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From the pen of the Editor.....

I feel great privilege and pleasure in presenting this XXXth issue of 'JTRI Journal' to our esteemed readers.

This Journal contains mostly the articles and papers prepared by either the Hon'ble Judges of the Allahabad High Court or by the Judicial officers posted in various districts or in this Institute. A lawyer looks at law mostly from the point of view of the litigant, whereas, a law teacher looks at it from academic angle. The judge who sits in the court has the advantage of seeing both sides of a case and coming to an objective and impartial conclusion.

We are extremely indebted to Hon'ble The Chief Justice and all the Hon'ble Judges of the Allahabad High Court (including Lucknow Bench) who have been always a constant source of guidance, inspiration and encouragement to us and to this Institute.

We feel highly obliged to Hon'ble Mr. Justice Yatindra Singh Hon'ble Mr. Justice Sunil Ambwani, Hon'ble Mr. Justice Ashok Bhushan, Allahabad High Court, Allahabad & Hon'ble Mr. Justice Devi Prasad Singh, Allahabad High Court (Lucknow – Bench) who have contributed their valuable Articles which are the main highlights of this Journal.

I express my sincere thanks to all the authors who have contributed articles to the Journal.

I also express my thanks to all the faculty Members for their contribution, cooperation and hard labour in completing this task.

I take this opportunity to request our esteemed readers to contribute their valuable Articles (Book – Review also) for publication in 'JTRI Journal'.

Requesting cooperation and best wishes to take the Institute to new heights. I close, reproducing what Kennedy once said –

"Some see things as they are
and ask why;
I dream things as they should be
and ask why not"

V.K. Mathur
Director

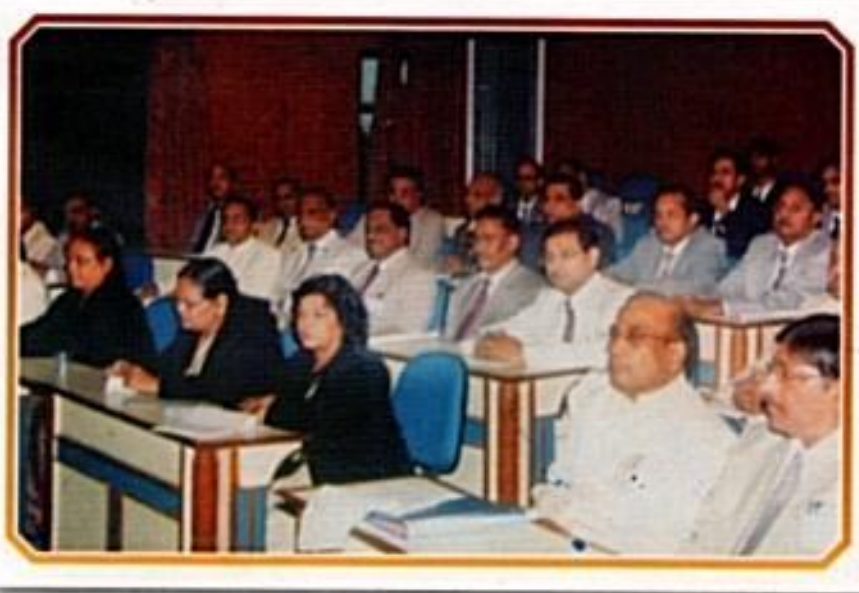
Hon'ble Mr. Justice Pradeep Kant, Senior Judge, Lucknow Bench and Chief Guest delivering inaugural address on the occasion of Special Training Programme (ST-5) for District Judges. Also seen are Hon'ble Mr. Justice R.K. Rastogi, Judge, Allahabad High Court and Sri V.K. Mathur, Director, IJTR.

Hon'ble Mr. Justice R.K. Rastogi, Judge, Allahabad High Court and Guest of Honour delivering lecture on the occasion of Inauguration of Special Training Programme (ST-5) for 40 Senior District Judges to acquaint them with working of High Court. (Duration 15.9.2008 to 21.9.2008)

Group Photograph of trainee District Judges (ST-5) on the occasion of visit of Hon'ble The Chief Justice, Mr. Justice H.L. Gokhale on 19.9.2008. Hon'ble Mr. Justice Alok Kumar Singh, Judge, Lucknow Bench, Sri V.K. Dixit, Registrar General, High Court and Sri S.V.S. Rathore, Registrar, Lucknow Bench were also present.

