J.T.R.I.
JOURNAL

Twelfth Year	2007
Issue – XXVII	July, 2007
Issue –XXVIII	December, 2007

INSTITUTE OF JUDICIAL TRAINING & RESEARCH, U.P.
VINEET KHAND, GOMTI NAGAR,
LUCKNOW – 226010

Publisher:

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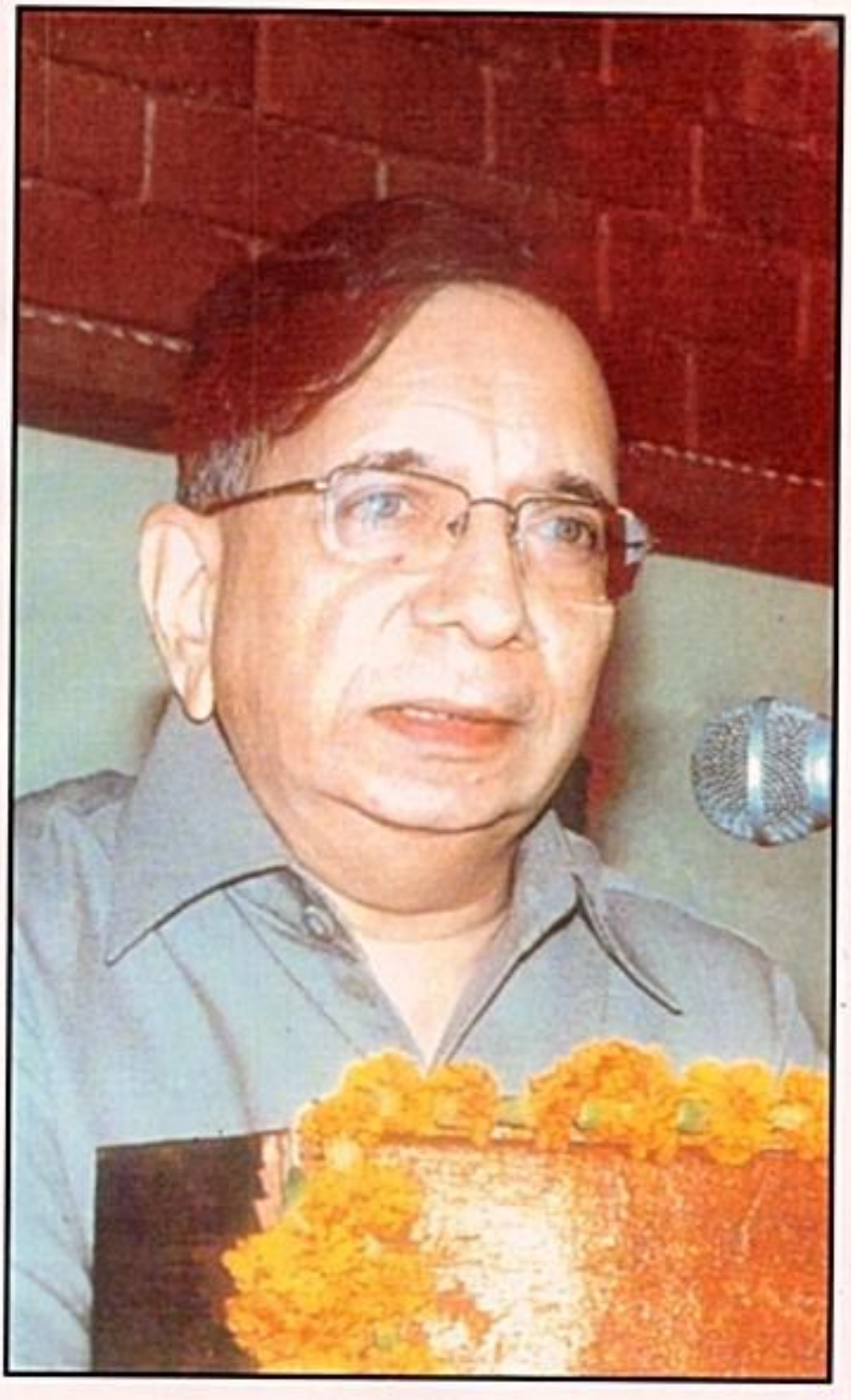

Hon'ble Mr. Justice Hemant Laxman Gokhle, The Chief Justice, Allahabad High Court addressing the gathering.

Shri Ved Pal, The Director, Institute of Judicial Training & Research, U.P., Lucknow, Presenting memento to the Hon'ble Mr. Justice Dalvir Bhandari, Judge, Supreme Court of India.

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Hon'ble Mr. Justice Hemant Laxman Gokhle, The Chief Justice, Allahabad High Court, Hon'ble Mr. Justice Dalvir Bhandari, Judge, Supreme Court of India and Hon'ble Mr. Justice Pradeep Kant, Senior Judge, Lucknow Bench of Allahabad High Court on the dais.

Third NJA Regional Programme on "Techniques and Tools" for 'Delay & Arrear Reduction' at I.J.T.R., U.P., Lucknow on 25-3-2007

- By Hon'ble Mr. Justice K.G. Balakrishnan
Chief Justice of India

The members of the subordinate judiciary play the most important role in the administration of justice in a State. In fact, the officers of the subordinate judiciary are directly in contact with the public and the reputation and respect of the judiciary very much depends on the decorum and demeanour shown by these officers while dispensing justice. Trial of a case is an important function. You are well trained in court management and know how to conduct the proceedings in the trial. Court management is a skill, which could be acquired by constant training and instructions. Needless to say that proceedings in the court are to be conducted with dignity and decorum and to be taken seriously and not lightly. The dignity is by no means synonymous with arrogance. A dignified judge is one who shows equipoise, uses tactful ways, is calm yet firm, and has pleasing manners to inspire the confidence and reverence due to the court. It is said that there are two kinds of judges - "those who swell" and "those who grow". An intemperate behaviour will spoil the respectability and dignity, howsoever knowledgeable and learned the judge might be. Unfortunately, there is some allegation that some of our judges show arrogance and exhibit aggressive attitude and explode without any apparent cause. Psychologists tell us that if a person becomes overridden or over-fatigued, he magnifies disputes and creates quarrels out of nothing. A fatigued body craves stimulation. A fight brings at the stimulation from adrenal glands and he should be anxious to make a fight. It is well known that violent outbursts are the results of the prolonged restraint of anger and the same can be explained on the basis of displaced aggression. There are judges who pound on the young lawyer but very helpful and considerate to senior lawyers. There are ever so many factors, which

a trial judge should keep in mind while conducting the proceedings in the court.

There is always a fear in a lawyer's mind that some judges would make up their mind before the counsel presents his entire case. Some judges set up their own fancy ideas or notions and think themselves to be superior than other men. Some time we mistakenly call them strong judges. Such judges always think that they are right and will not listen to arguments or suggestions tending to show them to be wrong. Keeping the mind open, flexible is one of the greatest judicial virtues and it is the insignia of intellectual humility.

Frequent interference by the judges is a complaint often raised by the lawyers. Some lawyers would be anxious to know what is passing through the mind of a judge as the argument proceeds, and any comment that may accord with the decision made later may lead to questioning the impartiality of the decision. The defeated party would feel that his case was pre-judged. If the decision is contrary to the observations, the defeated litigant and counsel are often shocked and wonder what it was that caused the judge to change his mind.

People come to the court of law for redressal of their grievances. Both sides cannot win and very rarely both sides would be satisfied with a decision. But, one should not leave the court with the impression that his case has not been fairly tried or feel that he lost the case because of a particular judge. Therefore, the conduct of the Bench towards the bar, litigants and witnesses are matters of great concern. They are entitled to be treated with courtesy and patience by the Bench. A client is entitled to fullest exercise of the talents of the advocate he had chosen to engage. There are judges who have an in-bred quality of being considerate to the feelings of others and respect the dignity of other men. This does not mean that you should be unduly lenient in matters of sentence or extremely liberal in adjournments or tolerate the very lengthy arguments and allow the counsel to argue till the cows come home. So long as you are human beings on the bench, the occasional outbursts or dashes of quick temper may be overlooked. It is the duty of the judge to have the trial of the case conducted as expeditiously as possible. Your courtesy and consideration shall not lead to an unwise extreme. Some judges are anxious to convince the counsel that they were wrong, seeming to forget that the counsel are paid for not to be

convinced. It may be the duty of the judge to put question to the counsel in order to clear an obscure piece of evidence to prevent injustice. During the course of trial and examination of witnesses, the trial judge has got the right and indeed it is his duty to put questions to prevent injustice. In our present system, certain amount of questioning by the court is desirable and necessary. Most of the witnesses come from poor or illiterate background. They are often afraid and unable to speak out fully in a court atmosphere. A powerful cross-examiner can mislead a witness and stifle the process of justice. It is the duty of the trial judge to see that the witnesses are not browbeaten or cowed down, so that they may have a free mind to speak out the truth.

Judges play a unique role in the society. They are given the liberty to decide the rights of others. People approach the courts with the hope that they will get justice. One important judicial virtue required for a judge is the "art of understanding." It is said that "we do not trust a brain without a heart or respect a heart without a brain." A sense of compassion is not weakness. It is a divine's power within a man and kindness is a knowledge by which we are reminded of the obscure and neglected interest. This does not mean that judges have to decide according to their private impulse and not in accordance with law and customs of the land. Read the law and customs in the light of its ethical significance. Supplement your reasons with the promptings of a sensitive and understanding heart. There are great judges to whom ethical consideration had little place in their judgments. One great judge wrote: "I have called them a body of imperfect social generalization expressed in terms of emotions." But there are so many other English judges who were greatly influenced by their ethical conduct. **Lord Esher** once said: "I don't know whether I do justice, but I will take my oath. I try with all my might to do it."

Lord Wright once said: "I am not afraid of being accused of sloppiness of thought when I say that the guiding principle of a judge in deciding cases is to do justice: that is, justice according to law, but still justice." Ethical consideration can no longer be excluded from the field of administration of justice. That does not mean that you should impose your individual sense of justice, far from that. Your individual sense of justice shall not be the whim or caprice but it

must rather be the reflection of the moral conviction of the community of your time on the subject under consideration. In any event, escape from the moral values is impossible. It is easy to say I would do the only right. But while construing and applying legal concepts, we encounter conflicting claims. There are judges who feel annoyed when counsel appeal to their justice and good conscience. There are judges who shrug their shoulders and express their inability to do justice and feel deeply lamented and say that court has no power to deal with as the law stood otherwise. **Lord Macnaghten** once said: "it is a public scandal when the law is forced to uphold a dishonest act." Long experiences tell us that moral timidity in the decision of a case is often an intellectual confusion. History shows that there have been great judges who believe that morality is the life of the law. **Justice Cardozo**, the great American Judge said: "The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by." "My duty as a judge, may be to objectify in law, not my own aspirations and convictions and philosophies, but the aspirations and convictions and philosophies of the men and women of my time. Hardly shall I do this well if my own sympathies and beliefs and passionate devotion are with a time that is past." But we have also judges who fit in with the description given by **Hon. Bernard L. Shintag**, who said: "There is a different kind of judicial personality, one that spurns social consciousness. For that type of judge the law moves in stately isolation, untouched by the other social sciences, unrelated to and unaffected by alterations in economic, political and social conditions. His mind lives in the past, immutable, constant and fixed. He views the post with an obdurate complacency and blinds him altogether to any of its errors. Disdainful and oblivious of the changing, pulsating world about him, he holds himself stiffly aloof and remote from it. He shrinks from coming to grips with pressing problems of contemporary life and thought. He will hold no traffic with what he calls new-fangled notions. His mind is based entirely on the learning of the past, uncontaminated by, indeed completely immunized against, the ideas of the present.

Closely akin to this is another important judicial virtue is that your impartiality which is undoubtedly the most difficult thing to attain. I am not about the conscience partiality, favouritism or prejudice of prejudgment, for no judge worthy of his office can be

guilty of such offence. Honestly speaking, every judge would feel annoyed and disturbed if his impartiality is questioned. He believes that he has acted with cold neutrality with an unbiased mind but often in reality, he blinds himself and unable to understand the limitations of human nature. Only a skilled psychologist would be able to tell you your limitations, your nature of partiality and prejudices as they are not tangible or visible. Impartiality implies an appreciation and understanding of the different viewpoints. There would be competing claims. The personality of the Judge, individual tone of his mind, his likes and dislikes, his character, variety of his interests and his prepossessions, all play an important role in the decision making process.

The suppression of personal emotion, the willingness to suspend judgment until a comprehensive survey of the ground has been made, a hospitable receptivity to the viewpoints of others, a disposition, in the language of Justice Holmes, "to learn to transcend our own personal convictions," a distrust of the spontaneous conclusions of so-called common sense or happy conjecture, unchecked and unverified by reflective thought and deliberation-all these play their part in enabling us to approximate impartiality with a high degree of probability.

Inaugural Speech
by
Hon'ble Mr. Justice. B.P. Singh,
Judge, Supreme Court of India
on
"Expeditious Disposal of Cases by Court Management"

at a Training Programme
Organized by the
***Institute of Judicial Training and Research,* U.P.**
on 17.03.2007

In the Indian democracy in order to protect the rights of the people the judiciary plays a pivotal role. Our primary role as members of the judiciary is the enforcement of rights of citizens and to ensure adequate remedies in case of violation. With the rapid growth in the population and business and trade, the workload on the judicial system has multiplied manifold. As a direct consequence of this increase in workload, the efficiency of the courts is hampered badly. This can be well witnessed in the statistics. The current backlog of over 40,000 civil and criminal cases in the Supreme Court up by 25 percent over 2006. As per the Minister for Law and Justice, according to statistics, as recent as those of Jan 31, 2007, a total of 40,243 civil and criminal matters were pending in the Supreme Court.

The apex court registered an increase of at least 25 percent in the number of pending cases in the last year alone. The figure was reported to be around 29,000 at the beginning of 2006. The data valid till Dec 31, 2006, shows a total of 3,991,251 cases were pending in 21 High Courts of the country. The backlog in High Courts includes 3,287,037 civil cases and 704,214 criminal cases. The layman when sees such statistics of pending cases, without any reasons attributed for the same they truly considers that *"Justice delayed is Justice denied"*. Due to the delay in rendering justice people are losing faith in the judicial system. The imperative for clearing the burgeoning judicial backlog, and hence the need for more judges and Courts requires to be fully understood. Any lawyer

practicing in the Delhi High Court - undoubtedly one of the most important High Courts of the country - can testify that, on an average 60-70 cases are listed before a Delhi High Court Judge per day. The sheer quantum of cases forces a judge to adjourn most of the matters leading to further backlogs. The inevitable outcome: normal adjournments are for 4-6 months, the trial dates are not available before 2 years and settlement of suit takes over 15 years.

All of this amount to a daily mockery of the fundamental right to speedy trial. The Supreme Court made it clear more than two decades ago that "speedy trial is of essence to criminal justice and there can be no doubt that the delay in trial by itself constitutes denial of justice".[1] It added in another case that "There can be no doubt that speedy trial -- and by speedy trial we mean a reasonably expeditious trial -- is an integral and essential part of fundamental right to life and liberty enshrined in Art 21".[2]

Even apart from Art. 21 the constitutional mandate for speedy justice is inescapable. The preamble of the Constitution enjoins the state to secure social, economic and political justice to all its citizens. The Directive Principles of State Policy declare that the state should strive for a social order in which such justice shall inform all the institutions of national life {(Art 38 (1)}. This is elaborated by specifically adding that 'The State shall secure that the operation of the legal system promotes justice..; to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities" (Art. 39A). While interpreting this provision the Supreme Court has held that "social justice would include 'legal justice' which means that the system of administration of justice must provide a cheap, expeditious and effective instrument for realization of justice by all section of the people irrespective of their social or economic position or their financial resources."[3]

As is evident the Supreme Court in its decision has confirmed that speedy trial is deemed a fundamental right included in Article 21 of the Constitution of India. Inspite of this, the condition has not improved to a large extent. Many Committees set

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[1] Hussainara Khatoon. v. State of Bihar AIR 1979 SC 1364
[2] Maneka Gandhi v. AIR 1978 SC 597
[3] Babu V. Raghunathji AIR 1976 SC 1734

up by the governments from time to time have come up with recommendations for effective disposal of cases. However, much to our dismay most of such recommendations are not put in practice either due to inbuilt constraints or other extraneous factors. Therefore I today would like to throw light on a few factors for such arrears so that we could come out with some workable solutions.

FACTORS BEHIND PENDENCY-

For the reformation and overhaul of the existing judicial system, there are number of elements which must be considered:

Judges-Population Ratio & *Vacancies* of *Judges*

The greatest drawback that requires the urgent attention is the number of judges in the country and the burden of work they suffer. For clearing pending cases an adequate number of judges is a prerequisite. But in the Indian judicial system however there are number of vacancies existing, which at the end of the day affect the speed, efficiency and effectiveness of the justice rendered. Moreover, the frequency with which serving judges are diverted to head probe panels further aggravates the problem. The apex court was constrained to issue a note of caution in a recent ruling against this practice and warned that it should be done on rare occasions if it becomes necessary for the paramount national interest. Keeping in mind the huge backlog of cases it rightly observed that preventing a sitting judge from performing his regular duties for abnormally longer periods added to the judiciary's burden and slowed down the process of justice.

In proportion to its population, India is estimated to have the lowest number of judges among the major democracies of the world. In 2002, the total strength of judges in the High Courts was 669 out of which 163 vacancies were not filled, which come out to be 25% of the total strength. Like wise in the Supreme Court out of a total strength of 26 there were 2 vacancies. It was also suggested by the 127th Law Commission Report, 1988 that the judge-population ratio should be increased from 10.5 judges per million population (at that time) to 50 judges per million populations within a period of 5 years. It recommended that by the year 2000 the ratio should be increased to at least 107 judges per million populations. But neither the Law Commission's recommendations nor the repeated reminders of

successive Chief Justices of the apex court to this effect could move the executive into making the required number of appointments. *At present in India, the ratio is* 12 *or* 13 *judges per million populations where as* 12 *years ago it was about* 41 *judges in Australia,* 75 *in Canada,* 51 *in U.K. and* 107 *in United States.* Due to this low judge-population ratio, the courts lack the requisite strength of judges to decide the cases. This judge-population ratio has been used for providing quantity of judges required to deal with the cases. Yet, it is the view of the government that raising the strength of the judges must be set on the basis of the pendency of cases and the average rate of disposal and not simply on the basis of population.

Also, according to the norms, the process of filling up a vacancy should start six months before the actual date of retirement of a Judge. In 2002, there were 170 vacancies in High Courts, out of which only on 64 vacancies, the process of filling began. Further, there was also a delay in filling up the 1500 vacancies in the sub-ordinate courts. Even today the position is the same regarding the process of filling up of judges in place of retired judges. The number of laws enacted by the legislature is on the rise day by day and so does the level of litigation but the strength of judicial officers remains the same, by and large.

Accountability of Judges

The Woolf Report of 1996, emphasized to make the judiciary accountable for their functioning by generating accurate judicial statistics, revised on daily basis. It was observed by the report committee that a statistic report pertaining to the Judges functioning and flow of such information ultimately make judges more accountable to the judiciary and it was also suggested that it is a more important and useful mean to tackle these arrears, than increasing financial and human resources. But these suggestions remain on paper and have never been put in practice.

In India, the judiciary is a separate and independent organ of the state. The Legislature and the Executive are not allowed by the Constitution to interfere in the functioning of the judiciary. But such independence is not to be understood as not being accountable to anyone. In a democracy the power lies with the people. The judiciary I believe should volunteer and endeavour to take stock of the

situation and create a system of internal checks. The High Courts have the power of control over the Subordinate Courts under Article 235 of the Constitution of India. The Supreme Court has no such power over High Courts. The Chief Justice of High Court has no power to control or make accountable other judges of the court.

Adjournments

One of the main problems that has resulted into pending cases is the adjournments granted by the court on flimsy grounds. This tendency of taking adjournments in my opinion reflects the quality of the bar and the recklessness with which the lawyers take the bench for granted. Section 309 of Code of Criminal Procedure and Rule 1, Order XVII of Code of Civil Procedure deals with adjournments and the power of the court to postpone the hearing. *These adjournments are granted only when the court deems it necessary or advisable for reasons to be recorded. It also gives discretion to the court to grant adjournment subject to payment of costs.* However these conditions are not strictly followed and the bad practice continues. This rule should be reinstated in stronger terms leaving no leeway for the advocates to get away on flimsy grounds. Adjournments are one of the most crucial causes that thwart the right to a speedy trial. By granting regular adjournments the value of time and importance of the remedy sought gets degraded.

Certain other causes

- No consideration is given to the expertise and specialization of judges while assigning cases to them. Normally the same judge is assigned civil as well as criminal cases, resulting in them taking more time to understand the facts and circumstance of the case and the law on the subject. By an effective system of case management this problem can be curbed.

- Lack of utilizing the applications of information technology for case management.

NEED FOR REFORMATION

The development of any country is measured by the economic and judicial system, governmental setup and the standard of living of its people, which includes fair and speedy justice. Due to the delay in deciding cases, the whole democratic and economic

structure of a country is affected. For rectifying these defects it is time we take stock of the situation and act upon it. And finally, one would do well to remember that the district judiciary is overburdened with heavy workload with no modern infrastructural support. It would be worthwhile to quote the Supreme Court's observations in the case of the All India Judges' Association:[4] "The sedentary work is mainly of two types -- mechanical and creative. Each case coming before the judge has its own peculiarities requiring application of fresh mind and skill. The judge has constantly to be a creative artist. His work, therefore, requires constant thinking and display of talent. The exertions involved in the duties of the judge cannot be compared with the duties of other services... "The problem of pendency is not restricted to India but many other countries like USA, Australia had also suffered the same in the past but by proper implementation of 'policies regarding the reformation of the judicial system they capitulated the situation. Considering how these countries dealt with the same situation, it is time we manifest a certain amount of discipline and set our record right. A few mandatory measures are as follows-

The Department of Justice has made computations for the reduction of pendency of cases over period of 3,5 or 7 years, besides disposal of regular year to year institution of cases. However it is my opinion that the aim should be to clear the arrears within three to four years, that the primary sanctioned strength should be maintained on the basis of an optimum judge population ratio worked out on the basis of the pendency and the rate of disposal, and that judges' strength should be augmented protem to deal with the accumulated arrears. The system should ensure a zero accrual of arrears beyond three years. The judges' strength should be increased or augmented in a phased manner and without compromising the quality of judges for numbers can never be a substitute for quality".

Alternative Dispute Resolution

For reducing the number of cases pending in courts it is necessary to bring down the rate of newly registered cases in the courts. Mediation is one of the methods, which is adopted by many countries with positive results. USA had a similar problem, though

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[4] AIR 1993 SC 2493, para 25

not of the Indian magnitude. In San Diego (California) having the third largest number of trial Courts in the USA, 97% of the civil cases get settled through mediation.

The main benefit of this method is:

- Timely resolving of matters with the participation of parties
- Privacy, confidentiality and continuity during the proceeding.
- A Solution is found by the participation of parties.

Malimath Committee Recommendations[5]

The Committee suggested that the cases must be assigned according to the specialized area of the judges. Assigning cases without considering specialization results in delay in deciding the matters. Also some specialized tribunal must be established to deal with matters pertaining to tax, services, and labour etc. separately. Such specialization provides consistency, certainty, speedy and quality judgments.

It also suggested that the newly appointed judges and the judges promoted from sub-ordinate courts to the higher courts should be given intensive training for a reasonable period to improve their skills in hearing cases, taking decisions, writing judgments and in court management. The incompetence of the judge resulting in a delay in justice should be removed through proper training. .

It also recommended that special attention should be paid in the matter of prescribing qualifications for recruitment of Judges at all levels and to improve the methodology for selecting the most competent persons with proven integrity, character, having regard to the nature of functions which a Judge is required to discharge. No other consideration other than merit and character should be taken into consideration in choosing a Judge for the Courts.

