from the administration.

The Right to Information Act, 2005 is a recognition of such fundamental rights making possible the participation of such people in decision making process in the democratic set up of the country.

Right to Information will enable the citizens to perform their fundamental duties set out in Article 51-A of the Constitution in a better way for the reason that fully informed citizens will certainly be better equipped for the performance of their duties. Free flow of information would assist citizens in fulfilling their legal obligations.

Even otherwise, free exchange of ideas and free debates on a particular subject are essentially desirable for a free country as lack of transparency may be the main cause for pervading corruption. Transparency may solve this problem to a certain extent and prevent occurring of clandestine deals, arbitrary decisions, manipulations and embezzlements.

The information may prove to be a key to democracy and development as it may make participatory democracy meaningful, cementing trust in Government, facilitate economic growth and tackle corruption. More so, information is to be disseminated for the reason that neither it belongs to the Government of the day nor the civil servants, but to the public. Information is generated with public money by public servants paid out of public funds, therefore, it cannot be withheld. It is inherent to the democratic functioning and a precondition to good governance. It sets a higher amount of accountability. The onus is on the duty holders to prove their case if they refuse to disclose the documents.

The Act does not provide that an applicant must give reasons for seeking information, but the authorities refusing to furnish information are bound to record reasons why it is so necessary. Reasons ensure proper application of mind, reduce the paucity of casualness, minimize whim and caprice and thereby serve to provide legal protection against arbitrary conduct.

The State decision must be informed by reasons as the rule of law contemplates governance by law and not by whim or caprice of the Authority. The State instrumentality must not take any irrelevant or irrational factor into consideration while taking the decision. The duty to act fairly is a part of fair procedure as envisaged under Articles 14 and 21 of the Constitution of India. The expanding horizons of principles of natural justice provide for requirement of recording reasons. The reasons are the links between the material foundation and the actual conclusion. The reasons would explain also how the mind of the maker was activated and actuated and its rational nexus and its synthesis that the facts considered and the conclusion reached. (Vide Km. Shrilekha Vidyarthi Vs. State of U.P. & Ors, AIR 1991 SC 537. Union of India Vs. M.L. Capoor & Ors, AIR 1974 SC 87 and Krishna Swami Vs. Union of India & ors, AIR 1993 SC 1407.)

Section 114 of the Evidence Act provides that every State action may be presumed to have been regularly performed. However, this presumption is rebutabble by adducing evidence of impeccable character. In fact, had State instrumentalities performed their duties in a legal and regular manner, the question of rebutting such presumption could not arise. It is a matter of common knowledge that when a contract is carried out at the cost of public exchequer huge amount is embezzled by showing fake names in the muster roll and including the work which has never been performed. The Act of 2005 may prove very useful in such circumstances.

There may be documents, part of which requires to be withheld and information regarding the rest may be given. In such a case doctrine of severability must be applied and the particular information which can be given without any legal impediment must be furnished. Therefore, a long struggle is ahead before the Act becomes an effective instrument in the functioning of the Government and its agencies is to be watched carefully as this country has inherited its secrecy in governance and legacy and it cannot be thrown out so easily. People in power have become greedy and they do not want to share the power. Information being knowledge is power. It requires courage to share it. It is, therefore, too early to say anything regarding the implementation of the Act.

People do not actually understand what is the scope of the Act nor the Authorities under the Act are willing to fulfill their obligations as provided under Section 4 of the Act which includes maintenance of all the records duly catalogued in a manner and form which facilitates the right to information under this Act and to ensure supply of the copy to the applicants, within the stipulated period. It also provides for particulars of the organizations' functions and duties, powers and duties and its officers and directory of its officers and its employees.

People are not aware of the kind of information that can be sought under the Act. Unscrupulous persons want to obtain information for achieving

ulterior goal and the period of one year since the coming into force of the Act has shown that some of the applications regarding information have been totally unwarranted and uncalled. For example information was sought regarding the selection process of the Supreme Court Judges. The Central Information Commissioner rejected the application giving reference to the provisions of Article 124 (2) of the Constitution. However, this application has raised question about the confidentiality of the process of consultation between the President of India and the Supreme Court. If the Judges are not protected from the gauge of the Act, 2005, it would be very difficult for them to work independently. Information about their personal behaviour, conduct and friendship are being asked everyday. People are not aware that such information is exempted from its disclosure under Section 8 (1) (e) of the Right to Information Act.

Information was also sought regarding the number of Scheduled Caste and Scheduled Tribes persons who have been elevated to the High Court and Supreme Court but as the authorities are not required to keep the record on the basis of caste, such information should not have been asked for.

A student asked the authority of Delhi University to disclose the identity of the examiner. The question does arise as to at what stage a student can seek such information. It also puts a question mark on the sanctity of the examination itself, but the student may be right in seeking the information considering the manner in which the copies, answer sheets are being examined in some cases by children up to age of ten years. What will be the legal position if the students seek information in advance as to who will be paper setter and examiner.

The issue of amendment to the Act is also not of lesser importance as the Government wanted to amend the Act keeping the notings of the file outside the purview of the Act. The Information Commissioner has categorically and rightly held that notings are integral part of the file and information in this regard cannot be withheld.

In a case, where large number of people sit in a committee and take a collective decision, it may not be possible to record reasons. However, the order does not stand vitiated only on the ground that reasons have not been recorded. The notes made in the margin of the file can be examined by the Court to find out the reasons for passing the orders. Therefore, the notings made in the file should not be excluded from the information sought by the individual.

In Reliance Petrochemicals Ltd. Vs. Indian Express Newspapers Bombay (P) Ltd. (1988) 4 SCC 592, the Supreme Court recognized the right to know as emanating from the right to life. The question which arose was whether Reliance Petrochemicals Ltd. was entitled to an injunction against Indian Express which had published an article questioning the reliability of

the former's debenture issue. The learned judge observed:-

> "We must remember that the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age on our land under Article 21 of our Constitution. That right has reached new dimensions and urgency. That right puts greater responsibility upon those who take upon themselves the responsibility to inform."

In a later judgment, the Hon'ble Supreme Court in Tata Press Ltd. Vs. MTNL, (1995) 5 SCC 139, while considering the scope of Article 19 (1) (a) in the context of advertising or commercial speech, held that the public has a right to receive information. The question which arose in that case was whether advertisements being for commercial gain could avail of the protection guaranteed under Article 19 (1) (a). The Supreme Court held as under:-

> "The protection of Article 19 (1) (a) is available to the speaker as well as to the recipient of the speech. The recipient of 'commercial speech' may be having much deeper interest in the advertisement than the businessman who is behind the publication. An advertisement giving information regarding a life-saving drug may be of much more importance to general public than to the advertiser who may be having purely a trade consideration."

The right to information flows from Article 19 (1) of the Constitution. This makes the right available against all the world and not just the State. There is a strong case for including private bodies within the scope of the Freedom of Information Act to the extent that they are in possession of information of public importance and interest. Investigations into investor grievances or environmental disasters which concern private bodies are matters of public interest. Increasingly, privatization has brought more and more public bodies into the private sector. There is no logical rationale for excluding an erstwhile public sector enterprise from the Act merely because, as a matter of economic policy, the enterprise has now passed into private hands. There is therefore, a strong case for transparency and accountability for such private bodies also.

A very recent example is the failure by several States to disclose the so-called results of their independent tests into the pesticide content of aerated beverages and colas. Is there any compelling reason why this information should be withheld from the consumer? The Bhopal gas tragedy is another glaring example of a private corporation whose acts and omissions had a disastrous effect on the lives of thousands of common people.

A recent case in India, infamously known as the "Mysore sex scandal

case", raised interesting questions on different facets of the right to know. Leading newspapers published reports about how three Judges of the Karnataka High Court had been found indulging in immoral behaviour at a private resort in Mysore. The High Court responded by issuing to the editors and publishers notice for contempt of court. The Court's demand to know the journalists' sources of information was staunchly resisted by the press on the grounds of journalistic privilege. While there was something to be said in favour of confidentiality of sources, there was also much to be said against news reports which cast aspersions of such a serious nature without a shred of supporting material.

In Indira Jaising Vs. Registrar General, Supreme Court of India, (2003) 5 SCC 494, a Senior Advocate practicing in the Supreme Court filed a petition demanding the publication of the inquiry report. The Court declined disclosure with a reasoning that is difficult to reconcile with its own bold pronouncements in the past.

The people must get education from the observations made by the Supreme Court in BALCO, Employees Union (Regd) Vs. Union of India, AIR 2002 SC 350, wherein the Court held:

> "Transparency does not mean the conducting of the Government business while sitting on the crossroads in Public. Transparency would require that the manner in which decision is taken is made known. Persons who are to decide are not arbitrarily selected or appointed."

An author has rightly stated that "one sided information, disinformation, misinformation and non-information all equally create uninformed citizency, which makes democracy a force when medium of information is monopolized either by State or any other organisation".

Such a right is necessary for the citizen in a country like India, where 65% of the population is illiterate and a very few people have access to the print media which is not subject to pre-censorship.

By enacting the Act 2005, the Government has shown its political will. However, struggle for achieving transparency in the Governmental affairs is not over.

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ENVIRONMENTAL JUSTICE: SCOPE AND ACCESS*

Justice Sunil Ambwani**

Introduction:-

1. The earth's atmosphere is a common heritage. The environmental issues, take into account the human being, and not the State as a unit. It is a global issue. The Stockholm declaration recognized that man is the part of nature and life depends on it. U. Thant, the Secretary General, United Nations, in Stockholm Conference appealed: *"Like or not we are traveling together on a common planet and we have no national alternative but to work together, to make an environment in which we and our children can live a full and peaceful life".*

2. The declaration in the United Nations conference, on human environment from 5th to 16th June, 1972, considered the need for a common outlook for common principles to inspire and guide the people of the world in the preservation and enhancement of human environment. The long and tortuous evolution of the human race was not possible without rapid acceleration of science and technology. The man has achieved the ability to transform his environment in countless ways and on an unprecedented scale. This power if used wisely can bring benefits of development and opportunity to enhance the quality of life. The wrong application on the other hand can do incalculable harm to human beings and human environment. The members to the declaration felt that millions continue to live far below the minimum level required for a decent human existence, deprived of adequate food and clothing, shelter and education, health and sanitation. The industrialist countries pose gigantic environmental problems. The natural growth of population on preservation of environment. With the people as the most precious commodity in the world and their progress, social wealth, with development and science and technology continue to transform human environment. The members felt that a point has reached when we must shape our actions with a more prudent care for environmental consequences for achieving for ourselves and our prosperity, a better life in an environment more in keeping with human needs. What is needed is an enthusiastic but calm state of mind. The freedom should not be misused for manipulating environment.

3. The declaration proceeded to declare the principle: State of common conviction with the fundamental right to freedom, equity and adequate arth to

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*Valedictory Address in workshop on **'SUSTAINABLE DEVELOPMENT FOR THE SUBORDINATE JUDICIARY'** on 21st August, 2006 (Organised by *teri* (The Energy and Resources Institute), New Delhi at J.T.R.I. and sponsored by Ministry of Environment and Forest, GOI)

** Hon'ble Judge, Allahabad High Court, Allahabad.

conditions on life to the man permitting life of dignity and well being, bears solemn responsibility to protect and improve the environment for present and future generations. The natural resources are common to all and must be safeguarded for the benefit of present and future generations. The capacity of the earth to produce vital renewable resources must be maintained and wherever practicable restored and improved. The discharge of toxic substances and the release of heat in the quantities and the concentration should not exceed the capacity of the environment to tender them harmless. The states should take positive steps to prevent pollution of the seas by substance hazardous of human health, living resources and marine life. The economic and social development is essential. It should however be such that would not adversely affect the present or future development potential nor should hamper attainment of better living condition for all. The resources must be made available to preserve and improve the environment. A rationale management of resources should be ensured to make development compatible with a need to protect and improve the human environment for the benefit of the population. The planning should be rationale, to avoid adverse effect on environment and obtaining maximum social economic and environmental benefits. Science, technology and education should be applied for identification, avoidance and control of environmental risks.

4. The club of Rome and the historic Rio Declaration in the Earth Summit in 1992 on 6th June, which is celebrated as 'World Environment Day' every year, recognized that the States should cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of earth's eco system. The summits recognized the principles of 'Sustainable Development', as a balancing concept of development and ecology. It was found that human desire to progress cannot be restricted, but has to be controlled by preserving the biosphere. The 'Precautionary Principle', reversing the burden of proof; the 'Polluter Pays', putting the burden of cost of compensation as well as restore the injury to environment, on the polluter, and the 'Public Trust Doctrine', declaring that nature's resources are common to all, are the essential features of sustainable development.

Environmental justice:-

5. Kautilya, the Prime Minister of Magadh, during the regime of Chandra Gupta Maurya, 300 B.C. in his 'Arthshastra' exhaustibly dealt with the question of environment protection. He laid down the rules for protection and upgradation of environment minutely, meticulously and with great details. Mauryan King Ashoka depicted exemplary compassion for wild life and prohibited killing of certain species of creatures.

6. We find instances of compassion towards nature in all religions. "Don't make mischief in the earth" says holy Quran. Gautam Buddha's

religion was based on experience and logic. He believed on evolution of man. In the contemporary period Sikhism teaches that the life is made of five basic elements i.e. earth, air, water, fire and sky. The colonial rule, however, disregarded ancient prudence, cultivated ruthless intelligence to exploit environment for their material gain. The legacy of imperialism and colonialism, concealing a sense of ownership over environment, propagated its consumption for wealth. Growth of industrialization, and lack of awareness to handle the fast pace of development, has brought into focus many environmental issues and in response legislations.

7. The Wild Life (Protection) Act, 1972, the Water (Prevention and Control of Pollution) Act, 1974, the Forest (Conservation) Act, 1980, the Air (Prevention and Control of Pollution) Act, 1981, the Environment (Protection) Act, 1986, the National Environment Tribunals Act, 1995, the National Environmental Appellate Authority Act, 1997, the Biodiversity Act, 2002 etc. along with the Rules, Regulations and Notifications under these acts have provided regulatory measures, the 'Hard Law' mostly in response to the treaties and conventions the 'Soft Law' signed by India. These special acts have supplemented the provisions of Indian Penal Code, 1860 in Chapter XIV of offences affecting the public health, safety, convenience, decency and morals; the Criminal Procedure Code, 1973; the Easements Act; the Civil Procedure Code and other such antiquated legislations.

8. 'Public nuisance', though difficult to be defined, is provided in Section 268 IPC to be any act of a person guilty of illegal action, which causes any common injury, danger or annoyance to the public or to the people in general, who dwell or occupy property in the vicinity, or which must necessarily causes injury, obstruction, danger or annoyance to persons, who may have occasion to use any public right. The Food Adulteration Act has supplemented Sections 272 and 273 IPC providing for punishment for adulteration of food and drink intended for sale, the Drugs and Cosmetics Act has supplemented Sections 274 and 275 providing punishment for adulteration of drugs and sale and misbranding of adulterated drugs. The Water (Prevention and Control of Pollution) Act, 1974, extends the provisions of Section 277 IPC providing for punishment for fouling water of public spring or reservoir and the Air (Prevention and Control of Pollution) Act, 1981 expands Section 278 IPC providing for punishment for making atmosphere noxious to health and enhances the punishment. The Motor Vehicle Act, makes special provisions dealing with compensation in respect of death and injury arising out of rash driving or riding on public way, made an offence under Section 279 IPC. The Poison Act and the Explosives Act are special acts extending offence under Section 284 and 285 IPC and the Factories Act, defines and provides for enhanced punishment for offences, which were till then punishable under Section 287 IPC. Section 290, stands apart for all such public nuisance in cases not otherwise provided for:-

"290. Punishment for public nuisance in cases not otherwise provided for: -

Whoever commits a public nuisance in any case not otherwise punishable by this Code, shall be punished with fine which may extend to two hundred rupees.

291. Continuance of nuisance after injunction to discontinue:- Whoever repeats or continues a public nuisance, having been enjoined by any public servant who has lawful authority to issue such injunction not to repeat or continue such nuisance, shall be punished with imprisonment for a term which may extend to six months, or with fine, or with both."

9. The growth of environmental jurisprudence in India was slow but steady. First of these cases, which is still the Magnacarta of the environmental jurisprudence for recognition of public right to decent living was treatised in Municipal Council, Ratlam Vs. Vardhichand, AIR 1980 SC 1622. Justice V.R. Krishna Iyer in his inimitable style, affirmed the Trial Court's order upheld by the High Court, directing under Section 133 Cr.P.C. to abate the nuisance of a foul drain flowing in between the city with the filth and stink and discharge from the alcohol plant. He justified the exercise of powers by the Magistrate under Section 133 to go and take action wherever there is public nuisance, invoking the duties of the Municipal Council and held:-.

"Public nuisance, because of pollutants being discharged by big factories to the detriment of the poorer sections, is a challenge to the social justice component of the rule of law. Likewise, the grievous failure of local authorities to provide the basic amenity of public conveniences drives the miserable slum-dwellers to ease in the streets, on the sly for a time, and openly thereafter, because under Nature's pressure, bashfulness becomes a luxury and dignity a difficult art. A responsible municipal council constituted for the precise purpose of preserving public health and providing better finances cannot run away from its principal duty by pleading financial inability. Decency and dignity are non-negotiable facets of human rights and are a first charge on local self-governing bodies. Similarly, providing drainage systems- not pompous and attractive, but in working condition and sufficient to meet the needs of the people- cannot be evaded if the municipality is to justify its existence. A bare study of the statutory provisions makes this position clear.

This is a public duty implicit in the public power to be exercised on behalf of the public and pursuant to a public proceeding. Failure to comply with the direction will be visited with a punishment contemplated by S. 188 I.P.C. Therefore the Municipal Commissioner or other executive authority bound by the order under S.133 Cr.P.C. shall obey the directions because disobedience, if it causes obstruction or annoyance or injury to any persons, lawfully pursuing their employment, shall be punished with simple imprisonment or as prescribed in the section."

10. The recognition and growth of Public Interest Litigation has became a catalyst for environmental justice. In Rural Litigation and Entitlement Kendra, Dehradun, AIR 1985 SC 652, the Supreme Court recognized imbalance of ecology and hazard to healthy environment due to working of lime-stone quarries. In Sachidanand Pandey, AIR 1987 SC 1109, the Court recognized society's interaction with nature and the environmental question affecting the humanity. The Supreme Court observed:-

"Industrialisation, urbanization, explosion of population, overexploitation of resources, depletion of traditional sources of energy and raw materials and the search for new sources of energy and raw materials, the disruption of natural ecological balances, the destruction of multitude of animal and plant species for economic reasons and sometimes for no good reasons at all are factors which have contributed to environmental deterioration. While the scientific and technological progress of man has invested him with immense power over nature, it has also resulted in the unthinking use of the power, encroaching endlessly on nature. If man is able to transform deserts into oases, he is also leaving behind deserts in the place of oases. In India, as elsewhere in the world, uncontrolled growth and consequent environmental deterioration are fast assuming menacing proportions and all Indian cities are afflicted with this problem."

11. In Shriram Foods and Fertilizer Industries and another, AIR 1987 SC 965, the leak of olium gas from one of the units of the company affecting several persons including one Advocate practicing in Court, who had died, the Supreme Court awarded costs and directed remedial measures.

12. In M.C. Mehta Vs. Union of India, AIR 1988 SC 1115, the reckless discharge of untreated sewage in river Ganga by a riparian owner was sought to be checked with several directions issued to clean the river. The Bhopal gas leak disaster case woke up the entire country to the threats of environmental degradation and loss of life. The right of compensation to the victims, invoking "parens partriae" doctrine was invoked. The State was directed to assume the role of a parent protecting the rights of the victims and then claiming compensation from the negligent corporation.

13. In Tarun Bharat Singh, Alwar, AIR 1992 SC 514 the right of the government and private persons over forestland were curtailed to protect wild life, and mining operations were stopped.

14. The Vellore Citizens Welfare Forum, AIR 1996 SC 2715 is landmark decision recognizing 'Sustainable Development' as answer to balance development with ecology. The Supreme Court accepted the concept, which came down for the first time in Stockholm Declaration of 1972 and then in 1987 by the World Commission on environment and development in its report called "Our Common Future". The Commission chaired by the then Prime Minister of Norway Ms. G.H. Brundtland, came out with a document called "Caring for the Earth" a strategy for sustainable living and the earth summit in

June, 1992, deliberating and chalking out a blue print for survival of the planet signed by 153 nations. In Vellore Citizens case, monitored by the Supreme Court for five years, the pollution caused by Tanneries in the State of Tamil Nadu discharging untreated effluent into agricultural fields, roadsides, water-ways and open lands was confirmed through various reports and National Environment Engineering Research Institute, Nagpur (NEERI). Accepting the principles the Supreme Court held: -

"The precautionary principle and the polluter pays principle have been accepted as part of the law of the land. Article 21 of the Constitution of India guarantees protection of life and personal liberty. Articles 47, 48A and 51A(g) of the Constitution are as under: -

47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health- the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

48A. Protection and improvement of environment and safeguarding of forests and wild life- the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.