Class on Public Perception of Judicial System by Hon'ble The Chief Justice. Hon'ble Mr. Justice Alok Kumar singh, Judge Allahabad High Court, Lucknow Bench is also seen.

Trainee District Judges listening to Hon'ble Mr. Justice K.K. Mishra, Administrative Judge, Lucknow and Chief Guest of Valedictory Session on 21.9.2008



A view of Classroom during ST – 5

Hon'ble Mr. Justice K.K. Mishra, Chief Guest distributing certificates to trainee Senior District Judges after completion of training ST-5 on 21.9.2008

Group Photograph of Trainees – Additional District & Sessions Judges of 1977 & 1979 batches during Refresher Training Programme. (RT–4; on 20.11.08)

OPEN FORMAT, OPEN SOURCE AND THE ALLAHABAD HIGH COURT

- By Justice Yatindra Singh,
Judge
Allahabad High Court,
Chairman, Computer commitee Allahabad-211001
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We, at the Allahabad High Court, not only use but advocate open source software (OSS) and open formats. Many raise the question,

'Why is it so? Why do you do it?'

Let me take this opportunity to explain it.

Mahatma Gandhi once said,

'Means are more important than the end: it is only with the right means that the desired end will follow.'

His philosophy is deep rooted in law too. Lord Denning, one of the greatest judge of 20th century, in RVs IRC Exparte Rossminster Ltd 1979 (3) All ELR 385 held,

'But it is fundamental in our law that the means that are adopted ...should be lawful means. A good end does not justify bad means.'

In the field of Information and Communication Technology (ICT):

- The end is dissemination and communication of information; and
- The means are, how to achieve it, implement it; the kinds of software to use, the kinds of standards to adopt, the kind of formats to employ?

WHAT IS OPEN SOURCE SOFTWARE (OSS)?

The software consists of two parts.

- Source code; and
- Object code.

Nowadays, computer programmes are written in high level computer languages using compact English words. Only humans, but not computer can understand it. This part is known as source code.

The languages also have a programme called compiler and with its help, source code is compiled into the language that computers can understand. This is called object code or machine code. This runs the computer or any application therein.

Protection - Object Code

There was some debate as to how the object code is protected but Article 11 of the TRIPS mandates its members to provide authors with the right to authorise or to prohibit commercial rental of at least computer programmes and cinematographic works. This has also been so provided under Section 14(b) of the Copyright Act and now in our country, as in almost all other countries in the world, the object code is protected as copyright.

Protection - Source code

Source code is a kind of a description. Copyright lies in the description and source code of a computer programme-being description-is a literary work within the Copyright Act. If it is not published then it is protected as a trade secret. In case it is published it is protected as a copyright and may also be protected as a patent.

Copylefted, Free, and Gpled software

Everyone is not using Intellectual Property Rights (IPRs) to hoard rights in the software. Some are using them in such a way that no one is able to hoard them. Using copyright, they are doing a thing that is its opposite. It is for this reason it is called copylefting. This happens if software has the following conditions:

(i) The software is royalty free and no fee is charged for the same;

(ii) The source code is disclosed;

(iii) There is freedom to modify the software; and

(iv) Anyone who redistributes the software, with or without changes, must pass along similar freedom to others i.e. disclose the source code and permit further modification.

Copylefted software is also called free software as there is freedom to modify it. General public licence (GPL) contains conditions that copylefts a software. Software, under a GPL licence, is also known as GPLed software.

Open Source Software (OSS)

The philosophy of copylefted/ free/GLed software conveyed an anti-business message. Though it not so: it is merely a way of doing business. In the late 1990's, a group of free software enthusias got together in California and started a consortium - called Open Source Initiative (OSI). They also drafted ten guidelines and if the license or conditions under which the software has been released satisfies these guidelines then they called it Open Source Software (OSS). Among the ten conditions, the three important ones are,

(i) The software is royalty free and no fee is charged for the same;

(ii) The source code is disclosed; and

(iii) There is freedom to modify the software.

The guidelines do not contain the fourth condition of Free Software. Thus OSS is more comprehensive. All Copylefted/ free/GLed software is OSS but all OSS is not Copylefted/ free/GLed software. The sphere of OSS is bigger than Copylefted/ free/ GLed software.