The Committee also recommended that the provision of impeachment by amending Article 124 of Constitution of India to make it less difficult. The Committee while considering the situation

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[5] This committee was formed by the Government of India, Ministry of Home Affairs by its Order dated 24th November 2000. The main aim of this committee was to make recommendations for reformation in the Criminal justice system, simplifying judicial procedures, practices and making the delivery of justice to the common man closer, faster, uncomplicated and inexpensive.

of USA tried to implement it in the Indian scenario. There were similar problems in USA where the Judge can be removed only through an impeachment process, which is not easy to enforce. Accordingly, the Judicial Councils Reform and Judicial Conduct and Disability Act 1980 was enacted. Under the Act, there is a judicial council for each circuit and a National Judicial Conference at the Apex. They have been given power to censure a Judge, request him to seek retirement or direct that no cases be assigned to the Judge for a limited period. The Committee is in favour of conferring similar powers on the Chief Justices of the High Courts.

Check Adjournments

Today adjournments are granted on the grounds, which clearly defeat the provisions of law and purpose of the law. To cope up with this situation it is important to regulate the discretion of the High Courts and it must lay down the exceptional circumstances when adjournments may be granted. Section 309 of the Code of Criminal Procedure should be amended to make it obligatory towards imposition of costs against the party who seeks and obtains adjournment. The quantum of costs should include the expenses incurred by the opposite party as well as the Court, the expenses of the witnesses that have come for giving evidence and not merely a cost of Rs.200/-, Rs.500/- or Rs.1,000/-.

Also pushing cases can be unpopular. But once the bar recognizes that a particular judge sitting in a particular courtroom has made up his mind to go through his list, and will not countenance lawyer's pleas for, adjournments, the bar in turn takes note, and cases somehow get decided more effectively and in a more satisfactory manner than in other courts. This is not because the judge sitting in that courtroom is necessarily a person of greater erudition than the one sitting in the next but simply because he or she gently but firmly moves cases along towards a conclusion, disregarding the trivial ground on which lawyers lately request for adjournments.

Arrears Eradication Scheme

The Government of India has created 'fast track courts' which are limited only to the Session Court Cases; also have practical problems which restrict it to work in all states. To overcome this

problem it is advisable to work out an 'Arrears Eradication Scheme' for the purpose of tackling all the cases that are pending for more than 2 years on the appointed day. A retired judge of the high court, known for his efficiency, should preside over this scheme.

Take immediate steps to fill existing vacancies at various levels in the Indian judiciary and make such filling time-bound. Increase the ratio of judges as against the population for speedy and efficient justice delivery.

Make immediate arrangements through appropriate ministries such as the Ministry of Finance to provide adequate funds to the judiciary and the prosecution mechanisms so that they are able to function effectively.

Make use of available international expertise and advice to improve judiciary's communication infrastructure.

Establish a process of accountability so that the aggrieved party suffering from delay of process could challenge the delay without fear of judicial wrath, including contempt of court charges.

Provide adequate training and education to members of the judiciary so as to facilitate a respect for the rights and dignity of all individuals, as well as for the rule of law, in discharging their judicial functions.

Two-year maximum time limit be given for disposal of cases by the judicial officers so that the pendency could be brought down to the maximum extent.

Like earlier said our cases go on far too long; and one of the primary reasons is too much time spent by lawyers citing case law. Over the years, our law reports are filled with some useful, and many not-so-useful decisions. The Americans had the same problem but the surfeit of judicial opinions in the United States is now kept strictly under control by a simple judicial device known as "un-publication of opinions". "Un-publication" means that an opinion, (or judgment) because it is restricted to the facts of the case is (judicially) designated not fit for publication in the official law

reports, and when this is put out on the website as an "un-published" opinion, it just cannot be cited in Court.[6]

The Government of India should examine the feasibility of creating an all India Service for judicial officers in the same manner as that of IAS and IPS officers, so that there would not be any arbitrary method of selecting and appointing judges.

A few other corrective measures suggested by the Minister for Law & Justice, Shri H. R. Bhardwaj taken for speedy disposal of court cases are:

A. Besides increasing the Judge strength from time to time, other measures such as grouping of cases involving common questions of law, constitution of specialized benches and organizing Lok Adalats at regular intervals etc. have also been taken.

B. Alternative modes of disposal including mediation, negotiation and arbitration has been encouraged. Special tribunals like Central Administrative Tribunal, State Administrative Tribunals, Income Tax Appellate Tribunals, Family Courts, Labor Courts, Consumer Courts etc. have been set up to expedite disposal of cases.

C. Information technology is being used in generation of cause lists, providing information to the litigants/Advocates etc. for speedy disposal of cases.

D. Fast Track Courts (FTC) have been set up for the disposal of long pending cases, particularly sessions cases and cases involving under trials in jails.

E. The Government has extended the term of existing 1562 Fast Track Courts, which were functional as on March 31, 2005, for another five years i.e. up to March 31, 2010 for clearing huge pendency of cases at District level.

In recent times decision are coming at a little faster speed. A fast delivered decision will help in making people law abiding.

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[6] This has proved most effective: the rate of un-published opinions of federal courts in the United States is presently around 80 per cent. To introduce this system in India will require much spade work; thousands of judgments will have to be scanned and declared "un-published"; but it will be worth the effort. It will help reduce the law's interminable delays.

COURT & CASE MANAGEMENT

As this area is of great relevance to this training program I would like to throw some light on it. One should encourage matters to be settled in the initial stage through mediation or any other process. And only on the process failing should it be brought before the court. To a certain extent to reduce the pendency of cases it is necessary to manage cases effectively in the courts. Effective case management depends on court management. The Chief Justice plays a vital part in the process of court management. He monitors the working of each court, its needs and problems and gives solutions and support. It is necessary for the Chief Justice to devote time not only to his judicial function but also to the administrative functions. The Chief Justice should consider suggestions from a Joint Committee of Judges and Lawyers who meet once in a couple of months to discuss problems faced by litigants, lawyers and judges in the course of judicial administration. This leads to effective court management, which ultimately results into effective case management. For an effective system there must be scheduling of cases in the courts. A Time should be mentioned for the trial proceeding like filing the case, document presentations etc. Delay in presenting and submitting the document generally leads to adjournments. A pre-planned schedule helps to reduce such delays in proceedings. To enhance the understanding of this concept I shall dwell into it in detail.

Meaning

Case Management means the proceedings of a case are managed effectively by the Judge presiding over the Court and not controlled by the lawyers. In the USA, it has been realized that alternative dispute resolution mechanisms like mediation or any other mechanism will not achieve desired results, unless the parties know that in case the dispute is not settled, they will have to go to trial after a few months with all its attendant uncertainties, and that too on a date already fixed in advance. It has further been realized that at the earliest stage of the case, the Judge should take the initiative to persuade the parties sitting in a multi door hall to select the door to the appropriate room for dispute resolution. In short, mediation and case management are considered as complementary to and indispensable for each other.

The Chief Judge

In the United States, the Chief Judge devotes his time exclusively to Court management & administration (Judicial work is undertaken hardly once or twice in a month) and he monitors the working of each court, its needs and problems and gives solutions and support. He has to see that all his courts work optimally & efficiently. He is assisted by a number of professional management persons & consultants who are very highly paid, often even more than the Chief Judge. As the Chief Judge of such a large establishment, he has enormous task of implementing reforms, policies, monitoring the work of judges, supervising, guiding & instructing them, looking after the entire administration and staff. If the administration is not done efficiently and effectively, the work of all courts would suffer.

Thus, the priority of the Presiding Judge is to oversee the whole judicial administration and ensure that the judges' time and energy are utilized to their optimum capacity. He rarely sits in the courtroom for judicial work. For doing judicial work, he has many judges, but for over all administrative leadership and for ensuring good administrative support to those judges, he is the only driving force. In other words, the other Judges will be able to look after Case Management more effectively, when the Chief Judge looks after the Court Management.

The authority of the Chief Judge, however, does not merely stem from his status and position. He also considers suggestions from a Joint committee of Judges and lawyers who meet once in a couple of months to discuss problems being faced by litigants, lawyers and judges in the course of judicial administration -whether before or during trial and find solutions.

Some of the problems of delays and arrears in India can be attributed to the lack of time made available for effective management to the judicial leadership. Judicial Leadership is expected to attend to judicial work in the same manner and in equal proportion to that of a sitting Judge of the Court. Thus, the time available for administrative work is quite limited.

Early Assignment of the Case to a Particular Judge

Case Management is placed on a very highly professional level and made effective in a very scientific and rational (and also ruthless) manner. Sick notes and strikes are unheard of. There are no unattached ("Orphan") cases -discharged, sine die, unlisted, unready, no date -no judge matters. For every case, there is an involved & accountable trial judge right from the beginning -early assignment of each case to a trial judge till final disposal. Scheduling of the cases is thorough and time limit is adhered to. Right from filing the plaint and the appearance of the defendant, the judge is very actively involved & applies his mind at every stage more particularly at time appropriate stages before the trial. There are early settlements of agreed facts and also of disagreements, issues are narrowed and focused and tacked.

Scheduling

Right from the beginning the trial Judge is directly involved with the case and as soon as the plaint is filed the plaintiff is given a small brochure about mediation. Along with the summons and the plaint such brochure of mediation is also sent to the defendant. A schedule is fixed for the service of summons, appearance of the defendant and for a conference of the lawyers for reference to mediation. Within five months from the date of filing of the plaint, the dispute is referred to mediation (expected to be completed within 2 months) and the date for trial of the suit is also fixed so that the trial begins by the 11th month from the date of filing the plaint, just in case the suit is not settled in the meantime. In between this period i.e. between the 8th and the 10th months, the stage for production, discovery, admission of the documents, witness list etc. is completed, in case the mediation does not succeed. A joint statement of agreed facts and of disagreed facts is filed and controversy is narrowed down. One month before the trial a pre-trial conference takes place to see that everything is complied with and the matter is made ready for trial on the fixed date with the estimate of time required. Full preparation is ensured.

Pre-Trial Judicial Settlement Conference

Before the trial is to begin, the matter is placed before a Settlement Judge who is other than the trial Judge for that particular

case. Many cases are settled at this stage. One or two Judges specially suited for the purpose are assigned the work of the settlement Judge. It is found that the cases which would have taken a week at the trial are settled within an hour. A good settlement Judge on an average settles about half a dozen cases in a day, thus saving trial time of about six weeks of other Judges.

Cut Off Date for Implementing Reforms

Unless it is seen working, working well & successfully and satisfactorily, the progress made by the American Judicial system in civil litigations may seem unattainable at the first blush. But even there, it has taken more than a decade to reach this level. During discussions with the Chief Judge and former Chief Judges of the trial Courts in California, each of them agreed that it is never possible to introduce such reforms in any judicial system at one go and that they also introduced the reforms in new cases filed after a cut off date, adopting other measures for disposal of old civil cases including classification of cases and the circulation of disposal figures amongst Judges.

An Institute of Court Management

Today, there is a great need to put the management systems in the Courts on a professional basis. A Post-Graduate Degree Course in Court Administration should be started for those who are possessing degrees in Law. They must be eligible for being recruited pinto the staff of the Subordinate Courts or High Court or the Supreme Court or even to the various quasi-Judicial tribunals. The direct recruitment could be at a level of two stages from the lowest level and along with other departmental promotees, unified cadres can be formed. The lower staff could also be given training in the Institute.

FINANCIAL AUTONOMY AND MANAGEMENT OF THE JUDICIARY

Today, the Judiciary in India is blamed for the huge backlog of cases. It is time that the public is made aware that during the last 50 years after independence, little attention has been paid by the Government for improvement of the infrastructure of the Judiciary. In several cases even minimum facilities have not been given. The

reason is that there is no planning and proper budgeting of the Courts' requirements in consultation with the Judiciary as is done in other countries. Nor is there a long range Plan or at least a Five Year Plan. The result is that most courts are over burdened with cases on the civil and criminal side. Such delay results in a serious infraction of right to speedy trials, to violation of human rights in various cases.

In the above scenario, it has become necessary to go into the subject of\'financial independence' or 'financial support' of the Judiciary in India at some length on a comparative basis and also to consider the need for adequate provision for the Judiciary as a 'Plan' subject.

Unless the judiciary is given full financial autonomy, the problem of pending cases or non-appointment of judges would persist. It goes without saying that creating new posts of judges, increase in the number of courts and providing necessary infrastructure needs finance. The judiciary has to petition the Law Ministry each time it needs funds. At present, hardly 0.2 per cent of GNP (or 0.73 per cent of the total revenue) is spent on judiciary in India (when half of this is realized by State Governments through court fees and fines) as compared to other countries such as the U.K., the U.S. and Japan where it is between 12 and 15 per cent of the total revenue.

Independence of the Judiciary deals with the independence of the individual Judges in relation to their appointment, tenure, payment of salaries and also non-removal except by process of impeachment. The independence has also other facets including the 'institutional independence of the Judiciary'. One of the accepted facets of 'institutional independence' is the one concerning the financial resources and financial freedom or autonomy that is to be given to the Judiciary. Today, this concept has been developed and accepted in most of the democracies governed by the rule of law. The doctrine of separation of powers has been suitably modified and adjusted to achieve the above goal of financial freedom of the Judiciary.

The International Bar Association adopted, at its 19th Biennial Conference held in New Delhi, October 1982, the recommendations made by Dr. Shimon Shetreet,[7] said:

"2. The Judiciary as a whole should enjoy autonomy and collective independence vis-a-vis the Executive.

9. The Central responsibility for judicial administration shall preferably be vested in the Judiciary or jointly in the Judiciary and the Executive.

10. It is the duty of the State to provide adequate financial resources to allow for the due administration of justice.

13. Court services should be adequately financed by the relevant government.

14. Judicial salaries and pensions shall be adequate and shall be regularly adjusted to account for price-increases independent of Executive Control.

15. (a) The position of the Judges, their independence, their security, and their adequate remuneration shall be secured bylaw.

(b) Judicial salaries cannot be decreased during the Judges' serve' services except as a coherent point of an overall public economic measure."

In the last 50 years, there has been no proper allocation of funds commensurate with the corresponding increase in population, legal awareness, increase in legislation. There not being a periodic Five Year or an annual Plan for the Judiciary, has compounded the

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[7] He is a Professor of Hebrew University, Jerusalem, Israel, has done pioneering work in this field and written two great books' Judges on Trial' and' Judicial Independence: The Contemporary Debate', His recommendations concerned the 'Minimum Standards of Judicial Independence and these are known as the 'Delhi Approved Standards' Published later in CIJL Bulletin pNo.11, p.53 and CIJL Bulletin, 23, Jan. 1989, p.18). Para 2 thereof refers to the need for autonomy of the Judiciary and states that judicial administration must be vested jointly in the Judiciary and the Executive and adequate financial resources must be made available.

problem. The result is that there is, in terms of international Covenants and resolutions, a clear violation of the basic structure of the Constitution and of the basic human rights resulting in an excessive 'overload' of cases.

So far as financial independence or support is concerned, our present system is suffering from serious difficulties. It is these difficulties that are the cause for the clogging of cases in the subordinate courts and in several High Courts. It is true that by means of Alternative Dispute Resolution systems such as Lok Adalats several lakhs of cases have been disposed of in the last more than a decade, but that, in the overall perspective, has not reduced the general congestion in the subordinate courts and the High Courts.

Basically, lack of long-range planning and lack of finances have been the main causes for such pendency in all parts of the country.

In principal cities like Delhi, Bombay, Calcutta and Madras even increasing the court rooms has become difficult due to lack of land for construction or ready accommodation. Further extreme bureaucratic procedures requiring consultation with half a dozen departments thwart any progress. A stage has been reached where, if officers upto the full strength of the judicial service are recruited, some of them have to sit idle for want of courtrooms.

If seen in the light of other developed countries of the world, it is clear that the policy making for the Judiciary is by and large done by the Judges and the budgets are prepared by an administration which is responsible to the Judges and not to the executive and it takes into account the demand for extra Courts and the increase in Civil and criminal cases because of new legislation and it draws plans for the future, both long range and short range. The budget as prepared by its bureaucracy is approved by the Judicial Council as in US and German constitutional Court and sent directly to Parliament or sent to Parliament through the Executive by placing before Parliament (as in Japan), the budget as prepared by the Judges council and as cut by the executive and at that stage, a broad settlement is made between the Judges Council and the Executive and approved. In the US a Judge may appear before the Congressional Committee if need be. It is therefore essential to 'have

a Judges' Council as a policy making body to look into its own needs and a regular bureaucratic system of administrators who will prepare the budgets and receive a lump sum grant from the government and spend it, under the supervision of the Court and are accountable to the Court. The Judicial Council is accountable to the Parliament or its committee.

But we do not have a system by which the Judges can be involved in the preparation of long range Plans, or a body which will be responsible for making statutory recommendations keeping in view the present excess work-load and the anticipated increase in cases, say, in the next five years. In India, nobody does go into the question as to how any fresh legislation can increase the workload- a study, which is mandatory in USA before the legislation is brought into force. We have no judicial organization or body, which can fight for the needs of the Judiciary.

In the Supreme Court and the High Courts, the respective Courts prepare budgets but these budgets have to be submitted to the Union or State Governments, as the case may be, which will have the final say in regard to the extent of budgetary support. On the theory that the Judiciary is not productive of 'goods' or utilities, or application of 'value for money' theory, propounded in England by Mrs. Thatcher, the judiciary has always been a \ very low priority. The result is that the judiciary has never got its due share of finances in the last fifty years either for increasing the number of Courts or the number of Judicial Officers and supporting staff, in the whole country.

Again, the Chief Justice of India alone has powers to shift the monies allocated for one subject to another subject.[8] The High Court Chief Justices had no such power. Result was that if monies allotted to one head are not spent, they will lapse at the end of the financial year. Only recently pursuant to a resolution of the Chief Justices' Conference, several State Governments have agreed to this shifting of allocations within the budget provided an officer of the Court (not a Judge) appears before the legislative committee. Further, in some States for every unit of expenditure (say) above Rs.10,000/-, a

[8] Justice P.N. Bhagwati, Vol.1 CUL Year Book (p.16)(1992)

further approval of the executive is necessary, even though the expense is within the budget for that item. Registrars keep shuttling between the High Court and Secretariat of Government.

While it is true that the Judiciary cannot expect an undue share of the finances as compared to certain other important items of governmental expenditure having higher priorities, the fact remains that the Judiciary has not received, in the last 50 years, even a reasonable proportion of what was due to it.

In other words, while the matters relating to appointment, disciplinary control and supervision of the officers and staff of the Courts are in better shape and are directly under the control of the Judiciary, the expansion in strength of officers or staff and certain service conditions of these personnel involving financial implications are not exclusively within the purview of the High Courts. Whether it be long range planning or short range planning for purposes of increasing the number of Courts, Judges and staff, there is no serious scientific planning done in consultation with the Judiciary. No policies are laid down by the judiciary.

The main difficulty is about proper budget allocation for the Judiciary. Such allocation in the Plan has not been made except by way of (i) the Centrally sponsored scheme which requires the State to make matching grants and (ii) the recent allocation of Rs. 500 crores and odd for Fast Track Courts. So far as the Centrally sponsored scheme is concerned, as it requires a matching grant from the States, it has not been fully utilized in several States because the States are not able to make adequate matching grants. So far as the fast Track Courts scheme is concerned, this type of a grant after fifty years, for Courts which are to last only for a temporary period, does not meet the problem. Appointing retired judicial officers on contract basis can even create problems if they are not within the disciplinary jurisdiction of the High Courts under the existing rules. This temporary measure should be replaced by permanent and lasting solutions.

The proper thing for each State is to first require separate allocation of funds by the Planning Commission and the Finance Commission for the purposes of the State judiciary and once this is done, most of the problems will be solved.

There is an important reason as to why provision is to be made in the State plan by the Planning Commission and by the Finance Commission. The crucial point here is that the Subordinate Courts and the High Courts have been administering not only the laws made by the State legislatures but also the laws made by Parliament under various Entries in List I and List III. In fact, laws made under the Concurrent List in the Seventh Schedule (List III) are the most common statutes in use in the Courts everyday as they concern the civil and criminal administration of justice.

The Central Government cannot therefore throw the entire burden of establishing the subordinate Courts and maintaining the subordinate judiciary on the State Government. It is true that under Article 247, the Central Government has powers to establish additional Courts for purposes of the litigation arising in respect of subjects in List I of the Seventh Schedule. But, the number of Courts established at the level of the Subordinate Judiciary by the Central Government in exercise of its power under Article 247 of the Constitution even for purposes of cases arising out of subjects in List I, is almost negligible. It appears on the whole that there is a concurrent obligation on the Central Government also. Therefore, the Planning Commission and the Finance Commission must allocate sufficient funds from national resources to meet the demands of the State Judiciary in each of the States. These sums must come through the Planning Commission and the Finance Commission.

In fact, in Latin American countries, it may be noted, that there is a 'constitutional requirement' of allocation of a fixed percentage of the country's total budget to the judiciary. The most generous provisions are in Costa Rica, which grants the judiciary not less than 65% of the nation's ordinary annual receipts, excluding loans and grants, while Hondurus allocates at least three per cent and Peru 2%, Gautamala and Panama allocate 2% of the nation's ordinary annual receipts.[9]

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[9] See Bulletin of the Centre for the Independence of Judges and Lawyers, No., 122, October 1988, page 18 in an article by Kutt S. Rosehn on 'The Protection of Judicial Independence in Latin America'.

What Has Been Done

As mentioned earlier, fast track courts have been established as a part of reformation in most of the states. Lok Adalats are working well with the objective to dispose the matters outside the courts, specialized tribunals are also established, some amendments are made in the Code of Civil Procedure, which reduce the burden from the higher courts. Industry wise tribunals are being set up to hear appeals against orders passed by the regulators, increased number of law colleges and legal courses, introduced more law subjects in Management, CS, CA and other professions and many more. But arrears of pending cases are yet to be wiped off from the courts. What this requires is up to date modification and implementation of recommendations with the changing times.

The pendency of cases in the Supreme Court has actually in fact shown a downward trend. The pendency of cases, which was 1,04,936 as on 31-12-1991, came down to 58, 794 in 1994 and further down to 21,995 as on 31 October, 2001.

The Supreme Court has taken certain steps, which have resulted in a substantial reduction in accumulated arrears. It has successfully implemented the cardinal principles of Active case Flow Management Technique (ACMT) by creating dual tracks, one for keeping abreast of current filings and the other to deal with old pending matters. It is a model which commends itself to us and which can be replicated for dealing with the arrears in the High Courts and Subordinate Courts.

Another area where the Apex Court has concentrated its energy is on adjournments. Adjournments have been made an exception. Adjournments in the Supreme Court can never be taken for granted and cases scheduled for a particular date are invariably listed on that day. Indeed, listing is entirely computer-managed, except for extremely urgent listing required within less than 15 days for which a special oral mention has to be made to the Chief Justice.

In the Apex Court, the cases listed for a day which were earlier adjourned owing to the absence of any judge are now immediately redistributed on the very day over the remaining benches and thus dealt with or disposed of on the same day, despite an inevitably enhanced work load for each bench.

Bench stabilization in the Apex Court over three – month or six month periods ensures that the same or similar subjects out of the 56 computer classified subjects go to the same benches as far as possible, thus expediting disposal. More practical categorization and grouping of areas involving similar questions of law is also assisting the cause.

On the human resource front, the Apex Court has made efforts to streamline the distribution of work in all the departments in such a way that intra-departmental and inter-departmental file movement can be minimized.

The Apex Court has made use of the computer in the most effective way. Computerization at every level in the Department of Registry has considerably increased efficiency. Maximum information covering numerous fields and criteria are fed into the computer in respect of each case, thus ensuring maximum information retrieval at the touch of a button and a Judis Programme has already incorporated all Supreme Court judgments in the computer.

Impressed by the various steps taken by the Supreme Court towards reducing the arrears successfully the high courts have also tried to replicate these steps. Though similar methods are said to have been applied by various High Courts also, similar results have not been achieved. This I assume can be attributed to court specific conditions that need personalized attention or lack of discipline in terms of executing these changes. And in the end I would like to say in light of other countries that suffered from the same defects, and in view of the fact that they have so brilliantly coped, it is time we analyze our role in light of all this and take certain a d definite steps towards a proper solution.

Before I close, let me say a few words about the role of judicial officers in dealing with matters relating to Land Acquisition cases.

There was a time when such cases were treated as routine cases, and the only grievances, which a litigant could have against the judiciary were the inadequacy of compensation, and the delayed payment thereof. There has been a considerable change of attitude in such matters. As recent events have shown, there is a growing

resistance to measures of acquisition. The farmers have been resisting acquisition of their lands for industrial purposes. This however is a matter of policy for the Government to consider.