51A(g). To protect and improve the natural environment including forests, Lakes Rivers and wild life, and to have compassion for living creatures."

15. The Court directed the Central Government to constitute an authority under Section 3 (3) of Environment (Protection) Act, 1986, to monitor the implementation of the treatment plants, close the industries, which did not take any steps for installation of treatment plants, impose fine on the tanneries for delay in installations of treatment plants and set up 'Environment Protection Fund' for compensating the affected persons identified by the authority. It also approved the standards for 'total dissolve of solids' approved by NEERI.

16. The long line of cases, thereafter, regulating shrimp culture industry in the ecological fragile costal areas in Gopi Aqua Farms, AIR 1997 SC 3519, and S. Jagannath Vs. Union of India, AIR 1997 SC 811; protecting Taj Mahal from pollution by the foundries Agra in M.C. Mehta Vs. Union of India, AIR 1999 SC 734; directing the Pollution Control Board regarding proper search of effluents in Lagoons in Re: Bhavani River-Sakthi Sugars Ltd., AIR 1998 SC 2059, controlling vehicular pollution in Delhi by use of CNG and phasing of old vehicles in M.C. Mehta Vs. Union of India, AIR 1999 SC 291, protecting Yamuna river in News Item 'Hindustan Times' A.Q.F.M. Yamuna, AIR 2000 SC 3510; regulating solid waste disposal and cleaning of metropolitan cities in Almitra H. Patel, AIR 2000 SC 1256; imposing exemplary damage for restoration of environment and ecology on construction of Span Hotels

Private Ltd. on Beas river in M.C. Mehta Vs. Kamal Nath, AIR 2002 SC 1515; banning smoking in public places in Murli S. Deora, AIR 2002 SC 40, protecting cubban park at Bangalore in Bimal L. Desai, AIR 2003 SC 2246 and enforcing the Forest (Conservation) Act, 1980 in T.N. Godavarman Thirumulpad in series of its orders, and many such matters have firmly established the environmental jurisprudence in India.

17. More recently the Supreme Court invoked the public trust doctrine evolving methods for arriving at 'Net Present Value' to be paid by the State of the diversion of forest land to non forest use to be paid to Compensatory Afforestation Fund Management and Planning Agency (CAMPA) in T.N. Godavarman (87) 2006 (1) SCC 1; issued directions for disposal of imported contaminated waste oil in Research Foundation For Science (21) 2005 (13) SCC 675; rationalized the meat export promotion policy and regulation of abattoirs in Akhil Bharat Goseva Sangh (3) 2006 (4) SCC 162; and intervened in town planning (DCR 58) providing for conversion of large open lands of cotton mills in Mumbai for public housing, balancing ecological factors on the principles; of 'Sustainable Development' in Bombay Dyeing Mfg. Co. Ltd. (3) Vs. Bombay Environmental Action Group (2006) 3 SCC 434.

18. In the State of U.P., the unchecked, unplanned urbanization, almost total lack of sanitary conditions, over flowing drains, obstruction to public pathways, public lands, encroachment of parks and playgrounds, lack of public conveniences, lack of organized and scientific removal of waste, lack of sewage management, lack of facilities of disposal of hospital, bio-medical and chemical waste, contamination of food articles, lowering water tables, vanishing green belt and other such Eco violations, call for an urgent legal action and judicial response. These are Socio environmental issues, which must be addressed to by the judiciary at District level. The competent authorities, Law Enforcement Agencies and the Members of Subordinate Judiciary responsible for administration of law cannot sit back and be unresponsive to the public duty reposed on them by Constitution of India. There is an urgent need to address issues of environmental justice at local levels.

19. There is a common feeling in legal fraternity that the laws do not provide for sufficient measures to deal with these issues at local units and they look forward to the response from High Court and Supreme Court. This feeling is not justified. They have ample powers under the existing provisions of law, both substantive and procedural, to deal with these issues. Sections 133 to 144 in Chapter X of the Code of Criminal Procedure, provide for procedure to deal with public nuisances and urgent cases of nuisances and apprehended danger. Section 133 deals with issuing conditional orders in case of injuries to the health or physical comfort of the community by any trade and occupation or by regulations of any goods or merchandize. Section 144 has a potential of providing immediate prevention and speedy remedy in response of danger to human life, health or safety. This Section is

utilized mostly in cases of disturbances of public peace and tranquility. Its full potential has not been realized in environmental matters. The Ratlam Municipality case arose out of an order under Section 133 of Code of Criminal Procedure. The Supreme Court emphasized that the powers are public duties to the members of public, who are victims of nuisance.

20. A misgiving in the judiciary that the special legislations like the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981 have impliedly repealed, Section 133 of the CrPC was cleared by the Supreme Court in State of M.P. Vs. Kedia Leather and Liquor Ltd., AIR 2003 SC 3236. It was held:

"While as noted above the provisions of Section 133 of the Code are in the nature of preventive measures, the provisions contained in the two Acts are not only curative but also preventive and penal. The provisions appear to be mutually exclusive and the question of one replacing the other does not arise. Above being the position, the High Court was not justified in holding that there was any implied repeal of Section 133 of the code. The appeals deserve to be allowed to the extent indicated above, which we direct."

21. The Panchayats, Municipalities and Municipal Corporations, owe a duty to its citizens, to provide clean environment for human development. U.P. Panchayat Raj Act, 1947 provide for land development, minor irrigation, water and watershed management, social and farm forestry, drinking water, medical sanitation, planned economic development, preservation and maintenance of community assets. A yearly development plan has to be submitted by every Gram Panchayat to Kshhetria Panchayats. These Panchayats have powers in respect of maintenance of public streets, waterways and to prevent pollution of water resources and to improve sanitation. The U.P. Municipalities Act, 1916 provides in Chapter VII for construction, alterations of public drains, enforcement for drainage connection, removal of projection and obstructions over streets and drains, cleaning cesspools, dust bins, filthy buildings and lands and saving water resources from bathing and washing, disposal of dead bodies etc. By 73rd Amendment Act, 1992, amending Constitution of India, the Panchayats and Municipalities have become part of the Constitution of India. The powers, authorities and responsibilities of Panchayats and Municipalities have been expanded to propose plan of economic development and social justice and to implement schemes given in XI Schedule and XII Schedule respectively. These Schedules enumerate subject, which are closely related to Environmental issues. These powers subject to legislation, authorize the local authorities to maintain ecological balance along with development.

22. The District Courts can also address to these issues while enforcing individual rights and duties. The environmental matters are often mixed up in deciding the individual or collective rights. One such example can be found in the case of Hinch Lal Tiwari Vs. Kamla Devi (2001) 6 SCC 496. The Gaon

Sabha allotted a part of land including village pond, which was filled up with silt by passage of time. In hearing an application for cancellation of allotment the Additional Collector found that the plot was recorded as 'Pond', and thus the allotment was cancelled. The Commissioner dismissed the revision. The High Court partly cancelled the allotment. Relying upon Section 117 (1) (vi) of the U.P. Zamindari Abolition and Land Reforms Act, 1951, which vests tanks, ponds, private ferries, water canals, pathways and abadi sites in Gaon Sabha, the Supreme Court held that material resources of community like the above, maintain delicate ecological balance. They need to be protected for proper and healthy environment, to enable people to enjoy a quality life, which is the essence of the rights guaranteed under Article 21 of the Constitution of India. The Revenue Authorities after taking notice that the pond is falling in disuse should have bestowed their attention to develop the same to prevent ecological disaster, and to provide better environmental for the benefit of public at large.

23. In the suits for injunction, representative suits under C.P.C. to protect local environment, the trial courts can insist upon maintenance of balance in environmental issues. Before granting injunction in property matter, the courts can insist on the development plan of the house or locality. In the maters of drainage the courts can ensure that the ultimate course of effluent is connected to proper drainage. The Courts can also ensure that the regulatory measures provided under the environmental legislation are complied with by the plaintiffs and defendants before granting any relief. In property disputes, relating to urban and rural properties, while granting injunctions, the courts must issue directions to safe-guard green belt, preserving trees and plantations and for strict compliance of Municipal Laws. Directions can be issued to Panchayats, Municipalities and Local Bodies to comply with environmental obligations. Public nuisance to human life, and health can be prevented by the procedures under Code of Criminal Procedure, and its violation punished under Sections 188, 268, 277 and 278 of Indian Penal Code. Courts have to be careful and cautious in Food Adulteration Cases for recurrence of offences. A vigilant and responsive judiciary can create a great impact on the local environment. These issues cannot be left to be taken care only by High Court or Supreme Court.

24. The subordinate courts, given the judicial activism and dynamism can take special advantage in dealing environmental matter. Public Interest Litigation, social action and pro-bono process can be entertained under Section 91 of the Code of Civil Procedure, 1908. The Section is quoted as below:-

91. Public nuisances and other wrongful acts affecting the public-

(1) In the case of public nuisance or other wrongful act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such other relief, as may be appropriate in the circumstances of the case, may be instituted,-

(a) by the Advocate-General, or

(b) with the leave of the Court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit, which may exist independently of its provisions.

25. The subordinate courts, have sufficient power and jurisdiction, which should be used with comprehensive knowledge of law, relating to environmental matter and the motivation to use the jurisdiction for public good. A trial Judge can better appreciate the local environmental matters and can ascertain the environmental damage, effectively through local commissions. Witnesses can be examined and questions of fact can be determined and adjudicated at local levels. There is no dearth of legislation and the case law, relating to environmental issues. What we require is a proper understanding of the legal system and the remedies, which can deliver environmental justice.

26. In attempting any mater touching environment the courts should be cautious. Their approach should be to create a balance between development and environment. An objective criteria must be adopted to be the basis of the decision. Such a criteria can be fixed only by understanding, the cause of pollution, the effect, which it is likely to cause on environment, the legislation which deals with such issue and a careful manner of reducing the impact of such pollution.

27. Every Judge has an opportunity to enforce environmental laws. Even if the environmental cases do not directly come to his Court, his concern for environment can bring a tremendous change.

Access to Environmental justice:-

28. The right of access to justice is characterized as the most fundamental of all the fundamental rights. The Universal Declaration of Human Rights mandates in Article 10 that, "everyone is entitled in full equity to a fair and public hearing by an independent and impartial Tribunal, in the determination of his rights and obligations and any criminal charge against him."

29. Our society is founded upon rule of law. If the people without using force or trying to obtain extra legal remedies, approach the Court of law for redressal of their grievance, the Courts must ensure that they have real and effective access to the remedies. At present our Courts are overburdened with pending cases called 'arrears'. There is acute shortage of Judges in the country. At present there are 3.5 million cases pending in different High Courts and 25 million cases pending before subordinate Courts. With only 26 Judges in the Supreme Court, 719 in High Courts with 198 vacancies and

13204 Judges in subordinate Courts with 2101 vacancies, and with ratio of 10.5 Judges per ten lacs people as against 50 in developed countries, the judiciary is extremely hard pressed, to respond to the people of the country. With the expansion of rights, with little emphasis on duties there is increase in legal actions making it increasingly difficult for the Courts to deliver timely justice. The Courts have, however, evolved methods like class action suits, representative suits and public interest litigation to overcome the problem of accessibility. The strict requirement of locus has been relaxed. The Apex Court has also ventured to create new rights for the citizens through progressive interpretation of constitutional provisions. Right to travel, right to privacy, right to fair trial, right against torture and custodial violence, right to free legal aid, right to health care, right to safe drinking water, right to quality life, women's right against sexual harassment, right to work, and right to environmental protection (M.C. Mehta Vs. Union of India, AIR 1997 SC 734), amongst others have been recognized and have flooded the Courts. The achievement of environmental justice through the existing judicial system has become a mirage.

30. For the common man faced with might of industries and multinationals on violations of environmental rights, the access to environmental justice through local Courts has become more relevant. The strict regulation of environmental legislation mostly borrowed from west, and the end product of treaties and conventions, without local concerns has simultaneously raised many human rights issues. The same brave women in Uttranchal, who saved their forests by 'Chipko Movement', are not allowed to use forest on the declaration of Nanda Devi Biosphere Reserve in Uttranchal. The air and water legislations are more concerned about resource degradation and resource access, soil erosion, declining water tables, toxics and pesticides than the local concerns. The public good and public concerns have often driven away more people from homes to be 'environmental refugees'. Gadgil M. Guha, R. 1995, 'Ecology and Equity' have appealed for more pragmatic approach to these issues calling "think Globally-act locally". The concern of tribals, local communities, and traditional trade is forgotten by the enforcement authorities. Many trades employing lacs of artisans have died, to save rivers, forests and wild life. The dyers of cotton sarees at Vrindavan; tanners in Tamil Nadu and Jajman at Kanpur; stone crushers around Delhi; weavers at Bhadohi, tribal fishermen in Madhya Pradesh, the displaced persons of the catchment areas of large dams like Narbada and Tehri, are knocking at the doors of the Courts to reverse actions on environmental law enforcement, seriously interlinking human right concerns with environmental issues. The Courts have a greater role to play in these areas.

31. The superior Courts may have, led the path by adoption of techniques of investigation, enquiries and remedial actions through Public Interest Litigation, the local Courts still feel helpless in providing remedies to the common citizens.

32. A close look on various legislations would go to show that in each case the complaint has to be filed for violation of environmental rights created under these special acts by competent authorities, who many at times are violators of these rights. The common man does not have access to the records and reports, and is mostly left alone in the fight for causes, which trouble him the most. The financial power of the violators of environmental rights, is frightening. Their reach extends to even stalling the legislation, like in the case of the Central Government dilly-dallying with the 'central food standards'. In the scenario, the local Courts have doubts in giving orders and their implementation even for small violations like pollution of drains and *nalas*, noise pollution, removal of bio-medical waste or dumping of toxic wastes by industries and slaughter houses.

33. It is surprising as to why the power under Section 133 is still left with Executive Magistrates, when most of them, are on many occasions administrators of the municipal bodies. Are they required to issue orders against themselves? These powers should be entrusted to Judicial Magistrates, with greater sense of responsibility, judicial temperament, independence and accountability.

34. It took more than 10 years for the Central Government to constitute authorities under the Environmental (Protection) Act, 1986 and that too only after the reminders given by the Supreme Court in Vellore Citizens Welfare Forum case. It took 16 years for a petition filed in Supreme Court to complete the investigation, surveys to protect Taj Mahal and to establish a Taj Trapezium. The directions to install cupolas on iron foundries have not been realized so far. The Apex Court had taken up the issue of cleaning Ganga in 1988 with little success. The air pollution caused by increasing automobiles in Delhi took about six years of persuasion with threats to the Delhi Government to convert all the public transport to CNG.

35. The subordinate Courts not only require knowledge and expertise, to deal with environmental issues but also sensitivity and courage to pass the orders and to get them executed. The access to environmental justice, is an issue, which requires serious thought.

Conclusion:-

36. The environmental justice, is part of socio-economic development of the society. The superior judiciary has made tremendous progress in distributing environmental justice. The orders passed by the Supreme Court have provided healing touch to many and even those, who are residing in remote places in hills, coastal areas and forests. The Courts, however, are not the forum to solve all environmental related challenges in the country. Judiciary has to be equipped with creation of additional capacities to deal with the whole gamut of environment related issues. Only the trained and motivated judges can take correctional measures and help in distributing environmental justice with human element, fairness and compassion. To that extent every court in the country should be turned into environmental court, for environmental actions.

ORIGIN AND SCOPE OF FUNDAMENTAL RULES

Vedpal*HJS

After the commencement of the Government of India Act, 1858 on 2nd August, 1858, the then Government framed and published separate financial codes on different subjects. The first code which was framed and published in the year 1871 on the subject was **'Pay And Acting Allowances Code'**, which was brought into force on 1st August, 1871. The second code published was **'Civil Pension Code'**, which was brought into force on 10th January, 1872. The third Code i.e. **'The Civil Leave Code'** was also published in 1872 and brought into force on 14th March, 1872. In the year 1883, one another Code i.e. **'Civil Traveling Allowances Code'** was published and brought into force on 1st April, 1883.

The Codes which were published and brought into force upto 1883 were not complete in themselves, and so many subjects were left untouched, therefore the then Government of India on 1st May, 1889 framed and published **"The Civil Service Regulations"** which was a comprehensive Code defining all the conditions of service under which salaries, leave, pension and other allowances etc. were to be earned by an employee in the service in Civil Department. These "Regulations" provided the manner in which the leave, pension and allowance etc. were to be calculated.

After the commencement of the Government of India Act 1919, the Secretary of State in Council under section 96B of this Act, was conferred with the power to make rules for regulating the Civil Services, its classification, the methods of recruitment, the service conditions, fixation and calculation of pay and conduct of Government servant. The Secretary of State in Council was also empowered to delegate the rules making power to the Governor General in Council or to local Governments or to authorize the Indian legislature or local legislature to make laws regulating the services of the Public Servants.

A proviso was also added to Section 96B (2) of the Government of India Act, 1919 to the effect that every person appointed before the commencement of the Government of India Act, 1919 by the Secretary of State in Council to the Civil Service of the Crown in India, shall retain all his existing or accruing rights, and if any right of an employee was lost the provision was made that such employee shall receive such compensation for the loss of such right as the secretary of State in Council may consider just and equitable.

The right to **Pensions** and the scale and the conditions of pension of all persons in the Civil Service of the Crown in India appointed by the Secretary of State in Council was ordered to be regulated in accordance with

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the rules in force at the time of the passing of the Government of India Act, 1919. Although the Secretary of State in Council was conferred with the power to amend the rules but a specific provision was made that if rules are varied or added it will not adversely effect the pension of any member of the Service appointed before the commencement of the Government of India Act, 1919.

It was also specifically stated under section 96B(4) that all rules or other provisions in operation at the time of passing of the Government of India Act, 1919 whether made by the secretary of State in Council or by any other authority, relating to the Civil Service of the Crown in India may be revoked, varied or added to by rules or laws made under Section 96B.

In pursuance of the power conferred by section 96B as stated above, the Secretary of State in Council framed **Fundamental Rules 1922** which came into force on 1st January, 1922. These rules were made applicable to all the Government servants both Central as well as provincial. These rules were wide enough in respect of all aspects of service of Government employees.

The power to amend these fundamental rules in relation to employees under control of Secretary of State in Council were retained by the Secretary of State himself and the power to amend fundamental rules in respect of other Government servants was delegated to the Central and State Governments and to frame subsidiary rules in respect of Government servants under their administrative control. In pursuance of the said power certain subsidiary rules were framed by the Governor of the Provincial Governments. The then local Government of United Province (now State of U.P.) in exercise of the said delegated powers further framed separate traveling Allowance Rules 1924. The Fundamental Rules 1922 which were framed by the Secretary of State in Council were adopted by U.P. Government with certain modifications which were made applicable to the Government servants in service vide Notification NO. A-5822/10-303, dated 14 November, 1930.

The Government of India Act, 1935 came into force on 2nd August, 1935 but its Part III related to Governors Provinces came into force on 1st April, 1937. The procedure for recruitment in service and conditions of services were prescribed under Section 241 of the Act which states that except as expressly provided by this Act, APPOINTMENTS to the Civil Service and the Civil Post under the Crown in India shall (after the commencement of Part III of this Act) be made

(a) in the case of services of the Federation, and posts in connection with the affairs of the Federation, by the Governor General or such person as he may direct;

(b) in the case of services of a Province, and posts in connection with

the affairs of a Province, by the Governor or such person as he may direct.

As regards to the CONDITIONS of services the provisions were made as follows:-

(a) in the case of persons serving in connection with the affairs of the federation, by rules made by the Governor General or by some person or persons authorized by the Governor General to make rules for the purpose;

(b) in the case of persons serving in connection with the affairs of a Province, by rules made by the Governor of the Province or by some person or persons authorized by the Governor to make rules for the purpose;

It was further provided that it shall not be necessary to make rules regulating the conditions of service of persons employed temporarily and their employment may be terminated by one month's notice or less notice.

Under the provisions of Section 241 (i)(b) of the Government of India Act, 1935 the State Governments were given full power to frame their own rules laying down conditions of service of persons serving under them in connection with the affairs of the Province. However, the power to frame or amend the rules in respect of All India Civil Services, continued to be vested in the secretary of State in Council. It was provided under Section 276 of the Government of India Act, 1935 that subject to the rules that may be made by the Governor of a State under section 241 all the rules shall remain in force, notwithstanding the repeal of any act by Government of India Act 1935, if they were not inconsistent with the provisions of the Government of India Act 1935. Fundamental Rules were published by U.P. Government in the form of Financial Hand Book Vol.2 in 1936.

The Government of U.P. had published the revised edition of the Fundamental Rules in the form of Financial Hand Book Vol.2 consisting of four part in the year 1942. Part I was published separately while Part II to IV were published together and had come into force with effect from 1st April, 1942 without adversely affecting or invalidating any rules or orders in force immediately before the introduction of these rules brought into force on 1.4.1942.