Anyone can copy, distribute or modify OSS. No one infringes copyright by merely using or modifying it. This does not mean that it has no copyright. There is copyright in OSS. In fact, OSS is copylefted by using copyright. Anyone who uses OSS contrary to the conditions governing the license, not only breaches the contract but also infringes the copyright. This has also been so held by the US Court of Appeals for the federal circuit in Robert Jcobson Vs Matthew Katzer on 13.8.2008 (http://www.cafc.uscourts.gov/opinions/08-1001.pdf).

Advantages of OSS

(i) *No Copyright infringement in using or modifying it:* There is copyright in the OSS. In fact, OSS is copylefted by using copyright. However in terms of the license conditions, there is no copyright infringement in merely using or modifying it. Copyright infingement due to unauthorised use is a global issue and adopting OSS will obviate this aspect of it.

(ii) *Lesser cost:* OSS is royalty free; it does not cost anything. The only cost is for services or support for the same. Utilising OSS will reduce the cost of any project. The cost reduction has an impact on the proprietary software too. In order to be competitive, their cost is being reduced.

(iii) *Service sector:* Due to historical reason, our English and Maths have always been a plus point. These subjects are necessary for providing services in the IT sector. Adoptions of OSS may open new job opportunities in the service sector.

(iv) *Customise software:* Software can be modified if source code is disclosed and there is permission to modify the same. In OSS, source code is disclosed and there is permission to modify the software. This permits everyone to participate in the software movement and also provides opportunity to everyone to customise software. Today, OSS is not only available in our national language but also in almost all regional languages; its adoption offers us opportunity to take IT movement to the grass root level.

(v) *Avoids IPR:* It is possible to have IPR in the modified software created from OSS but the authors of any OSS do not claim any IPR in the OSSwritten by them. This is clear from the fact that they permit everyone to use/ modify/ distribute it without any royalty. This not only leads to reduction in the IT cost but avoids future conflicts in IPR area.

(vi) *Different licenses:* There are many licenses that are certified by OSI. This creates some difficulties but different licenses have their advantages too. They can be adopted for different business models:

(a) GPL is viral: a business model centered around programming and support services should be adopted.

(b) BSD type licenses are at the other end: they permit creation of proprietary software. The Macintosh Operating System (a proprietary software) is partly based on BSD licensed code.

The other licenses lie between these two and may be chosen by the companies/software developers according to their need.

(i) *Stable:* Virus is nothing but a computer programe which effects any other computer programme or computer data. In OSS there can be viruses however there have been only a few viruses in OSS. This is because its source code is open/ published. Experts say that it is safe and provides stable environment. This is also strengthened by the fact that Apache (an OSS) web servers are the most popular ones.

WHAT IS OPEN FORMAT?

Formats are particular way of encoding or a method of storing information so that a computer programme or a device may, understand, reproduce, and, if the need be, render it for modifications.

Formats may be proprietary. They could be,

- Secret and protected as a trade secret; or
- Published and yet protected as a patent (as was the gif format for images).

This is not true for open formats. They are,

(i) Documented and published - sufficient to implement them in any computer programme or device.

(ii) Made available irrevocably to everyone without any royalty or fee.

(iii) Maintained by a neutral body, where decisions are taken with consensus or majority thus catering to the needs of all.

Advantages of Open Format

Open formats, not only avoid monopoly but encourage healthy competition. Information technology has best flourished in the open formats/ standards: the Internet, the web, the protocol transfer are all based on open formats/ standards. Apart from other advantages,

(i) There is no fear of patents or licensing;

(ii) Open source software supporting ODF exists for every operating system; they work across the operating systems.

(iii) The files can never be lost as they will always be accessible.

(iv) They can be implemented in any software making the users true owners of their files.

THE TORTOISE AND THE HARE

Let me explain open source software and open format with the help of a story from 'Panchtantra': this has common thread in all cultures. It is a story of a hare and a tortoise.

One day, the hare and the tortoise decided to race against each other. The hare obviously took the lead; he thought of relaxing and went off to sleep. The tortoise, walking slowly but steadily, overtook the hare and won the race. The moral is,

'Slow but steady wins the race'.

In recent time, some new chapters have been added.

The hare was perturbed by the defeat. He asked the tortoise to race again. This time he did not take rest and won the race easily. The moral is,

'It is better to be fast and reliable',

But, this is not the end of the story.

After some days, the tortoise asked the hare to race once again but with a condition that the course will be chosen by him. The hare, who was confident of his victory, gave him a free hand. This time the course included a river. The hare ran up to the river and then stopped. The tortoise came and swam across the river to win the race. The moral is,

'Every one has weak and strong points -play on your strong side.' However, the story still does not end here.