So far as adequacy of compensation is concerned, a judicial officer cannot transgress the limits imposed upon him by law. He can determine compensation only in accordance with norms laid down by the Act. He is bound by the principle of determining compensation taking into account exemplars produced by the parties in respect of comparable lands. May be those sale instances do not represent the correct market value on account of the dishonesty of the parties concerned who may have shown a much lesser value that what was paid and received, for various reasons. The courts cannot help in such matters. But what the courts can do in such matters is to ensure prompt payment of compensation. This would at least meet the second criticism of the litigants. To the extent possible justice will be done according to law.

As I have earlier observed, judges have to be imaginative and innovative with a view to do justice. Imagination gives rise to idealism as well as a practical sense to deal with matters before him. Hard work and thorough preparation leads to clarity. Clarity leads to brevity and brevity leads to brilliance. We judges tread on the path of law. Justice is our destination. Conscience is our sole guide and honesty our supreme defence. Imbrued by our infatuation for justice, we can really perform our divine duty of doing justice. At all times, we must not forget that a judge above all, is always a gentleman.

CHALLENGE BEFORE THE JUDICIARY, ROLE OF JUDGES IN EFFICIENT FUNCTIONING OF THE JUDICIARY, JUDGMENT WRITING & JUDICIAL ETHICS[1]

- By Hon'ble Mr. Justice Dalveer Bhandari
Judge,
Supreme Court of India

My greetings to all of you on the 60th Anniversary of our Independence.

It was only after our independence that we could adopt our Constitution by which our Founding Fathers had pledged to secure to all our citizens: justice – social, economic, political; liberty of thought, expression, belief, faith and worship, apart from equality of status, opportunity and fraternity assuring the dignity of the individual and also the unity and integrity of the Nation. It is not only a day of rejoicing for all of us, but it is also an occasion for introspection and to take stock of what we have achieved and what remained unaccomplished.

India is a great country with rich legacies and high traditions. Culturally, it has reached heights which mankind nowhere else ever did.

I am deeply indebted to the Institute of Judicial Training & Research for inviting me to address a distinguished gathering of young Trainee Officers who are on the threshold of entering and commencing a judicial career. I am extremely happy to be here with the young men and women who are going to man the Indian Judiciary.

INDIAN JUDICIARY

It is said by a section of people that our judicial system has either collapsed or is fast collapsing. I do not share this perception. No system can be perfect. I strongly believe and maintain that we have a time-tested system and there is no justification to discard it by giving it a bad name. I think we have one of the finest judicial systems in the world. Our judiciary is highly respected all over the world for its total independence, credibility, fairness, erudition, learning and scholarship. Our judgments are cited in many countries. I was in Pakistan last year.

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[1] Speech Delivered at I.J.T.R.U.P.Lucknow in a Special Session on 15 Aug.2007.

Every good lawyer is subscribing AIR and the Supreme Court Cases and referring them very frequently.

The judiciary in India has emerged as a beacon of truth, faith and hope for the people. The success of the judiciary as an important pillar of democracy hinges on our credibility, dedication and devotion. Our motto has to be to ensure prompt and inexpensive justice for all. For accomplishing this goal, members of judicial fraternity have to make concerted efforts with utmost integrity and devotion.

A judicial career is much more than a job. It is a great opportunity to serve the society and humanity. It is really a divine function, therefore, we have to be extremely careful in discharging our functions, duties and obligations.

CHALLENGE FOR THE JUDICIARY

Harmony, social peace and cooperation are the foundation of any civilized society. Our Constitutional goal is to achieve justice – social, economic and political. Access to fair, inexpensive and expeditious justice is a basic human right. Equal access to justice for all segments of the society is imperative. Access to justice would be meaningful only if the judicial system yields result through a fair process and within a reasonable time.

The greatest challenge before the Indian Judicial System is the tremendous explosion of docket. The Courts are flooded with cases, consequently leading to huge pendency of cases at all levels. On the one hand, it shows immense faith and trust of the people in the judicial system and on the other, it also reflects that despite best efforts, the Courts' are unable to dispose of cases promptly for a variety of reasons.

As per statistics provided by the Registry of Supreme Court of India in its quarterly newsletter "***Court News***" for the period April-June, 2007, as on 31st March, 2007, 2,49,56,919 cases are pending in our subordinate courts and 36,78,043 cases are pending adjudication in our High Courts. As on 30th June, 2007, 8,27,639 cases are pending in the High Court of Allahabad and 47,79,654 cases are pending in the subordinate courts in the State of U.P. As per latest statistics, as on 1st August, 2007, 43,728 are pending in the Supreme Court of India. There is also huge pendency of cases in Tribunals and quasi-judicial bodies. The figure of cases pending adjudication is indeed staggering. To deal

with these cases, we have less than 15000 judges and judicial officers in the country.

The ratio of judge per million population in this country is the lowest in the world. The Law Commission of India in its 120th Report examined the problem of under-staffing of the judiciary. The Commission found that India has 10.5 judges per million of population, the corresponding figure in England was 50.9, Australia 57.7, Canada 75.2 and the U.S.A. 107. The main reason of delay in disposal of cases is inadequate judge-population ratio.

The Law Commission in its 120th report submitted in 1987 examined the problem of understaffing of judiciary and recommended 50 Judges per million of population instead of 10.5. The present requirement of number of judges is much greater, looking to the spate of litigation, population explosion and other factors. The inadequate judge strength is a major cause of delay in disposal of cases. Sanctioned strength of the Judges in High Courts was 725 and working strength was 597 as on 1st March, 2007 leaving 128 vacancies. Sanctioned strength of subordinate judges was 14477 and working strength 11767, leaving 2710 vacancies as on 31st December, 2006. Besides increasing number of judges in a phased manner, at all levels, as a first step, it is absolutely imperative to fill existing vacancies at all levels in the shortest possible period. We have to develop zero vacancy or nearly zero vacancy culture.

Increase in the number of Judicial Officers will have to be accompanied by proportionate increase in the number of court rooms and other infrastructure. The supporting staff of courts has to be increased. The existing court buildings are grossly inadequate to meet even the existing requirements and their condition particularly in small towns and moffusils is pathetic. A visit to one of these Courts would reveal the space constraints being faced by them, over-crowding of lawyers and litigants, lack of basic amenities such as regular water and electric supply and the unhygienic and unsanitary conditions prevailing therein. The National Commission to review the working of the Constitution noted that judicial administration in the Country suffers from deficiencies due to lack of proper planned and adequate financial support for establishing more Courts and providing them with adequate infrastructure. It is, therefore, necessary to phase out the old and out-dated court buildings, replace them by standardized modern court

buildings coupled with addition of more court rooms to the existing buildings and more court complexes. As per the information collected by the First National Judicial Pay Commission, every state except Delhi has been providing less than 1% of the budget for subordinate judiciary whereas the figure is 1.03% in case of Delhi. During the 10th Plan (2002-2007) Rs.700 crores have been allocated for priority demands of judiciary, which is 0.078% of the total plan outlay. Such meager allocations are grossly inadequate to meet the requirements of judiciary.

There are some criticisms against judiciary particularly regarding inordinate delay in disposal of cases. This criticism is justified, but if proper steps are taken by all concerns then this evil of the system can also be eradicated in the near future.

The meaningful deliberation on this issue would go a long way in improving the entire judicial system. I expect the new generation of judges would find new and innovative methods to ensure prompt and inexpensive justice.

In a situation of traffic jam on a road, we are compelled either to get the traffic cleared or to take alternate route in order to reach the destination.

The answer to any clogged artery leading to heart is two-fold: either to clear the artery or create an alternate route-by-pass. Time alone will tell whether the bye-pass would succeed or not. But try, one must, for better health and longevity.

Our present justice delivery system – because of multiple reasons – is getting more and more clogged each passing day because of more cases in our in-tray than in our out-tray. Since the road to that final goal – early resolution of dispute – is jammed, it is imperative that we put our minds together and devise new techniques of alternate dispute resolution. While doing so we have to necessarily keep in mind our peculiar national setting, our needs, our resources and the profile of our litigants. Any alternative method, in our context, will succeed only if it is fair, inexpensive, simple and quick.

SENSITIZATION OF THE JUDICIARY & THE ROLE OF JUDGES

You are fortunately joining the judiciary when Shetty Commission's recommendations have been implemented and service

conditions of subordinate judiciary are much better now. There is always a scope for improvement but we see no legitimate ground of any serious dissatisfaction or grievance. Hopefully, conditions would be further improved after receiving VIth Pay Commission recommendations.

The integrity, credibility, honesty, basic knowledge of law and robust common sense are main virtues of the good judicial officer. It is true that the judicial function is not always automatic and, therefore, it is necessary to recommend and train intellectually able men and women to serve as judges who will decide cases as objectively as possible. Further, educating judges on judicial functions and training them on how to judge properly are relatively new ideas looked at differently by the judicial fraternity. However, the nature and scope of judicial education depends upon the function of the judge in a given society. Some of us still believe that institutionalized training may interfere with judicial independence. Other resent the very notion of training inasmuch as it questions their capacity and competence. However, with the explosion in knowledge bearing on legal disputes and with the diversification of complex litigation, there has been increasing demand from many judges themselves for programmes of continuing education tailored to specific problems and needs. Unquestionably, the comprehensive judicial training would produce not only an efficient and effective judicial officer but the judicial officer who is particularly sensitive to the problems and cases pertaining to human rights violations and cases of indigent and the poor.

The role of a judge is by and large determined by the nature and variety of his functions. The conventional functions are assuming new dimensions with the expansion and diversification of judicial assignments and changes in the expectations of the society. It is in this context that we have to consider the necessity of Judicial Education for Judges. This training should not be treated as an affront to the independence of judges nor a threat to their deciding fairly, fearlessly and impartially according to their own judgment. The object is to change one's awareness, knowledge, skills and behaviour in relation to gender issues and to provide an opportunity to evaluate and discuss the issue against existing understanding and social context. In my opinion continuing legal education is beneficial for judges at all levels including High Courts and the Supreme Court. There are new emerging areas of

law, such as, cyber law, computer and internet related cases. Continuing legal education is bound to be more beneficial.

Sensitized judges can take a more proactive role in the proceedings of particular cases rather than simply responding to the material presented by the lawyers. They can exercise their discretion to assist the processes wherever appropriate. They can recognize the need to obtain the best quality evidence from witnesses in criminal trials who have been subjected to violence and litigants in civil cases. They can pay particular attention to the way in which this evidence is recorded. Deciding a case in the courtroom involves adjudicating/settlement of the dispute between the parties and a decision about the application of law. Judges have the ultimate control over this process. They determine what evidence can be given under the rules of evidence. An important factor in this behalf is change in the outlook and perception of the Judge. However, the exercise is a delicate one – there must be proper restraint and caution – lest the judges overstep the limits of their jurisdiction or create uncertainty in law.

JUDGMENT WRITING & JUDICIAL ETHICS

We expect a great deal from our judges – we expect them to be objective, knowledgeable, independent, discerning, practical, and sensitive and above all, we expect them to be fair and impartial. We expect this because judges have such an important and crucial role in society. They decide the fate of people. They also decide dispute between citizen and the State. Judges' powers are unlimited. In appropriate case they can award death sentence as a punishment.

When I was Chief Justice of Bombay High Court, I had the occasion to deal with a case[2] wherein the petitioner sought relief for expunging disparaging remarks and comments regarding her character by the Maharashtra Administrative Tribunal, Aurangabad while dealing with the service matter. In that case, the observations of the tribunal were expunged being uncalled for, unwarranted and unjustified. In that case, we attempted to reiterate and restate some of the basic features and aspects which should be borne in mind by the Judicial Officers and the members of the Tribunal while framing or constructing the judgments and orders. The said features are stated as under:

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[2] Sonibai Nathu Kuwar v. State of Maharashtra : 2005 (6) Bom. CR 261

1. No exact instructions could be given as to how the judgment/order is to be prepared. A judgment is the expression of the opinion of a Judge or Magistrate arrived at after due consideration of the evidence and of the arguments, if any, advanced before him. There are no rules, norms or style of universal application for writing or framing of judgments. Section 2(9) of the Code of Civil Procedure defines a judgment as (a) "statement given by the Judge on the grounds of a decree or order". The Criminal Procedure Code does not define a judgment. In Halsbury's Laws of England the expression has been understood to mean an order in a trial, terminating in the conviction or the acquittal of the accused and this interpretation has been accepted by the Indian Courts.
2. Every Judge or Judicial Officer has his own style of writing judgments. They have to express themselves about the cases which come up for decisions before them in their own style. Cases which come up for decision in different courts are also of such various types and have so many peculiarities of their own, that it is almost impossible to lay down how and in what manner the Judge or the Magistrate should express himself. Some of the basic features and characteristics of the judgment which the Judicial Officer should bear in mind are briefly set out as under.
3. The judgment should ordinarily contain (a) statement of facts, (b) points in dispute, (c) findings on points in dispute on the basis of evidence and documents; and (d) reasons for granting or refusing order/relief.
4. Emotion has no place in a judgment, which has to be based on facts as presented by the parties in the evidence, oral or documentary. Anything, which directly or indirectly aggravates the emotion, definitely induces an element of perversity.
5. The Court should abstain from harsh or ungenerous criticism of measures taken in good faith by those who bear the responsibility of the Government.
6. A judgment must be calm and balanced and neither should it show prejudice nor sympathy. There should never be any display of emotions or sentiments in the judgment. A Judge neither rewards virtue nor chastises vice. He only administers even-handed justice between man and man and between a citizen and

the State. This cardinal principle should always be remembered while constructing a judgment or the order.

7. Judicial Officers should not make sweeping remarks of general nature about any class of people - women, lawyers, politicians, businessmen, landlords, tenants, doctors, moneylenders, policemen, etc. etc.

8. The Judicial Officers should not be unduly sensitive to honest criticism of their judgments and should avoid jurisdiction of contempt as far as possible. I narrate you a very interesting incident. The London Times carried an Editorial referring Lord Temple man Justice of House of Lords "Those Old Fools". When he was asked why no contempt proceedings were instituted, his apt reply was "Well old I am and my wisdom is always a matter of somebody's opinion. How it is contempt." He laughed over.

9. The pen of the Judge should be just like the knife of a surgeon, which probes into the flesh only inasmuch as it is absolutely necessary for the purpose of the case before it. Disparaging remarks which are not unwarranted by evidence against a person should never be made.

10. A judgment should not be based on conjectures and surmises or personal knowledge. It should be based on proper appreciation of evidence on record.

11. The language of the judgment should be sober, dignified, restrained and temperate and in no case satirical or factious. Judicial officers should see that their pronouncements are judicial in nature and do not normally depart from sobriety, moderation and reserve. They should refrain from being sarcastic in their judgments. They should try to avoid expressions, which may attract a comment that the Judge had either made up his mind even before he initiated proceedings or had identified himself with a case to an extent that he was unable to appreciate the case or weigh the evidence before him impartially and without any basis.

12. The Courts and Tribunals must refrain from making any observation and remarks regarding personal characters of individuals, particularly of women, unless it is absolutely imperative in deciding the case.

A Judge may keep in mind certain essential attributes of judicial functioning:

a) A Judge should be alert in the conduct of the business of the Court and in giving judgments.

b) A Judge's official conduct should be free from impropriety.

c) A Judge should be temperate, attentive, patient, impartial and he should be studious of the principles of the law.

d) A Judge should be industrious.

e) A Judge should be prompt in the performance of his judicial duties recognizing the time of the lawyers and the litigants.

f) A Judge should be enough competent to get the best from the court staff.

g) A Judge should be courteous to the lawyers, especially to those who are young and newcomer in the Bar.

h) A Judge should not hear a case where his own interest is involved or a near relative is a party so as to avoid any allegation of being influenced.

i) A Judge should not accept gifts from the lawyers practicing before him or from the litigants.

j) Even though a Judge is free to make his personal opinion with regard to politics of the nation, he should avoid making political speeches, soliciting contributions for party funds or for any Association, Organization or Trust.

By adhering the aforesaid canons of judicial ethics, a Judge will not prove himself to be worthy of holding the office of a Judge but also will become a personality having impeccable integrity, credibility and honesty. In the eyes of the public, he will be the real ambassador of the Judiciary.

CONCLUSION

Successful working of the judicial system is as much responsibility of the members of legal profession as that of any one else. It has been the endeavour of the Institute of Judicial Training & Research, Lucknow to help to prepare the best judges.

Dear friends, I would like to refer to the following lines from ***Brihadaranyaka Upnishad***:

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

I once again convey my deep sense of gratitude to Hon'ble the Chief Justice of Allahabad High Court, the Director of the Institute of Judicial Training & Research, Lucknow, U.P. for inviting me for today's function. I hope that under the able guidance and patronage of Hon'ble the Chief Justice and the Director of the Institute, this Institute will achieve milestone in providing well trained judicial officers to this country.

All my good wishes for your bright career.
Thank you for your patience.

CONTEMPT OF COURT: THE NEED FOR A FRESH LOOK

- By Hon'ble Mr. Justice Markandey Katju,
Judge,
Supreme Court of India

The topic of Contempt of Court often comes up for discussion and comment. Some talk of reforming the Law of Contempt, others suggest abolishing this power in Courts altogether, etc. There are a large number of books and articles on the subject.

The attempt is here to give the subject a new look by going into the Fundamental Principles.

The basic principle in a democracy is that the people are supreme. It follows that all authorities, whether Judges, Legislators, Ministers, Bureaucrats, etc. are servants of the people. Thus, the preamble to the Constitution of India states:

> "We, The People of India, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:
>
> JUSTICE, social, economic and political;
>
> LIBERTY of thought, expression, belief, faith and worship;
>
> EQUALITY of status and of opportunity;
>
> and to promote among them all
>
> FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;
>
> IN OUR CONSTITUENT ASSEMBLY this twenty-sixty day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUION."

These words emphasize the republican and democratic character of our Constitution, and show that all power ultimately stems from the People.

Once this concept of popular sovereignty is kept firmly in mind it becomes obvious that the people of India are the masters and all authorities in India (including the Courts) are their servants. Surely the master has the right to criticize the servant if the servant does not act or behave properly. It would logically seem to follow that in a democracy the people have the right to criticize the Judges. Why then, it may be asked, should there be a Contempt of Courts Act which to some extent prevents people from criticizing Judges or doing other things which are regarded as Contempt of Court? This is a question, which calls for a close examination, and this is what is attempted here.

The Constitution has no doubt been created by the people. But this instrument has itself created the Courts, which means that the people in their wisdom realized that there must be a forum (or fora) where disputes between the people could be resolved and grievances of the people redressed peacefully.

It is in the nature of things that in every society there will be disputes between the people and grievances of the people. If there is no forum to resolve these disputes and redress these grievances peacefully, they will be resolved violently with bombs, guns, knives and lathis. Hence the judiciary is a great safety valve. By giving a hearing to a person having a grievance, and by giving a verdict on the basis of settled legal principles, the Court pacifies that person, otherwise the grievance may erupt violently. The judiciary thus maintains peace in society, and no society can do without it.

Looking at it from this angle one can immediately realize that in a democracy the purpose of the Contempt of Court power can only be to enable the Court to function. The power is not to prevent the master (the people) from criticizing their servant (the Judges) if the latter do not function properly or commit misconduct.

Article 19(1)(a), of the Constitution gives the right of freedom of speech and expression to all citizens. But Articles 129 and 215 give the power of Contempt of Court to the higher judiciary, and this power limits the freedom granted by Article 19(1)(a). How are these two provisions to be reconciled?

In my opinion once it is accepted that India is a democracy, and that in a democracy the people are supreme, the reconciliation

can only be affected by treating the right of the citizens of free speech and expression under Article 19(1)(a) to be primary, and the power of contempt to be subordinate. In other words, the people are free, and have the right to criticize Judges, but they should not go to the extent of making the functioning of the judiciary impossible or extremely difficult.

Thus in my opinion the test to determine whether an act amounts to Contempt of Court or not is this: does it make the functioning of the Judges impossible or extremely difficult? If it does not, then it does not amount to Contempt of Court, even if it is harsh criticism.

Much of our Contempt Law is a hangover from British rule. But under British rule India was not free and democratic, and the people were not supreme; rather it was the British rulers who were supreme. Also there was no Constitution at that time containing provisions like Article 19(1)(a). How then can the law of those days be applicable today?

As a Judge in three High Courts (Allahabad, Madras and Delhi) I would often tell the lawyers in open Court that they could criticize me as much as they liked, inside the Court or outside it, to their heart's content, but I would not initiate proceedings for Contempt of Court. Either the criticism was correct, in which case I deserved it, or it was false in which case I would ignore it. Some people deliberately try to provoke the Judge to initiate Contempt of Court proceedings, their whole game being to get publicity. The best way to deal with such persons would be to ignore them and thus, deny them the publicity, which they are really seeking. I would often say in Court "Contempt power is a 'Brahmastra' to be used only on a 'patra' (deserving person), and I do not regard you as a 'patra'."

I also said that the only situation where I would have to take some action was if my functioning as a Judge was made impossible e.g., if someone jumps up on to the dais of the Court and runs away with the Court file, or keeps shouting and screaming in Court, or threatens a party or a witness. After all I have to function if I wish to justify my salary.

In a speech delivered on 1.12.2001 in Jaipur on the topic "The Law of Contempt - is it being stretched too far?" The doyen of

the Indian Bar, Mr. Fali Nariman, said that the offence of 'scandalizing the Court' is a mercurial jurisdiction in which there are no rules and no constraints. I may quote an entire long passage from this speech:

> "It was Jeremy Bentham (the theoretical jurist) who characterized the Common Law as "Dog Law."
>
> "When your dog does anything you want to break him off", (he wrote in 1823), "you wait till he does it, and then beat him for it. This is the way you make laws for your dog, and this is the way judges make laws for you and me."

The law of contempt of court in Anglo-Saxon jurisprudence both in England in the past, and in India in the past and present has been no more, no less than "Dog-Law". There' are no rules, no constraints - no precise circumstances when the administration of justice is brought into contempt. The judgments are strewn with pious platitudes that give little guidance to the editor, to the commentator, to lawyers, and to members of the public: this part of the law of contempt though necessary, is a standing threat to free expression. It leaves too much to the discretion of the particular judge (or judges). And at times decisions do give rise to a strange feeling that the status of the person who scandalizes the Court perhaps did affect the ultimate result.

In 1988 a sitting Cabinet Minister made wide and improper remark against Judges of the Supreme Court. He said:

> "Zamindars like Golaknath (he was speaking of the Golaknath Case) evoked a sympathetic cord nowhere in the whole country except the Supreme Court of India. And the bank magnates, the representatives of the elitist culture of this country ably supported by industrialists, the beneficiaries of independence, got higher compensation by the intervention of the Supreme Court in Cooper's case (1970). Anti social elements, FERA violators, bride burners and a whole hoard of reactionaries have found their haven in the Supreme Court."

The minister then went on to say that because the Judges of the highest Court had their "unconcealed Sympathy for the haves" (as opposed to the have nots) they had interpreted the expression "compensation" in the manner they did: clearly attributing motives.

And yet a Bench of two Judges (in Duda' s case AIR 1988 SC 1208) exonerated him. Let me read to you what the Bench said:

> "Bearing in mind the trend in the law of contempt (they were speaking of the liberal trend)- established by the Judgment of Justice Krishna Iyer in Mulgaokar's case (AIR 1978 SC 727), the speech of the Minister has to be read in its proper perspective, and when so read it did not bring the administration of justice into disrepute or impair the administration of justice. The Minister is not guilty of contempt of the Court."

Admirable, Laudable, Free speech upheld. But one cannot help wondering whether their Lordships would have been quite as liberal if the criticism had been made by a less important personage than a Cabinet Minister.

Again when an important personage Mr. Mohd. Yunus, Chairman of the Trade Fair Authority of India known at the time to be very close to the Prime Minister - had criticized a judgment delivered by a Supreme Court Judge in the Jehovah Witness' case holding that the singing of the National Anthem for a particular sect. of Christians was not compulsory - Mr. Mohd. Yunus said this Judge (Justice Chinnappa Reddy) "has no right to be called either an Indian or a Judge."