Part I of Financial Hand Book Vol. 2 contains the Fundamental Rules applicable to Central Government Servant.

Part II of Financial Hand Book Vol. 2 contains the U.P. Fundamental Rules made by the Governor under section 241(2)(b) of the Government of India Act 1935 and orders issued under these rules. It also contains the audit instructions issued by the Auditor General regarding the Fundamental Rules.

Part III of Financial Hand Book Vol.2 contains the subsidiary rules applicable to Government Servants under the administrative control of U.P. Government.

Part IV of Financial Hand Book Vol.2 relates to the delegations of powers and different Forms.

Fundamental Rules were amended from time to time by the Secretary of State and by the U.P. Government. In Part I and Part II of Financial Hand Book Vol. 2 identical numbers have been given to rules.

After Independence with effect from 15 August 1947 the control and power of rule making vested in the Secretary of State in Council seized to exist as the Government servants were brought under the control of the Governor General but their pay and service conditions were kept undisturbed under the provisions and section 10 of the Independence Act, 1947.

The Constitution of India came into force on 26 January, 1950. In the Constitution of India, under Article 309, the appropriate legislature was empowered to regulate the recruitment and condition of service of persons appointed to public services by framing appropriate laws. A provision was also added to Article 309 of the Constitution of India that the President and Governors of the respective states may also frame rules for the Central and States Government Servants respectively, until provision in that behalf is made by Parliament or the respective State Legislature as the case may be.

In the Constitution of India, under Article 395 the Indian Independence Act 1947 and the Government of India Act, 1935 together with all enactments amending or supplementing latter Act was repealed keeping intact and in force the Privy Council Jurisdiction Act 1949. Notwithstanding anything contained in Article 395 of the Constitution of India repealing the above Acts a provision was made under Article 372 of the Constitution that subject to the other provisions of the Constitution of India all laws inforce in the territory of India immediately before the commencement of the Constitution of India will remain in force until altered or repealed or amended by the competent legislature or by other competent authority.

The Fundamental Rules, 1922 which were framed by the Secretary of the State in Council and had come into effect on 1.1.1922 and were also adopted by U. P. Government, as stated earlier, were neither repealed by any statute nor any fresh rules were framed in this respect at the time of commencement of the Indian Constitution. In U.P. Rules regarding appointment, salary, leave, retirement etc. of Government Servants serving under Province have been given in fundamental rules which is also known as Financial Handbook Vol. II, part II to IV and is presently applicable in the State with amendments made from time to time.

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HAS THE INDIAN CRIMINAL JUSTICE SYSTEM LOST ITS RELEVANCE IN THE PRESENT SET-UP

VIJAI VARMA*

H.J.S.

- The murder of Pramod Mahajan by his brother in his house.
- The murder of a bar girl Jessica Lal on refusing to serve the drinks at late hours of the night in front of many people.
- Parading a woman naked through the village.
- Pouring of acid on young girl by frustrated lover and seriously injuring her.
- Killing of the husband by the wife with the assistance of her paramour.
- Killing of a political adversary in broad-day light after chasing him for miles together in full view of the public.
- Killing of Meher Bhargawa by a criminal on her objecting to making lewd remarks on her daughter in law.

There is not a single day when the newspaper is not filled with the reports of the kind of incidents mentioned above. It appears that either there is no law and order in the country or the machinery loaded with the responsibility of maintaining law and order and administering justice has totally lost its punch and relevance. Why is that the offender is having least regard and care for the rule of law? Why suddenly a criminal does not bat an eye-lid in firing and killing a person for sometimes as flimsy a reason as to overtake his car? It appears that the criminal has become over and above the legal system of the country or he knows that the law of the nation is too weak to reach to his neck or inflict any substantial punishment on him. The citizens of the nation while crying for justice, want to know the reason as to why the criminal justice system (hereinafter referred to as C.J.S.) is coming crashing down and whether the present criminal jurisprudence has lost its relevance and needs a total revamping and overhauling. There is serious concern, serious danger of the whole system crumbling down in case something urgently is not done to keep the credibility and confidence of the people in the system and the Rule of Law, which otherwise might bring down the democratic system of India.

G.W. Paton in his text book of jurisprudence writes, "crime is the result of character". This speaks volumes about the societal norms of our country which have taken a nose dive. There is no singular factor for the failure of the C.J.S. in India but to my mind, the major factor of this deterioration in law and order in India is the outcome of the growing belief among the people in general and the criminals in particular that in the present system, more often than not, the criminal will go scot free and there is every chance that he will escape from the clutches of the C.J.S.

Let us scan out some of the causes and the reasons for the breaking down of the system. Those who are at the helm of affairs, specially the knave

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politicians, have scant regard for the moral values, its breach and the consequences thereof. What is paramount for such politicians is, to cling to power by hook or by crook irrespective of the fact as to whether the means applied for achieving the power are legal or illegal, as far as they suit their interest and fulfil their political desires, aims and objectives. This desire of grabbing or usurping power by any means, right or wrong, drives such politicians to hobnob with the criminals as they have the muscle power which can be put to good (sic) use of bringing votes for them. So when such politicians gain power, these criminals not only have a hay day but also have the support and the blessings of such politicians which makes them absolutely fearless with regard to their criminal activities as they are well aware that nothing will happen to them howsoever heinous their criminal activity may be.

Next, the role of police is quite apathetic towards the victim of the crime. The predicament or the dilemma of the police official is that he has to keep his officers in good humor. So even if an improper order is passed by their senior, he has to obey, otherwise, has to bear the brunt of that officer. Besides, Indian police works under so much pressures and constraints that it is not possible for it to do justice to its main duty that is to maintain law and order. Normally, it is so much involved in the security and safety of the politicians, criminals in the garb of politicians that there is no time left to take care of its most important duties. Besides, there is so much dearth of police personnel in comparison to the criminals in society that basically it is impossible for the police to have a strong hold on the area in curbing the criminal activity especially when it has to do a lot many more duties such as mentioned above. This tremendous pressure of work and killing of their conscience, drives the police force to corruption which brings them close to the criminals, jeopardizing the prospect of a crime free area or community. Infact nexus between politicians and criminals, percolates to nexus between police and criminals and the result is once again the harrowing one where the law and order system is the major casualty. Now a days, what we see in the newspapers normally is, that instead of being a saviour the police is involved into robberies and dacoities, so the 'Rakshak' has become 'Bhakshak'. And the people have almost lost confidence in the Khaki wardi people.

The role of courts has also not been very positive in wresting the criminal activity, by bringing the criminals to book. The Criminal Procedure Code, the IPC and the Special Acts dealing with different offences in different areas have, instead of been of assistance to the courts in punishing the guilty expeditiously, have infact been the bottlenecks in advancing the C.J.S. If a person is arrested for a crime, he knows that sooner or later he will get bail from the courts because of the system being so, and has therefore no hesitation in committing a criminal act as there is no fear of incarceration or punishment by the courts.

Even if bail is not granted in rare cases for the offence being extremely serious or otherwise, the criminal knows that evidence is required to prove his guilt which will not come forward because of the fear of the criminal or the temptations and allurement given to the witnesses. Courts also sometimes on technical grounds grant bail or acquit the accused. So the criminal knows that ultimately he will be acquitted even if he has to remain for a few days in the prison. This again strengthens the hand of the criminal making him stubborn and fearless in the commission of a crime.

It is often seen that a person who has been in and out of prison, due to the provisions of bail, normally turns a hardcore criminal.

It is astonishing that our Constitution which is the mother source of all laws in India and which provides for the equal protection of law to all the citizens, does not specifically provide for the establishment of a criminal justice system. May be, it is because of that, that the thrust needed on a near fool proof C.J.S. has yet to see the light of the day in India. More interestingly it is found in our constitution that there are provisions which appear to be putting a limitation on the conviction or curtailment of personal liberty etc. Infact our Constitution appears to be having a criminal supportive approach. May be it is because of the violation of human rights and personal liberty during the freedom struggle that the constitution makers were more cautious in their approach in having that sort of approach or may be because at that time law and order situation was not paramount on the minds of Constitution makers, who were having building of new India as of prime importance. But to my mind this is a big flaw which probably has resulted in not having "law and order", the thrust that was or is needed for the purpose for an orderly society.

Besides, Art. 21 provides that- no person shall be deprived of his life or personal liberty except according to procedure established by law. There is no denying the fact that life and personal liberty are the basic human fundamental rights but they can be curtailed through a due process of law. Our legal system does not appear to be having the teeth required for curtailing the personal liberty of an offender as there are so many loopholes in the system that he is invariably able or manage to get through them and is able to again indulge in criminal world with impunity. It appears that our C.J.S. is such that it does not want to harm any innocent individual, framed as an offender, but then the big question is that whether the communities' interest are to be sacrificed for the individual sake or should it be vice-versa. In my view the larger interest is to be protected even if, it somehow is detrimental to an individual because after all community is nothing but an association of many individuals.

In our CJS, a convict can be inflicted corporal punishment also. The idea of remaining behind bars for days, months or years should be quite horrifying for a person, even if he is an offender, but of late imprisonment or a jail term is not remaining a Macbeth's dagger, as the jail does not remain a condemned place now a days. Infact, it is a 'safe haven' for criminal especially habitual offenders. When a criminal is apprehensive of being killed in an encounter or otherwise having threats from his opponents, then he gets his bonds cancelled and takes refuge into the jail wherefrom, it is quite often seen that he manages to operate his criminal activity. So what used to be a deterrent in olden times when a person sent to jail was looked down upon or castigated by the society, has now become a safe place for them to eat, drink and be merry. Most of the criminals turned politicians, are living a majestic life in jails, as was shown in the TV channels. So this is also a flaw in the CJS, which instead of being a deterrent factor, is a motivating factor for the hardcore as well as upcoming criminals.

Besides, a disturbing feature is that the criminals and mafia are not looked down upon in the society, instead they are treated as heroes as those who have their say in the society because of their muscle and money power. As mentioned above, some knave politicians nurture them for their own selfish reasons. All these "qualities" (sic.) inspire and motivate a bewildered unemployed youth to emulate them. So today's youth instead of taking to a righteous path take to a path shown by these criminals as it is easier to make fortune and recognition in society based on muscle power. This is, what is drawing the younger generation to have scant regard for moral values and tread upon the path of Mafiosi's world.

Now a million dollar question is, as to how to control this deteriorating law and order situation. To my mind, the reformative theory of punishment has lost its relevance in the present scenario. Once the things become so bad that drastic steps only could correct things, then society or the people have to think in those terms only. Infact very strict, deterrent and punitive steps are needed for putting things back on rail. The following words by W.H. Paton in support of retributive theory are of vital importance-

"Community as a whole places emphasis on the retributive theory, at least where certain crimes are concerned; a feeling of outrage demands satisfaction and, if the penalty imposed by the courts is not considered sufficiently harsh, there is a danger of lynch law."

As there are special provisions for grant/refusal of bail in NDPS, Gangster or POTA, so should be applied for cases pertaining to heinous crimes under IPC also. There is a need to evolve a CJS where there is more thrust on arrest, detention, punishment of the offender then to get on with an existing porous legal system allowing the criminal to pass through it by adopting one mean or the other. Whenever any habitual offender is punished, then his property obtained by him through ill-gotten means should be forfeited to the government. Such other measures which deprive the criminal of his wealth and property should be devised and adopted, so that a budding criminal has these things in his mind that even if he attains wealth and property through criminal activity neither he nor his family members would be able to enjoy it.

Besides police and the judicial departments are to be strengthened. The police should be given a free hand in dealing with criminals and no politician should be allowed to interfere in the investigation or prosecution process and anyone doing that should be considered a person who is harbouring with criminals and should be charged as such. The witnesses should be given full protection, as well as motivational awards in terms of money etc., so that they feel secured as well as motivated in coming forward in giving evidence specially against hard core criminals. Number of courts should be increased, so that cases dealt with by the criminal courts are expeditiously decided and the accused get the punishment as early as possible. Jails should be rid of all the facilities provided to the criminals and should look a place where criminals should fear to be in instead of the place being a safe haven for them. Criminals and also their family members should be debarred from taking part in any election not only parliamentary or assembly but even in the corporation election. The infrastructure needed for the institutions responsible for Administration of Justice should be provided at all costs.

For all such measures what is needed is the political will. Whether that will is there in our country is a debatable point. Unless and until we have that political will, there is no hope of even dreaming the society, where law and order prevails, where people at the dead hour of the night can walk on the street without any fear, where even a small businessman works without the fear of the mafia or the police, where even in the night, a bar girl does not have the fear of any one, where villagers live without the fear of the dacoits and above all, the people of the country are able to exercise their franchise without the fear of mafia, musclemen or the criminals, where there will be absolute rule of law in our country.

Am I talking about a utopian world or a dream country or being sheer quixotic? I don't have any answer, may be you have one!

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THE DOCTRINE OF SEPARATION OF POWERS

S.K. SINGH*

"Every power tends to corrupt and absolute power tends to corrupt absolutely." **- Lord Acton**

It is generally accepted that there are three main categories of Governmental functions i.e. the legislative, the Executive and the judicial. According to Eminent English constitutional writers[1], the separation of powers mean three different things, firstly, that the same persons should not form part of more than one of the three organs of Government, i.e. the Ministers should not sit in Parliament, secondly, that one organ of the Government should not control or interfere with the exercise of its functions of the another organ i.e. the Judiciary should be independent of the Executive or that ministers should not be responsible to parliament and thirdly, that one organ of the Government should not exercise the functions of another i.e. the ministers should not have legislative powers.

Though the doctrine is traceable, to Aristotle but the writings of 'Locke', and 'Montesquieu' gave it a base on which modern attempts to distinguish between Legislative, Executive and Judicial powers is grounded. 'Locke' distinguishes between what is called discontinuous legislative power, continuous Executive power and the Federal power. 'Locke' and 'Montesquieu' derived its contents from the developments in British constitutional history of the early 18th century. In England after a long war between the parliament and the king, they saw the triumph of parliament in 1688 which gave parliament legislative supremacy culminating in the passage of the Bill of rights. This led ultimately to recognition by the king of legislative and tax powers of the parliament and the judicial powers of the court. At that time, the king exercised executive powers, parliament exercised legislative powers and the courts exercised judicial powers. Though later on England did not stick to this structural classification of functions and changed to the parliamentary form of Government.

This doctrine emerged in several forms at different periods. Its origin is traceable to 'Pluto' & 'Aristotle.' In 16th and 17th century French Philosopher 'John Bodin' and British Politician 'Locke' respectively had expressed their views about the theory of separation of powers, but it was 'Montesquieu', a French Jurist who for the first time formulated this doctrine systematically, scientifically and clearly in his book 'Esprit deslois'[2]

Montesquieu's Doctrine

The doctrine of separation of powers[3] mean that one person or body ,

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1. Wade & Phylips Constitutional and Administrative Law. (A.W.Bradley 9th End. 1978)
2. The spirit of the laws published in the year 1974.
3. 'des Pouvoirs.'

of persons should not exercise all the three types of powers of Government, namely executive legislative and judicial. He further said, there would be end of every thing, were the same man or the same body whether of the nobles or of the people to exercise those three powers, that of enacting laws, that of executing laws, that of executing the public resolution and of trying of causes of individuals.

It was appreciated by English and American jurists and accepted by politicians. 'Black stone' has observed that if the legislative, the Executive and the judicial functions were given to one man, there was an end of personal liberty[4].

The accumulation of all powers, legislative, executive and judicial in the same hand and whether of one a few or many and whether hereditary, self appointed or elective may justly be pronounced the very definition of tyranny[5]. According to the constituent assembly of France, there would be nothing like a constitution in the country, where the doctrine of separation of powers was not accepted[6].

The real existence of the Doctrine

England: In none of the senses, the doctrine of separation of power exists in England. On the contrary, in reality, the theory of integration of powers has been adopted in England. Though 'Montesquieu' has based his doctrine, taking into account the British Constitution[7] as a matter of fact. At no point of time was the doctrine accepted in its strict sense in England. The king though is an Executive head, is also an integral part of the legislature. All his ministers are also members of one or the other of the two houses of parliament. The Lord Chancellor is at the same time, a member of Govt. and the senior most member of the judiciary. Therefore, in England, the concept of Parliamentary Executive is in clear negation of the first formulation of 'wade'. As regards second formulation, it is clear that House of commons ultimately controls the executive., The judges of superior court can be removed on an address from both Houses of parliament as regards the third formulation of the 'wade', the House of Lords combines Judicial & legislative functions. It is clear that England was not the classic home of separation of powers[8].

United States of America: If the rule of law hampered the recognition of Administrative law in England, the doctrine of separation of power had an intimate impact on the growth of administrative process and administrative law in the United States[9]. It has been characterized as the principal doctrinal

4 Black stone's commentaries of the laws of England published in 1765
5 Madison.
6 Declaration of constituent assembly of France in 1789.
7 There is no written constitution in British.
8 Professor Ullman.
9 Jain & Jain on administrative law.

barrier to the development of administrative law, in USA. This doctrine is implicit in US constitution. Of course, the doctrine does not apply rigorously even in USA. Some exceptions to it are recognized in the US constitution itself, for instance, a bill passed by a congress maybe vetoed by the president[10] and the president in U.S. may to this extent be said to be exercising legislative functions. Again certain appointments of High Officials[11] and treaties[12] made by the president do not take effect until they are approved by the senate. To this extent, the senate may be said to be exercising executive functions. This exercise of some functions of one organ by the other is justified on the basis of 'checks & balances' i.e. the functioning of the one organ is to be checked in some measure by the other.

The doctrine has influenced & has itself been influenced by the growth of administrative law. The strict separation theory was dented to some extent when the courts conceded that legislative power could be conferred on the executive and thus introduced the system of delegated legislation in USA. Power of administration on the executive has caused further dent on the doctrine. Also due to some administrative tribunals like tax courts have grown in USA. A much more dent in the theory is due to development of independent statutory commissions to handle and regulate areas of activities endowed with the triple functions of legislation, administration and adjudication along with powers of investigation and prosecution. The US Supreme Court has never held the vesting of all the three kinds of powers in one agency as unconstitutional.

The aim of the doctrine is to guard against tyrannical & arbitrary powers of the state. In the face of complex socio-economic, problems demanding solution is in a modern Welfare State. It may no longer be possible to apply the separation theory strictly. It is essential to develop adequate checks & balances in order to prevent administrative arbitrariness. By force of circumstances, administrative law has inevitably grown in US but doctrine did not generate an attitude of indifference towards it, as happened in England under the spell of the Dicean concept of rule of law. Many US people criticized the growth of administrative process as doing violence to the concept of separation of powers. US Attorney General appointed a committee to report on the subject. The committee reported in 1941. The number of recommendations could not be implemented due to Und world war. After some times the administrative procedure act 1946 was enacted[13]. It was made obligatory for administrative authorities to publish orders, opinions, statement of policy, interpretation rules of procedure etc[14].

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10 Art -1 sec 7 & Art - 2 sec 2, US Constitution

11 Art-2 sec2 Ibid.

12 Ibid.

13 Administrative procedure Act 1946 lays emphasis to follow minimum procedure by administrative authorities. The act was amended in 1966, 1967 and 1976.

14 Freedom of information Act 1967.

In Mc Nabb V US (1943) Justice Frank Furter asserted that the history of liberty has largely been the history of the observance of procedural safe guards. Perhaps the due process clause emphasizes on administrative procedure. The concentration of legislative Executive and judicial powers in the same hands is precisely the definition of despotic Govt[15].

In Panama Refining Co. V Ryan (1935) Justice Cordozo was right in observing that the doctrine of separation of powers is not a doctrinaire concept to be made use of with pedantic rigour. There must be sensible approximation, there must be elasticity of adjustment in the developments of tomorrow in their nearly infinite variety.

India: In the spectrum of our constitutional scheme, there is no formalistic & dogmatic division of powers amongst the three organs of the Government. Only directive principle incorporated in the Indians constitution enjoins the separation of Judiciary from the Executive[16]. In constituent assembly, a member, Professor K. T. Shah proposed to incorporate the doctrine in the constitution, but the assembly did not accept it deliberately.

The president invested with executive power of the union[17], Governor is similarly empowered with the state executive[18]. The president may assume to himself all or any of the functions of the Government of the state on failure of constitutional machinery in state[19] and may promulgate ordinances during recess of parliament[20]. The president is also vested with the legislative functions[21]. He adjudicates upon the question of disqualification of members of parliament[22]. The parliament exercises judicial functions by considering questions of breach of privileges and power to punish for contempt and impeachment[23]. The Supreme Court exercises legislative functions by framing rules[24]. The supervision of subordinate courts by High Court[25] is an administrative function. A High Court also empowered to effect transfer of cases[26] The principle of collective responsibility is direct negation of the doctrine. The doctrine under our constitution is an approximation of the British position, rather than USA.