After some days, the tortoise and the hare repeated the race over the same course but the rules were changed, This time they decided run it as a team. On the ground, the hare carried the tortoise on his back and on the river, the tortoise carried the hare on his back, The result was that both of them reached the destination quickly, saved time and enjoyed the race too. The moral is,

'It is best to consolidate everyone's strong points'.

OPEN STANDARDS, FORMATS -GOOD MEANS

This is, what the open source and open formats are about. They,

- Consolidate strong points;
- Use the IPR to prevent the hoarding of technology;
- Invite others to participate in its development.

It is 'Make love, not war' in a typical way. In term of Gandhi's philosophy, they are right means and are the key to the future: they will lead us to the desired end.

Mahatma Gandhi once said,

'You must be the change that you want to see in the world.'

Lead by example: show the world how changes can be effected. This is, why we use and advocate Open Source Software and Open Formats.

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Appendix-1

Popular OSS programmes that work across all Operating Sytemsl platforms

(i) *Audacity* (GPL version 2): It is programme for recording audio files. It permits editing of the audio files too. One can copy, paste, or mix the audio files.

(ii) *OpenOffice.org suite* (LGPL License): It provides bundle of software that are used in an office. It is similar to MS office suite and contains similar programmes. The default format of different programmes of this suite are Open Document Format maintained by Organisation for the Advancement of Structured information Standards (OASIS). It was approved by the International Standardisation Organisation (ISO) on May 3, 2006. OpenOffice.org suite can open and save files in default format of MS Office suite or Power Point Presentation as well as in any other format too. It can export any file into pdf format. In the latest version pdf files can also be modified. MS word does not open files saved in default format, which is open format, of OpenOffice.org. This can be easily achieved by Sun ODF Plugin, a freeware from Sun Michrosystems.

(iii) *Firefox, Thunderbird, and Sunbird (all from Mozilla Foundation)* (Mozilla Public License): Firefox is a web browser: Window equivalent to Internet Explorer. Thundrbird is a programe for sending and receiving emails. It can perform functions of Outlook express. Mozilla Sunbird is e-manager and manages e-calender. It is similar to Microsoft outlook and can be integrated with Firefox or Thunderbird.

(iv) *GIMP* (GPL License): It is GNU Image Manipulation Programme and is suitable for such tasks as photo retouching, image composition and image authoring. It is similar to photoshop.

(v) *Infra Recorder* (GPL-2 License): It is programme for burning CDs and DVDs. It works in the windows only. However, K3B is a similar programme that works in linux.

(vi) *VLC Media Player* (GPL-2 License): It is media player. It can play audio and video files. Mplayer is another open source programme similar to it. It can play files of mp3 format (a proprietary format) as well as ogg format which is open format.

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Appendix –2

(Partly modified for the purposes of this talk)

First Appeal No. 582 of 1998

Hemant Kumar Agrahari ... Appellant

Vs

Laxmi Devi ... Respondent

Hon'ble Yatindra Singh, J

Hon'ble Mukteshwar Prasad, J.

(Delivered by Hon'ble Yatindra Singh J.)

INTRODUCTION

1. This case involves diverse emotions – from happiness to disappointment and then determination to start new life. It also involves the interpretation and scope of section 27 of Hindu Marriage Act (the Act) as well as jurisdiction of the matrimonial courts to dispose of exclusive property of the spouses.

THE FACTS

2. Smt. Laxmi Devi (the wife) was married with Sri Hemant Kumar (the husband) on 30th April 1996. the marriage was not successful. It did not last long; it was not even consummated. According to the wife, her husband was already having physical relationship with one Sushri Sunita Pathak and continued to have it even after the marriage. Few meetings were held for settlement of dispute between the parties but were unsuccessful.

3. The wife filed a petition for divorce under section 13 of the Act on the ground of adultery and cruelty. She also prayed for return of the goods/amount given at the time of marriage and apart from her husband, impleaded her father-in-law and Sunit Pathak in the suit. The defendants denied the case of the wife.

4. The wife examined herself (PW-1) and produced two witnesses namely her brother Sri Ram (PW-2) and one Shri Mool Chand Gupta (PW-3). The defendants examined Hemant Kumar (DW-1), one Juggi Lal (DW-2) real Mausa of the husband and one Shri Shiv Prakash Kushwaha (DW-3) cousin of the husband.