An Association of individuals called the Conscientious Group filed a petition seeking a direction that Mr. Yunus should be hauled up for contempt. But close colleagues of Justice Chinnappa Reddy daily sitting with him suddenly found themselves powerless to even call for an explanation from Mr. Mohd. Yunus - on the technical ground that when the Attorney-General was approached by the petitioners to give his sanction he had declined, and the Solicitor-General had also demurred, vide Conscientious Group vs. Mohammed Yunus and Ors., AIR 1987 SC 1451.

They know that the power to issue notice suo motu for any contempt was plenary (not dependant on the fiat of the Attorney-General or Solicitor-General) - yet they chose not to invoke it even though a Sitting Judge of the Supreme Court had been described as a person not fit to be an Indian, not fit to be a Judge.

Yet in a later case (also reported) a not-so-important litigant was held guilty of contempt for saying that a Judge was anti-national. When a Bench of the Supreme Court of India hearing a miscellaneous application said that it was inclined to think that a particular case should go before a Bench, which had earlier passed some orders, an inconsequential member of the public Mohd. Zahir Khan (the litigant) addressed the Court in a loud tone thus:

> "Either he is an anti-national or the Judges are anti-nationals."

"A notice was issued and the litigant was found guilty of contempt of court and made to suffer imprisonment for one month, vide Mohd. Zahir Khan vs. Vijai Singh & Ors. 1992 Supp. (2) SCG 72. These examples are given not to deride our Judges or criticize previous decisions. It is only to illustrate very graphically - that the true nature of this aspect of contempt jurisdiction: is mercurial, unpredictable capable of being exercised (and therefore in fact exercised) differently in different cases and by different judges in the same Court.

And the disturbing trend persist."

The criticism of Mr. Nariman about the uncertain state of affairs regarding the Law of Contempt appears to be justified.

To give an example, in P.N. Duda vs. P. Shiv Shanker AIR 1988 SC 1208, the speech delivered by the then Union Law Minister Mr. P. Shiv Shanker in substance was similar to the one delivered by the then Chief Minister of Kerala Mr. Nambudiripad. However, Mr. Nambudiripad was held to be guilty of contempt of Court (vide AIR 1970 SC 2015) but Mr. Shiv Shanker was not. Is this not uncertainty in the law?

It may be noted that Mr. Nambudiripad in his speech had accused the Judges of being biased in favour of rich people and against the poor. In substance this was the same allegation, which was made by Mr. Shiv Shanker (extract of whose speech is referred to above).

Mr. Nariman and others are perfectly correct in saying that there should be certainty in the law, and not uncertainty. After all, the citizen should know where he stands.

The uncertainty in the Law of Contempt of Court was, in my opinion, for two reasons (1) In the Contempt of Courts Act, 1952 there was no, definition of 'contempt', (2) even when a definition was introduced by the Contempt of Courts Act, 1971 (vide Section 2) there was no definition of what constitutes scandalizing the Court, or what prejudices, or interferes with, the course of justice. What could be regarded as scandalous earlier may not be regarded as scandalous today and what could earlier be regarded as prejudicing or interfering with the course of justice may not be so regarded today.

In this paper it is sought to remove this uncertainty in the Law of Contempt, and this calls for a deep analysis of the subject.

The view about the contempt power was first stated in England by Wilmot J. in 1765 in a judgment, which was in fact never delivered (R. VS. Almon). In that opinion Wilmot J. observed that this power in the Courts was for vindicating their authority, and it was coeval with their foundation and institution, and was a necessary incident to a Court of Justice. The above dictum was thereafter followed by successive Courts not only in England but also in other countries.

Thus the power of Contempt was said to be required for maintaining the dignity and vindicating the authority of the Court.

But whence comes this authority and dignity of the Court? In England it came from the King. The judicial function is a sovereign function. The King was the fountain of justice, and in earlier times he would himself decide cases: It was only subsequently when the king had many other functions (military, administrative, etc.) that he delegated judicial functions to his delegate, who began to be called Judges.

Thus in a monarchy the Judge really exercises the delegated functions of the King, and for this he requires dignity and majesty as a King must have, to get obedience from his subjects.

The situation becomes totally different in a democracy in which it is the people, and not the King, who are supreme. Here the Judges get authority delegated to them by the people, and not by a king.

We may analyze this a little deeper. In a monarchy it is the King, which is the superior entity, while the people, being his subjects, are the inferior entity. Since the Judges are really performing the delegated functions of the King, they need the majesty and aura, which the King needed to secure obedience from his subjects.

In a democracy, on the other hand, it is the people who are supreme, and therefore they are the superior entity, while all State authorities (including Judges) are inferior entities, being the servants of the people.

Hence in a democracy there is no need for Judges to vindicate their authority or display majesty or pomp. Their authority will come from the public confidence, and this in turn will be an outcome of their own conduct, their integrity, impartiality, learning and simplicity. No other vindication is required in a democracy by Judges, and there is no need for them to display majesty and authority.

The view expressed above is in fact accepted now even in England. As observed by Lord Salmon in AG vs. BBB (1981) AC 303 = (1980) 3 All ER 161 (170):

> "The description 'Contempt of Court' no doubt has a historical basis, but it is nonetheless misleading. Its object is not to protect the dignity of the Courts but to protect the administration of justice."

This is precisely the thesis, which is sought to propounded in this paper. The contempt power in a democracy is only to enable the Court to function, and not to vindicate and maintain its authority and dignity.

In Almon's case, to which we have already referred, the defendant had published a pamphlet accusing Lord Mansfield, the Lord Chief Justice of having acted 'officiously, arbitrarily and illegally'. Wilmot J. observed that this:

> "Excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous

obstruction of justice, and, in my opinion, calls for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the Judges, as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be impartial, and to be universally thoughts so, are both absolutely necessary."

(Vide Miller's Contempt of Court 3rd Edition page 568)

Wilmot J's opinion was expressed in 1765. Can it be said to be the Law of Contempt of Court in England today? Hardly. Even though there is no written Constitution in England and hence no Fundamental Right like Article 19(1)(a), the old view of Contempt of Court is totally changed today even in England, and now the view is that of Lord Salmon, as mentioned above.

Justice is not 'a cloistered virtue', said Lord Atkin, and must suffer the scrutiny and outspoken comments of ordinary men. In fact exposure to criticism only strengthens the judiciary, far from weakening it.

As observed by Lord Denning in R vs. Commissioner of Police (1968) 2 QB 150:

"Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself.

It is the right of every man, in Parliament or out of it, in the press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticize us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication."

The best shield and armour of a Judge is his reputation of integrity, impartiality, and learning. An upright Judge will hardly ever need to use the contempt power in his judicial career. It is only in a very rare and extreme case that this power will need to be exercised, and that, too only to enable the Judge to function, not to maintain his dignity or majesty.

Sometimes an honest and learned Judge is unjustifiably criticized. But for one such person criticizing an upright Judge one hundred people will immediately rush to his defence (even without the Judge asking for such defence). Why then, should Judges get upset or be afraid of criticism, particularly when we are living in a democracy? As long as the Judge is allowed to function, the best course for him is to ignore baseless criticism (but pay heed to honest and correct criticism).

I remember when I was Chief Justice of Madras High Court two Hon'ble Judges of the Court (whom I greatly respect) one day came to my chamber during the lunch interval. They were looking very upset and disturbed. Apparently someone in the Court distributed a leaflet making some allegations against them. I went through the leaflet and then asked them "Is your conscience clear?" They said it was. Then I laughed and told them to just ignore the leaflet, otherwise they would get blood pressure. When I said this they too started laughing, tore up the leaflet and threw it into the waste paper basket. I told them, that this was only an 'occupational hazard' of a Judge, and in a democracy people say all sorts of things, which a Judge should learn to ignore as long as his conscience was clear.

In 'American Jurisprudence' (1964 Second Edition, Vol. 17 page 6) it is stated:

> "Contempt of court has been defined as a despising of the authority, justice or dignity of the court. Generally speaking, he whose conduct tends to bring the authority and administration of the law into disrespect or disregard, or otherwise tends to impede, embarrass or obstruct the court in discharge of its duties, is guilty of contempt .... Contempt of court has also been described as any conduct that in law constitutes an offence against the authority and dignity of a

court or of a judicial officer in the performance of a judicial function."

With due respect this definition is wide off the mark in modern times in a democracy. It is a hangover of the archaic and obsolete British Law of Contempt, which originated at a time when the British King was supreme, and the Judges were his agents.

In a democracy it is not criticism by a few persons, which brings a Judge into disrepute or shakes his authority, it is his own conduct (or rather misconduct), which can do so. If a Judge is honest and upright (and the people know about the integrity of a Judge very quickly) no amount of misguided and baseless criticism can bring him into disrepute or shake his authority, for such authority comes from the confidence of the public at large.

We may now come back again to the central point in this paper. I submit that the law of contempt of court can be made certain once it is accepted that the purpose of the contempt power is not to vindicate or uphold the majesty and dignity of the court (for it is automatically vindicated and upheld by the proper conduct of the Judge, not by threats of using the contempt power) but only to enable the court to function. The contempt power should only be used in a rare and very exceptional situation where without using it, it becomes impossible or extremely difficult for the court to function. In such rare and exceptional situations, too, the contempt power should not be used if the mere threat to use it suffices.

It has, no doubt, been mentioned in Section 2(c) of the Contempt of - Courts Act, 1971 that any act which 'scandalises or tends to scandalize, or lowers or tends to lower the authority of any court is contempt of court.

But what is the meaning of 'scandalising'? The meaning of words, and our notions, change with the passage of time. For instance many things which were regarded obscene earlier are no longer regarded obscene, today (e.g., D.H. Lawrence's book 'Lady Chatterley's Lover').

Does calling a Judge a fool scandalize him? In this connection we may refer to the decision of the House of Lords in the Spycatcher case, vide Attorney General v. Guardian Newspaper 1987(3) All.E.R. 316 (H.L.).

The facts of the case were that a former spy, Peter Wright, wrote a book entitled 'Spycatcher' about his days in the British Intelligence Agency MI5. The British Government filed an injunction suit to restrain publication of the book on the ground that the material in the book was confidential and was prejudicial to national security. By a 3-2 majority the House of Lords granted the injunction.

The Press was outraged. The Daily Mirror, for example, ran a banner headline next day accompanied by upside down photographs of the majority Judges and the caption 'YOU FOOLS'.

Mr. Nariman, who was in England at that time, asked Lord Templeman (the Senior Judge in the majority) why no contempt proceedings were initiated. Lord Templeman smiled, and said that Judges in England did not take notice of personal insults. Though he believed he was not a fool, others were entitled to their opinion.

Thus the concept of 'scandalising' the court has changed. In earlier times a person who caned a Judge a fool in England would certainly be hauled up for contempt today he would not. And the reasons for this change is, as Lord Salmon has pointed out, that today the contempt power is not used for vindicating the authority of the Judge but only for enabling him to function. If for instance, a person keeps shouting or whistling in my court repeatedly, and does not stop despite my repeated requests, obviously I will have to take some action to enable me to function. After all people are paying taxes from which I get my salary and perks, and I have to justify this salary by deciding their disputes. Similarly, if someone threatens a party or witness in a case, I will certainly take action. But if a person calls me a fool, whether inside court or outside it, I for one would not take action as it does not prevent me from functioning, and I would simply ignore the comment, or else say (like Lord Templeman) that everyone is entitled to his opinion. After all, words break no bones.

In Balogh v. Crown Court at St. Albans (975 QB 373 the defendant told the Judge in Court "You are a humorless automation. Why don't you self-destruct?" Lord Denning said that such insults are best treated with disdain, and took no action.

There may, of course, be differences of opinion about what acts prevent, or make it very difficult, for a Judge, to function. For instance, do comments by the public (including' lawyers, journalists, etc.), or publicity in the media, about a pending case prevent, or make it very difficult, for the Judge to function? I, for one, am inclined to think that it does not. A Judge should have the equanimity and inner strength to remain unperturbed and unruffled in any situation.

In this connection I may refer to the speech delivered on 19.2.1968 by Mr. K. L. Misra, the then Advocate General of U.P. on the demise of my grandfather, Late Dr. K.N. Katju in which he said:

> "No leadership of the Bar, at least in those days, was possible without the background of a deep scholarship and learning of law. I remember, very vividly, his coming back to the Bar, after incarceration of about 3 or 4 years, late in 1943, when he sat down, in a comer of the Advocates Association, and then, within a few days, read through cases decided by the British Courts during the time of his absence from the Bar. I went near him. He called me and put before me a judgment of the King's Bench Division, which I read with absorbing interest, the 'very learned discussion in the judgment on the difference between "value" and "price", Dr. Katju asked me: "what is the significant thing you have noticed about this judgment". I read it again before him and tried to tell him what the gist of the judgment was. He said: "No, no; look at the date of the judgment." He then pointed out to me that the date, on which the judgment was delivered, with that scholarly and cloistered detachment, fell during the days when the German Air Force - its bomber squadron - were spreading widespread devastation and destruction in England. He told me that this detachment makes up the mentality of a true Judge."

Now if even bombs falling near him do not disturb a true Judge, why should mere comments or publicity do so? A Judge's shoulders should be broad enough to shrug off such comments or publicity without getting perturbed or influenced.

In my opinion, therefore, the expression 'preventing or making it extremely difficult, for the Judge to function' should ordinarily be understood with reference to a Judge who has a true Judge's temperament detached, calm, with equanimity, and with broad enough shoulders to shrug off baseless criticism or attempts to influence him without being perturbed.

In my opinion a fresh and modern, democratic approach, like that in England, USA and commonwealth countries, is now required in India to do away with the old anachronistic view. Contempt jurisdiction is now very sparingly exercised in these western countries. Thus in Defence Secretary v. Guardian Newspapers (1985) 1 A.C. 339 (347) Lord Diplock observed, "The species of contempt which consists of 'scandalising the judges' is virtually obsolescent in England and may be ignored".

Moreover, it must always be remembered that contempt jurisdiction is discretionary jurisdiction. A Judge is not bound to take action for contempt even if contempt has in fact been committed.

An interesting example of this is given by Lord Denning in his Book "The Due Process of Law" at Page 6 where he writes:

> "On every Monday morning we hear litigants in person. Miss Stone was often there. She made an application before us. We refused it. She was sitting in the front row 'with a bookcase within her reach. She picked up one of Butterworth's 'Workmen's Compensation Cases' and threw it at us. It passed between Lord Justice Diplock and me. She picked up another. That went wide too. She said, 'I am running out of ammunition'. We took little notice. She had hoped we would commit her for contempt of court - just to draw more attention to herself. As we took no notice, she went towards the door. She left saying: 'I congratulate your Lordships on your coolness under fire'."

Before concluding, I may refer to the book on "Judges" by David Pannick, in which he states:

> "Some politicians, and a few jurists, urge that it is unwise or even dangerous to tell the truth about the judiciary. Judge Jerome Frank of the US Court of Appeals sensibly explained

that he had little patience with, or respect for, that suggestion. I am unable to conceive.... that, in a democracy, it can never be wise to acquaint the public with the truth about the workings of any branch of government. It is wholly undemocratic to treat the public as children who are unable to accept the inescapable shortcomings of man-made institutions... The best way to bring about the elimination of those shortcomings of our judicial system which are capable of being eliminated is to have all our citizens informed as to how that system now functions. It is a mistake, therefore, to try to establish and maintain, through ignorance, public esteem for our courts."

In this connection reference may be made to the recent amendment to the Contempt of Courts Act (the contempt of Courts Amendment Act, 2006) which has introduced a new Section 13(b), which states:

"The courts may permit, in any proceedings for contempt of court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is bona fide."

Thus, truth is now a defence in contempt of court proceedings if it is in public interest and is bona fide. This amendment is in the right direction, and was long overdue.

The Role of Art and Literature in the People's Lives

- By Hon'ble Mr. Justice Markandey Katju,
Judge,
Supreme Court of India

Today India is facing gigantic problems. In Andhra Pradesh, Maharashtra, etc. farmers and weavers are committing suicide regularly. Prices of essential commodities are skyrocketing. The Finance Minister talks of the stock market boom, but people are more interested in the boom in prices of dal, roti, onions and vegetables. Unemployment has become massive and chronic, the educated youth can see only darkness in their lives. Industries are closing down, increasing unemployment. Water and electricity shortage is widespread. Corruption and fraud are seen everywhere, even in the highest places. Medicines and medical treatment have become prohibitively expensive for the masses. Housing is scarce. The educational system has gone haywire. Law and order has collapsed in many parts of the country where criminals and mafia are calling the shots.

One may ask, what has all this to do with art and literature?

The first is called '*art for art's sake*' and the second is called '*art for social purpose*'.

According to the first theory, art and literature are only meant to create beautiful or amusing works to please and entertain people and artists themselves (LokUr% lq[kk;), and they are not meant to propagate social ideas. If art and literature is used for propagating social ideas it ceases to be art and becomes propaganda. Proponents of this view are Keats, Tennyson, Ezra Pound and T.S. Eliot in English literature, Edgar Allen Poe in American literature, Agyeya and the 'Reetikal' and 'Chayavadi' Poets in Hindi literature, Jigar Moradabadi in Urdu literature and Tagore in Bengali literature.

The other theory is that art and literature should serve the people, and help them in their struggle for a better life, by arousing the people's emotions against oppression and injustice and increasing their sensitivity regarding the people's sufferings.

Proponents of this school are Dickens and George Bernard Shaw in English literature, Walt Whitman, Mark Twain, Harriet Beacher Stowe, Upton Sinclair and John Steinbeck in American literature, Balzac, Stendhal, Flaubert and Victor Hugo in French, Goethe, Schiller and Enrich Maria Remarque in German, Cervantes in Spanish, Tolstoy, Gogol, Dostoevsky and Gorki in Russian, Premchand and Kabir in Hindi, Sharat Chandra Chattopadhyaya and Kazi Nazrul Islam in Bengali and Nazir, Faiz, Josh and Manto in Urdu.

Which of these two theories should be adopted and followed by artists and writers in India today?

Before attempting to answer this question it is necessary to clarify that there have been very great artists and writers in both these schools. For instance, Shakespeare and Kalidas can be broadly classified as playwrights belonging to the first school i.e. '*art for art's sake*'. Their plays serve no social purpose beyond providing entertainment and understanding of human impulses and motivations. Though he was basically a realist, Shakespeare had no intention of reforming society or combating social evils. Yet undoubtedly Shakespeare is an artist of the highest rank. One is simply amazed by his insight and portrayal of human psychology and the springs of human action. Whether it be his Tragedies or Histories or Comedies, one is amazed and wonder-struck by his depiction of human nature and human motivations. Be it Hamlet, Macbeth, King Lear, Falstaff, Julius Caesar or Iago – these are all characters so full-blooded that we can recognize them from our own experience as actual human beings from real life.

Similarly, 'Meghdut' of Kalidas is nature and love poetry at its highest. The depiction of the North Indian countryside, which Kalidas gives, is astonishing in its sheer beauty. Even Wordsworth, the English nature poet, cannot come anywhere near it. Nevertheless Kalidas has no social purpose in his works.

On the other hand, George Bernard Shaw writes his plays almost exclusively with a social purpose in mind – to combat social evils and reform society. Whether it is 'Major Barbara' or 'the Doctor's Dilemma', or 'Mrs. Warren's Profession' or 'Misalliance' or Captain Brassbound's Conversion', his plays are a powerful

denunciation of social injustices and evils. Similarly, Dickens in his novels attacks the social evils in England in his time e.g. the terrible conditions of schools, Jails, orphanages, the judicial system, etc.

Shakespeare or Shaw, who is greater as an artist? The first represents '*art for art's sake*', the second '*art for social purpose*'. We shall attempt an answer, but a little later.

Literature – the art of the word, the art which is closest to thought – is distinguished from other forms of art (e.g. painting and music) by the greater emphasis on thought content as compared to form. On the other hand, an art such as classical music may be almost entirely devoted to creating a mood rather than arousing any thought. For instance, the main form of serious North Indian classical music which is called *'khyal'* has hardly any thought content (since very few words are used in it), but it has an almost unbelievable power of creating a mood and arousing aesthetic feelings – whether it is the 'raag' of the rainy season called *'malhar'* (there are many varieties of malhars – the main one being 'mian-ka-malhar', though I am personally more fond of 'megh malhar') which can make one feel that it is raining, or the morning raags like 'Jaunpuri', 'Todi', Bhairav' etc. which gently wake you up, or night raags like 'Darbari' or 'Malkauns' (called 'hindola' in Carnatac music) which gently put you to sleep, or a raag like 'Bhairavi' which can be sung (or played) at any time and in any season, and is astonishing for its sheet beauty, or a large variety of other raags which create other types of moods. There are other styles of North Indian classical music like 'Thumri' in which there is more thought content, because they use more words than *'khayal'*. However, there is no style or raag in North Indian or Carnatic classical music, which arouses the emotion of fighting against social injustices. It is pure art's sake, and yet it is undoubtedly very great art.

Art critics often regard the two basic trends or tendencies in art and literature as realism and romanticism. The truthful, undistorted, depiction of people and their social conditions is called realism. As regards romanticism, the emphasis in it is on flights of imagination, passion and emotional intensity.

Both realism and romanticism can be either passive or active. Passive realism usually aims at a truthful depiction of reality without

preaching anything e.g. the novels of Jane Austen, George Eliot or the Bronte Sisters. In this sense it can be called socially neutral. However, sometimes, passive realism preaches fatalism, passivity, non-resistance to evil, suffering, humility, etc. An example of this is Tolstoy's depiction of the meek peasant Platon Karatayev in 'War and Peace' who humbly and cheerfully accepts his fate, or in Thomas Hardy's pessimistic novels (e.g. 'Tess', 'Far from the Madding Crowd', etc.). Some writers were initially active but later became passive, e.g. Dostoyevski who in 'Crime and Punishment', 'Brothers Karamazov', 'The Idiot' etc. powerfully expressed the rebellion of the individual against the forces fettering him, but ended up by calling 'proud man' to humility. On the other hand, a writer like Tolstoy was a fatalist in his earlier novel 'War and Peace', but became a social reformer in his later work 'Resurrection'.

Dickens, Victor Hugo, Maxim Gorki, Sharat Chandra, etc. belong to the school of active realists. They oppose fatalism, passivity and non-resistance to evil, and instead inspire people to fight against social evils. For instance in 'Mother', Gorki describes the transformation of the oppressed. In it men and women of the Russian common people straighten their backs, purge their souls of the traces left by centuries of oppression, and of everything that suppressed or distorted the sterling potential in human beings, which was only waiting to be liberated. Pavel Vlasov and his mother are such people. Similarly, in the stories and novels of the great Bengali writer Sharat Chandra Chattopadhyaya we find a powerful attack on the oppression of women and against the caste system (see 'Shrikant', 'Brahman Ki Beti', 'Gramin Samaj', etc.).

The strength of passive realism lay in its exposure of human motivations and social evils, but its weakness lay in its lack of positive principles or ideals (see the works of Zola, Taine, etc.). This literature was valuable because of its truthful approach to reality, concentrating on meticulous description of the visible and real (e.g. Henry Fielding's 'Tom Jones', which is regarded as the first realistic novel) but it showed no way out to the people. It criticized everything but asserted nothing. And it often viewed man from a fatalistic point of view, as a mere passive product of his surroundings, helpless and incapable of changing his social conditions.

Passive and active realism can both serve a social purpose. But whereas passive realism often preaches fatalism, pessimism and uselessness of endeavours to improve society, active realism is optimistic, characterized by its solicitude and concern for the people, inspiring them to strive against their plight and improve their social conditions.

In great writers like Shakespeare, Balzac, Tolstoy or Mirza Ghalib it is often difficult to define with sufficient accuracy whether they are romantics or realists. Both trends merge in their works, and in fact the highest art is often a combination of the two.

Romanticism, like realism, can be either passive or active. Passive romanticism attempts to divert people from reality into a world of pure fantasy or illusions, or to a fruitless preoccupation with one's own inner world, with thoughts about the 'fatal riddle of life' or about dreams of love and death. Its characters may be knights, princes, demons, fairies, etc. who exist in a world of make believe (as in the novels of the Hindi writer Devki Nandan Khatri e.g. Chandrakanta Santiti, Bhootnath, etc. which were very popular at one time). Much of the 'reetikal' Hindi poetry, which was mainly written to please kings and princes, and which deal with subjects like beauty (shringar) and love, belongs to this category. Passive romanticism thus hardly serves any social purpose.