In Re Delhi Laws act case[27], Hon'ble justice Mahajain took note that

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15 Jeffers on.
16 Art-50 Indian constitution
17 Art-53 (1) Ibid
18 Art- 154(1) Ibid
19 Art 356 Ibid
20 Art 123 Ibid
21 Art 372 & 372-A Ibid
22 Art 103 Ibid
23 Art 61 Ibid
24 Art 145 Ibid
25 Art 227 Ibid
26 Art 228 Ibid
27 AIR 1951 SC 332

"it does not admit of serious dispute that the doctrine has strictly speaking no place in the system of Govt, that India has at present, under our constitution unlike the American and Australian constitution, the Indian constitution does not expressly vest the different sets of powers in different organs of State our constitution though, federal in character is modelled on the British parliamentary system -- the essential feature of which is the responsibility of the executive to the legislature "

In Ramjawaya V State of Punjab[28], Hon'ble Justice Mukherjee opined that the Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity, but the function of the different parts or branches of the Government have been sufficiently differentiated and consequently, it can very well be said that our constitution does not contemplate assumption by one organ or part of the state functions that essentially belong to another, thus the doctrine is not fully accepted in Indian constitution.

In Ram Krishna Dalmia V justice Tendulkar[29], Hon'ble Justice Das held, the constitution does not express the existence of separation of powers and it is true that division of powers of the Government into legislative, executive and judicial is implicit in the constitution, but the doctrine does not form an essential basis of foundation stone of the constitutional frame work as it does in USA.

In Chandra Mohan V State of UP[30] Hon'ble apex Court held that though our constitution does not accept the doctrine of strict separation of powers, yet provide for an independent judiciary in the state.

In Uddi Ram V Union of India[31] Hon'ble apex court categorically stated that the doctrine has not been accepted by our constitution. The court expressed its opinion that the American doctrine of Separation of powers has no applications in India.

In Kesavanand Bharati V State of Kerala[32] Hon'ble S.C. by, Majority of 13 judges constitution bench held that both the supremacy of the constitution and separation of powers are constituents of the basic structure of the Indian constitution,

In Indira Nehru Gandhi V Raj Narain[33], Hon'ble Justice Ray observed that there is a separation of powers in the Indian constitution in broad sense only. A rigid separation of powers as under American and Australian constitution does not apply to India.

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28 AIR 1958 SC 538
29 AIR 1966 SC 1987
30 AIR1968 SC 8
31 AIR 1973 SC 1461
32 AIR 1975 SC 2299
33 AIR 1951 SC 332

In SP Gupta V Union of India[34] Hon'ble apex court held that so far as our constitution is concerned the doctrine of separation of powers reveals an artistic blending and an 'adroit admixture of judicial and administrative functions. The Constitution has taken the mixture of both the British and American Constitution.

In Krishna Kumar v Union or India[35], apex court observed that this court in the matter of expenditure includible in the annual financial statement has to be 'loath'[36] to pass any order or giving any division of any functions between the three coequal organs of the Government under the constitution.

On the whole, the doctrine in strict sense is undesirable and impracticable, there fore it is not fully accepted in any country nevertheless its value lies in the emphasis on checks and balances. The object of the doctrine, that judiciary must be in dependent of, and separate from the remaining two organs of the Govt. is to have Govt[37]. of law rather of official will or whim.

It becomes clear that the doctrine in its classical sense, is structural rather than functional, can not be literally applied to any modern Govt. because neither the power of the Government can be kept in water tight compartment nor can any Govt. run on strict separations of powers Thus our constitution will be worked by the different organs of the state amicably, wisely, courageously and in the spirit in which the makers of the constitution expected them to act[38]. Enforcement of rigid conception of separation of powers would make modern Govt. impossible[39]

In modern practice, the theory means an organic separation and distinction must be drawn between essential and incidental powers and one organ of Govt. can not encroach upon essential functions of the other but may exercise some incidental functions there of[40].

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34 AIR 1982 SC 149
35 AIR 1990 SC 1782
36 Unwilling
37 The report of international congress of Jurists held at New Delhi in 1959
38 Re. Keshav AIR 1965 SC 847
39 Justice Frank Furter
40 Basu

JUDICIAL REMEDIES AND PROCEEDINGS IN CASE OF BREACH OR RELIGIOUS AND CHARITABLE PUBLIC TRUST

Raman Lal Sharma*

History

First of all, I would like to discuss historical developments and origin of the ideas in different laws, relating to religious and charitable public trust. Under English Law charitable trusts are synonymous with public trusts and what is religious trust is only a from of charitable trust. The beneficiaries being the general public or a section of the same and not the definite body of individuals. In English Law the Crown is constitutional protector of all property subject to charitable trust. Such trust being essentially against all public concern. The Attorney General represents the proper person to take proceedings on their behalf and to protect charity. Whenever an action is necessary to enforce an execution of a charitable purpose, all remedy in abuse or misapplication of charitable funds or to administer a charity, the Attorney General is the proper plaintiff. Whenever he comes to the conclusion that such an act is committed, acting as an officer of the Crown, reports the matter to the court who is considered to be another officer of the Crown. The Attorney General need not appear in the court and it will be the duty of the court to act on the information of the Attorney General. Such actions were originally taken as information. The Chancery in England exercised jurisdiction in cases of charitable uses even before passing a well known statute of Elizabeth. The power is not vested in the High Court of Justice. The jurisdiction is more extensive when the trust is charitable than in case of a private trust and the court has jurisdiction not only to enforce and redress of breaches but also in certain circumstances to alter or modify the trust in a greater or lesser degree in accordance with Cypres Doctrine.

In English law there is a visitorial power attached to all Eleemosynary Corporation. The visitor has a right to settle disputes between the Members of the Corporation to inspect and regulate their action and generally to correct all abuses and irregularities in the administration of charity. The law allows a founder of such a corporation full powers to make regulations for its creation and such powers include the right of nominating visitors. The law as it stood before 1925 lays down that if a private person was the founder of a charitable corporation then he and his heirs automatically became the visitors. The descent of the right of a visitor of heirs has now been allowed by the Administration of Estates Act 1925. It is not clear as to who will be the visitor in default of express appointment of the founder. Most probably such a right would devolve upon the Crown.

The duties of the visitors were limited and they could not work

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against the terms of foundation or with the discretion on internal management of the corporation, unless there was a total disregard to the foundation. The court again could not control the discretionary powers of the visitors unless they exercised corruptly or dishonestly and a prohibition can be granted only if a visitor exceeds the authority.

Subsequently charity Commissioners were appointed in England who exercised powers under various Charitable Trust Act. The object of these Acts was to protect the property of the charity and promote the smooth and economic way of carrying out the charitable intention of the founders where such intentions are found to be inadequate. They have the power to enquire into the conditions of management of charity within their jurisdiction and for this purpose require accounts, statements and written answer from the trustees or from the trustees or who are in possession of the funds of the charity. They could give their opinion or direction or advice respecting the administration and any person acting on such advice or opinion would be indemnified for any loss, except in cases where the opinion was proved to have been obtained by willful misrepresentation or suppression of facts. Their sanction is also necessary for the institution of certain legal proceedings.

One fundamental distinction between English and Indian Laws lies in the fact that there can be religious trust of a private character under Hindu Law, which is not possible in English Law. So far as the public religious and charitable trust are concerned in India there are various enactments and which impose some control over the administration of such trusts and provide remedy for mal- administration. Apart from these statutory provisions there is general law of the land which can be involved on the administration of these trusts. So far as the private religious trusts are concerned there is no specific statutory enactment and whole subject is regulated by the general law of land. It may be stated that the Trust Act does not apply to public trust. However, it has been settled by various courts and lastly by the Apex Court in A.I.R. 1974 S.C. page 1084, State of Uttar Pradesh Versus Banshi Dhar and Others, that the principles of Trust Act can be applied to public trust as well.

Coming to Indian law in old days it was a disputed question as to whether the king has the powers of control over the religious and charitable trusts or not. Research was made and the text to Narada was found which says "a King can reduce to slavery a Sanniyasin who is guilty of incontinence." This text conceivably suggests only in a vague way that the king has some sort of jurisdiction over the religious bodies and institutions. However, there has been some customary laws in India relating to temples and endowments which in the last resort has to be enforced by the King. The Smriti writers make it a duty on the part of the King to uphold the customs and

usages of the land unless they are contradictory to revelation. Mitakshara incommenting upon a passage of yajnavalkya relating to the enforcement of customs, expressly refers to customs in connection with management of temples. The Sukraniti and other texts made primary duty of the King to protect endowments. These principles were followed by the Judicial Committee of the Privy Council in various cases.

I may add there that in Hindu Law there is no distinction between religion and charity. They are synonymous. The basic idea behind this being that in had been repeatedly observed by various texts that there are three words "Daya", "Dan", "Dharm". One who performs 'Daya' repays the interest of sins, one who performs 'Dan' repays the principal of sin and one who performs 'Dharma' earns for future savings. There can be various ways for performing these acts but all the said acts lead to the same conclusions and, therefore there is no difference between religion and charity. Same principles will apply to charitable as well as religious endowments.

The Bengal Government of rather East India Co, which was coming in control of various territories of India, enacted regulations for Madras, Bengal and Bombay Presidencies from 1827 to 1842. These regulations exercised control over the Hindu and Muslim endowments through a Board of Revenue. The Britishers raised objections against these regulations on the ground that Christians were controlling Hindu and Muslim endowments. They Company did not adhere to these objections.

RELIGIOUS ENDOWMENT ACT OF 1863

However, after the Indian Territory was acquired by the British Government, the East India Company ceased to exist. The first act known as Religious Endowment Act, 1863, was enacted. Briefly examine the provisions of this Act.

"The Act divides all public religious endowments into two classes, which are described in sections 3 and 4 respectively. Section 3 deals with the cases in which at the time of commencement of the Act the temple or other religious establishment was one to which the Bengal or Madras Regulation applied and it was an institution in which the right of nomination of the trustee, manager or superintendent thereof vested in or was exercisable by the Government or any other public officer and such nomination was subject to the confirmation of the Government or any other public officer. Section 4, on the other hand, relates to cases in which the nomination of the trustee, manager or superintendent did neither vest, nor was subject to the confirmation of the Government or any public officer. In the first type of cases, covered by section 3, the procedure to be followed is detailed in section 7 to 12 of the Act. Section 7 provides that in all the cases coming under section 3 of the Act the local Government shall appoint one or more committees in

every district or division to take the place and exercise the power of the Board of Revenue and the local agents under the repealed Regulation. Such committee shall consist of 3 or more persons and section 8 lays down that they shall be appointed from among person professing the religion, for purposes of which the religious establishment was founded or maintained and in accordance with the general wishes of those who are interested in the maintenance of the institutions. For the purposes of ascertaining the general wishes of such persons, the local Government is entitled to cause an election to be held under such rules as may be framed by them. Under section 9 every member of the committee thus appointed, shall hold office for life unless removed for misconduct or unfitness by any order of the court. Section 10 lays down the procedure to be followed in filing up any vacancy among the members of the committee. Section 11 forbids any member of the committee to be also a trustee, manager or superintendent of the institutions, and section 12 provides that on the appointment of such committee, the Board of Revenue and the local agents functioning under the Regulations shall transfer to such committee the properties of the endowment in their possession or under their superintendence.

In case of religious endowments in which the right of appointment is not vested in or subject to confirmation of the Government, the properties controlled by the Board of Revenue are transferred by section 4 itself of the trustee or manager as the case may be, and the entire management to the institution would vest in such trustee or manager (section 6). It any vacancy occurs in the office of any such trustee, power is given by section 5 of the Act to any person interested in the temple or establishment or in the performance of the worship of the service thereof, to apply to the Civil Court to appoint a manager of such institution, and the manager thus appointed by the Civil Court was to act as such, unless some other person by suit, have established his right of succession in the said office.

The position therefore is that the control exercised by the Board of Revenue under the Regulation was given up in regard to the institution where the right of nomination of trustee, manager or superitendent was no vested in or subject to the confirmation of the Government. In other cases where the Government or any public officer had the right of making or confirming the nomination, the control of a committee constituted under the act was substituted for that of the Board of Revenue under the Regulations.

It may be mentioned that under section 12 of he Act, the properties of the endowments do not vest in the committee. The properties remain with the idols or the institutions, as the case may be, and the trustees or the managers are competent to institute suits and proceedings in relation to them. The duties of the management are really carried on by the trustees and managers

subject to the supervision of the committee and the court would not ordinarily interfere with the acts of the committee, provided they are not proved to have acted dishonestly or in excess of their duties. The fact that a temple committee was appointed does not oust the general jurisdiction of the court to make any order which is considered necessary for due administration of the trust. The true principles being that the courts would not ordinarily interfere with the statutory powers of the members but the general right is subject to ask for the court's assistance to set right abuses or to have other remedies independent to the Statute, is not thereby taken away.

Section 13 of the Act imposes duty upon all trustee or manager of keeping accounts. Section 14 of the Act lays down an important provision under which any person or persons interested in a religious establishment may institute suit against trustees, managers or members of the temple committee for any misfeasance, breach of trust or neglect of duty and empowers the court to direct specific performance of an act, award damages remove the trustee, manager or superintendent. The nature of interest entitling a person to institute such suits is as described in section 15. It need be pecuniary or immediate or the interest entitling him to take part in the management. Any person having a right of attendance or having been in the habit of attending the performance of the worship or service or part taking in the benefit of any distribution of alms shall be deemed to be a person interested within the meaning of section 14. Under section 18 such suit as could be instituted after obtaining leave from the court on an application. The court spoken is a principal civil court of original civil jurisdiction in the district. Section 16 and 17 provide reference to any matter in dispute to arbitration.

The remedies provided in a suit under this Act are not exhaustive the provisions are similar to section 92, C.P.C., but the reliefs granted in the suit under this Act are limited i.e. directing specific performance of an act, awarding decree for damages and costs against the trustee etc. or may direct the removal of such trustee etc. the section does not empower a court to frame a Scheme for the management of the temple. Undoubtedly section 14 creates a special jurisdiction in civil courts for deciding matters regarding public religious trusts and to that extent the jurisdiction or ordinarily civil court for the reliefs which could be claimed under the section was taken away.

This act did not apply to Presidency Court and the jurisdiction in these areas was exercised by the High Court. Section 19 of the Act empowers the court before giving any leave under section 18 or even after giving the leave to direct the trustee etc. to file in court the accounts of the trust. It left the common control unaffected in regard to non-religious charitable trusts. Section 21 also provided that where a trust was partly for religious purposes and partly for secular purposes both purposes can s Act

subsists together. Thus the remedies provided by this Act were not adequate.

CHARITABLE ENDOWMENT ACT OF 1890

Thereafter-Charitable Endowment Act No. VI of 1890 was enacted. The object of this Act was to provide vesting the administration of property held in trust for charitable purposes. Charitable purposes includes relief to the poor, education, medical relief and the advancement of any other object of general public utility but not includes a purpose which relates exclusively to religious teachings or worshippers. Thus distinction was drawn between religion and charity. Section 3 of this Act empowered the State Government to appoint an officer called as "The Treasurer of Charitable Endowment" for respective territories and the vesting of the property in him. It also empowered the State Government to settle a scheme. This Act is not very material for our present purposes.

CHARITABLE AND RELIGIOUS TRUST ACT OF 1920

The other Act Charitable and Religious Trust Act No. XIV of 1920 is of importance. It applies to non-religious charitable trust and also to religious trust as well. This Act is intended to provide the facilities for obtaining of information regarding trust created for purposes of a charitable or religious nature and enable the trustees of such trust to obtain the direction of a court on certain matters and also to make special provisions for the payment of the expenditure incurred in certain suits against the trustees of such trusts. The expression 'Court' in this Act means the District Judge or any other court empowered in that behalf by the State Government including the High Court in the exercise of its ordinarily original jurisdiction.

Section 3 of the Act provides that any person having interest in any express or constructive trust, created or existing for a public purpose of charitable or religious nature may apply by a petition to the court in whose jurisdiction substantial part of the subject matter of the trust is situated to obtain an order embodying or any of the following directions viz. directing the trustee to furnish the petitioner through the court with particulars as to the nature and object of the trust and of the value, condition, management and application of the subject matter of the trust and of the income belonging thereto or as to any of these matters, directing the accounts of the trust examining and auditing them. The period of accounting is limited to a period of 3 years prior to the date of the plaint. The manner of petition is provided under section 4 i.e. it is to be in writing signed and verified in the manner prescribed by C.P.C. for signing and verifying the plaint. Section 5 prescribes the procedure to be followed in dealing with such petitions. The court is to first satisfy itself on such enquiry, as it thinks proper, whether the trust to the petition relates is a trust of the nature to which Act applies and this the petitioner is interested therein. After this satisfaction notice will be issued to

other side, a date for hearing will be fixed. It would be open to opposite party to file written statement in the manner as prescribed in the C.P.C.

There is very special provision in this Act. On the date of hearing if the opposite party denies the existence of trust or denies that it is a trust to which the Act applies or denies that he is a trustee of the said trust shall apply and undertake to institute a suit within 3 months, for a declearation to that effect. The proceedings on the petition shall be stayed during the continuance of the said suit. If no undertaking is given or after expiry of 3 months no suit is instituted the court shall itself decide the questions and give such directions as it thinks proper. It is specifically provided that the court shall not try or determine any question of title, examine the parties and any person claiming title adversely to the trust, it a trustee without any reasonable excuse fails to comply with the order made by the court, as mentioned above, such trustee shall without prejudice to any other penalty or liability which he may incur under any other law, be deemed to have committed a breach of a trust affording ground for a suit under section 92, C.P.C.

Under section 7 of this Act a power is given to the trustee to the court for the opinion, advise or direction of the court on any question effecting the management or administration of the trust property and the court shall give its opinion, advise or direction as it considers proper. However, no advice shall be given if the court considers that the question is not fit to be decided by the summary enquiry.

The other important provision is section 10 under which the court is empowered in any suit under section 14 of the Religious Endowment Act or section 92, C.P.C., i.e. on the application of the plaintiff and on hearing the defendant to make or direct the defendant either to furnish security for any expenditure incurred or likely to be incurred by the plaintiff in instituting and maintaining such suit or to deposit such sum as the court consider sufficient to meet such expenditure. When any money has been deposited in accordance with the order, the court may make offer to the plaintiff, whole or in part of such sum for the conduct of the suit subject to taking such security from him if it considers proper.

The only advantage which a person interested in the trust may gain by following procedure laid down in the Act is to obtain material information relating to the trust. Ofcourse, if the trustee refuses to give information the petitioner will get advantage that the trustee has committed breach of trust within the meaning of section 92, C.P.C. the whole proceeding is summary proceeding and no appeal lies from the order. It also does not operate as res-judicata in a subsequent proceedings.

Section 92 C.P.C.

Now I come to section 92 C.P.C. This section as it stands is 1882 the

reproduction with certain changes of section 539 of code of Procedure of 1882. In the Code of Civil Procedure of 1859 there was no special provision form institution of suits in relation to public charity. The provision was made for the first time, in the Code of Civil Procedure of 1877. The words used in the Code of 1887, however, were "trust created for public charitable purpose" and on the basis, thereof it was held that they did not apply to religious trusts or to the trusts, which were both religious and charitable. In the Code of 1882 the expressions "public charitable or religious purpose" were used and to remove all ambiguity it has now been replaced by the" public purpose of a charitable or religious nature" in the present code. Clause (a) and (b) of section 92 were not in section 539 of the old Code, though with the exception of a few descenting opinions they were held to be included in other clauses of the section particularly the last clause. The addition made in the present section has set at rest all doubts of this point.

Another point on which there was conflict of opinion in the old code was as to whether the provision of this section was mandatory or was mere enabling and permissive. If it was mandatory a suit of the character mentioned in the section would have to be brought in accordance with these provisions and not otherwise. On the other hand, if it was permissive the right of suit that existed in dependently of this section would not be taken away and it would open to the aggrieved party either to avail himself of the form of remedy laid in this section or else to institute proceedings under the general law. Calcutta High Court was of the view that section 539 was not mandatory and according to the view the suit was maintainable under general law.

This conflict has been resolved by the enactment of sub section (2) which clearly lays down that the jurisdiction that is created by this section is a special jurisdiction in regard to a class of cases which the section contemplate and to that extent a special procedure is laid down. For such cases the procedure is compulsory and non-compliance of which would be fatal to the obtaining of the relief in the suit of that character. In other words it is special jurisdiction of principal Civil Court for the reliefs, which could be claimed under the provisions of this section. Accordingly it has been held that by mere adding any consequential relief not allowed by the section the jurisdiction of the court cannot be ousted. The only explanation provided for by subsection (2) is to file suit under the Religious Endowment Act of 1863. The said Act, as has already been discussed above, does not apply purely to charitable endowments. It only deals with religious endowments whereas section 92 deals with both charitable and religious trusts.