5. the court below decreed the suit, for divorce and for return of Rs. 75,000/- in cash and goods (mentioned at item numbers 4 and 5 of the plaint), on the following findings;

- The husband was having relationship of husband and wife with Sunita Pathak since before the marriage and has continued the same even after it;
- The marriage was not consummated;
- The husband is guilty of cruelty;
- The wife has justifiable reasons to live separately from the husband;
- The goods mentioned in item nos. 4 and 5 of the plaint and Rs. 75,000/- cash were given at the time of the marriage.

6. The husband and his father have filed this appeal against that part of the decree by which the court below has ordered for return of cash and goods mentioned at item nos. 4 and 5 of the plaint. The wife has filed cross-objection against that part of decree by which the court has refused to grant decree for the return of the cash and goods mentioned at item nos. 1 to 3 and 6 of the plaint.

7. The parties have, neither challenged the finding of the court below that the husband has continued husband-wife relationship with Sunita Pathak, nor the decree of divorce granted by the court below.

THE POINTS FOR DETERMINATION

8. We have heard Sri Salil Kumar Rai counsel for the appellants and Sri RN Bhalla, counsel for Laxmi Devi (Plaintiff-respondent). The following points arises for determination in this case;

(i) Whether the wife is entitled to return of cash and goods? Whether the return of cash and the goods (mentioned at item nos. 4 and 5 of the plaint) has been decreed on the basis of inadmissible evidence?

(ii) Whether the goods ordered to be returned are not specific and no decree ought to have been passed?

(iii) Whether the cash/goods were exclusive property of the wife?

(iv) In case answer to the third point is in affirmative then whether the court below had jurisdiction to decree the suit for return of the cash/goods?

[1]The father of Hemant Kumar, in whose possession the original is alleged to be, is party to the proceeding. Sub section (2) of section 66 the evidence Act may apply in this case. But we have not considered its effects while recording the aforesaid finding as no arguments on its basis were advanced before us.

POINT NO. 1: THE FINDING REGARDING CASH/GOODS IS CORRECT

9. The counsel for the appellants submitted that:

- The court below has decreed the return of cash and goods on the basis of Photostat copy of minutes of panchayat dated 15.7.1997;
- It is secondary evidence; and
- It can not be relied upon.

10. the wife had produced Photostat copy of minutes of panchayat. It is alleged to be signed by father of the husband, brother of the wife and is attested by the witnesses. Moolchand Gupta PW-3 is one of the witnesses of this document. He has stated that the original was given to the father of the husband. He has also deposed as to what was agreed in the panchayat. Neither the husband, nor any of his witnesses have stated anything about this panchayat. They have also not stated whether father of the husband signed this document or not. Nevertheless the document produced was a Photostat copy of the original and secondary evidence. It was not admissible under section 65 of the Evidence Act unless notice to produce as contemplated under the Evidence Act was given to the other side. There is no evidence that any such notice was given. It seems an inadvertent mistake on part of the counsel of the wife. However the Photostat copy is inadmissible. But the decree may not be set aside if this finding is supported by other evidence on record.

11. the court can take judicial notice of the fact that in our society parents present gifts to their daughters and son-in-laws. Unfortunately some time it is forced, but often it is voluntary and is for the bright future of the newly weds. There is presumption that gifts must have been given from girl's side during marriage. In this case the wife produced herself and made a statement about the goods gifted to her during marriage. She has also stated that cash of Rs. 75,000 was given at 'tilak'. The witnesses produced on behalf the defendant-appellants accepted having received many items, though the gift of Rs. 75,000/- was disputed. According to them only Rs. 5000/- in cash was given. The trial court had the opportunity to watch the demeanor of the witness and found the statement of the wife trustworthy on this aspect. We see no reasons to doubt it. The court below has rightly held that the goods mentioned in item

[2] **27. Disposal of property**:-In any proceeding under this Act, the court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and wife.

nos. 4 and 5 of the plaint and cash Rs. 75000/- were given and this finding is upheld.

12. The court below has mentioned that no specific thing is mentioned in item nos. 1 to 3 and item no. 6 and has not ordered for the return of the same. We agree with the findings recorded by the trial court in this respect also. There is no justification to decree the suit for the items other than those decreed by the court below.

POINT NO. 2: MONEY DECREE SHOULD BE PASSED

13. The counsel for the appellants submitted that in item nos. 4 and 5 of the plaint, no details of the specific goods have been mentioned and decree can not be executed.