Active romanticism, on the other hand, attempts to arouse man against the evils in society, e.g. Shelley's 'Prometheus Unbound', Heine's 'Enfant Perdu', Gorki's 'Song of the Stormy Petrel' and the poem's of the great Urdu writer Faiz. It thus clearly serves a social purpose. Active romanticism rises above reality, not by ignoring it, but by seeking to transform it. It regards literature as having a greater purpose than merely to reflect reality and depict existing things. Rousseau's novels 'Emile' and 'New Heloise' are good examples of this school.

It may also be mentioned that '*art for social purpose*' may be expressed not always in a direct way, but also sometimes in an indirect, roundabout, or obscure way, e.g. by satire. In this connection, reference can be made to Jonathan Swift's 'Gulliver Travels' or 'A Tale of a Tub', Lewis Carrol's 'Alice in Wonderland', Cervantes' 'Don Quixote', Voltaire's 'Candide' and 'Zadig' etc.

Much of Urdu poetry, which mostly serves a social purpose (as it attacks oppressive customs and practices, like the poetry of Kabir) is expressed not in a direct, but in an indirect way, e.g. the works of Mir, Ghalib, Faiz, etc.

Similarly, '*art for social purpose*' can also be in a religious garb e.g. much of the Bhakti poetry in Hindi.

We now come back to the question posed earlier. Should artists and writers in India follow the school of '*art for art's sake*' or '*art for social purpose*'? As mentioned earlier, both schools have produced great artists and writers. What we have to think of, however, is which school would be more beneficial to our country in today's historical situation. Thus the question who is greater as an artist, Shakespeare or Shaw (I personally think Shakespeare is greater) is not very relevant in India today.

In my opinion in a poor country like India it is the second theory ('art for social purpose'), alone which can be acceptable today. Our country is facing the tremendous challenge of abolishing poverty, unemployment, ignorance, casteism, communalism, and other social evils, and hence artists and writers must join the ranks of those who are struggling for a better India, they must inspire the people by their writings, and write against oppression and injustice.

However, what is the scenario before us today? The truth is that there is hardly any good art and literature today. Where is the Sharat Chandra or Premchand or Faiz of today? Where is the Kabir or Dickens of today? Today, there seems to be a total artistic and literary vacuum. Everything seems to have become commercialized. Writers write not for highlighting the plight of the masses but only to earn some money, for the TV or Films.

And what do we see on TV? Some channels show pop music, disco and fashion parades (often with scantily clad young women). Is it not a cruel irony and an affront to our poor people that so much time (and money) is spent on showing disco dancing and pop music? What have the Indian masses, who are facing terrible economic problems, to do with fashion parades, disco and pop?

Some channels show cricket day in and day out throughout the year. In India cricket is really the opium of the masses. The Roman Emperors used to say, "If you cannot give the people bread

give them circuses". This is precisely the approach of the Indian establishment. Keep the people involved in cricket so that they forget their economic and social plight. What is important is not price rise or unemployment or poverty or lack of housing or medicines, what is important is whether India has beaten New Zealand (or better still, Pakistan) in a cricket match, or whether Tendulkar or Ganguly have scored a century.

Some Hindi writers complain that Hindi magazines are closing down. Have these people ever thought why? Evidently, no one is interested in reading what he or she write because they do not depict the people's sufferings, and do not inspire people to struggle for a better life.

When Maxim Gorky, the great Russian writer, used to step onto the streets of Russia he used to be mobbed by the people, because he was so much loved by the people as he wrote about their lives and championed their cause. Can a Hindi writer say that the same thing happens to him when he steps onto a street in India? When writers get out of touch with the people and live in a world of their own it is no wonder that no one wants to read what they write.

Today the people in India are thirsty for good literature. If someone writes about the people's real problems it will spread like wildfire. But are our writers doing this? If not, why do they complain that Hindi magazines are closing down? Art and Literature must serve the people. Writers must have genuine sympathy for the people and depict their sufferings. And not only that. Like Dickens and Shaw in England, Rousseau and Voltaire in France, Thomas Paine and Walt Whitman in America, Chernyshevsky and Gorki in Russia and Sharat Chandra and Nazrul Islam in Bengal they must inspire people to struggle for a better life, a life which can be really called a human existence and to create a better world, free of injustices, social and economic. Only then will the people respect them.

The concept of '*art for art's sake*' in its active sense, that is in the sense of using art and literature for reforming society, is of recent origin. It could hardly arise prior to the Industrial Revolution because upto the feudal age the thought that men could improve or change their social conditions by their own effort was rare. The belief upto the feudal times was that whatever has existed or will

exist in future is ordained by God or Destiny and man has no role in this connection. It was only after the Industrial Revolution that the thought that man can change his social conditions with the help of science and scientific thinking could arise.[3] Hence almost all art upto the feudal age (e.g. Sanskrit verse and drama) was art for art's sake, or else art for social purpose only in the passive sense, that is, for preaching that man should accept his lot ordained by God or Destiny.

Now that the scientific age in the true sense has dawned, and man can change his social conditions by his own efforts, art, too, should help in this great endeavour. Art for arts' sake in poor countries like India in which the vast masses live in poverty and other terrible social conditions, really amounts to escapism.

In the end, I would like to appeal to writers in Hindi, Urdu and other Indian language to use simple language. Hindi and Urdu should both come closer to Khariboli (or Hindustani), which is the people's language. Often when reading a Hindi book one finds it difficult to understand what is written because it is in very difficult (*klisht*) language. The same is true of some Urdu writers. But if what is being said or written is not even comprehensible what use is there for such literature? Great literature is in simple language, like the war time speeches of Winston Churchill or in the stories of Premchand and Sharat Chandra.

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[3] This was because upto the feudal age, production techniques did not change (or changed extremely slowly) for centuries or even thousands of years. Upto feudal times society was predominantly agricultural. Agriculture was done by backward techniques e.g. the tilling of the soil by the bullock in India and the horse in Europe. The cycle of production kept repeating itself again and again for centuries e.g. the kharif crop in the monsoons, the rabi crop in winter, then again the kharif crop next monsoon etc.

On the other hand, modern industrial society is characterized by the revolutionary nature of modern industry. After the Industrial Revolution, which began in Western Europe in the 18th century and gradually spread all over the world, the method of production is constantly changing, due to new scientific discoveries and inventions. Thus while society was broadly static upto feudal times, it is dynamic and fast changing after the Industrial Revolution. This changed situation has given rise to the idea that now man can change and improve his social conditions. Earlier this idea was impossible or Utopian.

Speech delivered
By
Hon'ble Mr. Justice Brijesh Kumar
Chairman, KWDT on Sept. 1, 2007

SUBJECT: "Public Interest Litigation – A Human Right"

Hon'ble Mr. Justice Ahmadi, Mr. Justice S.B. Sinha, Mr. Justice Gokhale, Chief Justice of Allahabad High Court, Justice Bhalla, Acting Chief Justice, Justice Pradeep Kant, Senior Judge, Lucknow Bench, other Hon'ble Judges present and past, Mr. Alok Mathur, Secretary of the Trust, respected Senior Members and friends at the Bar, Mrs. Mathur and Mr. S.B. Sinha, ladies and gentlemen.

It is the Seventh Memorial Lecture in the series, which is organized every year by the Trust, to remember late Mr. Justice J.K. Mathur. Most of us present here knew him well. On a few earlier occasions I had the opportunity to throw light on some of his qualities of head and heart since I personally came to know him on his posting as Director, I.J.T.R. and later, as a Brother Judge on the Bench. A very pleasant person with broad smile on his face and yes, his passion in the field of legal training of judicial officers can never be missed to be mentioned. He was quite a legally aware person. On a few occasions, while talking generally, he would mention about the shift from institutional thinking or approach to individualistic stand taken by the decision makers. Resultantly, of course, the interest of institutions or society at large had to give way to the narrow consideration or interest of individuals or group of individuals in authority. Apprehension from such a development was none unrealistic. Cause of the people in general and interest of the society suffered. Violation and non-compliance with the standards of Human Rights norms was no exception. Sub-human living conditions, exploitation, illiteracy, usurpation of natural resources by vested interest, bonded labour and the like problems were all around and rampant. Access to the court, for reasons more than one, was out of bound for an individual with hardly any means worth the name. In these circumstances, plural justice, breaking of shackles of technicalities of law was the only need of the hour, which was

realized by the Courts. Courts did not even hesitate to spring into action on mere letter petition or information through any other source including PIL in connection with atrocities by State force, regarding living conditions in prisons, custodial deaths and the like or to render plural justice for the masses.

There is always a scope of some criticism of one or the other aspect of PIL, e.g. where it may relate to human rights' aspect of terrorists or where it is thought that Courts sometimes exceed the limits and so on and so forth. It is also true that misuse of the tool of the PIL and too much of interference is also a matter of continued debate. But criticism on that ground would not deter the Courts nor the Courts would desist from acting in a PIL where it is required to do so.

Thus PIL, at least for a country like ours, is one of the most effective ways for enforcement of human rights and for redressal of violation thereof. The question thus, as to whether it acquires the status of 'A Human Right' itself, seems to be the main theme of the subject of talk which is indicated as "Public Interest Litigation – A Human Right". (Emphasis supplied)

The PIL, as it developed in our country from case to case, is a kind of procedural concession granted judicially by Court for access to it. It is an easier tool and effective too, for redressal of grievances relating to Human Rights and violation of Fundamental Rights besides some other matters of general importance without sticking to the question of locus standi or in granting relief for the benefit of masses, or to those who lack means to have access to it.

Universal Declaration of Human Rights (1948), Preamble of which begins saying –

"Whereas recognition of the inherent dignity and of equal inqlienable rights of all members of the human family is the foundation of freedom, justice and peace in the world....." And the 1st Article says "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." (Emphasis supplied)

Articles 3 and 4 provide for right to life, liberty and security of person, and slavery or servitude is prohibited.

In the above background, Article 8 may be relevant and important in connection with the subject of talk, i.e. "PIL – A Human Right." It says –

"Everyone has a right to an effective remedy by the competent National Tribunal for acts violating fundamental rights granted to him by the Constitution or by law."

The Charter mentions about many other rights too, quite a good number of which are covered under Part III of our Constitution as Fundamental Rights including Article 21. Enforcement of such rights is also ensured more particularly by Articles 32 and 226 of the Constitution. These remedies have undoubtedly become more effective with advent of PIL, as said earlier, which is a kind of procedural concession judicially made by Court for easier access to the Courts. As such, can PIL itself be elated to the status of 'A Human Right' referable to Article 8 of U.N. Charter or it only aids in making the remedies easily available and more effectively. Is it a 'tool' in aid of effecting the remedies or it itself falls in category of Human Rights, which a human being inheres by virtue of his birth as a human being? Or it can be treated to be providing power (through PIL) to Supreme Court supplemental to power contained under Article 32, which are exercisable in cases of violation of Fundamental Rights only. High Courts' powers under Article 226 are wider. But matters relating to Human Rights would be covered under Article 32, whereas matters falling outside the scope of Fundamental Rights may seek shelter of PIL – but again the question is if it would be a Human Right?

The two very learned and eminent speakers, Mr. Justice Ahmadi and Mr. Justice S.B. Sinha, would throw light on the subject with their eloquent lectures, of which you already have good experience.

I would stop here, to thank the Organisers for giving me this opportunity to be associated with this function. I wish it to continue for years after years.

JUSTICE ADMINISTRATION: 'CASE AND COURT MANAGEMENT'

ADVANCE COURSE ON CIVIL PROCESS INCLUDING RECENT TRENDS IN JUDGMENT WRITING

27th to 31st JULY 2006

NATIONAL JUDICIAL ACADEMY, BHOPAL

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

1. Indian judiciary is doing a commendable job. It is still enjoying the public faith and confidence, much to the envy of other organs of states. The pendency of 3.5 million cases in the High Courts and 32.2 million in subordinate Courts has not deterred the people from filing more and more cases, which proves their faith in the system. The administration of justice, however, in the words of Justice V.R. Krishna Iyer is still.

> *"the judicial process wrapped in a mystery inside an enigma what with its baffling legalese, lottery techniques, habitual somnolencies, extensive proclivities, multi-decked inconsistencies, tyranny of technicalities and interference in everything with a touch of authoritarian incompetency."*

2. Within the system the judiciary has realised and it is frankly admitted in the successive speeches delivered by the Chief Justices of India on Law Day Celebrations that Indian judiciary is in a management crisis. It is with great resilience and untiring efforts of the Judges and Court staffs, that the system is holding itself in its place, and managing the affairs.

3. The Constitution of India vests extraordinary powers in the High Courts in the matters of the rules of the court and conditions of service of its employees. The High Courts have administrative powers of superintendence over all the Courts in the State. The appointment of officers and servants of the High Court are made by the Chief Justice or the designated Judge or officer of the Court.

The administrative expenses are charged upon consolidated fund of the State. The Chief Justice of the High Court along with his brother Judges sitting in Full Court or such Committees as may be constituted by him, exercise complete administrative control over High Court and Subordinate Courts. The Judges, however, do not have expertise in the Court management.

4. 'Management' is a science of judicious use of means to accomplish an end. Experience is not a substitute for good managerial practices. The Courts should not be run by hit and trial methods or experiments to be made in a crucible, with the mixture of experience and traditions and borrowed ideas. In order to secure efficient justice delivery system, to meet the challenges in Court administration, and to reduce arrears while maintaining quality of work to the satisfaction of the litigants, which are the most important stakeholders of justice, expert managerial intervention is indispensable.

5. In the past even after realisation of the challenge, the efforts have focussed only on the amendments in procedural laws, ADR's, lok adalats, legal aid and use of computers as typewriters and for collection of datas. Very little work has been done to analyse the issues and to bring changes in court and case management in the High Courts and Subordinate courts, for effective solutions, and to focus on risk management.

6. The 'First Advance Course on Management, Judicial Planning and Judicial Administration' made an attempt to diagnose administrative and management deficiencies. The participants formulated reform strategies, and measures to revamp the system. The judicial administration, and its performance assessment, indicating priorities, assets accountability and internal reforms were called into motion, and new methods of case management and case flow management were deliberated. The second advance course on Court Management and Judicial Administration (24th to 28th February, 2006), focused on essentials of change management with specific reference to Court and Case Management, case studies in the methods adopted in change management in Courts and case flow management, and increasing efficiency by use of ICT and removing corruption. We should now focus on formulation of methods and

strategies, to resolve the issues. This paper attempts to deal with the Court Management and Case Management separately.

COURT MANAGEMENT

HIGH COURT

Modernizing and Streamlining the Rules and Procedures:-

7. Most of the High Courts have out-dated and much amended but still tangled and knotted rules and procedures applicable to both the Court Management and Case Management. These rules require to be updated to be in tune with amendments in procedural laws and uniformity in its application to all the High Courts. This will not only simplify the system but will also make it conducive for 'e-governance'. It can be achieved by a common effort to be made by the representatives of each High Court under the umbrella of Supreme Court.

8. Mr. Justice Jeevan Reddy in his farewell speech as Chief Justice of the Allahabad High Court remarked that the rules of the court are all tied at wrong places. In order to bring efficiency in the court procedures, the rules must be reframed and simplified. The Rules Committee, however, did not do much for next ten years and that Court continues to function under adhoc changes. The attempt to revise the General Rules (Civil) and General Rules (Criminal), applicable to subordinate Courts in U.P. to bring them in tune with the latest amendments in CPC and Cr.P.C. is still under deliberations. The efforts in this direction should be expedited in all the High Court.

Financial Autonomy and Accountability

9. The judiciary is one of the strongest pillars of Indian democracy. The financial needs for its sustained and targeted growth require special attention. It is absolutely necessary that the judiciary with its growing needs of infrastructure must be made a planned subject. It is unfortunate and painful to witness the Chief Justice repeatedly requesting the State Government for minimum financial allocations to meet the exigencies. A planned and assured outlay will not only make it comfortable to go through its requirement but will also put it on guard for its optimum utilization and accountability for expenditure.

10. New legislations continue to put extra load of work on the existing Courts. The spate of public welfare legislations, demand establishment of new Courts, for example Courts dealing with human rights, juvenile justice, family Courts, IPR and IT Act violations etc. The extra work created by these legislations have put extra burden on the Courts. There is no study of legislative impact assessment of these new legislations on the existing infrastructure. Provisions must be made in the budget, along with the enactment, for establishing new Courts or increasing the strength of Judges at the time when these legislations are passed.

The judiciary must adopt a more dynamic and progressive attitude in preparing budgets and in spending of allocations.

Accounts and Audit

11. Uniform accounting practices and regular audits will provide much needed financial discipline. The demand of financial autonomy should be made with an offer of greater transparency and open policy for audit. The judiciary must prepare itself to audit through CAG to bring in more discipline in accounting practices and policy.

Human Resource Management

(a) Re-defining Staffing Pattern.

12. With common judicial system, we have different staffing patterns in different High Courts. The staff structures training and its optimum use, for a proper court management needs to be standardized. Uniform service conditions will be beneficial to avoid dissatisfaction and will achieve better performance.

13. In most of the states the judiciary do not have rules regulating service condition of the judicial officers and staff, and borrow them from the respective State Governments bringing in state government culture in judicial services. The judiciary needs uniform service conditions applicable to all judicial officers and staff in the country, to be adopted by the High Courts, with suitable amendments.

(b) Uniform Pay Structure

14. The pay structure in parity with the Central Government to be applied uniformly to all High Courts will invite more talent and

will result into better performance. At present a lot of litigation with regard to parity in pay is pending in the High Courts, breeding dissatisfaction and inefficiency, which can be easily avoided by adopting a uniform pay structure in parity with the Central Government.

Record keeping

15. A scientific approach of record keeping, using micro filming techniques, digitalization of records and maintaining hard copy with standardized indexing will help reducing problem of space in the High Courts which are courts of records, as well as subordinate courts. It will be conducive for connectivity for e-governance, and will also help in systematic weeding in a time frame to achieve optimum utilisation of space and staff. A special training in record keeping may help in achieving the desired targets. Apart from this a consistent policy of weeding of administrative records will also result in optimising using of staff and space.

E-Governance

16. The use of computers in record keeping, maintenance of datas and its optimum utilisation in court management and case management has now become a reality. So far we have used computers only for preparing pay bills, generating daily cause list or at best for creating datas of filing of cases. The technology is now being put to use for case tracking system, case management, case flow management, information of case laws and statutes laws, automating the formal part of court work, and summons tracking system. It will also help in maintaining accuracy minimise discretion and will avoid outside interference and corruption in court system.

Annual Reports

17. The publication of datas of filing, disposal, utilisation of funds, achievements of management targets, brings in transparency and confidence in the system.

18. The Supreme Court has taken the lead of publishing annual reports, and a 'Handbook of procedure in the Supreme Court'. The official handbook provides useful information of institution, pendency of disposal of cases, filing, court fees, limitations, review, accountability and the facilities available in Court including legal

aid procedures. The High Court and subordinate Courts have been asked to undertake similar measures to bring transparency in procedures.

Bar Reforms

19. The lawyers are important stakeholders in the administration of justice. The court management hardly take their opinions and associate Bar in taking decisions in court and case management. This not only causes dissatisfaction but also suspicion in the motives of the court administrators. The Bar must be taken into confidence in all decisions. In reciprocity, the Bar must also allow the court management to implement reforms in its functioning namely maintenance of libraries, chambers, and the use of I.C.T. for more efficient and knowledge based lawyers.

B. SUBORDINATE COURTS

Increase in Judges Strength/Judicial Manpower planning.

20. With the backbreaking caseloads, it is not practical to expect the Judges of Subordinate judiciary to perform well and to reduce the arrears. In Uttar Pradesh, out of total Judge strength of 2172, we are short of almost 432 judicial officers. Instead of doubling the Judge strength the Courts are forced to work with about 20% vacant Courts. The Court had to make serious efforts to persuade the State Public Service Commission to undertake selection procedure. Thereafter it took long innings of litigation on many issues of procedural errors before appointments could be made at the entry level and at the level of Higher Judicial Service. The self-inflicted wound of staying the appointments took a long time to heal.

21. There is an urgent need for judicial manpower planning for next two decades with the legislative impact assessment. The arrears in Court, call for increasing strength of Judges and Court staff by atleast four times along with infrastructure, to meet the growing demands of judicial intervention.

Enforcement of all India Judicial Service

The Central Government has avoided framing rules for All India Judicial Service for too long. Several directions of Supreme

Court in this regard have been ignored. A positive step to enforce the Forty Second Constitutional Amendment in Article 312, will attract best talent to be trained and fostered for manning the High Courts in future. It will go in a long way to improve administration and management in both High Courts and Subordinate Courts.

Planning Court Rooms, Infrastructure, Record Rooms, Libraries:

There is need for standardization of the infrastructure, the size and design of Courts, Courtrooms, Judicial Officer's chamber, staff room, office record rooms and libraries. There should be no compromise with such standard size and design. Although the Central Government has committed 50% of the cost of infrastructure, the corresponding cost is either not paid by the State Government or delayed unreasonably. There should be deductions made from the budget allocation to the State Government, and the matching grant, to be met by the State Government must be directly paid by the Central Government to judiciary.

Basic facilities for litigants:

The Courts are required to deliver justice to the litigants, but nobody cares about the consumers of justice. The litigant pays court fees, lawyers' fees and for various other ancillary services attached to the Court. He is, however, denied of the basic facilities, such as waiting rooms, clean water, toilets, notice boards and enquiry counters. The adjudication is a time consuming task. The litigants have to wait for days, months and often years to reach to the logical end of the expensive litigation. The concerned court managers cannot avoid to deliver these basic facilities to its consumers.

Uniformity in Court hours:

25. In many States like in U.P. the court hours are changed with changing seasons to avoid extreme heat or winter. It is not in tune with the timing of the other offices and causes serious inconvenience to litigants and lawyers. The courts must maintain uniform court hours and holidays, to maintain discipline, certainty and punctuality in its functions.

Certified Copies:

25-A. The litigant is interested in the outcome of his case. He requires a certified copy of the order or judgment as soon as it is pronounced. The Law Commission in its 77th Report suggested that where a carbon copy of the judgment is not available, certified copy by mechanical or electronic process should be supplied within 15 days. Carbon copies, if ready should be immediately supplied. Order 20 Rule 68 CPC provides for immediate issuance of copies for preferring appeals on payment of specified charges. Now with ICT judgments will be uploaded on servers instantly for issuing copies without delay.

Increase of working days:

26. With millions of pending cases, there is no justification for only 210 working days in High Courts and 240 working days in subordinate Courts. It is a luxury, which the system can no longer afford. An increase by one hour in a day and 15 days in a year for both High Courts and Subordinate Courts, will result into clearing lacs of cases in a year. The judiciary must respond to the call and show its genuine concern for the delays.

Containing Strikes by Advocates and Court staff:

27. The lawyers are integral part of the justice delivery system. The Advocates Act, 1961 entrusted the enrolment, conduct and disciplinary matters of lawyers to the State Bar Councils and Bar Council of India. The Bar, however, has not responded to the challenges faced by the system and has rather complicated the possible solutions. The lawyers should never be allowed to stop judicial functioning. The right to strike judicial work has never been recognized. Inspite of repeated pronouncements by the Supreme Court, the last of which is made by Constitution Bench in Harish Uppal (Ex.-Capt.) Vs. Union of India (2003) 2 SCC 45, where the Supreme Court authoritatively held that lawyers and their Associations have no right to strike or give a call for boycott, not even a token strike, the strikes have not abated. The loss of working days has reached intolerable proportions. The statistics in Uttar Pradesh for the years 2003-04 demonstrated that in 26 districts out of 70 districts, the strikes paralyzed the functioning of the Court for about 60 to 80 days in a year. In Pratapgarh (a small district

adjoining Allahabad) the Court could function only for 96 days in that year.

28. The Court has to change its policy of observing tact in such situations. The judiciary exercises sovereign powers. It must adopt a policy of no tolerance towards strikes by lawyers or Court staff. The police stations must be established in the Judgeships under the direct control and supervision of the Judges and that any attempt to disturb Court work must be punished with severity. An attempt should be made to meet the reasonable demands of lawyers and Court staff but not under a threat of strike. Wherever lawyers or Court staff resort to strike, without making a proper representation or complaint or going through the grievance redressal procedure, the resolutions of the Bar Association and Staff Association must be rejected. The judicial officers must continue to sit on dais and perform judicial work. They should not, under any circumstances be allowed to do work in chambers, however, urgent the cause may be.