The reliefs claimed under the Endowment Act were limited one i.e. removal of the manager and that too on grounds of misfeasance, breach of Act or neglect of duty. There is no provisions for the appointment of new trustees nor for the settlement of a scheme but in the case of religious endowment of a public character to which the act applies it is open to the

parties to proceed either under the provisions of that Act or in conformity with the requirements of section 92. If the reliefs claimed by him are such as are obtainable under both the provisions.

Section 92 does not discriminate the religious and charitable trusts under any law i.e. it applies to the trusts of public nature under Hindu Law, Mohammedan Law or to the Christians.

It may, however, be noted that, as I have discussed above, there is nothing take religious purpose under the Mohammedan Law or under the law for Christians. Therefore, so far as the religious purpose is concerned, practically it will be applicable to Hindus only though there is no distinction between religion and charity so far as Hindu Law is concerned.

It may also be noted that after passing of the Waqf Act, which is a special Act applicable to Mohammedan Waqf for the reliefs which can be claimed under the said Act the jurisdiction of the civil Court under section 92 is ousted. In such cases the aggrieved party will have the right to seek the relief under the provisions of Waqfs Act so far as they can be claimed under the said Act. If the reliefs are not covered under provisions of the said Act section 92 will remain unchanged. The suits filed before the commencement of Waqf Act shall continue and will not abate Vide Md. Ghose Sahib V/s Md. Kutubuddin Sahid A.I.R. 1985 S.C. 375.

In framing section 539 of the old code the legislature had before it is a model, the principles of English Act with the only difference that under the the English Law proceedings were in the nature of summary proceedings, while in the code it was taken to be a regular suit. However, as discussed above, the practical difficulty and the scope of relief under the Indian conditions was realized and changes were made, from time to time. Still the glimpses of English law are found in the section as the suit can be filed by the Advocate General as well. By the Amending Act of 1976 the suit can be filed by any two or more persons with the leave of the court. However, before that amendment the suit could have been filed with the permission of the Advocate General which was a trouble some work and therefore, now the matter has been simplified to the effect that the suit can be filed with the leave of the court.

CONDITION

To attract the provisions of section 92 there are certain preexisting conditions. In the first place the suit should relate to a trust created for public purposes of a charitable or religious nature. In other words in existence of such a trust is essential. In the second place the suit must proceed on the allegation either of breach of trust or of the necessity of having directions from the court for the administration of the trust. In the third place the relief claimed must be one out of the reliefs specified in the section and forthly the suit must be one brought in the representative capacity in the interest of the general public or of the trust and not for vindicating the personal right of the plaintiff. Lastly there is a general condition which is applicable to all suits that the trust

must be situated within the territorial limits of the court in which the suit is filed. The court competent to try such suits is the principle civil court or original jurisdiction or any other court empowered in this behalf by the State Government.

There was a dispute on the question that in absence of specific empowerment by the State whether the suits can be tried by the Additional District Judges. However, Now it is settled view that such suits can be tried by the Additional District Judges but the leave has to be granted by the leave the District Judge can transfer the suits to Additional District Judges for deciding such cases even if they are not specifically empowered by the State Government in this behalf.

Let us now consider the above conditions separately. The first condition necessary to bring a case within the perview of this section is the existence of a trust, whether express or constructive, for public purposes of religious or charitable nature. A private trust is outside the perview of this section. A suit for mere declaration as to whether the public trust exists or not is not within the contemplation of this suit. Such a suit will be only maintainable on the ordinary civil jurisdiction of the civil court. However, it has been held that mere declarations are outside the scope of this section yet when reliefs contemplated by the section are claimed and such reliefs cannot be granted without determination of the question as to whether a public trust exists or not or whether a particular property appertains to a public trust, such questions would have to be decided by the court. The existence of a public trust is to be proved by the plaintiff and if it is denied by the defendant, the mere denial will not oust the jurisdiction of the court. Such a denial merely raises a triable issue on the questions and the existence and nature of the trust has to be proved by evidence like any other disputed fact.

The scope of section 92 was considered by the Apex court in Mohant Prag das Ji vs. Ishwar Lal Bhai reported in A.I.R. 1952 S.C. page 143 wherein it was observed that a suit under section 92 was maintainable only if it related to a public endowment and was filed against a trustee for one or more of the reliefs mentioned in the section. In such a case when the conclusion is reached that the trust is a private trust the section ceases to be applicable and though relief by way of declaration as to the character of the trust could be given a ancillary to granting any of the reliefs mentioned in the section where there was no ground for granting any of those reliefs it was not proper to grant a mere declaration as to the character of the trust. However, it was further held that if a finding is given on such a question about the existence of the trust in an ancillary manner the finding shall not be final nor shall operate res judicata in a subsequent suit. The Privy Council in Abdul Rahim v. Barkat Ali reported in A.I.R. 1928 Privy Council page 66 had laid down that a suit for declaration that certain property pertains to a religious trust would lie under the general law and in such a case the requirements of Section 92 need not be specified.

It has also been held in a number of decision that a suit by the beneficiaries or worshippers for a declaration that an alienation of the property belonging to the institution is not binding can be filed as a representative suit and before a regular civil court and not under Section 92, C.P.C. The court in a suit under Section 92, C.P.C. can not grant any relief against a trespasser or transfereee for possession vide UMA Shanker and others V. Salig Ram and others, AIR 1975 Allahabad page 36 (F.B.). Such a suit would lie in a regular civil court either at the instance of the beneficiaries or by the trustees after they are appointed in a suit under Section 92, C.P.C. This principle was approved by the Apex Court in Vishwanath and another v. Thakur Radhaballabh Ji AIR 1967 SC P 1044 wherein it was held that Section 92 will not be applicable to a suit for possession against the transferee or trespasser of a property belonging to an idol. The reason therefore was given to be that in such a suit it is the idol who will be enforcing its private rights and must, therefore, choose the forum of ordinary Civil Court. Similarly no suit for injunction is maintainable before civil court in case breach of trust is alleged. In such a case remedy under Section 92 has to be followed AIR 1980 All. 283 and 1990 Allahabad 202."

The word 'trust' has been used in Section 92, C.P.C., in a general and not technical sense. The word 'public' includes a section of public in Vidyabasuthi V. Balusami reported in Law Reports XLVIII Indian Appeal Page 302 after reviewing the Hindu and Mohammadan Laws it was held that the legal position of a Mahant, Shebait or Mutwali was that none of them is trustee in the strict sense. No property conveyed to them in trust as happens in English Law but, at the same time, they were answerable as trustees in the general sense for mal administration. This principle was extended even against the had of Math in Ram Prakash v. Anand reported in Law Reports XLIII Indian Appeals Page 43 wherein it was held against the head of Math that although he possesses large administrative powers but the trust did exist and must be respected.

The trust need not be express. It may be constructive as well. In some of the decided authorities it has been held that a constructive trustee and a trustee de son tort are Synonymous expressions. A person without title chooses to take upon himself the character of a trustee becomes a trustee 'de son tort' or 'de facto' trustee and is liable to action for what he has done or what he has received while so acting in the way as if he was a de jure trustee such persons may be described as 'de facto' or 'de son tort' but are distinguishable from a trespasser as he does not purport to act as a trustee at all, but claims adversely to the trust. It has been held in a number of cases that a suit under Section 92 C.P.C., would lie against the de facto trustee as well, in other words against a trustee de jore or de facto. IN this respect you may refer Abdul Razzaq V. Abdul Hameed I.L.R. (1951) Madras's Page 228 Nanhoobeh v. Ghulam Hasan, I.L.R. (1950) Nagpur p 90 Satyacharan v. R.N. and, AIR 1953 Calcutta P 716 and H.K. Mitra v. Dey, AIR 1960 Cal. P558.

The distinction must be remembered between English and Indian Laws regarding the constructive trust. Under the English Law a transferee of a trust property becomes a constructive trustee while under Indian Law a transferee of a trust property, even from a trustee who makes the transfer alleging adversely to the trust, the transferee will not become constructive trustee. He will be in a position of a trespasser and liable to be sued in an ordinary civil court and not in a suit under 92 C.P.C.

The Apex Court has made a further distinction which is remarkable. It was held in Swami Parmatama Nand Saraswati v. Ram Ji Lal Tripathi reported in AIR 1974 SC P 2141 wherein it was held that in a suit under Section 92 C.P.C., the plaintiff must admit the defendant to be a trustee. In case the plaintiff does not admit the defendant to be a trustee either constructive or de facto the suit will not come within the perview of Section 92 C.P.C. This is based upon the principles that it is the allegations of the plaint and plaint alone which confer jurisdiction upon a court and in this regard defence is not to be locked into. It may be noted here that in a case where the plaintiff alleges the defendant to be the trustee and the defendant denies the same it will becomes a triable issue to be decide by the court like any other issue on the basis of evidence. If the denial of a defendant is coupled with the denial of the fact of existence of a turst then though the matter will be decided but it will have the same consequence as I have discussed above. If the denial is only regarding the position of trustee and not the existence of a trust the decision will have different consequences.

LEAVE

A suit under Section 92 C.P.C., can be filed with the leave of the court. This leave has to be granted by the District Court upon prima facie consideration of the fact which confired jurisdiction under Section 92 C..P.C. If the court is satisfied that their exists a trust, breach is alleged and is apparent, suit is in a representative capacity for adjudicating upon the rights of the public trust and the reliefs claimed are within the perview of Section 92 C.P.C., the court will grant the leave. It has been a controversial question as regards Allahabad High Court is concerned as to whether the leave can be granted exparte or should be granted after notice to the defendant. The controversy has now been settled that in cases of urgency leave can be granted without sending notices to the defendants but order passed must be a reasoned one. The order without disclosing reasons is illegal vide AIR 1989 All. P 194 and AIR 2001 SC P 60. The Apex Court in AIR 1991 SC P 221 has held that the leave can be granted exparte without notice to the defendant but by a reasoned order. It has further been held in that case that the order granting the leave is not final and if the defendant subsequently comes before the court and alleged that the suit under Section 92 C.P.C., was not maintainable or the leave was obtained fraudulently or that no ground for

granting the leave did exist, the court can certainly revoke the leave and consequently the suit will have to be dismissed. Since the leave is revocable it puts an end to all earlier controversies.

Section 92, C.P.C., will apply only to the religious or charitable trust which is for public purposes. The essential distinction between a public and a private trust is that in the former the beneficiaries are uncertain and fluctuating body of persons either the public at large or some considerable portion of it, answering a particular description, while in the latter the beneficiaries are definite and as certain individuals or who within a definite time can definitely be ascertained. The fact that uncertain and fluctuating body of persons is a sect of the public following a particular religious faith or only a sect of persons of a certain religious persuation would not make any difference in the matter and would not make the trust as private trust.

Whether a trust is public or private would have to be decided in each case with reference to the terms of documents, if any, and if there is no document or the language is ambiguous the decision would depend upon the inferences which would legitimately be drawn from the evidence adduced in the case. The material evidence being of actual user and public repute. The question at times becomes/undoubtedly difficult and although certain indicia of a public foundation have been enunciated in several decided authorities yet none of them can be said to be conclusive. The question generally arises in regard to temples, where it gives rise to consideration of the fact whether the temple is public or private, in deciding whether the temple is public or private several questions shall arise for consideration and various facts have been laid down for deciding the said questions. The ultimate test is as to how the property was dealt, treated and asserted. Besides, other questions being the structure of the temple, the right of the persons visiting the same, taking part in the worship as or right, making offerings and taking part in the functions etc. will be relevant considerations. This aspect has been dealt by the Apex court in some detail in Tilkayat Sri Govind Lal Ji Maharaj Versus State of Rajasthan reported in A.I.R. 1963 S.C. page 1638. The case relates to famous Nathadwara Temple of Rajasthan.

There can be cases where the temple was originally a private one but by a long user it became a public temple. If it is so held to be a public temple on the basis of evidence then provisions of section 92, C.P.C., shall apply thereto. It can also apply to cases in which trust is partly religious and partly for charitable purpose e.g. a Dharmshala is attached to temple or a scheme of distributing food to poors etc. is maintained such a case will fall within the ambit of section 92, C.P.C.

Section 92 C.P.C., will apply in a case where the trust is partly for the public purposes and partly private purpose. If the settler of the trust has laid

down a scheme that certain portion of the income will go to the benefit of individuals and the remaining will go for the public purpose the suit will be within the purview of section 92, C.P.C., but the court shall not disturb the private part of the trust. However, in such a case scheme can be framed in such a manner so as not to disturb the private part of the trust.

It should be noticed that the suit contemplated by section 92, C.P.C., proceed on the allegations of a breach of public trust or is founded upon the necessity having directions from the court regarding the administration of such trust. A trust may be partly public or private but in orders to attract the provisions of section 92, C.P.C., it is essential that the need of public trust should be alleged to determine as to whether the case comes within the purview of section 92, C.P.C. it is necessary to deal precisely what allegations are made in the case. If what is complained of, relates entirely to the private part of the trust and has nothing to do with the portion which concerns the public, section 92, C.P.C., would obviously has no applications. On the other hand, if the grievance of the plaintiff is that the public trust has been properly carried out or there is misfeasance or neglect of duty in respect of the same the suit would have to be framed in conformity with the provisions of section 92, C.P.C. If it is possible to separate the two parts of the trust, proper procedure should filed the suit under section 92, C.P.C., to the public trust alone.

The condition which is to be fulfilled in order that the suit may come within the purview of section 92, C.P.C., is that is should be instituted on the ground that there has been a breach of trust and directions from the court are necessary for administration of trust. In English Law any act or neglect on the part of a trustee, which is not authorized or excused by the terms of the trust instrument or by law is called breach of trust. The word 'trust' as has been said above, has been used in general sense in section 92, C.P.C., and connotes an obligation or duty attached to a person in charge of properties dedicated to the religious or charitable purposes which could be enforced either in law or in equity, what is ought to be alleged under section 92, C.P.C., is a breach of such obligation or duty.

The allegation of breach of trust undoubtedly pre-suppose the existence of a trust but it is not necessary that the trust should be admitted by the defendant. The defendant can certainly deny the existence of the trust but such a denial would not oust the court of its jurisdiction under section 92, C.P.C. If that were so then every case of public charity might be excluded from the jurisdiction of the court by mere denial of the defendant. The existence of a public trust is a jurisdictional fact which has to be determined by the court. It is like any other disputed fact which is to be decided upon the evidence that may be adduced by the parties. The suit under section 92, C.P.C., would lie without any allegation of breach of if it is necessary that according to the case of the plaintiff directions are necessary from the court

regarding administration of the trust. The directions must be for carrying out the trust and relate to a trustee, where there is one or a new trustee, where there is one or a new trustee or where one is to be appointed. The nature of the relief expressly mentioned in the section give a clear direction as what these directions are. Thus a settlement of scheme would be a proper direction under section 92, C.P.C.

Here it may be repeated that an allegation of breach of trust can be made only against the persons who, accordingly to the plaintiff, occupy the position of a trustee either de jure or de facto and is answerable as such. Of course, the defendant may deny that he is guilty of breach of trust or even regarding existence of the trust but such denial will not oust the jurisdiction of the court.

However, it must be remembered that if the defendant alleges to be a total stranger or alleges adversely to the trust he cannot be joined in a suit under 92, C.P.C., and no relief can be granted against him. It has been a question of dispute as to whether such a person is necessary party to the suit. Different High Court are not in unanimity of the opinion against such persons. However, it has been settled that if such a person comes before the court of his own accord and seeks impleadment as a defendant and if he is so impleaded and the question is decided against him he will be bound by the decision of the court which will operate res judicata granted against him, but in such case the relief of possession will not be granted against him in a suit under section 92, C.P.C., and a separate suit of possession will have to be filed by the new trustees or authorized person on civil side.

The third requirement of section 92, C.P.C., is that the relief claimed by the plaintiff must be covered by one or other of the clauses attached to subsection (1) of the section. No further relief beyond the same can be granted by the court. However, cause (h) of the sub-section (1) is to be construed in accordance with 'ejusdem generis' doctrine which was fully explained by the Calcutta High Court in Nabi Siraj v. Province of Bengal, I.L.R. (1942) Calcutta page 211. This doctrine means "where generally words immediately follow or are closely associated with specific words their meaning must be limited by referring to the proceedings words". For purpose of deciding as to whether a particular case come within clause (h) of sub-section (1) we have to see whether the relief claimed by is similar, in character in all those specified in clause (a) to (g). Relief against the third party is obviously of dissimilar nature and cannot be covered by clause (h). It is not necessary that relief under clause (h) should be claimed as additional relief. If the language of relief claimed and also the purpose for which they are claimed impliedly and substantially be identical, the operation of section 92, C.P.C., would be attracted. In Jambulinga v. Akilanda reported in A.I.R. 1927 Madras page 886 it was held that there was no express power for removal of the defendant as a trustee but in substance the object of the suit was to get the defendant removed and to have a new trustee appointed it was held that

under these circumstances the suit was covered by section 92, C.P.C.

A question some times arises as to whether a suit is maintainable under section 92, C.P.C., when some of the relief claimed by the plaintiff is covered within that section and some are not. Allahabad High Court in Ram Roop Gosain v. Ramdhari reported in I.L.R. XLVII Allahabad page 770 has held that if the relief claimed in a suit under section 92, C.P.C., are reliefs which a court is competent to grant in such a suit and other are not covered. It is not a correct procedure to return the plaint for presentation of proper court but the judge should either call upon the plaintiff to amend his plaint by striking out the relief, which are not appropriate to the suit, in a question or should wait until judgment is delivered and dismiss the claim relating to such reliefs. If, however, the relief claimed are of subsidiary character and are really involved in accordance with a clause of the section, it would not affect either the character of maintainability of the suit. The Bombay High Court appears to have taken a contrary view but the Calcutta High Court has taken view similar to that of Allahabad High Court.

The other requirement of such a suit under section 92, C.P.C., is that it must be a representative suit. The suit must be in the interest of trust or the benefit of general public. It has nothing to do with rights of the persons claimed by him is the trust property attached to him. He can also not invoke the jurisdiction of the court in vengeance of his personal grievances. Enforcement of such rights will be outside the purview of section 92, C.P.C., and it will also be ground even for not granting the leaves to file such a suit.

There has been conflict of opinion on the question as to whether the suit by a co-trustee against other trustee for recovery of the properties or accounts etc. was maintainable under section 92, C.P.C., or not different views were expressed at different times. However, the Apex Court in M.M.D. Cathelolic v. M.P. Athanasies reported in 1954 S.C. page 526 has pointed out that a suit by a plaintiff, as a validity constituted trustee is different from a suit under section 92, C.P.C., which is one for removal of the defendant from trusteeship or for the framing of the scheme. A suit by the plaintiff for establishing his right of hereditary management and to remove the defendants who claim to be elected managers of the mosque was held not to fall within section 92, C.P.C.

If the Advocate General himself does not figure as the plaintiff the suit has to be instituted by two or more persons who must be interested in the trust subject to the permission of the Advocate General or the leave of the court.

The person who figures as plaintiffs must show the existence of an interest in the public trust. The interest must be direct and not contingent. The interest can be in different forms, such as worshipper who does visit the temple or mosque for performing his worship. Such an interest could be shown to be really existing e.g. a resident of Chandigarh, who once visited a temple in South India, cannot claim to be a worshipper in that temple though e

he has the right to perform worship in that temple. In such a case it will have to be decided on the basis of the evidence. In fact, it should be the right ordinarily exercised by the worshipper. The mere fact that a man is Hindu and, therefore, must have some interest in the temple alongwith millions of his countrymen, who profess the same religion, would not be enough. He must have some interest over and above the said fact. Residence in the place where a temple is situated is a material piece of evidence to prove the existence of an interest. But the test of residing in the locality is to be applied in relation to actual user of temple by those who reside close to it. A person who has contributed funds for the temple and is a worshipper in shrine has sufficient interest to be the plaintiff in a suit under section 92, C.P.C., vide Ramaswami v. Karummatha, A.I.R. 1967 Madras page 597. In the case of Selajanad v. Umeshnand reported in II C.L.J. page 460 related to famous Vaidyanath temple it was held that persons who are officiating trustees of the temple and are maintaining the same out of the income, as also those who act as Pandas or guides or priests to the pilgrims have interest in the trust. In A.I.R., 1991 Allahabad page 266 a Pujari was held to have an interest in the trust property.

A founder or his representatives or the descendents are certainly regarded as the persons having interest in the endowment. The disciples of the same act which founder of the religious institutions belongs, may be taken as persons interested.

RELIEFS

(a) The reliefs specified in clause (a) is removing a trustee. It was introduced in the code of 1908. Under the old code there was difference of opinion in various High Courts. Some were of the view that in view of existence of clause (b) having power to appoint new trustee, the power of removal was implied. While some High Courts took the contrary view. In view of the introduction of clause (a) controversy has been resolved.

The removal of trustee will only be justified if welfare of the institution demands it. Any and every dereliction of the duty of a trustee would not justify the removal, if it is found that he has not misappropriated any income and has displayed a proper interest in the maintenance and worship of the temple, the mere fact that his management does not came to a particular standard of efficiency would not be a ground to remove him from his office and put a stranger at his place.