14. It is correct that specific details of the goods i.e. model, year of manufacturing, size, brand and other specification have not been given in the petition. The wife also did not disclose them in her evidence. The husband disclosed that the TV, which was given to him in the marriage, was black & white. On the other hand, the wife stated that colour TV was given. Dispute may arise at the time of execution of decree and a number of objections may be raised in the execution proceedings regarding condition of the goods and brand etc. This may further delay the recovery of cash given at the time of the marriage: we assess the value of the goods mentioned in the item nos. 4 and 5 at Rs. 1 lac. The appellants are liable to return Rs. 1 lac (value of goods in item nos. 4 and 5) and Rs. 75,000/- given in cash (total one lac and seventy five thousand) to the wife. As the appellants are using the goods/cash since marriage between the parties; they are liable to pay simple interest at the rate of 6 per cent on this amount from the date of judgment of the court below till the date of actual payment.

15. We would like to clarify that no arguments were advanced before us regarding maintenance to the wife and we have not considered it. It would be open to her to claim the same if permissible under the Act.

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[3] These cases are reported in
- i. Smt. Shukla vs. Brij Bhushan Kakkar: AIR 1982 Delhi 223.
- ii. P. Maharajan alias Nadarajan vs Chakalayil Kanju Sarojini: AIR 1988 Orissa 175
- iii. Sardar Surinder Singh vs. Manjeet Kaur: AIR 1983 J & K 86
- iv. Smt. Surinder Kaur vs. Madan Gopal Singh: AIR 1980 Pnjab 334.

[4] These cases are reported in
- i. Kamta Prasad vs. Smt. Om Wati; AIR 1972 All 153
- ii. Sangeeta B. Kadam vs. Balkrishna R. Kadam; AIR 1994 Bombay 1
- iii Ashok Kumar Chopra vs. Smt. Visandi; AIR 1996 MP 226

POINT NO. 3 & 4: COURT BELOW HAD JURISDICTION

16. The counsel for the appellants brought to our notice section 27 of the Act (see below) and submitted that two conditions are necessary under this section:

(i) The property must have been gifted at or about the time of marriage.

(ii) It must jointly belong to the husband and wife.

According to him, most of the property is exclusive property of the wife and no decree can be passed for their return.

High Court Decisions

17. Section 27 of the Hindu Marriage Act is similar to section 42 of the Parsi Marriage and Divorce Act. Both of them provide that the matrimonial courts have power to deal with the property presented at or about the time of marriage. There is some conflict among the High Courts about the true interpretation and area of operation of these sections.

18. The High Courts disagree whether the courts are entitled to deal with exclusive property of the parties or not. The Delhi High Court. Orissa High Court. Jammu and Kashmir High Court, and Punjab and Haryana High Court (see below for citation of these cases) have held that exclusive property of the parties can not be dealt by the matrimonial courts under section 27 of the Act and they should seek remedy before regular civil courts.

19. the Allahabad, High Court, Bombay High Court, and MP High Court (see below for citation of these cases) have taken a contrary view and have held that exclusive property of the parties can also be dealt by the matrimonial courts. The Allahabad and MP High Court were concerned with the ornaments (stridhana) given to the wife at the time of marriage. The Bombay High Court was concerned with the ornaments given at the time of marriage and some other property that the wife had purchased from her own earnings during marriage i.e. property not presented at or about the time of marriage and exclusively belonging to the wife. This view has been taken on the basis that section 27 of the Act does not prohibit the disposal of the exclusive property belonging to one of the parties and matrimonial courts can deal with it under inherent powers of the courts.

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[3] Kindly see part seven 'the Deserted Wife's Equity' and part eight 'The Wife's Share In the Home' of the book 'the Due Process of Law' by Lord Denning about history of this struggle inEngland

Supreme Court Decision – interpretation of section 27.

20. The decision from the Bombay High Court was taken in appeal to the Supreme Court. It was partly overruled in Balkrishna R. Kadam vs. Sangeeta B Kadam (AIR 1997 SC 3652=1997 (7) SCC 500) (the Balkrishna case). The Supreme Court held:

> *"It [Section 27 of the Act] includes the property given to the parties before or after marriage also, so long as it is relatable to the marriage. The expression "at or about the time of marriage" has to be properly construed to include such property which is given at the time of marriage as also the property given before or after marriage to the parties to become their "joint property", implying thereby that the property can be traced to have connection with the marriage. All such property is covered by Section 27 of the Act".*

21. In substance the Supreme Court in the Balkrishna case held that property covered under section 27 must be traced to marriage and should be connected with it. In this case cash and goods were presented at the time of 'tilak' or marriage. The ceremony of 'tilak' is normally held at boy's place: sometimes immediately before marriage and sometimes many days before it; however it is part of marriage. The gifts given at 'tilak' are also property given at or about the time of marriage, they are connected with it. Cash or goods in dispute are property within meaning of section 27 of the Act as explained in the Balkrishna case.