Training of Judicial Officers and Court staff:

29. The Courts have started looking for specialized judicial work. The Family Courts, Juvenile Courts, Accident Claims Tribunals, Land Acquisition, Arbitration, Essential Commodity, Anti Corruption and CBI Courts, NDPS, SC/ST matters and with Environmental and IPR matters coming up, special training for both Judicial Officers and the Court staff has become necessary. Regular seminars, workshops for sharing experiences, and regular amendment of procedures to suit the needs of specialised judicial work, are the need of the day. A judicial officer in future will have to go for specialization, to achieve optimum results. Similarly the Court staff, will require training in IT techniques, case management, case flow management, and record keeping. Regular training sessions by deputing Judicial Training and Research Institute Officers to subordinate Courts in these areas will be very useful.

Case Management

30. The most neglected area, in the management of delays in justice delivery system is case management both at the level of High Court as well as subordinate Courts. With increasing caseload and backbreaking schedule, it is not possible for a judge or registry to keep track of the case after it is filed. In most of the High Courts

including Allahabad High Court, the registry has no system in place for keeping track of the case. No dates are fixed between filing and dates of hearing except on the request of the counsels. All miscellaneous matters are taken up on urgent motions filed by counsels or on some occasions when the dates are fixed by the Court. No records are maintained about the pendency of applications, and the stages at which the cases are pending. This leaves the case management virtually in the hands of lawyers, who are interested parties. When the applicant is denied interim relief, he applies for early hearing. The other side, enjoying the benefits of possession, money or occupation then adopts all means to delay the matter indefinitely. This leaves the system under a great strain.

Control over management of cases and case flow management: -

31. There has to be a system of case management and case flow management, in place, controlled by the registry for efficient performance of judicial functions. For this purpose we require generation of datas, and automation by adopting Information and Communication Techniques. The progress of each case must be entered in the database and the judge sitting in jurisdiction, should be given supervisory powers to have control over the case management. The Court must stick to the various time schedules fixed by CPC, in progress of the case. A brief summary of the time schedules fixed by the CPC as amended in 1999 and 2000 w.e.f. 01.7.2002 is given in a chart appended to this presentation.

Generation of data for effective case management and case flow management: -

32. Every Judge sitting in the jurisdiction must be regularly provided with data of the pendency of total number of cases, the stages on which such cases are pending, the listing of the cases before him for the next three months. This will give the Judge a clear picture, to plan the targets.

Specialization and equitable allocation of work: -

33. The determination of jurisdiction by the Chief Justice/ designated Judge is not always correlated with the pendency of the cases. Large number of vacancies, which are existing in the High

Courts, and the lack of specialization, some times leads to small number of Judges being assigned in an area where there is larger pendency. As an illustration, in the District Court at Allahabad, at present there are only 45 judicial officers as against the sanctioned strength of 68 and with 33764 civil cases with an average of 1986 cases per judge, 4117 session trials with an average of 242 sessions cases per judge and with 116006 criminal cases with an average of 7250 cases per officer. If a Juvenile Judge or a Family Judge goes on leave, the situation worsens. A regular and careful monitoring over the determination of jurisdiction and allocation of judicial work to the judges, should be undertaken to reduce overloading and achieving better results in disposal of cases.

Managing Adjournments: -

34. The misuse of the discretion for adjournments must be avoided. A Judge grants adjournments for following reasons:

1. There are too many cases on board on that day, and the Judge wants to reschedule his work.
2. The lawyer is either on leave or is too busy.
3. When a lawyer wants to delay the matter and is eluding appearance.
4. When the witness has not come or the client has not provided details, documents or instructions to his counsel.

35. Inspite of successive recommendations of Law Commission, and consequential amendments in CPC restricting adjournments to only three during the life of the case, the practical experience shows that adjournments are given for asking. This totally puts the case management into disarray. The judiciary has to adopt a strict attitude towards adjournments. Every judge should monitor his diary/ list to a reasonable limit and should not adopt appeasement policy towards lawyers. The Judge should understand the difference between accommodating a busy lawyer, and granting adjournments to delay the proceedings. It is not possible to manage work until the caseload on a Judge is put to a reasonable limit. The adjournment must be given only for the purposes of facilitating the progress and disposal of the case. There has to be an attitudinal change in the judiciary for granting adjournments.

36. Where a counsel is ill or is unable to attend the Court due to his pre-occupation, a Court should not grant more than one adjournment. Where a counsel is unable to attend on the second occasion, instructions must be given to the client to engage another counsel. A counsel is not a beneficiary or a consumer of justice. He is a part of the system, who must cooperate and be made accountable in case management. The entire system exists for dispensation of justice and not for commercial benefit of counsels. A responsible and accountable Bar strengthens the entire system both from within and outside.

Attitudinal Changes: -

37. The expedition of cases, at all stages namely pre-hearing, hearing, and post-hearing, is necessary. The amendments in the procedures have not been followed strictly. A lawyer is slow to change and the judges easily give way to their demands. In case the procedures of service of summons, time for filing written statement/ counter claims and adjournments as provided in the amended CPC are strictly monitored, the disposal will be quicker and effective.

The clearance of backlogs will not check filing of more cases in future. The study made by Dr. Justice G.S. Bharuka in his book "Redefining Judicial System through E-Governance and Attitudinal Charge" shows that we in India are not as litigious as some other developed countries. In case we achieve a quick disposal rate, the litigants will be encouraged to bring more litigation to Courts. Those waiting in the wings with undetermined issues, are dissuaded to come to Court on account of delays. They will then be encouraged to bring more actions in Courts. The confidence in adjudicatory process will again fill up the dockets. We have not seen abatement of criminal cases wherever the trials have been made quicker. I find that apart from an effective case management, we must bring in more reforms in both civil and criminal law, to bring only those cases on trial, which really require specialized adjudicatory mechanism.

Simplifying procedures: -

38. The legal procedures must be simplified, for better understanding and with the sole object of facilitating the progress of the case, observing principles of natural justice. The procedures of

committal, conditional bails, arranging video conferences to avoid presence of under trial prisoners on every date, plea bargaining in petty cases, use of ADR mechanism including negotiation, mediation and conciliation, reduce load on the Courts. These methods must be institutionalized with special training to Judges and lawyers for quicker, effective and qualitative disposal of justice. The Court must impose cost for containing adjournments and penalising those, who file frivolous cases.

39. The judiciary must stop fire fighting methods and start looking ahead for effective court management and case management to redeem the reputation of justice delivery system. A strong and effective judiciary, helps in maintaining rule of law, which brings peace and happiness in the society.

TIME SCHEDULE AS GIVEN UNDER THE CODE OF CIVIL PROCEDURE AFTER THE 1999 AND 2002 AMENDMENTS W.E.F. 01-07-2002

No.	Step	Time Frame
1	Issue and Service of Summons (Section 27)	30 days from the date of institution of suit
2	Enlargement of time (Section 148)	30 days in total
3	Furnishing of copies of plaint for service on the defendant and process fee for the same (Order 7 Rule 9)	7 days from the date on which summons are ordered to be issued
4	Written Statement (Order 5 (1) (1) and Order 8 Rule 1)	30 days from the date of service of summons, and can be extended upto 90 days
5	Filing of subsequent pleadings (Order 8 Rule 9)	Maximum 30 days
6	Application for fresh summons (Order 9 Rule 5 (1)	7 days from the date of return of the previous summons
7	For passing orders on an application seeking leave to deliver interrogatories (Order 11 Rule 2)	7 days from the date of application
8	For admitting documents (Order 12 Rule 2)	7 days from the date of service of the notice
9	For examination of witness or production of documents before framing issues (Order 14 Rule 4)	7 days maximum

No.	Step	Time Frame
10	For filing application for issue of witness summons (Order 16 Rule 1 (4)	5 days from the date of filing the list of witnesses
11	For payment of batta etc. for summoning witnesses (Order 16 Rule 2 (1)	7 days from the date of making application for issue of witness summons
12	Adjournment [Order 17 Rule 1 (1) proviso]	Maximum 3 adjournments during the hearing of a suit
13	Submission of report of Commissioner appointed for recording evidence [Order 18 Rule 4 (5)]	60 days from the date of issue of commission unless extended by Court
14	Arguments [Order 18 Rule 2 (3D)]	Time limit for oral arguments shall be fixed by court in its discretion
15	Judgment [Order 20 Rule 1 (1)]	30 days from the day on which the hearing is concluded and 60 days in exceptional or or extraordinary circumstances
16	Preparation of Decree [Order 20 Rule 6A (1)]	15 days from the date of judgment
17	For making deposit with an application under Order 21 Rule 89 [Order 21 Rule 92 (2)]	60 days from the date of sale

STATE'S FOCUS ON WATER CONSERVATION
SAFE DRINKING WATER AND SANITATION PROGRAMME

- By Hon'ble Mr. Justice Devi Prasad Singh
Judge,
Lucknow Bench,
Allahabad High Court

Hon'ble Mr. Justice Tarun Chatterji, Judge Supreme Court of India;
Hon'ble Mr. Justice Pradeep Kant, Senior Judge Lucknow Bench, Allahabad High Court and
My other brother Judges.
Sri Jyotindra Mishra, Advocate General of U.P.;
Sri Amrendra Singh Chairman, Bar Council, U.P.;
Sri Nimal Hettiaratchy, State Representative, UNICEF-UP;
Sri S.P. Srivastava President Nyay Sindhu;
Sri I.P. Singh Secretary, Nyay Sindhu;
Sri Shabihul Hasnain, General Secretary of Oudh Bar Association;
Sri Amitabh Mishra, Master of Ceremony;
Other Dignitaries,
Officers of the State Government;
Members of the Bar;
Ladies and Gentlemen.

I am grateful to the organisers of the conference for giving me the privilege to speak at the occasion on the subject which is a burning topic relates to survival of human race. I have tried to touch four fields namely, historical, mythological (spiritual), constitutional and ground realities in my exposition. According to Maxmuller, "history is a typography of human mind". Tolstoy wrote an essay entitled, "The Idea of Cause" in the year 1869, wherein he defined history as the "unconscious life of humanity". The study of the past will give us hope and convey the assurance that we have in the past conducted governments and administrations of vast empires, that we evolved theories and practices which were not inferior to those of some of the most advanced nations of the world, that, allowed the opportunities and scope, we may rise equal to what the circumstances may demand of us.

Since ages, this Country had attracted the inhabitants of other parts of the world because of its green lustre, forest, fertile land and rivers well suited to mankind to live a happy life. Ancient Indians knew their sub-continent as Jambudvipa or Bharatavarsa and also called Aryavarta. More than two thousand years before the Christ the fertile plain of the Punjab watered by five great tributaries of the Indus the Jhelam, Chenab, Ravi, Beas and Satlaj had a high culture, which spread as far as the sea along the western seaboard at least as far as Gujarat. The basin of Indus is occupied by Ganga and since ages right from Haridwar to Culcutta, densely populated cities were grown up at its bank. In far East Brahamputra in South Kaveri and other rivers have attracted the peoples of the World to migrate and settle in this sub-continent. Western Historians used to say that India was blessed by bounteous nature, who demanded little of man in return for sustenance because of rich natural resources, and that, is why the Indian character has tended to fatalism and quietism, accepting fortune and misfortune without any complaint. However, it appears to be not correct in its totality. The great genius of the Indian traditions lies in the concept of the divine power that pervades every atom of the universe, visible and invisible, manifest and unmanifest. According to ancient Indian scholars, the divinity is, in the ultimate analysis, seated within each individual. Indian civilization has unlike Egypt, Mesopotamia and Greece, preserved its tradition and culture without a break down to present day. It happened because of emotional attachment with the nature and worship of, ponds, lakes, hills and trees and nature related objects. In one or other form, Indian enjoyed the nature's blessing, since ages because of preventive and preservative steps taken by our forefathers.

The earliest evidence of urban sanitation was seen in Harappa, Mohenjo-daro and the recently discovered Rakhigarhi of Indus Valley civilisation. This urban plan included the world's first urban sanitation system. Within the city, individual homes or groups of homes obtained water from wells. From a room or from a place earmarked for bathing, wastewater was directed to cover drains, which lined the major streets. Homes opened only to inner courtyards and smaller lanes. Romans had some elements of sanitation systems, especially related to waste water collection and transport away from populated areas. According to historians, the

unsanitary conditions were widespread throughout the Europe and Asia in the middle Ages. Very high infant and child mortality prevailed in Europe throughout medieval times. In India, river Ganga since ages, has been personified as goddess whereas, river Saraswati has been referred to as the goddess in Vedas. Also water is one of the "panch-tatva's" (basic 5 elements, others including fire, earth, space, air). Alternatively, gods can be patrons of particular springs, rivers, or lakes: for example in Greek and Roman mythology, Peneus was a river god, one of the three thousand Oceanids. In Islam, not only does water give life, but every life is itself made of water. "We made from water every living thing."

The excavations show that the Indus civilization (2500-3000 B.C.) covering most part of the Punjab and Baluchistan to Gujrat were possessing well planned cities. According to historian, Mr. Irfan Habib (The Indus Civilization, page 24), Indus civilization is the first culture, known where access to underground water was secured by wells. On rivers, lakes and bunded reservoirs, the lever-lift based on stone counterweights were used to provide drinking water as well as to irrigate the field. Mohanjo Daro was built as a planned city on a large platform above the flood level. Spaces for roads were marked well before houses were built. Mohenjo Daro had long broad roads running parallel with other roads, with lanes meeting them at right angles. No encroachments or construction on roadside was allowed showing detailed lay out of a planned city with sumptuous drinking water facility and sanitation (supra). The excavation of the Lothal (Gujrat)also shows that there was water reservoir to provide drinking water as well as irrigation facility.

Water is considered a purifier in most religions. Major faiths that incorporate ritual washing (ablution) include Hinduism, Christianity, Islam, Judaism, and Shinto. Water baptism is a central sacrament of Christianity. It is also a part of the practice of other religions, including Judaism (mikvah) and Sikhism (Amrit Sanskar). In Islam the five daily prayers can be done in most cases after completing washing certain parts of the body using clean water (wudu). In Shinto water is used in almost all rituals to cleanse a person or an area (e.g., in the ritual of misogi). Water is mentioned in Bible 442 times in the New International Version and 363 times in the King James Version: 2 Peter 3:5 (b) states, "The earth was

formed out of water and by water". Many religions also consider particular sources or bodies of water to be sacred or at least auspicious. Water is often believed to have spiritual powers. A Greek philosopher Empedocles held that water is one of the four classical elements along with fire, earth and air, and was regarded as the ylem or the basic substance of the universe. Historically, civilization has flourished around rivers and major waterways.

A.L. Basham, Professor of Asian Civilization in the Australian National University, Canberra in his book *"The Wonder That Was India" said*, to quote: -

> In 3000 B.C. the climate was very different. The whole Indus region was well forested, providing fuel to burn bricks and food for wild elephant and rhinoceros, and Baluchistan, now almost a waterless desert, was rich in rivers. This region supported many villagers of agriculturists, who had settled in the upland valleys of Baluchistan and in the then fertile plain of the Makran and the lower Indus.

According to A. L. Basham, when, in 326 B.C. Alexander of Macedon crossed the Indus, the climate of North West India was much as it is today, though perhaps a little moister. The river valleys were fertile and well wooded, though the coastal strip to the west of the Indus, now called the Makran and much of Baluchistan, were already dry and desolate. Indian used to live vigorous corporate life, which continued into the Middle Ages. Tamil and Sanskrit inscriptions show that the village councils took an active interest in the communal welfare, dug and renewed reservoirs, made canals, improved the roads, and cared for the village shrines. This strong sense of the community was one of the chief factors in the survival of Indian culture (supra).

There is no dispute that in vedic period, the great Indian scholars had made great inventions and co-related the pleasure of human life with nature. The knowledge acquired in the vedic period has been codified in four veds. Western historian believes that vedic period runs around 1500 B.C. and some of the indian historian says that it is between 5000 B.C to 6000 B.C. However, without entering into this controversy the hymns of Rigveda and Atharvveda indicates

the keen interest of our forefather in nature and its conservation. Rigveda is the oldest manuscript in the world. Its secular credentials has been recognised all over world.

I wish to quote three hymns of Rigveda:-

"(I) Water contain
All disease-dispelling medicaments,
Useful for the upkeep of our body,
So that we may live long
To enjoy the bright sun.
(Ref: 1.23.2)

(II) That there is ambrosia in waters,
There is healing balm in them,
And there are medicinal herbs,
Know this all,
And by their proper use become wiser."
(Ref: 1.23.19)

(III) Some waters collect together,
Others join them.
As rivers they flow together
To a common reservoir (ocean).
The pure waters have gathered
Round the hydrodynamic power.
(Ref: 2.35.3)

In Atharvveda also the importance of water, its purity and medicinal value have been noted, to quote from Atharvaveda: -

(1) "May the divine Waters be weal for us, for our aid and bliss. May they stream unto us health and strength. Within Waters lie all healing balms. Soma has told me, and Agni, good for all.

(2) O waters, teeming with medicine, keep my body safe from harm that long I may see the Sun. O waters of the plains, those of the marshes, and those got by digging, bestow weal on us and also that brought in a vessel and those of the rain be propitious to us all."

In Yajurveda the importance of water has been noticed in hymn, to quote:-

> "All-pervading and quick-reaching Wind is the Gandharva. The Waters and Saps, which sustain life, are his Apsaras. May they guard us. All hail to them !

A great Indian king Bhartrhari who ruled in 7th century AD, in later period of life became saint and poet, in his splendid poem, addresses the five elements i.e., panchtatva of the Indian physics, to quote:-

> "Oh Earth, my mother, Air, my father,
> Oh Fire, my friend,
> Water, my kinsman, Space, my brother,
> Here do I bow before you with folded hands !
> With your aid I have done good deeds and found clear knowledge,
> And, glorious, with all delusion past, I merge in highest godhead."

The period of Chandragupta Maurya in Indian History is one of the golden period regulated by orderly life and strict discipline in administration. Chandragupta Maurya when ascended to throne around 321 B.C. had managed the affairs of the country with the help of Kautilya, who is also called chankaya. The Arthshastra of Kautilya is valuable piece of, treatise dealing with political and administrative law to run the country. Its secular credentials are recognised in every walk of life. According to the Kautilya's Arthshastra (compiled by L.N. Rangarajan) it was mandatory for the villagers to subscribe from their own fund for construction of ponds or lakes within their area for water conservation.

The rules relating to sanitation were strict and mandatory for compliance by inhabitants of a city, to quote from Kautilya's Arthshastra :-

> "The rules on precautions against fire show that fire was a major hazard in a densely packed city {2.36.15-25}. Craftsmen, like smiths, who worked with fire were concentrated in a separate quarter of

the city {2.36.20}. Maintenance of cleanliness, sanitation and hygiene was a part of house building regulations {2.36.26-33}; so was privacy {3.8.17}. The people were expected to contribute to building common facilities, not obstruct their use nor destroy them {3.8.26.27}. Causing harm to an entire neighbourhood attracted a fine of 48 panas {3.20.15} (Kautilya, The Arthashastra, *L.N. Rangarajan* page 57).

However, rules relating to sanitation were relaxed in certain circumstances, which includes illness or other infirmity of a person, to quote: -

> "The punishment prescribed for passing urine or faeces in public places is mitigated if the person did so due to illness, medication or fear {2.36.29}. The rules about sanitation in private dwellings in the city were relaxed during childbirth {3.8.6}]. Reduced punishments could be awarded for some offences if there were mitigating circumstances such as mistake, intoxication or temporary insanity {3.18.5; 3.19.4} (Kautilya, The Arthashastra, *L.N. Rangarajan* page 37)

The three characters of the Seminar namely conservation of water, safe drinking water and sanitation are interlinked. Without proper conservation of water citizens will not able to get safe drinking water and without proper sanitation management, the life of the citizens shall become unhygienic and prone to disease. Part IV of the Constitution of India under the head Directive Principle of State Policy contains mandate for the State while dealing with the welfare activities. Article 38 commands the State to secure social order for promotion of welfare of people. Article 39(B) relates to ownership and control of material resources and Article 48 A of the Constitution of India compels the State to protect the environment and safeguard forest and wild life. Water harvesting is part and parcel of the environmental protection. Article 51-A (g) of the Constitution of India which relates to citizen's fundamental duties, provides that "it shall be the duty of every citizen to protect the natural environment including forest, lakes, rivers and wild life and

to have a passion for living creatures". While expanding the horizon of Article 21 of the Constitution of India by catena of judgement Hon'ble Supreme Court had settled the law that not only right to life but right to live with dignity and quality of life are fundamental rights guaranteed under Constitution of India (2003 (6) SCC 1, Kapila Hingorani Vs. State of Bihar). It has further been settled by Apex Court that right to life enshrined in Article 21 means right to have something more than survival and not mere existence or animal existence. It includes all those aspects of life which go to make a man's life meaningful complete and worth living. Right to life also includes protection from all things, which causes health hazards due to pollution or use of harmful drugs. The right conferred under Part III of the Constitution of India i.e. Fundamental rights and Directive principle of State policy under Part IV are complementary to each other. It is the duty of State to ensure that citizens get unpolluted clean drinking water and lay out plan of the cities should be chalked out in such a manner, which may provide hygienic condition in the cities and town areas of the State. In the case of Kesavananda Bharti Vs. State of Kerala reported in 1973 (4) SCC 225 and Minerva Mills Ltd. Vs. Union of India reported in 1980 (3) SCC 625, Hon'ble Supreme Court held that Part III (Fundamental rights) and Part IV (Directive principle of the state policy) of the Constitution of India together constitute the core of commitment of social revolution and combine to form its conscience of the Constitution. It is to be traced for deep understanding of the scheme of Indian Constitution. This principle has been reiterated by Hon'ble Supreme Court in a recent judgement reported in 2007 (2) SCC 1, I.R. Coelho Vs. Stae of Tamil Nadu. Meaning thereby it is the liability of State not only to take necessary steps to ensure the protection of natural resources including lakes, ponds, hill tops but also it is State's liability to see that citizens gets safe and clean drinking water and cities must be provided with an effective sanitation system to provide hygienic condition and to ensure the quality and dignity of life protected by Article 21 of the Constitution of India. By catena of judgment of Apex Court ruled that even under garb of planned and sustainable development of cities vide: M.C. Mehta versus Union of India and others (2004) 12 SCC 118; 1991 Vol. 1 SCC 598(AIR 1991 SC 420) Subhash Kumar versus State of Bihar;(2006)1 SCC 1 T.N. Godavarman Thirumulpad versus Union of India and others;(2001) 6

SCC 496 Hinch Lal Tiwari versus Kamala Devi and others;(2006) 3 SCC 549 Intellectuals Forum, Tirupathi versus State of A.P. and others, the fundamental rights guaranteed by Part III of the Constitution of India particularly Article 21 of the Constitution of India can not be diluted or abrogated. I.R. Coelho (supra) says that the Constitution can not be amended which may abrogate the fundamental rights of the citizens.

Various acts namely U.P. Urban Planning and Development Act, 1973 and U.P. Nagar Mahapalika Adhiniyam, 1959, U.P. Municipalities Act and other statutes cast duty upon the State and local bodies to ensure that the citizens get safe drinking water and the Urban Development must consist the proper sanitation system to provide hygienic condition. Every State of the country possess identical statutes to regulate urban planning. However, once we take notice of the ground realities we will find that in most part of the country during rainy season citizens suffer with serious consequences because of water logging in view of bad sanitation. Whether it is Bombay, Delhi, Lucknow, Hyderabad, Kolkata or other cities of the country the executive has been failed to take care with preventive steps and maintain the sanitation system by enforcing the law with firm hand in its letter and spirit. Newspaper reports reveal the death of citizen in various parts of the country because of epidemic or bad sanitary system with water born disease including in Lucknow is not uncommon.