To settle one's title against the temple would prima facie amount to a breach of trust on the part of temple trustee and may justify removal; but the position would be different if there are doubts regarding the construction of the deed of gift and the trustee bonafidely believed that the property was his own. The mere assertion by a trustee in the suit under section 92 itself that the trust property are his private property is not sufficient ground for removal; but if he is found to have committed breach of trust prior to the suit, his conduct in

course of suit would be an important element to be taken into consideration in deciding whether the breach should be condoned and he should be allowed to retain the office. In the Privy Council Case of Shri Nivas v. Evalappa reported in I.L.R. 45 Madras 565 a Dharmakarta of a Hindu Temple, who claim as his own land found to belong to the temple and supported his claim by concocting accounts was removed. An assertion on the part of the trustee to treat trust property as his private state and to apply his income to his private purpose was considered sufficient for removal. Every case would depend upon its own circumstances and not hard and fast rule could be laid down. The true principle as said above on which such jurisdiction should be exercised is the welfare of the trust. A hereditary trustee should not be removed merely for inaccuracy in account or pretty neglect of duty (Vide Balmukund v. Nanak Chand A.I.R., 1929 All. 433). The court in such matters could very well be guided by the general principles set out in Story's Equity jurisprudence, which was quoted with approval by the Privy Council in various cases. The observations are as follows:-

"But in cases of positive misconduct courts of equity have no difficulty in interposing to remove trustees who have abused their trusts; it is not indeed every mistake or neglect of duty of inaccuracy of conduct or trustees which will induce courts of equity to adopt such a course. But the acts and omissions must be such as to endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties or a want of reasonable fidelity."

Mr. Justice Ashutosh Mukherjee in AIR 1924 Calcutta page 1024 Jovgunnessa Versus Mafilullah although a case of Mohammadan Waqf, held that the same principle would be applicable to a Hindu charitable and religious endowment summarized the principle "the court will be guided solely by consideration of the welfare of the trust and will not hesitate to remove a trustee who has purchased the trust property or concurred in a breach of a trust, has wrongfully alienated trust property or has been guilty of Wanton Waste and neglect of duty."

A mistake honestly committed by a trustee even as to his legal position does not necessarily effort for removing him from post as manager, nor a mere lack on improvident management of the trust property which is not proved to fraudulent or dishonest. In such case, the proper thing to do is to frame a scheme under which a committee could be appointed, supervise and control the acts of the manager (Anna Ji Versus Narain ILR 21 Bombay page 556). In Satish Chandra Giri Versus Dharani Dhar reported in 44 CWN 177 the Privy Council held that no general rule can be laid down as to the action to be taken befitting the different kinds of religious heads. In this case a spiritual office was connected with a public endowment of a religious character and associated by tradition and custom, with the control of properties and fund belonging to the institution, so that the religious and secular duties were intermingled and inseparably blended. In such a case it was held that the

court under section 92 has jurisdiction to be with not only the secular side of the office but also the religious side and deal with the occupant in respect of both offices. Mere mismanagement or incapacity may not be sufficient in all cases for removal from religious office and in certain cases the proper step would be to form an association of a committee of management which may meet the ends of the case. The true rule in such matter can be stated to be that if it is found by the court that the functionary in the excise of his duty has put himself in a position in which the court thinks that the obligation of his office in connection with the endowment can no longer be faithfully discharged with out danger to the endowment, that is a sufficient ground of removal if need be from both his office. In this case the Mohunt was found to be of immoral character and the Privy Council held definitely that the moral character of the man can be considered by the court in connection with his willness to remain in office and his liability to be removed there from. In some cases marriage, incontinence or sexual vice on the part of the man where the institution is a celibate institution would be one of the strongest grounds that could be assigned in support of the prayer for removal.

(b) The second relief embodied in clause (b) sub section (1) of section 92 is appointment of a new trustee. The two clauses have been placed in such a position which needs to suppose that appointment of a trustee is dependent on the removal of the old one, or any rate where the appointment of a trustee is necessary in place of trustee who has either been removed or has ceased to be a trustee. In matter of appointment of a new trustee it does not follow even when the founder has laid down that management should be hereditary in a particular family, that on the removal of the existing trustee for misconduct his heir must necessarily be appointed. Two things maybe urged against the appointment of the heir in such circumstances. In the first place, the misconduct of the existing trustee if it is considered of mis-appropriation of trust funds or other accounts of similar nature cannot but effect the heir and in effect the whole family of the misconducting trustee may be benefited by such acts. In the second case, no person can be, strictly speaking said to be the heir of another so long as the later is alive and merely dismissed for some misconduct. Whatever may be said about family and private endowments, in the case of a public trust the court should have unfettered discretion in making such arrangements for its management trust as would in its opinion the best conducive to the interest of the beneficiary. In the case of Mohammadan Ismail Versus Ahmed Moolla as reported in LR 43 IA 1227, which related to a public Waqf. The judicial Committee rejected the contention that under the Mohammadan Law the court has no discretion in the matter it must give effect to the rule laid down by the founder on all matters relating to the appointment and succession of trustee or Mutwalees. This argument was said to be based on misconception. The Muslim Law like the English Law draws a wide distinction between public and private trust. Generally speaking, incase of a Waqf or trust created for specific individuals or a determinate body of the individuals, the Qazi whose place has been

taken by the court, has been carrying on the trust into execution to give effect so far as possible to the express wishes of the founder. With respect to public religious and charitable trust of which a public mosque is a common example the Qazi's discretion is very wide. He may not depart from the intentionof the founder or from any rule fixed by him. He is governed by complete discretion. His primary duty is, in changed conditions and a circumstance is to consider the interest of the general body for whose benefit the trust was created. It was further laid down that the court should not only consider the wishes of founder but also past history of the institution and the way in which the management has been earned to years before in consumption with other existing conditions that may have grown up since its foundation. It has also the discretion to lay down and rules which might facilities the work of management and if necessary the mode of appointment of trustee in future. The duty of the court to appoint the best persons available which will secure, in the best manner possible the interest of endowment. Though in making the selection the practice of the institution, the previous association of particular persons or family with the institution is material circumstances and should be taken into consideration. The court has to take regard in the line of devolution in the deed of endowment, but it may owing to the circumstances may depart from the agreements contemplated in the deed. The court can also impose conditions as it thinks proper to ensure due performance of duties by the trustees even if the office has been hereditary. MR Justice Sadasiva Iyyer of Madras High Court in Phatmavi Versus Haji Musa reported in ILR 38 Madras 491 even went to the extent that the provision claiming hereditary right by succession should be looked with jealous eyes and the appointment should depend upon the necessary qualifications and the interest of the endowment subject to the only exception that if court comes to irresistible influence as to the intention of the creator and that such practice have always been followed.

(c) The third clause only requires that when a trustee is removed and a new trustee is appointed it is necessary to vest the trust property in the new trustee and the court is empowered to make a vesting order under this clause.

(cc) In UP by UP Act No. 24 of 1954 a clause numbered as (bb) was added. The present clause (cc) has been given effect to the said UP amendment in the wider words. The court has been given power directing a trustee who has been removed or a person who has ceased to be a trustee, to deliver possession of any trust property in his possession to the person entitled to the possession of such property to a newly appointed trustee. It is in the nature of a consequential relief to relief (a and b).

(d) This clause deals with directions of rendition of accounts and enquiries. A trustee if he is removed has to render accounts for the purpose of obtaining its discharge. It also becomes necessary to take accounts as a preliminary to settlement of a scheme. The first thing is to ascertain the funds of the trust so that provisions in the scheme could be made for their disbursement. Irrespective of the framing of the scheme the trustee can be called upon to

render accounts in order to know their manner of disbursement.

With respect to the general principles on which the courts deals with trustees of a charity, though it holds a strict handover them when it seems nothing but mistake. If the administration of the funds though mistaken, has been honest unconnected with any corrupt purpose the court while it directs for the future, refuses to visit with punishment what have been done in past. To act contrary to this principles would lead to that no prudent person will like to become trustee.

In determining how far accounts can be carried back against trustees the court will be guided by what was it seems proper in the circumstances of each individual case. The authorities go to show that in the absence of a special reason to the contrary, accounts could be directed as far back as there is misapplication of trust funds. In aggravated cases it can be directed even from the foundations of charity. As the court has discretion in the matter of fixing the period for which the accounts should be taken, it generally deals leniently with trustees, when they are found to have misapplied funds under an honest mistake without any corrupt motive whatsoever. There have been cases where looking to the extreme hardships but in absence of any misappropriation, the court have accepted lessor amount then which was found to be due and have even relieved the trustee from rendering accounts when the income was very small and the admitted expenditure does not leave balance and the accounts were not maintained but in that case too the trustee was removed.

Accounts may be directed in the common form that is to say that the trustees actually receive and not on the basis what they might have received but for willful default on their part. The second is undoubtedly onerous rule and should not be ordered unless the circumstances amount to active breach of trust or otherwise justify on that basis.

Unlike English Law in CPC there are provisions in order 20 Rule 17, Order 33 Rule 3 which empowers the court taking accounts by the decree or any subsequent order giving special directions to the mode in which the accounts is to be taken. It is better to express directions in the decree then to insert the general reference to the Judgment.

(e & f) These clauses authorized the court to declare what portions of the trust property or of the interest therein shall be allocated to any particular object of the trust. Such directions may be necessary when there are several objects of the trust and the founder has not laid down the apportionment of the income. They may be necessary in altered circumstances. The question as to what portion of the offering would go to Puzari and what portions to the servants of the temples and what has to be spent on deity has been held to be decided by the court under this clause. The Apex Court in Satyanarain Versus Venkatatapayya reported in AIR 1953 SC page 195 held that a provision that the Archakas might be put in possession of certain property as remuneration

for their services might be made in a scheme but would be out of place in a decree for ejectment of the Archakas mad in favour of the institution.

(g) Settling of scheme is most important relief relating to the administration of public trust which is provided by this clause. The direction of the court as to how the trust is to be administered can be conveniently imbodied in scheme and thus avoids the necessity of approaching the court for direction on individual occasion. The trustee carry out their administration in accordance with the scheme framed by the court and in case any difficulty is felt in carrying out the direction the scheme can be altered and amended by the court in such a way, as it considers proper. In Mohd. Ismail Arif Vs. Ahmad reported in LR 43 IA 127, which has also been referred above, Privy Council case while dealing with a Mohammadan public Waqf, laid down that the court has complete jurisdiction for framing a scheme for the management of the trust. It may certainly ought to honour the wishes of the founder so far as they are confirmable to change the conditions and circumstances, but it's primary duty is to consider the interest of the persons for whose benefit the trust was created, which may vary in rule of management, which it finds either not practicable or not in the best interest of the institutions. This view was followed in subsequent pronouncement but it was held that the court may not depart from the intention of the founder as to the object of the foundation but it has complete discretion as regards management in the exercise of which it is entitled to give any direction or lay down any rule for facilitating management and appointment of trustees in future and in doing so it is entitled to take into consideration the wishes of the founder only so far as they are confirmable to change the conditions and circumstances and also the past history of the institutions, the previous systems of management and the condition which have grown up since the foundation. The same principles are applicable in regard to the scheme relating to Hindu religious foundation. In Shriparti Prasad Ji Versus Barot Laxmidas reported in XXXIII CWN 352 the Privy Council held that in a case of religious sect and its property to which section 92 CPC, applies the principles to be followed in settling the scheme is that the institutional principles must be respected so that there maynot be interference with its spiritual, ceremonial or ethical code; and body of the worshippers shall have the protection of the court against their property being the subject of abuse, speculation and waste. If there is any danger of possibility of the trust property being wasted a scheme can be framed under a committee of management is to be appointed, supervise the work of the trust or additional trustee may be appointed with the existing trustee, to serve as a check upon them special provisions may be made in the scheme for protection of the trust's fund, subject to such restrictions as maybe most useful for the trust. However, it is not proper to lower the position of the religious head or weaken his spiritual authority. The Calcutta High Court in Srijit Naya Versus Dandiswami reported in AIR 1941 page 618, which was a case of well known shrine of Tarakeswar, considered the respective authorities of the Mahant and the management committee. It was held that

under the general law a Mahant is the head of the institution and he alone has power of management and administration over the whole institution, worship and property and all the officers are to act under his control and directions. However, these powers can be corrected by the court in a scheme framed under section 92 CPC, but only to the extent enacted in the scheme. The claim of the members to the effect that the committee was supreme even over the Mahant was rejected. It was held that the correct position is that the Mahant is the SUPREME HEAD OF THE ENDOWMENT. He is not subordinate to anyone and also the powers of management of the shrine and its properties are with him except those powers which have been taken away from him either in express or by necessary implication by the scheme itself and vested in the committee.

The basic test for framing the scheme will, however, remain that the scheme should be in the interest of the object for which the endowment was created and for protection of the property and also to safeguard the purpose of worshippers etc. in the manner as it had been continued in the past. While framing a scheme the doctrine of cypres can be applied.

It is settled law that a court which has sanctioned a scheme for administration of a religious or charitable trust is competent, from time to time, to very the scheme as the circumstances of the case may require. However, there has been a dispute on the question as to the exercise of this power can be made in which manner. Some cases have laid down that if the power to amend the scheme has been retained in the scheme itself then the said power can be exercised subsequently by the same court. In other cases it was held that if a power has not been retained it cannot be exercised except in a fresh suit under section 92, CPC. This view was taken on reasoning that the suit cannot be said to remain pending for all times. Ina Full Bench Case Madras High Court reported in ILR 51, Madras page 30 Veerangahari Versus. The Advocate General madras. Considering the said entire proposition has been laid down that if in a decree for scheme liberty is given to persons to apply to the court for direction merely to carry out the scheme already framed such reservation of liberty will be ultra vires if the assistance of the court can be given with out offending section 92; but where liberty is given to apply to court for alteration or modification of the scheme such reservation is ultra vires as offending section 92, CPC. The Calcutta, Bombay, Allahabad and Patna High Courts have, however taken an opposite view. The Privy Council itself approved all such directions and schemes in various cases. Allahabad High Court is of the view that there is nothing in section 92, CPC, which makes the reservation of a power of modify the scheme is ultra vires. The power of court to settle a scheme is sufficiently comprehensive including a provision which makes the scheme alterable by the court in future. If the scheme is amended subsequently by the court then the limits laid down by the decree itself, the court really gives effect to his own decree rather than amendment.

The question as to whether an order amending the scheme is appealable or not is a disputed one as there is difference of opinion OF VARIOUS High Court on this question. The earlier view has been that it is appealable and the letter view is that it is only revisable. The Apex Court in AIR 1965 Supreme Court page 231 "Venkatajanki Ramarao Versus Board of Commissioners", has held that an order amending a scheme is a decree within the meaning of section 2(2) CPC, irrespective of the fact whether the power was received originally or not and therefore the appeal was competent.

SUB SECTION (3)

This sub section has been added by the Amending Act of 1976. By this amendment the doctrine of Cypres which was herein before applicable as principle or by judge made law has been given the statutory effect. It lays down that where the original purpose of the trust as whole or in part has been fulfilled or cannot be carried out according to the direction given in the instruments creating trust or where there is no instrument according to the spirit of the trust, where the original purpose of a trust provides use of part only of the property available by virtue of trust or where properties available by virtue of the trust and other property applicable for similar purpose can effectively be used in conjunction with to that end can suitably be made applicable to any other purpose regard being had to the spirit of the trust and its applicability to common purpose or where the original purpose in whole or part with reference to an area which was then ceased to be or has to be ceased as being useless or harmful to the community or under law has ceased to be charitable or has ceased in any other way, the court can provide a suitable and effective method of using the property available by virtue of the trust, regard being had to the spirit of the trust.

The trend of recent law appears to be that the courts have taken upon themselves all the duties of the crown to protect and preserve religious endowment. It is held that it is the primary duty of the court to remove abuses, mis-management mal-administration of the endowment even if the management is carried on under a scheme or even under a statute by a statutory body enacted for that purpose by the State Government. In C.K. Rajan Versus State of Kerala reported in AIR 1994 Kerala page 179, which is a very lengthy Judgment, though in a writ petition under Article 226 of the constitution, the entire law on the subject was considered and it was held that the court as a protector of the religious and charitable endowment has to initiate actions, probe into the matter and set right the abuse by a remedy and action. This is a reserved power vested in the courts to protect the interest of persons who by themselves cannot initiate proceedings and safeguard their interest.

This power can be exercised apart from section 92, CPC, under section 151, CPC, or in a public interest litigation or in a writ petition. It was

accordingly held that existence of section 92, CPC, will not bar the maintainability of a petition in PIL and the court can under its inherent powers set at naught the same.

It may be added for the sake of convenience that after granting the leave the court has jurisdiction to pass an interim order as can be passed in a regular suit including the appointment of Receiver.

By CPC amendment Act of 1976, an important rule as rule 3 B order 23 CPC has been added. It lays down that no agreement of compromise in a representative suit including suit under section 92 CPC can be accepted and the suit cannot be decided by a compromise without the leave of the court. In case the leave is not granted, the agreement or compromise shall be void. Procedure before granting leave has been prescribed in the manner that the court shall before granting leave issue notices to the general public or to such persons who appears to be interested in the suit.

The reasons of this rule appears to be that once a matter relating to public trust has come before the court, it cannot be put to an end by a compromise which may be collusive or detrimental to the trust. It follows the principles of English Law which is as discussed in the beginning that once the matter is reported to the court, the plaintiff need not appear and the matter will be decided by the court as guardian of the trust.

It also follows that in such a matter, if the plaintiffs does not appear, the court should not dismiss the suit in default of the plaintiff but should follow the procedure of issuing general notice as aforesaid.

In the end, I may state that the suit under section 92, CPC, is a technical type of suit subject to various modifications, conditions and restrictions. It appears that all these conditions and restrictions are because of the fact that the judgment in such suit is a 'Judgment in rem' and binds not only the parties but the entire world and therefore, restraints of conditions etc. should be observed carefully and meticulously.

Before parting with I may add that since section 92, CPC does not deal with the private trust I have refrained myself from making any comments in that respect where the principles will be governed by the Trust Act or general law.

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SEC 494 IPC: A NEED FOR AMENDMENT

Abhitosh Pratap Singh*

"Law is not a breeding Omnipotence in the sky. It is born out of social experience and in turn tested by social experience after it is passed".

Justice P.B. Gajendra Gadkar

Section 494: Marrying again during lifetime of husband or wife[1]:

Remember, last time, when under section 494 any accused was convicted. If, I am not off the track I guess you will take your time. Section 494, a dead letter section that has lost its utility by strict and literal interpretation taken by the court of the word "marriage".

Pedantic approach taken towards this section has led to the throttling of justice, and has converted section 494 into a section, merely of academic use. For some reasons what so ever, legislature is not able to keep the law in sync with changed circumstances and social foundations may be this due to lack of "law regulating acumen" or due to the tendency of not acting, until & unless there is much hue and cry.

Marriage, a sacred institution, a social regulator and the very basis of the civilized society which after clothing is the second determining and distinguishing factor, which differentiates between human society and a animal society. Marriage, a recognition of the basic and inevitable human needs and the most sober way to fulfill them, and in this way an important tool to maintain the sanctity and morality of society. The beauty of this bond lies in the fact that it permits and prohibits at the same time.

Any Subversive practice, under the camouflage of progressive change, by which this basic rock bed of the society is being shattered, is not only a threat to this institution but also to whole society. After using several words to show the importance and beauty of this institution, I am constrained to say that owing to the cumulative effect of several factors, it is now at the brink of being converted into a defunct institution. Attitude of judiciary has been grossly apathetic towards the practices, which under the garb of progressive changes are in fact retrogressive.

In cases[2] of living together, court by not paying heed to the want of this bond, has left this institution at the mercy of perpetrators. In the cases of bigamous marriages, the height of pedantry, shown by the court has already foreboded against this institution. Even though, it is true that neither the courts nor legislature can alone be blamed, both are equally liable. For, firstly the language of section 494 does not provide much scope for interpretation and whatever scope it provides has been frittered away by courts. Combined impact of both these factors is the "moral holiday" of unlimited period, which every one is trying to utilize.

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Section 494, punishes the offence of what is known in English law as bigamy but that term is clearly inapplicable to offence here described for, it assumes a second marriage necessarily illegal but which having regard to the customs of different communities, is not necessarily the case. The English law against Bigamy is therefore wholly inapplicable to a non-Christian.

This section was inserted to elevate the downtrodden position of the Indian women, who with in the four corners had to fight with their rivals i.e. co wives, which led to make their plight more pathetic. For a Hindu male it was not applicable till Hindu Marriage Act, 1955 came into force, because up to that time the second marriage was not void, according to Hindu Personal laws. It was only after coming of Hindu Marriage Act into force and coming into force of its section 5 and section 17, that section 494 of IPC became applicable to Hindu male.