22. The counsel for the husband submitted that it was not enough that property should have connection with marriage but should jointly belong to the parties. According to him though some of them (sofa, almirah or TV etc.) could be joint property of the parties, but others (jewelry etc.) though presented at the time of marriage were exclusive property of the wife and no decree could be passed in respect of them. With due respect, the Supreme Court did not lay down any such proposition in the Balkrishna case.

23. Matrimonial cases are tried by the District Court and if Family Court has been established then by the Family Court. They are decided by the senior Judges at the district level and civil procedure code is applicable. The entire proceeding is like a regular suit; though court is required to conciliate between the parties. The Judges manning matrimonial courts are senior enough to decide about exclusive property on the regular side. Same procedure is applicable in the matrimonial cases. It is correct that section 13 of the Family Courts Act declares that a party shall not have right to legal representation, but court can always permit legal representation. In case

complicated questions are involved, permission for legal representation in the family court is normally granted; more so in a case where complicated questions regarding disposal of property are involved.

24. In case the matter is before matrimonial court, then it is proper that all disputes relating to the parties should be settled by one court at the same time: leaving a part of the dispute to be decided in future in another suit would prolong acrimony and agony. Life should be spent in a fruitful way, rather than wasting it in constant bickering. There seems to be no reason as to why joint property presented at the time of marriage can be disposed of, but exclusive property presented at the time of marriage can be disposed of, but exclusive property presented at the time of marriage should be disposed of separately. This will not only result in multiplicity of the proceedings, but will also cause delay in final settlement and start of new life by the parties.

25. Lord Denning in Allen vs. Alfred Mc Alpine; 1968 (1) ALL ER 543 said:

> *'Law's delays have been intolerable. They have lasted so long as to turn the justice sour.'*

It is truer in our country. We must adopt such interpretation as to avoid delay and multiplicity of proceedings.

26. Section 27 uses the phrase 'property presented at the time of marriage, which may belong jointly to both the husband and the wife'. This section has one prerequisite as laid down in the Balkrishna case: the property must be connected with the marriage. So far as the question of property being jointly owned by the parties is concerned, suffice to say that the section nowhere uses mandatory word 'must' as being suggested by the counsel of the husband; it uses the word 'may'. The phrase 'which may belong jointly'- because of the use of the word may-also includes within its [scope] the property which may not belong jointly to the parties. In our opinion, section 27 of the Act does not confine or restrict the jurisdiction of matrimonial courts to deal only with the joint property of the parties, which is presented at or about the time of marriage but also permits disposal of exclusive property of the parties provided they were presented at or about the time of marriage.

AN OBSERVATION

27. Generally wife is a house maker and stays at home and the husband is the earning member. He earns and acquires property in his own name: it is treated as his separate property. There is no decision in our country that separate properties of the spouses may be pooled and divided among them: at least we are not aware. However, in some parts of the world exclusive property of the parties is treated as community property or family asset and is

divided between the two at the time of divorce. The reason is that house makers also work but they cannot acquire property as they are not paid in terms of money. It is for this reason that such laws were enacted and upheld in other parts of the world.

28. Should we enact such a provision? Should section 27 be amended to include joint and exclusive property of the parties that are not presented at or about the time of marriage? Should the matrimonial courts have power to deal with entire dispute? Will the courts adopt procedure and interpret the law as done in some other parts of the world under their inherent powers even in absence of such provision? We have to wait for the future to disclose.

CONCLUSIONS/FINDING ON THE POINT FOR DETERMINATION

29. Our conclusions are as follows:

(a) Under section 27 of the Hindu marriage Act, Matrimonial courts have jurisdiction to dispose exclusive property of the spouses provided it was presented at or about the time of marriage.

(b) Photostat copy of the minutes of the panchayat was secondary evidence and was not admissible in absence of notice under section 66 of the Evidence Act. However, the finding regarding cash and goods mentioned in item no. 4 and 5 of the plaint is not vitiated as it can be sustained on other evidence.