According to report of WHO, almost more than 1000 children die every day due to diarrhoea. Infant mortality disease because of bad sanitation rates highest and in U.P., it is 72 out of 1000 because of bad sanitation. The worst affected segment of our society are women and children especially poor and down trodden segments of society. Though, hand pumps have been installed in urban and rural areas but because of lack of maintenance the majority of them are non-functional. However, time is not far when majority of hand pumps and tube wells and wells shall become non-functional because of receding of underground water level. It is unfortunate that inspite of lapse of 60 years, the post independent India has been failed to provide safe and pure drinking water and good hygienic condition. According to report, 55000 children upto the age of one year, die every year in the State of U.P. Needless to

say that water born disease is not uncommon, not only in the State of U.P. but other parts of the country also.

Waterbodies, which are natural resources, are being encroached not only by the land mafia, individual persons but also by the State instrumentalities. The modus operendi for destroying the lake or pond is simple and systematic. The municipality starts with dumping garbage into the lake. Domestic and industrial effluents are let into the lakes. Grass, weeds and water hyacinth are never removed. The lake gradually dies and slums, colonies or other 'development projects' spring up near it. The nexus between persons affiliated with political parties, government agencies, land grabbers and criminals is strong and powerful, with adequate muscle and money power.

So far as the State of U.P. is concerned, while deciding a case reported in Rajendra Vs. Additional Commissioner, Devi Patan Mandal, Gonda and others: [2007 (25) LCD 565], I have taken note of situations relating to encroachments over waterbodies. It is astonishing to note that waterbodies, ponds, lakes in the State of U.P. have been encroached not only by common citizen or persons or land grabbers or mafia or villagers to construct houses but it has been also encroached by local bodies like Nagar Palika, Nagar Nigam and Development Authorities in systematic way. In a planned manner development authorities had sold the part of water bodies for construction of houses, buildings and commercial complexes. In pursuance to Apex Court judgment reported in (2001) 6 SCC 496 Hinch Lal Tiwari versus Kamala Devi and others, State Government had issued an order dated 8.10.2001for the restoration and protection of waterbodies but even then the developmental authorities like Lucknow Development Authority, Ghaziabad Development Authority, Gorakhpur Development Authority and others, continue to allot waterbodies to builders and other influential persons. The result is, almost in entire State of U.P. the underground water level, is receding at the rate of 20 to 125 centimetre every year. In a judgment delivered by Hon'ble Mr.Justice S. N. Srivastava, at Allahabad, the State was directed to restore waterbodies of rural area. A Committee of 21 persons constituted by the State, failed to give required output because of its number game. The State and its instrumentality or local bodies who are responsible to maintain the

water reservoir, have become the wrong doers and are the main violators of Apex Court judgment. It has been noticed that in pursuance of the judgment of Apex Court or orders of High Court, State after issuance of an order or circular forget its responsibility to enforce it. Law is not the black letter existing in statute books but it is the action taken by the authorities concerned to implement the law in real sense is the rule of law. More than three decades of experience at Bar and Bench, I have noticed that a trend has been developed ordinarily to implement only those judgments which are monitored by courts whether it is High Court or Supreme Court. The case of *Hinch Lal Tiwari (supra)* is the recent example where Apex Court judgment has been blatantly not complied with by the State authorities.

Bundelkhand and Agra regions of the State of U.P., are water scared regions where water related crimes are much higher than the other parts of the State. In case, newspaper reports are believed, people use to guard their water bodies in the night in groups and because of water shortage. Not only irrigation is seriously affected, the people are suffering from various water born diseases as well as scuffle took place to meet out the water requirements.

I have seen a special report of electronic media telecast by 17.8.2007 at 10:30 p.m. [by NDTV] covering the water crisis of Bundelkhand area having 7 districts of State of U.P. namely, Jhansi, Mahoba, Lalitpur, Banda, Chitrakut, Hamirpur and Jalaun and 6 districts of State of Madhya Pradesh namely, Chhatarpur, Damoh, Datia, Panna, Sagar and Tikamgarh. According to live telecast of the electronic media [NDTV], the lower class of the society is using the same water, which is extracted from pits for drinking as well as to fulfil other needs. It is not uncommon because of water related disputes, murders took place between the parties and peoples fight with each other to get hold of wells, hand pumps and other water reservoirs in Bundelkhand area of U.P. According to report, the reduction of underground water level in Bundelkhand area is more than 1.5 metres per year.

According to one other report published in 'Indian Express' newspaper (Lucknow Edn.) on 18.8.2007, due to frequent draughts excessive exploitation of land minor cracks have been noticed in the agricultural fields in a village Jigni of Rath Tahsil of district

Hamirpur in Bundelkhand. Tensional cracks have been noticed in earth having depth of 4 ft. to 50 ft. and some of the villagers have deserted from their native place. Statement of Lavkush Tripathi Tahsildar of Tahsil concerned as appeared in the newspaper reveals that out of 200 houses in the village, 50% villagers have deserted. However, some of them are gradually returning to their home. It may be noted that Bundelkhand area was mostly forested until the late of 18th century when intensive logging of the forests accelerated. Deforestation accelerated after the consolidation of British control in the 19th century. The consequence of deforestation is one of the reason because of which the people of Bundelkhand are suffering today. The State has started to pay price of its animosity with the nature and because of ecological disbalance.

Dr. Rajendra Prasad as well as Dr. B.R. Ambedkar while making their concluding speeches in the constitution assembly were of the view that it is not the constitution which may be termed as good or bad but it is the person who manned it makes the Constitution good or bad. In case persons having foresight, sincerity, honesty and competence are at the helm of affair in a country, then even the bad constitution or law, may give good result. Because of corruption and casteism in our system, least interests are taken to chalk out developmental plan with foresightedness relying upon expert opinions. In case some positive steps are taken at particular point of time at later stage, such actions are made redundant.

We may take note of the fact that even the "master plan' prepared for cities are changed from time to time for extraneous reasons. For good sanitation instead of creating scientific drainage system, with sufficient infrastructure, old one-constructed decades before, have been encroached upon without any authority in violation of constitutional mandate, and their use is changed. The widths of drains and canals constructed before decades rather, a century back, are reduced for extraneous reasons and constructions are done on its banks by change of use of land. The residential areas are converted into commercial and commercial to residential for extraneous reasons and such actions on the part of authorities, badly affect the sanitation system which were originally planned, and such actions are contrary to spirit of planned development of a city.

Elected representatives have got their own problems. That is why, the scheme of permanent bureaucracy was adopted by constitutional framers for the planned development of the country, which may not be adversely affected by the change of Governments. It is always expected that bureaucracy shall not yield to the political pressure and shall stick to law and constitutional mandate. But things seem to be otherwise. That is why, India is likely to become water starved country in few decades.

Once Mahatma Gandhi said, civilisation is, the mode of conduct which points out to man the path of duty. Performance of duty and observance of morality are convertible terms. In constitutional purview it is the duty of every person to follow the pursuit of Article 51-A of the Constitution (Fundamental Duties).

The standard sanitation technology in urban areas is the collection of wastewater in sewers, and treatment in "waste water treatment plants" for reuse or disposal in rivers, lakes or the sea. Sewers are either combined with storm drains or separated from them as sanitary sewers. Combined sewers are usually found in the central, older parts or urban areas. Heavy rainfall, and inadequate maintenance can lead to combined sewer overflows or sanitary sewer overflows, i.e., more or less diluted raw sewage being discharged into the environment. Industries often discharge wastewater into municipal sewers, which can complicate wastewater treatment unless industries pre-treat their discharges. Discharge of industrial wastewater into river is causing serious threat to various rivers of the country. We may take notice of the fact that millions of rupees have been invested in Ganga action plan and even for the river Gomti without any outcome. Reasons need not to be discussed being well known. Disposal of solid waste in rivers and absence of recycling plans are causing hazards to public health.

UNESCO's World Water Development Report (WWDR, 2003) from its World Water Assessment Programme indicates that, in the next 20 years, the quantity of water available to everyone is predicted to decrease by 30%. 40% of the world's inhabitants currently have insufficient fresh water for minimal hygiene. More than 2.2 million people died in 2000 from diseases related to the consumption of contaminated water or drought. In 2004, the UK charity Water Aid reported that a child dies every 15 seconds from

easily preventable water-related diseases; often this means lack of sewage disposal and bad sanitation system. United Nations Development Programme sums up world water distribution in the 2006 development report, to quote:

> "While one part of the world sustains a designer bottled-water market that generates no tangible health benefits, another part suffers acute public health risks because people have to drink water from drains or from lakes and rivers".

Drinking water as well as fresh water for its extensive use in agriculture now becomes more precious than ever in our history. Availability of water and to provide safe and pure drinking water coupled with efficient sanitary system, are two fields of the basic need of a civilised society.

Polluting water may be the biggest single misuse of water; to the extent that a pollutant limits other uses of the water, it becomes a waste of the recourse, regardless of benefits to public health. People pay price of water pollution, while the private firm's profits are not redistributed to the local population victim of this pollution. Pharmaceuticals consumed by humans often end up in the waterways and can have detrimental effects on aquatic life if they bioaccumulate and if they are not biodegradable.

It is high time when the Government should gear up and take remedial measures to provide safe drinking water and should make water harvesting compulsory and create artificial water bodies, reservoirs and restoring the old one coupled with efficient sanitation system to maintain the underground water level. Old drainage system should be restored and renovated by removing encroachments. Efforts made by some of the countries for water harvesting and to regulate water supply have been discussed by me in the case of *Rajendra* (supra). Hence need not be repeated again.

There is one more reason why old water bodies should be restored and new one should also be created. From research, it has been borne out that atmospheric temperature over the seas is less than the temperature of the area covered by land. Accordingly, restoration of water bodies is also necessary to minimise the global warming as noticed by scientists by various research projects.

No doubt because of population growth, to some extent city planners compromise for one or the other reason by encroaching the water bodies but we must keep in mind that we can live without multi-storeyed buildings by taking shelter in huts or in rural areas, but it is impossible to live without safe drinking water and good sanitation system and hygienic condition.

Francesco Sindico, a University research fellow had presented a lecture at the Inter'national Conference on Human Security and Climate Change. It was published in *New Zealand Journal of Environmental Law* Vol.9 pp. 209-238 in the year 2005 and has also been published in *'The Icfai Journal of Environmental Law'*, January, 2007 Vol.VI No.1 wherein he has observed that world is gradually moving towards a situation where the countries shall fight each other to get hold of water bodies, rivers and reservoirs to meet out their requirements.

It is irony that we speak much, legislate too much, decisions are enormous but enforcement of law in their letter and spirit, is minimum. Lord Denning in his famous treatise, ***"The Discipline of Law'*** (page 61) had rightly said, to quote:

> "Our procedure for securing personal freedom is efficient, but our procedure for preventing the abuse of power is not."

The observation of Lord Denning is more correct for India than England.

It is unfortunate that nothing has been done to provide efficient machinery to preserve and protect waterbodies and create new one and make water harvesting compulsory. Orders passed by Supreme Court or High Courts are not being implemented in their letters and spirit. Society at large is likely to face acute water crisis and may be, after 100 years or 200 years, State may be compelled to sell water through fair price shops as "essential commodity". It is possible that some of the cities of the country shall convert into desert in the manner the policy makers and bureaucrats are functioning in our country. After 300 years substantial portion of our country including some part of the State of U.P., may become desert in case no remedial steps are taken. It is not the question of only present and coming generation but it is also the question of our

survival after rebirth. It is not necessary that we shall achieve salvation or Moksh. Because of good deeds, some of us again may reborn as human being or some may reborn in the form of other creature of world at any place on this earth. Our soul in "new body" shall suffer because of our own faults or inactions in the form of coming generation. That is why in Rigveda, the author prays to Almighty in repentance to forgive for things done resulting in destruction of water bodies to quote: -

O powerful waters
I might have violated
The laws of Nature
Knowingly or unknowingly,
Foolishly or impudently.
Take away whatever is wrong
Or deficient in me.

I wish to conclude with couplet of *Geetanjali*, written by Noble Laureate, nationalist and poet of this country Sri Ravindra Nath Tagore:

Where the mind is without fear and the
head is held high.....
Into that Heaven of freedom my Father,
let my country awake."

I thank to audience and organisers of the function once again and hope that outcome of the conference shall be very valuable and useful for the policy makers of the country.

'REVERSE DISCRIMINATION' IN THE INDIAN CONSTITUTION

-Siddharth Saxena[1]

ABSTRACT

Does the majority face discrimination in the garb of minority rights envisaged under our constitution? The rights of minorities to establish and administer educational institutions and the legal implications thereof tracing from the meaning of education in light of the Constitutional provisions on the majority are analyzed in this article.

INTRODUCTION

Article 29 and 30 of the Indian Constitution provide for the rights of minorities. Article 30(1)[2] relates specifically to *establish* and *administer* educational institutions of their choice. On the other hand Article 29(2)[3] guarantees to all citizens no discrimination on grounds of religion, race, caste etc. in matters of admission in educational institutions receiving aid out of State funds.

This brings out the obvious question as to whether the State aided minority educational institutions be forced to lose their right to *administer* its admissions. Another aspect of this debate is that courts can direct these minority institutions under a writ of *mandamus* as they perform *a public function* provide education. This constitutional dilemma was answered by the Supreme Court in the 11-judge bench judgment of *T.M.A Pai Foundation* v. *State of Karnataka*[4].

The objective of this article is to understand, in light of the solution that the constitutional framers sought, to give a feeling of

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[1] V Semester, B.A. LL.B.(Hons.), National Law University, Jodhpur

[2] All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

[3] No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

[4] AIR 2003 SC 355

security to the minorities, this judgment of the Supreme Court which has actually curtailed the right to *administer* of the minorities.

Previous judgments of the apex court gave the opinion that these rights of minorities would not be given a very liberal interpretation, quoting: *"Absolute words do not confer absolute rights"*[5]. Further the courts have given a smoke screen provision in saying that the right to administer does not include the *right to mal-administer*[6], the fairness of this administration being judged by the courts.

In interpretation of Constitutions across the globe and even in India, the text of the document is considered to be *explicit* and considered as *suprema lex* or the 'supreme law of the land', which even the courts don't have a right to change. Then, why is it so that the Supreme Court has interpreted these minority rights in way that they hamper the rights provided by the Constitution itself? The answer lies in the practical difficulty faced by non- minority students in getting into these educational institutions maintained by minorities -we thus come to the concept of ***Reverse Discrimination***, the basic idea behind these rights were to safeguard the interests of the minorities and save them from discrimination, these constitutional provisions in a way pave the way for discrimination against the majority.

EDUCATION AND ARTICLES 14 AND 21-A

The right to education, for first time in India, was raised in *Mohini Jain* v. *State of Karnataka*[7], which gave this right paramount importance. However, this mandate was diluted in *J.P. Unnikrishnan* v. *State of Andhra Pradesh*[8] which clearly mandated that the right to education be simply given the status of a Directive Principle under Art. 45 and not a justiciable fundamental right. But this mandate was also done away by the 86th amendment made to the Constitution in

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[5] St. Xavier's College Society v. State ofGujarat, AIR 1974 SC 1389 at para.258

[6] *St. Stephen's College* v. *University of Delhi*, AIR 1992 SC 1630 at para.65

[7] (1992) 3 SCC 666, as held by KULDIP SINGH, J. at para. 12 "Right to life' is a compendious expression for all those rights which the Court must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct which the individual is free to pursue. The right to education flows directly from the right to life."

[8] (1993) 1 SCC 645

the form of insertion of Art. 21 A into Part III of the Constitution. The same has been reaffirmed by the Supreme Court in the case of *Sujit Kumar Banerjee* v. *State of Bengal*[9] where the court opined that the right to education can no longer be considered a Directive Principle of State Policy and that it had taken the shape of a fundamental right meaning thereby that the State was under a definite obligation to provide for the same. This right has also been the subject matter of a number of international instruments[10] and also domestic policies in India[11]. It is submitted that the change in character of the right to education in the Indian scenario is such that the State has now become duty bound in spite of any constraints that it might have to provide for fulfillment of the mandate of Article 21A.

ARTICLE 30: AN OVERVIEW

To preserve the secular fabric of the country, the founding fathers of the Constitution inserted Art. 30(I) in the Constitution guaranteeing a fundamental right to religious and linguistic minorities to 'establish' and 'administer' educational institutions of their choice in order to protect their language and culture, as also recognized by a number of international covenants[12]. Art. 30 of Constitution confers two rights: (I) right to establish an institution; and (2) right to administer it. The former means the right to create an institution, while the latter means the *management of affairs of the institution must be free of external control,* so that the founders or their minorities can manage the institution as they think fit and in accordance with their ideas of how best the interests of the community in general and the institution in particular will be served[13]. Again, Art. 30(I) uses the word "of their own choice" which means minority institutions are free to administer education as

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[9] "Right to get education up to the age of 14 years was not a fundamental right before and this has been lately inserted by way of amendment in the Constitution. In order to understand properly the said provision is set out hereunder.", 2004 (4) CHN 612 at para.6

[10] Art. 26(1), Universal Declaration of Human Rights, 1948; Art. 28 of the United Nations Convention on Rights of a Child, 1989

[11] The National Policy on Education 1986, District Primary Education Programme

[12] Art. 27 of International Covenant on Civil and Political Rights (ICCPR), Art. 5(c) of UNESCO Convention Against Discrimination in Education, Art. 14 of the European Convention on Human Rights

[13] Md. JoynalAbedin v. State of West Bengal, AIR 1990 Cal193 at paras. 12 and 13

per their will and wishes[14]. Autonomy in the administration means right to *administer* effectively and to manage the conduct of affairs of the institution.

THE FIRST PHASE: THE LIBERAL OR ABSOLUTE APPROACH

The cultural and educational rights viz. articles 29 and 30 have been interpreted by the courts in a series of judgments which have shown the interplay between the two. In the case of *Sidhajbhai Sabhai*[15], SHAH, J. opined on the restrictions on Art.30:

> *"Unlike Art.* 19, *the fundamental freedom under clause* (1) *of Art.* 30, *is absolute in terms; it is not made subject to any reasonable restrictions of the nature the fundamental freedoms enunciated in Art.* 19 *may be subjected to. All minorities, linguistic or religious have by Art.* 30(1) *an absolute right to establish and administer educational institutions of their choice; and any law or executive direction which seeks to infringe the substance of that right under Art.* 30(1) *would to that extent be void"*[16]

He said that Art.30 confers an *absolute* right on part of the religious and linguistic minorities, further he goes on to say that it is a *real right* intended to protect the minorities and not to be whittled down by the so called regulative measures conceived in the interest not of the minority educational institution, but of the public or the nation as a whole[17].

The power of administration on part of the state, if held justifiable because of public or national interest, the right under Art.30 would be a mere *teasing illusion* and *a promise of unreality.*

HIDAYATULLAH, C.J. in *Father Proost*[18] went on to state that the language of Art.30(I) is wide and must receive full meaning, the protection under Art.30 deals with protection of minorities and

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[14] Shri Krishna v. Gujarat University, AIR 1962 Guj 88 at para.59
[15] Sidhajbhai Sabhai v. State of Bombay, (1963) 3 SCR 837
[16] Idat para.
[17] Id at para.15
[18] *Father W. Proost v. The State of Bihar, AIR 1969 SC 465*

attempts to whittle down the protection cannot be allowed[19]. The Hon'ble judge further in the case of *Mother Provincial*[20] went on to explain the ambit of *administer* as given in Art. 30(1):

> *"Administration means- 'management of the affairs' of the institution. This management must be free of control so that the founders or their nominees can mould the institution as they think fit and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served. No part of this management can be taken away and vested in another body without an encroachment upon the guaranteed right."*[21]

THE SECOND PHASE: THE NON-ABSOLUTE APPROACH

Contrary to the first phase judgments of the 1960's era, came the viewpoint of A.N. RAY, C.J., who in *St. Xavier's*[22], admitting that the construction of the language in art.30(I) is absolute, but it cannot be said to confer absolute rights:

> *'...to explode the argument of absolute or near-absolute right to establish and administer an educational institution by a religious or linguistic minority' from the absolute words of Article* 30(1). ***Absolute words do not confer absolute rights,*** *for the generality of the words may have been cut down by the context and the scheme of the statute or the Constitution"*[23]

This was a huge setback to the previously sough to be absolute Art.30 which gave the multicultural and secular protection to the minorities as they had the right to establish and administer their educational institutions, with this new facet, the right was threatened and so was the guarantee of protection.

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[19] *Id at* para.15
[20] *State of Kerala* v. *Very Rev. Mother Provincial*, AIR 1970 SC 2079
[21] *Id at* para.9
[22] *St. Xavier's College Society* v. *State of Gujarat*, AIR 1974 SC 1389
[23] *Id at* para.258

CHINNAPPA REDDY, J. in *Frank Anthony*[24] came up with the *academic excellence test* and the implied regulation under the garb of *mal administration:*

> *"The excellence of the instruction provided by an institution would depend directly on the excellence of the teaching staff, and in turn, that would depend on the quality and the contentment of the teachers. Conditions of service pertaining to minimum qualifications of teachers, etc..... cannot surely be said to be violative of the fundamental right guaranteed by Article* 30(1)"[25]

> *"The right to administer educational institutions can plainly not include the right to maladminister.*[26]

The above two statements by the apex considerably make the right under art.30 to be subject to regulations and guidelines from the state.

The *St. Stephen*'s case[27] did not merely discuss the scope of Art.30, but it specifically dealt with the interrelationship between Art.30(1) and 29(2), which is of material importance in this paper. The court reasons that the rights conferred to the minorities under Art.30(I) are enabling while clause (2) of Art.29 is a mandate that in the matter of admission in any educational institution maintained by the State or receiving aid all citizens would be treated equal and could not be denied admission on grounds only of religion, race, caste, language or any of them. The right guaranteed under Article 29(2) is a special right which would prevail over the general right guaranteed to the minorities under Article 30(I)[28]. It is humbly submitted that this construction by the Hon'ble Court is fallacious and would be dealt with later in the paper.

The court finally goes on to say that the right under Art.30(1) is partly curtailed by Art.29(2) and declared that only a rigid

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[24] Frank Anthony v. Union of India, AIR 1987 SC 311
[25] *Id* at para. 17
[26] *Id* at para. 12
[27] *St. Stephen's College* v. *University of Delhi*, AIR 1992 SC 1630
[28] *Id* at para. 143

percentage (50%) of minority students which could be admitted by these minority institutions.

The right had suffered much curtailment and therefore the matter came in front of an eleven judge bench in *T.MA Pai Foundation* v. *State of Karnataka*[29], where the court gave distinct guidelines as to the scope of minority rights.

VARIAVA, J. in his judgment, lays down the summary [30] of the judgment, of which two points are of utmost consequence for the purpose of this paper:

1. Even though right to admit students is an essential facet of right to *administer,* the moment aid is received by the minority institution, it would be governed by Article 29(2).
2. It explicitly overrules the ratio of *St. Stephen's,* once State aid is taken, no question of balancing Arts.29 and 30, Art.29(2) must be given its full effect.

INTERPRETATION OF THE CONSTITUTION

Plain Meaning

When the words of a statute are clear, plain or unambiguous, *i.e.* they are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of consequences[31]. "When a language is plain and unambiguous and admits of only one meaning no question of construction of a statute arises, for the Act speaks for itself[32]. The results of the construction are then not a matter for the court[33], even though they might be strange or surprising[34], unreasonable or unjust or oppressive[35].

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[29] AIR 2003 SC 355

[30] *Id* at para.60 ofV ARIAV A. J.'s judgment

[31] State of Jharkhand v. Govind Singh, AIR 2005 SC 294 at 296; Nelson Motis v. Union of India, AIR 1992 SC 1981 at 1984; Nathi Devi v. Radha Devi Gupta, AIR 2005 SC 648 at 659

[32] State of U.P. v. Vijay Anand Maharaj, AIR 1963 SC 946 at 950; Council for Homeopathic System of Medicine, Punjab v. Such in tan, AIR 1994 SC 1761 at 1769

[33] Pakala Narayanaswami v. Emperor, AIR 1939 PC 47 at 51; CIT, Agri. v. Keshab Chandra Mandal, AIR 1950 SC 265 at 270

[34] London Brick Co. Ltd. v. Robinson, (1943) 1 All ER 23 at 26 (HL)

[35] Mahalaxmi Mills Ltd v. CIT, Bombay, AIR 1967 SC 266 at para.7; Nasiruddin v. Sita Ram Agarwal, (2003) 2 SCC 577 at 588

GAJENDRAGADKAR, J. says: "If the words used are capable of one construction only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act"[36]

Harmonious Construction

It is the duty of the courts to avoid a head on clash[37] between two sections of the same Act and, whenever it is possible to do so, to construe provisions which appear to conflict so that they harmonize[38].