Section 5(i)[3] of the Hindu Marriage Act prohibits bigamy. Section 11[4] makes a bigamous. Marriage void and Section 17[5] makes it a penal offence for both Hindu males and females under Sections 494 IPC. The offence of bigamy is committed by a Hindu marrying again during the life time of his or her spouse provided that the first marriage is not null and void. If the subsisting marriage is void able then also offence of bigamy is committed if ceremonies of marriage were performed. The solemnization of marriage is proved by showing that the marriage was performed with the proper and essential rites and ceremonies of marriage prescribed under the law or custom applicable to parties. A prosecution for bigamy will fail if what is established is that some sorts of ceremonies were performed. The general rule as enshrined in the maxims *"generalia specialibus non derogant"* and *"generalibus specialie derogant"* is that a special law prevails over the general law. The penal code, 1860 describes in the preamble there to as the general penal code for India" also says in sections, "nothing in this Act shall affect the provisions of any special or local law".

Section 17 of the Hindu Marriage Act also provides for punishment for bigamy by referring to section 494 of the penal code.

If we see, the cases of section 494 that have come before the Supreme Court it can be easily borne out that in most of the cases, prosecution has failed to prove the performances of all the ceremonies in second marriage. For the conviction under section 494, the second marriage must be a valid one. Though, this is apparently contradictory, as in the presence of first subsisting marriage, how the second marriage is valid. After the perusal of case law on this topic it becomes clear and established that second marriage is required to be valid according to the ceremonies performed. Though it may be void because of being bigamous. Here valid means but for the bigamous, marriage would have been valid otherwise.[6]

Now, have a look over the case laws in which the evidentiary aspects

of such cases have come out. In several cases[7] Supreme Court has held that for the conviction under section 494, the observance of the necessary ceremonies must be affirmatively proved, a mere presumption would not suffice. In four Supreme Court Cases namely Bharaushankar's[8] case Kanwalram's[9] case, Priyabala's[10] case, and Lingari Obulamma's[11] case, the prosecution failed as it was not proved that essential ceremonies necessary for the solemnization of a marriage were performed even though there was sufficient evidence to show that a ceremony was proved.

In Laxmi Devi Vs. Satya Narayan [1994(5) JT (SC) 317 court held that when there is no evidence that two essential ceremonies *honam* and *saptapadi* were performed at the time when respondent stated to have married, the *factum* of marriage can not be proved.

To prove the performance of essential ceremonies has become a Herculean task for prosecution, as the presumption of marriage, which is available in the cases of normal marriage, is not available in bigamous and it cannot be proved by opinion of a person, owing to the proviso to section 50 of Indian Evidence Act[12].

In all the above-mentioned cases these points were discussed in detail and it was found that the performances of ceremonies cannot be only proved by circumstantial evidence but for this the positive proof of observance and performance of forms and ceremonies is required.

In Priya Balas[13] case the Supreme Court held that mere admission made by an accused that he contracted a second marriage was not enough, and that the prosecution should establish that the second marriage was solemnized.

Keeping in mind the practical difficulties, which are being confronted by prosecution to prove the performance of ceremonies in second marriage, changed social set-up, which is providing a persistent threat to institution of marriage, and also a reasonable appreciation of psychological aspects of a perpetrator, which compels him to perform the bigamous marriage surreptitiously as a clandestine observance ruling out all the possibilities of direct evidence, the need of the hour is to consider deliberately this issue and to remold the relevant law accordingly.

The law of the land depicts the need of the society. The need for amendment is not only confined to section 494 but also to several other sections related to marriage. Malimath Committee[14] on criminal justice reforms also took this point into consideration and committee observed that for proving bigamy, it is to be established that the second marriage was performed in accordance with the customary rites of either parties under the personal laws, which is not easy to prove. The Committee felt that evidence regarding a man and woman living together for a reasonably long period should be sufficient to draw the presumption that marriage was performed

according to the customary rites of the parties therefore the committee recommended that Section 494 of IPC be suitably amended to the effect that if the man and woman are found living together for a reasonably long period should be sufficient to draw the presumption that marriage was performed according to the customary rites of the parties.

But even by implementing this suggestion only those cases can be tackled where the couple has resided together for a long period. It will be proved as innocuous for the cases where the second marriage has been performed not too long back. And the couple has not resided for a long period. This shows that the matter is not as simple as it seems to be; therefore this area requires a careful contemplation. Present law provides a clever escape way to the perpetrators; which not only is making the mockery of justice but also is blurring the society. After considering all pros and cons, the urgency of the amendment becomes apparent the reason is crystal clear, still even after much vociferation over women emancipation. When it comes to marriage the position has not changed much being women at suffering end. To check philander practices, the legislature has to remold the laws and try to make then more serving and more strict. Otherwise we would be leading towards the society, where there will be no bonds but relationships sans commitment, no institution of marriage, but an optional ceremonial celebration of ephemeral relationships... Is this the form of society, for which we are looking for ward? Will this change would be in the interest of society.... A change, which will take the society back to that point from which our civilization has started.

END NOTE

[1] **Section 494:** Whoever, having a husband or wife living, marries in any case in which such marriage is void shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. **Exception** This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.

[2] Payal Sharma Vs. Superintendent, Nariniketan; Agra 2001(3) AWC 1778

[3] **Section 5:** Conditions for a Hindu Marriage. A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely (i) neither party has a spouse living at the time of the marriage.

[4] **Section 11:** Void Marriages Any marriage solemnized **after** the commencement of this Act shall be null and void and may, on a petition presented by **either** party thereto [against the other party], be so declared by a decree of nullity if it contravenes any one of the conditions specified

in clauses (i), (iv) and (v) of Section 5.

[5] **Punishment of bigamy** Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living; and the provisions of Secs. 494 and 495 of the Indian Penal Code, 1860 (Act 45 of 1860) shall apply accordingly.

[6] Smt. Rajkumari Vs. Smt. Kalawati; 1992 Cr.L.J. 1373, S.K. Kumari Vs. State of West Bengal 1992 Cr.L.J. 1502

[7] Bharaushankar Lokhande Vs. State of Maharashtra; AIR 1965 SC 1564: Kanwalram Vs. H.P. Administration; 1966 Cr.L.J. 472: Priyabala Ghosh Vs. Suresh Chandra Ghosh; AIR 1971 SC 1153: Gopal Lal Vs. State of Rajasthan; AIR 1979 SC 713: Muthumal Vs. Maruthathai; 1981 Cr.L.J. 833: In all these cases it was held that for the conviction under section 494, the observance of the necessary ceremonies must be affirmatively proved. This list is illustrative otherwise the list can be too long.

[8] AIR 1965 SC 1564

[9] 1966 Cr.L.J. 472

[10] AIR 1971 SC 1153

[11] Lingari Obulamma Vs. Venkata Reddy; AIR 1979 SC 848

[12] Section 50: Opinion on relationship, when relevant When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, or any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact:

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, 1869 (4 of 1869) or in prosecutions under section 494, 497 or 498 of the Indian Penal Code (45 of 1860)

[13] Supra 10

[14] Malimath Committee Report on Criminal Justice Reforms, 2003

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और अब है
सी०पी०सी० कैप्सूल

मुख्तार अहमद एल०एल०एम०
अपर जिला जज, अलीगढ़।

एक में पार्टी सूट की, दो में फ्रेमिंग सूट।
तीजे में एजेन्ट व प्लीडर, चार में इन्स्टीट्यूट।
चार में इन्स्टीट्यूट, पाँच में सर्विस होगी।
सात में होगा प्लेन्ट लिखना छः में प्लीडिंग होगी।
कह अहमद कविराय ब्यान तहरीरी लाना।
नौ में हाजिर नहीं हुए तो दस में ब्यान अदालत लेगी।।

ग्यारह में जो खोज सका इन्टर में एडमिट होता है।
तेरह में कागज दाखिल कर वापस लेकर सौंपा है।
चौदह में तनकी बनवाकर पंद्रह में पहली सुनवाई।
सोलह गवाह तलब न हुए तो जेल में जाकर रोता है।
सत्रह में एडजर्न कराकर एक०एच० करो अठारह में।
उन्नीस में एफीडेविट है, बीस में जजमेन्ट होता है।।

इजराय कराकर इक्किस में, बाइस में मौत दिखाने की।
तेईस दावा वापिस लेकर चौबिस जमा कराने की।
चौबिस जमा कराने की तो कॉस्ट जमानत पच्चिस में।
सताइस सरकार के दावे वाले कमीशन छब्बिस में।
कह अट्ठाईस पर नहीं सेना जायेगी।
उन्तीस में पूंजी देकर तीस में फर्म चली जायेगी।।

इकतिस के ट्रस्ट में बत्तिस माइनर आय।
तैंतिस में मुफलिस करे चौंतिस रहन रखाय।
चौंतिस रहन रखाय पैंतिस में इन्टर प्लीडिंग।
छत्तिस खर्चा खास सैंतिस समरी प्रोसीडिंग।
कह अड़तिस कविराय अटैच जजमेन्ट से पहले।
उन्तालिस में स्टे लेकर चालिस को रिसीविंग।।

इकतालिस में फर्स्ट अपीलें, सैकिण्ड है ब्यालिस में।
तैंतालिस आर्डर की अपीलें, मुफलिस है चौवालिस में।
पैंतालिस कौंसिल पैंतालिस में देखते जाओ।
छयालिस में रेफर करके सैंतालिस में रिव्यू कराओ।
अड़तालिस में मिस्ली खाओ, उनन्चास में चार्टर्ड हाई।
फिफ्टी वन में पी०एस०सी०सी० फिफ्टी में एससीसी आई।।

कह अहमद कविराय बात मेरी तुम मानो।

कविता को लो रट सी०पी०सी० को पहचानो।।

SIGNIFICANCE OF 'MORAL RIGHTS' OF THE AUTHOR UNDER THE CIVIL LAW AND COMMON LAW SYSTEM. HOW FAR INDIAN LAW REFLECTS THE PROTECTION OF 'MORAL LAW'?

JITESH BAHADUR SRIVASTAVA*

(I) Introduction.

The doctrine of copyright is not an economic doctrine alone; along with the economic rights of the author, the other thing that is to be protected is the reputation and the honour of the author in his work .Right accorded to authors can be classified under the headings of "moral rights" and "economic rights". Moral rights are those which relate to protection of the **personality of the author**[1] and the **integrity of his work**[2] and similar matters. On the other hand economic rights are those relating to control over the commercial or industrial exploitation of the works, and other means of use of the work , but do not by themselves involve prejudice to the reputation of the author or the integrity of the work.

While the extent to which this might be protected is dependent on each legal system, the convention is that every legal system which includes the copyright law, gives to the author not only the economic right but also the moral rights for his work. This flows from the 'romantic concept' of copyright protection being a derivation of the cultural value of authorship[3].

In France, home country to this doctrine, these rights are known as **le droit moral.** The singular number under French grammar connotes an indivisible package of rights, as distinguished from the plural "moral rights", reflective of the current common law concept of divisibility[4]. This in itself reflects the difference in significance of moral rights in civil law and common law countries. The following are the various rights that can be grouped together under this rubric.

(I) Attribution right (identification right or Paternity right): In French law they are called droit au respect du nom; also, droit a la paternite, it is the right of the author to be known as the author of his work or to prevent others from falsely attributing to him the authorship of a work that he has not in fact written or to prevent others from being named as the author of his work or to publish

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1. J.A.L.Starling, World Copyright Law, II E.d., Sweet & Maxwell, 2003, pg. 336
2. ibid
3. W.R.Cornish & David Llewelyn, Intellectual Property:Patents,Copyright, Trademarks and Allied Rights, 5th ed.(London: Sweet and Maxwell, 2003)p. 452
4. David Nimmer and Melville Nimmer, Nimmer on Copyright vol. 3 (New York: Lexis Publishing, 2003) page 8D 9

a work anonymously or pseudonymously, as well as the right to change his mind at a later date and claim authorship under his own name, or to prevent others from using the work or the authors name in such a way as to reflect adversely on his professional standing[5]. This right is of particular relevance where the author has assigned all his economic rights to the publisher or other party. In some laws, as in France, the false attribution of work to an author is viewed as a breach of the paternity right. Under the UK Act, however, a person's right not to have his work falsely attributed to him is separately recognised by a specific provision (Section 84)

(II) Integrity Right: In French law it is called droit au respect de l'oeuvre. This right may be regarded as the most important of the moral rights. This right of authors prevent others from making deforming changes in his work. The question whether the treatment of a work is derogatory to the reputation of the author , or in some way degrades the work as conceived by its creator, is largely a matter of opinion, and therefore more liable to be the subject of dispute. In addition, courts have had to face the question as to the opinion that should be taken in deciding whether the treatment of a work is derogatory. Should it be the author's opinion or of other persons?

Integrity right may come into question in connection with any exploitation of a work, and while considering any infringement of an economic right, the practitioner needs to ask whether the reproduction, performance, etc., of which complaint is made is also an infringement of the moral right of integrity.

Destruction of Works: - Law is silent on the point that if an artistic work is legitimately acquired by a purchaser, who then destroys the material, objects that has been acquired? Is destruction in this sense a derogatory treatment of the work?

One argument is that destruction is the ultimate form of mutilation, an act covered by Article 6bis of the Berne Convention. Second argument is that if the work has disappeared from sight, the author's reputation cannot be damaged by something that the public cannot perceive. The Berne Convention gives no specific guidance on the point, and the provisions of the national laws fall broadly into three categories in this respect

1. those which specifically include within the ambit of the moral right the author's right to prevent destruction (as is in the case of US Law, for certain works of visual art, under the applicable statutory conditions);
2. those which, while not containing a general provision on the point, have provided remedies in destruction cases before the courts (as in the case of France)
3. those where the legislation is silent on the point, and there is as yet no developed case law (as in UK)

5. This last right combines aspects of both the attribution right and integrity rights.

(III) Divulgation Right: In French law it is called droit de divulgation. It means right of author to publish a work, or to withhold it from dissemination. It is the author's right to decide when, where and in what form the work will be divulged to any other person or persons. In some laws divulgation right is regarded as embraced by the economic right of authorising first publication of a work, but the divulgation right, as developed in French and other civil law jurisdictions has a wider connotation, and is not related merely to the distribution of tangible copies. Divulgation right is not mentioned in Article 6bis of the Berne convention.

(IV) Retraction Right: In French law it is called droit de retrait; also, droit de repebtir. This means the authors right to withdraw a published work from distribution if it no longer represents the views of the author. In view of the continued interest, the author may wish to withdraw from circulation copies of the pervious book. This will not be possible in many cases, but where, for instance a publisher is still reproducing and selling the old work, the moral rights of retraction gives the author the right to prevent further reproduction and sales. However in such circumstances the author must indemnify the publisher, and usually must give first offer of the revised edition to the same publisher. The retraction right is recognised in some of the civil law system but is not mentioned in the Berne convention.

Research Methodology.

The present paper is essentially based on doctrinal studies. All the sources of data are secondary. However for the purpose of this paper they are analytically categorized to draw conclusions. The mode of citation is uniform. The attempt of researcher is to analyze law in various jurisdictions and to compare the Indian position. This research paper seeks to answer following question.

1. What is the need of 'moral rights'?
2. What is the scope of 'moral rights'?
3. Internet and Moral rights?
4. Is amendment/s required in Indian Law on 'moral rights'?

(II) Development of Moral Rights:

Universal Declaration of Human Rights declares under Article 27(2), "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

The personality aspect of authors' rights took shape in France and Germany in the course of the nineteenth century. However moral rights are not as alien to the common law as is often asserted. The British Statute of Anne 1709, the first copyright law, recognised for the first time a right of the author to control

the publishing and printing of his work and the interest of the author himself, as well as his assigns, to be protected against piracy. However later on they were rejected both in US and UK.

As can be gathered from the discussion above, moral rights in France are based on naturalistic approach and jurisprudential development. However though the concept of 'moral rights' is not unfamiliar to common law counties, they don't have jurisprudential value and they are not considered as natural rights. It was only after passing of Berne Convention that the common law countries adopted 'moral rights' in their respective legislation.

When it was proposed in 1928 that moral rights should be incorporated in the Berne Convention, there was general support from the civil law country but it was not similar from the common law countries. Nevertheless Article 6bis of the Convention was adopted, recognising the moral rights of the author to be identified as such in relation to the work (paternity right), and the authors right to preserve the integrity of the work(integrity right)[6].

In the common law countries it was argued that specific statutory recognition to the moral rights was unnecessary because they were covered under the headings such as contract and defamation. In particular, the statutory recognition of the moral rights was one of the blocks in the way of US adherence to the Berne Convention. The reluctance of the common law countries in implementing statutory recognition of moral rights is reflected in Article 9(1) of the TRIPS Agreement, which, while imposing on the members the obligation to comply with the substantive provisions of the Berne Convention excludes Article 6bis(the moral rights provision) in this respect[7]. However of late there is a change in the common law countries towards the recognition of the moral rights in the positive direction. United Kingdom has

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6. Article 6bis states "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation. The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.
The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed."

7. Article 9(1) state "Members shall comply with Articles 1-21 and the Appendix of the Berne Convention (1971). However, members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived there from."

introduced Copyright, Design and Patents Act, 1988. United States has also introduced changes in its Copyright Law through "Visual Artists Rights Act" of 1990. Most significantly the WIPO Copyright Treaty 1996[8] obliges Contracting Parties to comply with the substantive provisions of the Berne Convention but unlike the TRIPS agreement it does not exclude Article 6bis of the Berne Convention.

(III) Need for Moral Rights:

Recognition of 'moral rights' is needed for at least three reasons:

1 RIGHTS AND REWARD: The right of identification is critical to authors' livelihoods, especially in the early stages of their careers. This right has a direct economic impact. To put it negatively: a distributed work which is not an accurate reflection of an author's skill will discourage potential purchasers from purchasing that work.

2. RESPONSIBILITY AND AUTHENTICITY: With the right to identification as author of a work comes personal responsibility for its content. This is important for the society, because the society must know where the particular thing is coming from. There must be authenticity for the work. For its own benefit society should know whose work it is and is entitled to have the work in original form free from dilution.

3. EXTENSION OF PERSONALITY OF THE AUTHOR: This according to me is the most important need for the recognition of moral rights. Moral rights are the extension of author's personality and thus author of a particular work has full right to protect his personality in every way. Moreover for some authors, the non pecuniary reward, such as recognition and hope for immortality through preservation of the work, may be more important than immediate material gain.

(IV) Significance of Moral Right's in Civil Law and Common Law countries.

There is conceptual difference between the common law and civil law countries with regard to 'moral rights. It seems that generally in common law countries, a work of creation is in essence a commodity, to be freely traded and under the control of the person or corporation which holds title to it. On the other hand in civil law countries they are considered to be extension of author's personality and are thus considered inalienable. In fact the phrase 'moral right' is itself a very poor translation of le droit moral or droits moraux. However it is important to keep in mind, that while it is true to say that the world can be generally divided into countries of common law tradition and those of civil law tradition, in this area of law the very considerable differences existing among the national systems make it difficult to draw a distinct and

8. It states "contracting Parties shall apply mutatis mutandi the provisions of Article 2 to 6 of the Berne Convention in respect of the protection provided for in this Treaty".

consistent line between the two groups. For e.g. on the common law side one must distinguish between the UK system and the US system. While the two have common roots, the fact that the UK was a founder member of the Berne Convention in 1886 and has participated actively in every succeeding revision conference, while the USA remained outside the Union until recently, means that the UK and US approaches differ significantly. However in general it is a reality that the significance of 'moral rights' in civil law countries is much more then in 'common law' countries. When moral rights and economic rights clash, the moral right, in the civil law jurisdiction is likely to prevail[9].

To understand the significance of moral rights it is better to understand the legal framework of common law and civil law countries which will give the accurate picture. For this purpose researcher will deal with the law of France, Germany, United States of America and of United Kingdom.

(A) Moral Rights of Authors under various laws:

Before dealing with the law of these countries it is important to note that in civil law countries moral right and economic rights of the author are contained in one chapter while in civil law counties they are contained in different chapters[10]. This shows the common law countries consider moral rights and economic rights to be two different rights and not the part of same right of the author.

(B) Beneficiaries.

Moral rights may be claimed in France by all authors. Under German law author enjoys protection with respect to all their works, irrespective of date and place of publication of the work. Under United Kingdom apart from the object to false attribution, the moral rights can only be claimed by authors of copyright work directors of copyright films[11]. Under the US law only Authors of works of visual art [painting, drawing, print, sculpture or a photograph made only for exhibition, produced in a signed and numbered edition of 200 copies or fewer] are given moral rights under the Act. 'Works made for hire' are excluded in US law.

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9. Supra 1, pg.339

10. In France they are contained under article L.111-1 of the Law on Literary and Artistic Property 1957. in Germany they are contained under different Sections of the Act(i.e. Section 2 for the moral rights and Section 3 for the economic right, Although there is textual division in the description of the rights, but because of the monistic theory which lies at the basis of the German Law, the moral and economic rights are intertwined with each other in their application and exercise. Whereas in the United Kingdom's Copyright, Designs and Patents Act 1988, copyright is granted by provisions of Part I, Chapter I of the Act, whereas moral rights are granted by the provisions of Part I, Chapter IV.