VENKATARAMA AIYAR, J. says "The rule of construction is well settled that when there is an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should e given to both"[39].

Lex specialis

A familiar approach in all these cases of conflict is to find out which of the two apparently conflicting provisions is more general and which is more specific and to construe the more general one as to exclude the more specific[40]. The Principle is expressed in the maxims *Generalia specialibus non derogant*[41] and *Generalibus specialia derogant*[42]

We have to understand, which is the general law, Art.29(2) classifies institutions receiving state aid and Art.30(I) classifies minority institutions. The question in hand is an overlapping area of these two classifications and the general law has to be construed from other words given in the section.

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[36] *Kanaiial Sur* v. *Paramvidhi Sadhu Khan,* AIR 1957 SC 907 at 910

[37] *Raj Krishna* v. *Binod Kanunga,* AIR 1954 SC 202 at 203; *CIT* v. *Hindustan Bulk Carriers,* (2003) 3 SCC 57 at 74

[38] *Kailash Chandra* v. *Mukundi Lal,* AIR 2002 SC 829 at 834; *Krishna Kumar* v. *State of Rajasthan,* AIR 1992 SC 1789 at 1793

[39] *Venkataramana Devaru* v. *State of Mysore,* AIR 1958 SC 255 at 268

[40] *South India Corporation (P) Ltd.* v. *Secretary, Board of Revenue, Trivandrum,* AIR 1964 SC 207 at 215; *State of U.P.* v. *Renusagar Power Co.,* AIR 1988 SC 1737 at 1751

[41] General things do not derogate from special things

[42] Special things derogate from general things

Moreover, education as already stated is now an obligation of the State under Art.21 A, giving the state aid as a general rule and also the words *'No citizen...'* as in the beginning of Art. 29(2) give it a more general amplitude and hence it is the submission of the author that Art.30(1) is a special law and hence must derogate the general law under Art.29(2).

Therefore the rule of interpretation gives an absolute character to the right under Art.30(I) and hence we come to the term ***Reverse Discrimination.***

CRITIQUE: REVERSE DISCRIMINATION

The Black's Law Dictionary defines *reverse discrimination* as preferential treatment of minorities, usually through affirmative-action programmes, in a way that adversely affects members of a majority group.

Tracing the history of these minority rights, it is essential to look into the Constituent Assembly Debates[43] on Arts.23 and 23A of the Draft Constitution which currently are the present day's Arts.29 and 30 of the Constitution:

On minority rights:

> *"This article 23 gives an assurance to the minorities that their languages will be guarded, the minorities will be able to conserve their own languages and not only conserve, but a definite development also can be made by them."*
>
> On Art.29(2):
>
> *"Sometimes the minority said they were discriminated against and on other occasions the majority felt the same thing. This amendment brings the majority and the minority on an equal status ".*

We see therefore that Art.29(2) was made to keep the majority and the minority on an equal footing, but even after primary education being a fundamental right[44], the eleven judge bench still holds[45] that in unaided minority institutions, there can be no state

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[43] CAD, debates on 7th and 8th December, 1948

[44] Art.21A

[45] *T.M.A Pai Foundation* v. *State of Karnataka*, AIR 2003 SC 355

interference at all. The absolute construction of Art.30(I) and its interpretation according to the prevalent rules suggest that its character should have remained as opined in the first phase of the *liberal approach*. This creates a conflict between two fundamental rights.

Conflict between fundamental rights has been addressed to by the Supreme Court in the favor of *larger public morality*[46], but in this situation the 'larger' should be seen in terms of the populous majority or the moral aspect as enshrined in various Human Rights conventions internationally.

It is submitted (view of the author) that the Constitution does provide such *Reverse Discrimination* but the courts have intelligently maintained a status-quo by permitting the admission of non-minorities in state aided institutions based on merit, thus retaining some sanctity of the constitutional right.

Dissent is seen in the Supreme Court itself where two of the eleven judges preferred a liberal interpretation of minority rights. Notable though is the fact that the dissent came one from a Muslim[47] and the other from a woman[48], both of whom belong to a non-dominant minority.

Equality of opportunity for unequals can only mean aggravation of inequality.

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[46] *Sharda* v. *Dharmpal*, MANU/SC/0260/2003 (para.60); *Mr. Xv. Hospital Z*, (1998) 8 SCC 296

[47] QUADRI, J.

[48] RUMA PAL, J.

SOFTWARE AS 'GOODS'

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Abstract

"The real danger is not that computers will begin to think like men, but that men will begin to think like computers"

-Sydney J. Harris

The Indian Legislature has already shown its intention to be crafty when the matter is concerning tax by classifying certain transactions as 'deemed sale' for the purposes of sales tax vide Constitution (Forty-sixth Amendment) Act, 1982. Until the same happens with software, one has to decide what the status is in light of the 2004 Supreme Court ruling in the case of *rata Consultancy Services.*

The real problem arises due to the peculiar intangible nature of software, is it really intangible or it is just a matter of semantics. Many judicial pronouncements have divided software on the basis of medium of transfer, while others have seen the service character in software made to cater to the specific needs of the buyer.

To strictly apply the provisions of a 1930 enactment [Sale of Goods Act, 1930] to something as novel as software would truly be *thinking like a computer.*

What is needed or do we already have it, only need to apply it.

To explain this in a lucid and precise manner would be the author's objective while writing this article; hopefully to clarify some of the many doubts in this nascent area of law.

Article

At the very beginning, it is clarified that though the major chunk of research is on foreign authorities due to the paucity of

Indian material on this topic, the article restricts itself to the Indian legal scenario -essentially to the Sale of Goods Act, 1930

To introduce this topic, 'Software as Goods', the most important aspect is, and should be, to understand the objective or implications of when Software would or would not be considered as *Goods* or in the alternative as a *Service* .

Fundamental Implications

The two most fundamental implications of a valid sale which legally can only be of *Goods* under the Sale of Goods Act, 1930 are:

1. Sales[1] tax[2] which can be levied by the Government, forming the major component of Government earning; and
2. The rights and duties of the buyer/seller as given under the Sale of Goods Act, 1930 with special reference to the 'fitness for purpose'[3] as envisaged in section 16 of the Act.

Goods

'Goods' include all personal chattels other than things in action and money.[4] To take this definition as given by *Benjamin* creates difficulty when we generally consider chattels in its archaic sense to be only of a tangible import.

To first understand the connotation of the term 'Goods', which is interpreted to be quite indefinite[5] and deriving it's meaning primarily from the context in which it is used, one has to either rely on the restrictive definition under Section 2(7) of the Sale of Goods

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[1] This is with respect to the distinction between *sales tax* and *service tax*; Important to note is the OECD Classification of Taxes wherein unit 5000 is for Taxes on goods and services without a distinction between the two different types of taxes, which in turn is creating this difference; taken from< 2004.pdf> last visited on 13 October 2007

[2] The Hon'ble Supreme Court opined that the correct approach to the question as to what are "Goods" is for the purposes of sales tax; *Bharat Sanchar Nigam Limited* v. *Union of India*, AIR 2006 SC 1382 (para.55) per RUMA PAL, J.

[3] The idea of considering an agreement of software as that of service disposes the buyer off the umbrella of protection if it was construed as a sale of goods. The vendor's good faith standard to continually rectify the problem (if any) would relieve him of the onerous burden put on him by the doctrine of *caveat venditor* under section 16 of the Sale of Goods Act, 1930

[4] A.G. Guest (ed.), *Benjamin's Sale of Goods*, (London: Sweet and Maxwell, 6th edn., 2002) § 1-078

[5] The Noordam (No.2) [1920] A.C. 904 at 908-909 *cited from* A.G. Guest (ed.), *Benjamin's Sale of Goods*, (London: Sweet and Maxwell, 6th edn., 2002) § 1-078

Act, 1930 or the highly wide description given under Article 366(12) of the Constitution of India. Notable though is the fact that there is no distinction between 'tangible' and 'intangible' goods, but of that of 'movable' or 'immovable' property-leading to problems where software is concerned; moveable property (with the given exceptions) under the Sale of Goods Act, 1930 are defined as 'Goods'.

Software

Now to the second aspect of the situation, what is Software ? A plausible non-technical definition for the layman might not incorporate all the necessary legal dimensions, thus to succinctly put forth a functional one for the purpose of this article: Software is a set of bundled instructions that run a computer, as opposed to the physical machinery and devices that compose the hardware.

Basically, a machine-read code is termed as software. For the legal implications, software is divided[6] into:

1. Canned Software: 'Off the shelf' software which is not made for specific use; rather made to fulfill the general needs of the average user .
2. Un-canned Software: Software made to specifically cater to the needs of the buyer .

The rationale behind such a distinction was that the canned software can be treated as 'Goods' and un-canned software are more in the nature of 'Service' and hence would not come within the purview of the definition of 'Goods' .

Software and Served Food

Keeping aside the reliance placed on foreign judgments, the Indian Supreme Court did not consider the opinion of Hon'ble Justice R.S. Pathak, who categorically held that the sale of food by restaurant owners cannot get the benefit of the *Northern India Caterers* (II) case[7] as the case decided the matter relating to hotel owners; where it was held that 'services' provided by a hotel, while

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[6] This distinction was made by the Indian Supreme Court in the case of *rata Consultancy Services* v. *State of Andhra Pradesh*, AIR 2005 SC 371 following *St. Albans City and District Council* v. *International Computers Ltd.*, [1996] 4 All E.R. 481

[7] Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi, AIR 1980 SC 674 para 17.

including sale of foodstuffs would not come under the definition of 'sale'.

Food in a restaurant is although on a set 'Off the shelf - Canned' basis, variations in the same to specifically cater to the buyer's taste (becoming Un-canned) is commonplace. Thus the reliance on the 'need of the buyer's seems fallacious.

Medium of Transfer

The opinions on software being termed as 'Goods' have in many cases[8] relied on the medium of transfer, such as a CD, which is a thing 'tangible in nature', actually considering the medium as the 'Good' sold; having the code or knowledge inside it.

The interesting fact is that if the CD is considered the 'Good', it would create a problem of pricing as the price of the CD *with* the software is much more than the price of a *blank* CD. The price and hence also the 'Good' (if any) can only be the embedded software and not the CD.

Terminology

This problem of terminology as well as its forthcoming implications is relatively younger than software itself. In the year 1969, IBM announced a separate pricing policy for software, moving away from the concept of software *bundled* with hardware.[9] Software thus became the most divergent legal notion analogous to none; comparisons with entities like electricity, which had some common features, such as 'intangibility' cannot give a clear judicial idea as to the nature of software, need therefore was of new jurisprudence.

Problem : Tangible

The property in a 'Good' was always taken in terms of a tangible object in the Act of 1930; the problem arises in case of software which cannot be seen, touched or felt; the only situation by which a software can be put into the definition of the present legal

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[8] St. Albans City and District Council v. International Computers Ltd., [1996] 4 All E.R. 481

[9] Linda A. Sharp, *Computer software or printout transactions as subject to state sales or use tax*, 36 A.L.R.5th 133 § 2[a]

order, is to see it from the point of view of its carrier or its medium of transfer. To first understand the meaning of 'intangible' one can give it a simple meaning of anything that is intellectual property. A hypothetical situation where a company is supplying software through means of internet download[10] would in the present situation not come under 'sale'; creating Article 14[11] related difficulties for the State in case of taxation.

Goods: Movable

The Supreme Court of India in the case of *M.P. Electricity Board, Jabalpur*[12] citing *Durham Electrical*[13] held that:

> *There can be sale and purchase of electric energy like any other movable object, we see no difficulty in holding that electric energy was intended to be covered by the definition of "goods".*

The reasoning as above is defining an intangible object (electricity) as 'Goods'[14] *because* it can be sold and purchased like any other movable object. The clinching criterion in the above reasoning therefore is that whatever has characteristics of a movable object in case of it being sold would be considered 'Goods'.

As the definition under the Sale of Goods Act, 1930 speaks of 'movable property' such an analogy seems logical.

Dematerialized form of 'Goods'

One of the many views that make one believe that software is 'Goods' is that they are the product of an *intellectual process;* it is akin to the performance of a musician, which is not a 'Good'; but the magnetic tape or digital CD of the same music would then become

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[10] Chissick and Kelman, *Electronic Commerce Law and Practice* (2nd edn.), pp. 62-64 *cited from* A.G. Guest (ed.), *Benjamin's Sale of Goods*, (London: Sweet and Maxwell, 6th edn., 2002) § 1-086

[11] An intelligible differentia between the same software on one hand on a CD and on the other available through the Internet without any physical means cannot be sound, legally.

[12] Commissioner of Sales Tax, Madhya Pradesh v. Madhya Pradesh Electricity Board, Jabalpur, AIR 1970 SC 732 (para.9) per GROVER, J.

[13] County of Durham Electrical, etc. Co. v. Inland Revenue, (1909) 2 K.B. 604

[14] See also *State of Andhra Pradesh* v. *National Thermal Power Corp.*, AIR 2002 SC 1895

'Good'. Similarly a professor's lecture being an intellectual process is a 'Good' in the form f a book.

One point of view is from that of the software itself as it being a *dematerialized form of 'Goods'*[15] which can be materialized whenever needed.

Tangible: Considerations

Another facet of this discussion is that this whole debate is futile and the dispute s but a matter of perception:

> *In defining tangible, 'seen' is not limited to the unaided eye, 'weighed' is not limited to the butcher or bathroom scale, and 'measured' is not limited to a yardstick.*[16]

Meaning thereby that software is tangible too, just that it cannot be seen or touched by normal means of perception, and a medium has to be used. The argument simply hints as the special *nature* of software; for all practical purposes needs a computer system to run and perform the desired functions.

Therefore to consider anything with respect to software; the consideration of it being movable etc. for the purposes of being classified as 'Goods' should be seen from the eye-glass of a computer.

Duty on Intangible Property

To come back to the objective of this 'Goods' debate is to a large extent inclined on the considerations of taxation. The question as to whether objects which are intangible in nature, transmitted by use of technology into tangible mediums such as drawings, diskettes etc. has already been answered by the Hon'ble Supreme Court considering section 2(22) of the Customs Act, 1962 said:

> *Any media whether in the form of books or computer disks or cassettes which contain information technology or ideas*

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[15] Advent Systems Ltd. v. Unisys Corporation, 925 F .2d 670

[16] *South Central Bell Telephone Co. v. Sidney J. Barthelemy,* 36 A.L.R.5th 689 (Supreme Court of Louisiana)

would necessarily be regarded as goods under the ... provisions of the Customs Act.[17]

SIM Card: Analogy

The Hon'ble Supreme Court while considering the question as to whether SIM Cards are 'Goods' differentiated between the *transfer of right to use the goods* and a *license to the subscriber for providing telecommunication.*[18]

Holding that SIM Cards are not 'Goods' the Supreme Court held:

> *The contract between the telecom service provider and the subscriber is merely to receive, transmit and deliver messages of the subscriber through a complex system of fibre optics, satellite and cables.*[19]

Now though software and SIM Cards are essentially different, they do embody the same technological advancement that has created ripples into the existing law of Sale of Goods.

One of the major reasons why the Court held that SIM Cards are not goods; even though the SIM Card itself is something that is tangible and is movable to come within section 2 (7) of the Sail of Goods Act, 1930 – is because the major utility of the Sim Card is to provide telecommunication and not a right to use[20] the satellites and telephone exchanges.

The only plausible conclusion to end this section is that many-a-times software over the internet is merely license to use the particular service, such as the Manupatra or Westlaw search engine: are they 'Goods' or more reasonably software 'Service'?

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[17] Associated Cement Companies Ltd. v. Commissioner of Customs, AIR 2001 SC 862 (para.26) per KIRPAL, J.

[18] *Bharat Sanchar Nigam Limited* v. *Union of India*, AIR 2006 SC 1382 (para.22) per LAKSHMANNAN, J.

[19] *Id* at para.18

[20] *Id* at para.4

Medium of Transfer : Implications

Taking the Indian context, the opinion which was relied upon by the Hon'ble Supreme Court in the TCS case[21] was that of Sir Iain Glidewell[22] wherein he gave the reasoning that software would be 'Goods' *only* because it was transmitted through a CD which was a 'Good'; analogy was drawn from the instructions given in the maintenance and repair manual of a car.

To answer the question of whether software is 'Goods', for the purposes of Sales Tax, the object of the (proposed) tax would be the software and not the disc on which it is being transferred.

Ice Cream served in a cup and ice cream served in a cone cannot have an intelligible differentia for the purposes of sales tax; any such differentia on the basis of the medium of transfer being a CD or the Internet cannot stand on the touchstone of Article 14.[23]

Grounds: Proposal

Clearly, such an approach to bring software within the ambit of 'Goods' is unconstitutional; software therefore should be restricted to the debate of tangibility and hence to the ability to be *moved* as required by the Sale of Goods Act, 1930.

In the European case of *Beta Computers*[24] the problem faced by the court was that the software provided was not in form of discs but access to the intellectual property *Informix* was given from where the buyer could electronically copy the software onto their hardware. The court decided that all transactions of sale and download would all be one contract *sui generis*, mentioning the software to be 'Goods' without analyzing the question.

To determine the Indian legal scenario when the Internet is a global animal would be a tough task. Subjectively though if the *situs* of the contract would be in India - he author's proposal is that software should not be discriminated on grounds of medium of

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[21] Tata Consultancy Services v. State of Andhra Pradesh, AIR 2005 SC 371 (para.47) per VARIAVA, J.

[22] From St. Albans City and District Council v. International Computers Ltd., [1996] 4 All E.R. 481

[23] For Article 14 and Intelligible Differentia see *Laxmi Khandsari v. State of Uttar Pradesh*, AIR 1981 SC 873 at 891

[24] *Beta Computers v. Adobe Systems*, 1996 S.L. T. 604 : 1995 WL 1081393

transfer, the distinction (if any) should only on basis of whether it is *predominantly*[25] 'Good' or a 'Service'.

Canned/Uncanned: The Distinction

This distinction, according to the author might lead to instances to tax avoidance which though might be legal, would be a colorable exercise and ultimately lead to the Government not getting its requisite.

Reliance is placed on the opinion of Judge William Norris in the case of *South Central Bell Telephone CO.*[26]:

It seems probable that a substantial part of even standardized software that is purchased by larger businesses is modified in some respects. Consequently, the line between customized and canned programs is so vague and imprecise that a rule that taxes canned, but not customized, software is difficult to administer and tends to encourage tax avoidance through minor adaptive modifications

The Indian Supreme Court has laid down this Canned/Uncanned distinction in the TCS case by ruling that canned software is 'Goods' and uncanned software *may be* goods.[27]

The highest judicial authorities in India, tend to stay silent on an Issue not directly involved In the given fact situation - rather than clarifying the law once and for all. Recent trends have shown this to be present to a large extent where any matter which asks questions of the Judiciary relating to the digital age. The Hon'ble Judges rely heavily on foreign judgments than coming up with Indigenous Jurisprudence governing Computers and related aspects leading to unnecessary complications and voids in the Indian law.

Real Distinction

It is the view of the author the real distinction when considering software should be the terms of the contract itself as

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[25] Refer to the 'Dominant Nature' test as propounded in the case of *State of Madras* v. *Gannon Dunkerly*, AIR 1958 SC 560

[26] *South Central Bell Telephone Co.* v. *Sidney J. Barthelemy*, 36 A.L.R.5th 689 (Supreme Court of Louisiana)

[27] Tata Consultancy Services v. State of Andhra Pradesh, AIR 2005 SC 371 (para.29) per VARIAVA, J.

today it is considered in America under the Uniform Commercial Code (Article 2)[28].

Taking the Indian Jurisprudence on the topic, guidelines [which are beyond the scope of this article] should be framed embodying the 'Dominant Nature' Test[29] to find the actual substance of the contract.

Dominant Nature Test

A contract, composite in form, which in truth represents two distinct and separate contracts[30] -the test to decide whether the given composite contract falls into which category is known as the Dominant Nature Test; which distinguishes it on the foundation of the 'substance of the contract'.

How it applies to software

If software is perceived as no more than a set of ideas, a contract to sell software is a service contract and therefore is not covered by the Sale of Goods Act, 1930. But a computer cannot read ideas; for abstract instructions to become a computer program a technician must give those instructions a physical form. That technical metamorphosis from abstract instructions to concrete programs suggests a legal metamorphosis from services to goods.

'Goods' or 'Service'

The question though is not how the law perceives software; as software can be of a myriad of forms[31]. The real feature is to understand that whether there is a mere right to use or a right to property .

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[28] Julian Senter, Legal Issues in Computer Software: The Written Contract, 8 MIS Quarterly 67 (No.2; Jun. 1984) see also Bonna Lynn Horovitz, Computer Software as a Good under the Uniform Commercial Code: Taking a byte out of the Intangibility Myth, 65 B.U.L. Rev. 129

[29] As propounded in the case of *State of Madras* v. *Gannon Dunkerley*, AIR 1958 SC 560; relied upon in *Bharat Sanchar Nigam Limited* v. *Union of India*, AIR 2006 SC 1382

[30] Explained in *Bharat Sanchar Nigam Limited* v. *Union of India*, AIR 2006 SC 1382 (para.22) per RUMA PAL, J.

[31] *Horace Holman Group Ltd.* v. *Sherwood International Group Ltd.*, 2000 WL 491372 (QBD)

One of the distinguishing features between 'Goods' and 'Service' is the nature of the software if it requires continuing performance of the seller; if it does, then the *dominant nature* of such a contract is that of 'service'.

Moreover, another indicator is the recurring cost; if it needs constant transfer of money from the buyer to the seller for the purposes of that software then again 'service' would be dominant. On the other hand if there is no cost maintenance treated as a 'warranty' and therefore as an 'implied condition' -it can safely be treated as a 'goods' dominant contract.

Conclusion

To term software as tangible and hence movable to make it a 'Good' under the purview of the Sale of Goods Act, 1930 cannot be justified.

Even if done so, the ambiguity cannot be resolved in case of a 'service' dominant contract. If that is considered as a 'sale', then the Government loses out on further transactions between the buyer and the seller. The buyer looses out as the implied condition as to the quality under section 16 of the Sale of Goods Act, 1930 for all the subsequent transactions.

To draw analogies from substances like 'electricity' and 'SIM Card' may help to understand the jurisprudence of 'Goods' in our country -but if applied onto software: it would not be proper application of the law as barring few; the contracts relating to software are always of a composite nature; discern able only by the application of the 'Dominant Nature Test'.

Again, criticizing the *rata Consultancy Services* case (supra), the distinction based on both grounds;

1. Medium of transfer; and
2. Canned/Uncanned nature; is not sound in law

The reason being, that many-a-times the transaction relating to software happen over the Internet, a distinction therefore would violate the Constitutional provision of equality under Article 14 if such an Internet transaction is not taxed whereas its CD counterpart is.

In case of Canned and Uncanned software, the distinction is basically that of 'Goods' and 'Service' respectively. The characteristic feature according to the author must be the nature of the contract rather than the recipient and the nature of software being custom-made.

Mentioning the Uniform Commercial Code of the United States of America, academicians have concluded on the application of software sale only when the nature of the software comes within 'Goods' as defined under the UCC. The application to hybrid software licensing transactions is still unclear.[32]

This is exactly where the Indian jurisprudence of the 'Dominant Nature' test comes into picture and according to the author must be relied upon for unambiguous rule of law.

Notable Mention

The Ministry of Finance has, despite ambiguity of the *rata Consultancy Services* case in relation to Uncanned software as goods has issued circular No. 81/2/2005-ST pursuant to levying service tax on maintenance or repair of software, Canned or Uncanned; stating the Supreme Court decision as its basis in paragraphs 2 and 3 of the circular .

Need therefore is to clarify the position of law as soon as possible; so as to not make the unaware citizen of India bear the brunt of ambiguous decision making.

Further Reading:

Sarah Green and Djakhongir Saidov, *Software as Goods*, J.B.L. 2007, Mar. 161-181

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[32] Andrew Rodau, *Computer Software: Does Article 2 of the Uniform Commercial Code Apply?*, 35 Emory L.J. 853 at 920