11. Thus if a particular work is not protected by copyright for any reason or if the copyright has expired then no moral rights can be claimed.

Thus the common law countries have been very selective in providing moral rights. This is because as already mentioned in civil law moral rights are considered to be inalienable.

(C) Attribution right.

In France this right is provided under article L.121-1(The right of respect for name, qualification and for the work). The right of respect (article L.121-1) embraces two rights, namely the paternity right (respect for name) and the integrity right (respect for work). In addition, the right embraces respect of qualification. Respect for qualification apparently refers to the right of indication of the author's professional status[12]. Similarly, the right to protection against false attribution of work is covered by the moral right. The right of respect, with its three aspects, is stated to be "perpetual, inalienable, and imprescriptible". The right is transmissible to the heirs of the author, and the exercise of the right can be granted to a third party by testamentary disposition. The right being inalienable cannot be waived, thought the court permit the author to forego exercise of the right in particular circumstances e.g. where the author specifically agree in advance to certain use. Another noticeable feature is that the reference in the Berne Convention to any derogatory action "which would be prejudicial to (the author's) honor or reputation" does not appear in the French Code. The practical effect of this is that the court will pay heed in determining whether the moral right has been infringed or not and the author does not have the burden of proving prejudice to honour or reputation, but only that the action complained of is in his view, derogatory(however such assessment must be accepted by the court).

In Germany like in France this right has both positive (allowing the author to claim authorship) and negative aspects (ability to take action). However there is some uncertainty whether this right can be waived[13].

In UK Section 77 of the act provides that the author of a copyright literary, dramatic, musical or artistic work, and the director of a copyright film, has the right to be identified as the author or director of the work. However this right is subject to two limitations, first, the right is exercisable only in certain circumstances. Secondly, the right is not infringed unless it has been asserted in accordance with Section 78.

The US law does not provide a comprehensive paternity right because the general rule in US is that an author who sells or licenses her work does not have an inherent right to be credited as author of the work if there is no contractual provision in this regard. Moreover the general rule in US has been modified quite a bit after the rule of reverse passing off was in use for the first time. This rule provides attribution right in a round about route.

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12. For e.g. author's moral right will be infringed by describing him as "co-author" of a work, when he is in fact the sole author.
13. Supra 1, pg. 347

Here in case a work is published without the author's name then it is to be held that there has been reverse passing off which is basically the unauthorized removal or obliteration of the original trademark on goods produced by another before the resale of these goods. Similar arguments are also used in cases where there is false attribution to the author of a product. In those cases defamation and unfair competition[14] are the reasons given for it not being allowed.

(D) Integrity right:

French law of integrity has been discussed in the above paragraph. A important case in this regard is of **Bernard Buffet v. Fersing**[15] artist Bernard Buffet gained damages from a buyer who had disassembled one of his works. Buffet executed a painting on six panels of a single refrigerator, signing only one panel. The court held that the single signature was evidence of his intention that the work be understood as a whole; he was thus able to recover damages for violation of his integrity right when the owner of the refrigerator sold each panel separately. Thus even after parting with the economic rights Bernard Buffet still enjoyed 'moral rights'.

In Germany, unlike France, test for assessing infringement **requires proof of injury to honour or reputation.** Article 39(1) provides that in the absence of contrary agreement, a licensee may not alter the work, or its title or authors description. Furthermore article 39(2) provides that a modification to the work and its title is permissible where the author could not refuse them in good faith. Thus there can be a contractual agreement to waive the moral rights in these respects.

In UK Section 80 of the Act provides that the author of a copyright literary, dramatic, musical or artistic work, and the director of a copyright film, has the right in the circumstances mentioned in this Section not to have his work subjected to derogatory treatment, but this right is subject to Sections definition of "derogatory" and "treatment" and covers only use in specified circumstances. There are certain other exceptions provided by Section 81.

In 1993, the British singer George Michael was granted a pre-trial injunction by the Court of Appeal in London against release of the Bad Boys Mega mix (a medley of snippets of various Wham! songs), with the court ruling that was capable of being distortion or mutilation amounting to derogatory treatment.

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14. Jaeger v American International Pictures, Inc. (1971, SD NY) 330 F Supp 274, 169 USPQ 668 The court held here-"Whether or not there was any counterpart in American law of "moral right" of artist assertedly recognized on European continent, there was enough in plaintiff's allegations to suggest that he may yet be able to prove a charge of unfair competition where there was otherwise tortious misbehavior in distribution to public of film that bore his name but at same time severely garbled, distorted, or mutilated his work."

15. (LJ 1023 n. 1 (1976))

In the US law, full reading of Section 106A shows that the author has the ability to grant the right to make the changes in the work including the changes that amount to a distortion or truncation to an assignee or licensee. In the event of such a grant, the author could not thereafter complain about those changes. But in case such a right is reserved against the licensee and assignee, then it can be exercised against them[16].

The significance of moral rights in civil and common law countries can be best understood in the case of **Soc. Le Chant de Monde v. Soc. Fox Europe et Soc. Fox Americane Twentieth Century, 1 Gazette du Palais**[17]. A French court prohibited use of a score by Dmitri Shostakovich in a US anti-Soviet film. However the same case was filed in the American court **'Shostakovich v Twentieth Century Fox Film Corp**[18], the composer's claim was rejected courts on the basis that the right to artistic integrity as argued by the plaintiff was not found in US law. Court said, "in the absence of any clear showing of the infliction of a wilful injury or of any invasion of a moral right, this court should not consider granting the drastic relief asked ....."

(E) Right of divulgation : The French code and German code provides protection against unauthorised divulgation by virtue of moral rights. There are no such specific rights in United Kingdom. In United States the Supreme Court has held that "[u]nder ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use."[19] As Nimmer points out, "it is interesting to note that this moral right has flown across the ocean, adapted to the U.S. legal climate, and now comfortably makes its nest on these shores."[20]

(F) Retraction right: French code provides that, even where the author has ceded the right of exploitation and even after the publication of the work, the author enjoys the right of reconsideration or withdrawal in so far as the person to whom the exploitation right has been ceded.

This right is also provided in the German code[21]. There are no such right in US or UK.

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16. But when the license is silent with respect to this then the principle that is used to determine is that unauthorized changes in the work that are so extensive as to impair the integrity of the original work constitute copyright infringement. This right is therefore not affected when commercials are inserted in a movie and similar incidents. The assignee or licensee will not be prevented from making such minimal changes as may be necessary to present the work in a different and authorized medium or to possibly update and modernize the work. David Nimmer and Melville Nimmer, Nimmer on Copyright vol. 3 (New York: Lexis Publishing, 2003) page 8D 50
17. 191 (13 Jan 1953), aff'd, D.A. Jur. 16, 80 Cour d'appel Paris
18. 196 Misc. 67, 80 N.Y.S.2d 575 (Sup. Ct. 1948) aff'd 275 App. Div. 695, 87 N.Y.S.2d 430 (1st Dept 1949)
19. Harper & Row, Publisher, Inc. v. Nation Enters., 471 U.S. 539, 555 (1985), cited in 'David Nimmer and Melville Nimmer, Nimmer on Copyright vol. 3 (New York: Lexis Publishing, 2003) page 8D 58'
20. supra
21. Although under the French code this right is provided in different chapter then being under the chapter of moral rights, but it is considered to be a type of moral right.

(G) Term of moral rights: Berne Convention settled for a minimum period of the life of the author. In France the moral rights of the author are, as has been stated perpetual. In Germany all rights to the author expires at the same time i.e. 70 years after the death of the author. In United Kingdom except for the attribution right other moral rights in the Act continues until the copyright subsists in the Act (sec 86(1)). The right to object to false attribution continues until 20 tears after the authors death (Section 86(2)). In United States, Moral rights granted under the Act in respect of work created after the Acts coming into force shall endure for a term consisting of the life of the author.

(H) Assignability and Waiver: Article 6bis of the Berne Convention does not expressly states whether moral rights are assignable. However opening words of this article states, "Independently of the author's economic rights and even after the transfer of the said right..' thus on review can be that whereas economic rights are assignable, moral rights are not; an alternative view can be that an assignment of economic rights does not, by implication, carry with it an assignment of the moral rights and that an express assignment of moral rights is necessary to be effective. Looking at the time in which this convention came into existence it seems that the matter has been left deliberately vague because of the political reasons. However, the essentially personal nature of the droit moral strongly suggests that it should be inalienable; the author should alone determine whether or not he wishes to exercise the rights. In civil law countries they are considered to be inalienable and thus can't be waived though they can be transferred, but in common law countries they can be waived. This again reflects the difference of significance of Moral Rights in civil and common law countries.

(I) Computer Programs: French code provides that unless provided in the stipulation, the author of a computer program cannot oppose the adaptation of the program within the light of the right which he has ceded, nor can he exercise his right of reconsideration or withdrawal.

In German code all moral rights under the code will be applicable to the author of the computer programme. In the common law countries authors of computer program have no moral rights in the computer program which they create.

(V) Internet and moral rights.

The ease with which works that are stored digitally can be reproduced, disseminated, manipulated, adapted and so on means that there is enormous scope for breach of moral rights on the Internet. Any attempt to find the originator will be futile because of the number of loops the message had been though. There are at least four ways in which this situation might be resolved. Firstly, the present laws could be rigorously enforced. To do this would involve an enormous extension of government surveillance of, and interference with, the activities of large numbers of its citizens. Secondly, rather than increasing the policing of the law in such a way, the penalties for

breaching the law could be substantially increased , in the hope that the fear of the consequences of being caught, however unlikely, would deter potential law-breakers. Thirdly, the channels for the transmission of information could be more tightly controlled, with a kind of centralised "clearing-house" through which all messages would have to pass, where they could be checked for legality. Finally, the law could be altered to decriminalise unauthorised exchange of otherwise legal information.

(VI) Indian position on Moral Rights.

A number of amendments to the Indian Copyright Act 1957 were affected in 1983 to avail benefits arising from the revision of Berne Convention and Universal Copyright Convention to which India is an adherent. The Indian Copyright Act deals with moral rights of the author in Section 57[22]. These are:

- The right to claim authorship of a published or exhibited works (the right of paternity).
- The right to prevent alteration and other actions that may damage the author's honour or reputation (the right of integrity).

These rights remain with the author even after the transfer of copyright and the protection lasts during the whole of the copyright term. If the author desires to transfer these rights also he can do so specifically in writing in the deed of assignment. The Section also provides an exception to the rule that after an author has parted with his rights in favour of a publisher or other person, the latter alone is entitled to sue for infringement, the author retains the special rights even after the assignment of the copyright. The principle underlying this Section is that damage to the reputation of an author is something apart from infringement of the work itself.

Adaptations of computer programmes are not subject to the moral rights regime. The author of a computer programme does not have the right to restrain or claim damages when the making of copies or adaptation is done-

1) in order to utilize the computer programme for the purpose for which it was supplied. 2) To make backup copies as a temporary protection against loss,

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22. "Author's special rights:- (1) Independently of the author's copyright and even after the assignment either wholly or partially of the said copyright, the author of a work shall have the right to claim the authorship of the work as well as the right to restrain, or claim damages in respect of,
(a) any distortion, mutilation or other modification of the said work; or
(b) any other action in relation to the said work which would be prejudicial to his honour or reputation.
(2) The right conferred upon an author of a work by sub-Section (1), other than the right to claim authorship of the work, may be exercised by the legal representative of the author."

destruction or damage in order only to utilize the computer programme for purpose for which it was supplied. This interpretation is gathered by a combined reading of Section 52 and Section 57 of the Copyright Act, 1957[23]

Mannu Bhandari v. Kala Vikas Pictures (P) Ltd.[24]

The defendant had produced the motion picture Samay Ki Dhara under assignment of filming rights of the plaintiff's novel Aap Ka Bunty. The plaintiff claimed a special reputation for her novel and submitted that her image would be lowered down if the distorted version of her novel would be allowed to be presented through the film and thus, sought permanent injunction against its screening and exhibition. The author's objections were:

(1) There was a change of title;

(2) some characters and dialogues had been changed/modified which were not present in the novel; and

(3) the end of the film was different from that of the novel.

The Court held, "(It) does not sit as a sentinel of public morals. It cannot impose its views on sex or its depictions in the works of art. Some dialogues have to be deleted from the film as they distorted the characters and thus cannot be described as necessary changes for the change in the medium i.e. from literary to audio-visual. Another change had to be made in the end of the film. Regarding title, the name Aap Ka Bunty should find a place in the title of the film."[25]

Thus, the Court upheld the moral rights of the author and the decision of the Court vindicated the view that the film producer cannot make any unnecessary changes in the original work of the author without his or her permission.

K.P.M. Sundhram v. Rattan Prakashan Mandir[26]

The plaintiff and his co-authors entered into an agreement with the defendant giving them sole and exclusive licence to print and publish their works. The plaintiffs claimed that the defendants mutilated and distorted the original works by publishing various books in modified form. The defendants admitted the modifications made. The plaintiffs revoked the agreement. The Court held, "With the revocation of agreement by the plaintiffs, no right was left with the defendants to continue to publish and sell the works."[27]

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23. Dr. B.L. Wadhera, Law relating to Patents, Trademarks, Copyrights, Designs and Geographical Indicatons, 3rd Edition, (Allahabad: Universal Law Publishing Co., 2004) Page 353
24. AIR 1987 Del 13
25. ibid
26. AIR 1983 Del 461
27. ibid

Interim injunction was also granted. Therefore, the moral rights remain with the author and are enforceable even if all the economic rights have been licensed/assigned.

Amarnath Sehgal v. Union of India[29]

The work in question was a mural in the public office building in Delhi. In July 1957, the government of India invited Amarnath Sehgal to create a mural that would span the entire wall of the foyer of Vigyan Bhawan, an important government building used to host international conferences. Amarnath Sehgal agreed, and by 1962 he had completed a 140 feet by 40 feet bronze mural depicting rural and modern India." When the building got demolished, the mural was shifted elsewhere and in the process it was damaged. The government of India had to give instruction to repair the damaged part without affecting the integrity of the mural. The court observed that the moral rights cannot be transferred and thus the artist Amarnath Sehgal could prevent the mutilation of mural even after selling the same to the government. The court opined: "The mural, whatever be its form today, is too precious to be reduced to scrap and languish in the warehouse of the Government of India. It is only the plaintiff who has a right to recreate his work and, therefore, has a right to receive ...the broken down mural. Plaintiff also has a right to be compensated for loss of reputation, honour and mental injury due to the offending acts of the defendants.[29a]" The court observed "...various declarations by the international community in the conventions noted above, lift the moral rights in the works of Art if the same acquire the status of cultural heritage of a nation. India is a signatory to the conventions and it would be the obligation of the State to honour its declarations....There would therefore be urgent need to interpret Section 57 of the Copyright Act, 1957 in its wider amplitude to include destruction of a work of art being the extreme form of mutilation, since by reducing the volume of the author's creative corpus it affects his reputation prejudicially as being actionable under the said Section. Further, in relation to the work of an author, subject to the work attaining the status of a modern national treasure, the right would include an action to protect the integrity of the work in relation to the cultural heritage of a nation.[30a]" With this explanation the court freed the moral rights doctrine from the confines of mere statutorily interpretation.

Similarly, there is a catena of case-law in support of the author's moral rights. The Indian courts have been sensitive towards the moral rights of authors and the abovementioned cases buttress this fact.

(VII) Conclusion

Moral rights apart from protecting interest of an individual author in

28. 97(2002)DLT439, 2002(63)DRJ558
29. ibid
30. ibid

maintaining their standing and reputation are closely linked to public interest in maintenance of historical truth and cultural knowledge. The protection which law offers is thus not the protection of the artist or author alone. A very important development with regard to moral right has taken place in Japanese Copyright Law. Japanese law gives right of divulgation, attribution right and right to integrity[31]. With the amendments made in 2002 these rights are considered to be exclusively personal to them and are inalienable. There is a requirement of moral rights to be put on the equal footing with the economic rights of the author in all jurisdictions of the world. In India, the statutes and the ruling of the courts indicate that the quality of law relating to moral rights in India is compatible with the international conventions only (i.e. only integrity right and paternity right are provided in Indian statute) but the Courts are keen to implement them and to promote them.

This research proceeded on the hypothesis that Legislative trend, both at the national and inter-national level is to promote economic rights and not moral rights and that there is need for protection of moral rights. The hypothesis turned out to be true because the legislation of most of the common law countries seems just to fulfil the bare minimum of the Berne Convention i.e. they provide for Paternity right and Integrity right only and they do not provide Divulgation right and Retraction right. In India also though the judicial trend has been to protect the moral rights but the legislation under Section 57 of the Indian Copyright Act 1957 provides for the Berne minimum only. However in the opinion of the researcher protection of personality of author is also equally important as any economic right. Thus both the rights should be viewed at equal level and neither should be given preference over the other. Both the right should be harmoniously construed.

A consideration of moral rights on the international scene reveals a pervasive dilemma. Classification of this aspect of intellectual property rights at the international level requires the resolution of complex and fundamental conflicts- divergent legal traditions, the appropriate social role of creative authorship and the very logic of internationalization itself.

We can categorise moral rights in three standards according to it significance. First is the French Law which is considered to be the ideal and is at one extreme end. At the other end of the scale is the common law country which seems to fulfil the bare minimum of the Berne Convention by providing right of attribution and right of right of integrity. In the middle we find the German Law which provides a better pattern because of its moderate and realistic approach concerning moral rights[32] The main features of the German

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31. Under Paragraph 18(1), 19(1), 20(1).

32. The comparatively limited nature of German-style moral rights protection may have the advantage that, if harmonization is decreed, a compromise along those lines might prove more acceptable to both French and British legal systems than an attempt to impose an Anglo Saxon copyright system upon the former or droits moraux upon the latter.

system are the limited definition of "distortion"[33] the duration of moral rights protection limited to the duration of the economic rights and the authorisation of waiver clause if an author agrees in contract to a specific (foreseen) use of his work[34] More generally, it is necessary to find a compromise on the scope of moral rights. The first question is to determine whether all works must be protected and whether the same protection shall be provided. The most important point is to protect visual arts, that is why VARA makes sense because the work is the "object". In other domains, the work is a much more abstract concept. This does not mean that other works must not be protected but only that visual arts constitute the absolute minimum level of protection. A different protection for different kind of works could also be an acceptable compromise to conciliate moral rights and other interests.

Another question is: which rights must be protected? A large protection confers four rights to authors: attribution right, integrity right, retraction right, divulgation right. The first two rights are usually accepted, even by the Berne Convention and Anglo-American doctrine (including India). By contrast, the withdrawal right is a civil countries concept, which has no real supporter outside. It is unlikely that it would be accepted by the common law jurisdictions if the limits to this right are not more clearly defined. The integrity right is also a bit controversial, especially for works created by a multiplicity of authors. A flexible position has to be adopted by the courts, in the light of this erosion of the paradigm of single authorship.

As far as waiver clause is concerned the French approach is considered as too absolutist, a half-way house might be suggested: waivers could be subjected to a touchstone of reasonableness. This approach builds on a scheme in the old copyright Act of UK 1911, which stated that the record could make alterations or omissions to the music, but only if such changes were "reasonably necessary for the adaptation of the work"[35]. This proposition means that, far from being an unfamiliar concept, moral rights could already be more efficiently protected by the mere "good willingness" and the originality of the courts.

In the opinion of the researcher a moral rights regime which is "sufficiently flexible to provide a fair and satisfactory balance between authors and owners of copyright" seems a worthy goal. This new regime could be the product of a compromise on a moderate but full protective approach.

As far as India alone is concerned, though the legislation in this regard has been limited in the Indian statute on copyright but the courts are favouring a wider interpretation of these rights[36] However it is desirable that such wider interpretation of the courts should be given a statutory protection also.

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33. Article 14 of the Code on Copyrighted works prohibits "distortion as apt to put in danger the author's justifiable personal interests in the work".
34. French courts have also accepted this point.
35. UK Copyright Act 1911, s19(2)(b)(i)
36. See Manu bhandari V Kala Vikas Pictures (P) Ltd. and Amarnath Sehgal V Union of India at pg. 18 and 19 above

Abstract

The extent and the method of providing legal protection for an author's moral rights (or the droit moral) under domestic law has been a topic of continuous debate since the Berne Convention for the Protection of Literary and Artistic Works in 1928. It has remained a hot issue both internally in common law countries and internationally between the two main law systems. Moral rights, as proprietary rights which protect the personality of authors, have been progressively enhanced and separately expressed alongside authors' economic interests in Continental systems over the past century. By contrast, Anglo-American tradition has manifested certain scepticism towards whether or not authors deserve special protection in law. This paper seeks to understand the importance of Moral Rights in the Civil Law and Common Law countries including India

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