(c) The court below, instead of return of the goods, ought to have decreed the suit for return of their value in terms of money.

ORDER/RELIEF GRANTED

30. In view of our conclusions, the appeal filed by the husband and the cross objection filed by the wife are dismissed. However, the decree passed by the Court below is modified that the wife (plaintiff-respondent) shall be entitled to recover a sum of Rs. 1.75 lacs from the appellants (value of the goods mentioned at item nos. 4 & 5 of the plaint and Rs. 75,000/- given in cash) alongwith simple interest at the rate of 6 per cent per annum from 6.10.1998 (date of judgement passed by the court below) till the actual date of payment. Costs on the parties.

Date: 14.5.2003

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'ETHICS AND LEGAL PROFESSION'

- By Justice Sunil Ambwani
Judge,
High Court, Allahabad

1. In the North- East Province (later known as United province and now Uttar Pradesh) a regulation was made in 1802 for appointment of Vakils and Pleaders in Civil Courts. Legal Practitioners Act, 1879 consolidated laws and regulations governing the lawyers. The Advocates, Vakils or Attorney of a High Court, Pleader, Mukhtar or Revenue agents were all brought under the jurisdiction and on the rolls of the High Court. The High Court was empowered to make rules regarding their qualifications, fees, suspension and dismissal.

2. In **Regina Guha (1916) 21 CWN 74** the Calcutta High Court, and in **Sudhangshu Bala Hazara (1922) ILR 1 Patna 104,** the Patna High Court held that women otherwise qualified were not entitled to be enrolled as Vakil or Pleader. To remove the doubts Legal Practitioners (Women) Act, 1923 declared that notwithstanding the Letters Patent of any High Court no woman shall be disqualified to be enrolled as legal practitioners. The Allahabad High Court took the lead by enrolling Miss, Cornelia Sorabji as the first Indian lady Vakil of Allahabad High Court on **August 24, 1921** by a decision of the English Committee of the Court (as the Administrative Committee was then called), consisting of Chief Justice Sir Grim Wood Meers.

3. The Chaimier Committee 1924 head by Sir Edward Chaimier retired Chief Justice of Patna High Court recommended a single grade or lawyers and to abolish the distinction between Vakil and Advocate, to name all the practitioners as Advocates instead of Pleaders, Vakils and Mukhtars. It also recommended for establishment of Bar Councils. The Bar Council Act, 1926 established Bar Councils in eight States including Allahabad w.e.f. 1.6.28 with Advocate General and 14 members out of which four were to be nominated by High Court and two could be Judges of the High Court.

4. The All India Bar Committee 1951 with Mr. Justice S.R. Das as its Chairman recommended a unified national Bar and on the 14th Report of the Law Commission, the Advocates Act, 1961 was enacted providing for Bar Council of India and State Bar Councils as autonomous bodies.

5. Bar Council has made rules providing for standards of professional conduct and etiquette, which include duties of Advocates to Court, duty to client, duty to opponent and duty to colleagues. It also provides duty in

imparting training and duty to render legal aid. The conditions of practice fall in Chapter III. These are rules of good conduct on which an Advocate is enrolled.

6. Professional ethics is no different than morality. It is application of the accepted standards of right and wrong to the conduct of professional men. It is not important as to what the profession may be or the nature of the relations resulting from it. Under all the circumstances, a person must conduct himself in the accepted behaviour of good conduct and integrity. A practicing lawyer is governed by a system of rules, codes of conduct or etiquettes framed by the Bar Council of his State and Bar Council of India. All the rules, which are applicable to good behaviour are also applicable to a lawyer.

7. There is no difference between personal and professional ethics. The foundation on which the distinction between right and wrong rests are unaffected by the choice of man's occupation. These are in the nature of things, fixed and immovable. There is no fixed line or boundary between the permitted and the forbidden. The questions as to how far one can go and where he has to stop are to be determined, by not our conscience or moral instincts of individual for these have been already disregarded, but by intellectual calculation of the necessities of the situation, and of the risks of exposure and loss of professional standards, or punishment.

8. These standards of professional ethics have been the same since the beginning when the counsels were permitted to appear before the Kings. Mr. K.P. Jayaswal in 'Manu and Yajnavalkya', Tagore Law Lectures 1917 (Calcutta 1930) at wrote (Page 288 para 7) 2 that, 'Manu VIII, 169, shows that professional lawyers were already in existence in the time of Manava Code.' The source of professional ethics is in the moral law. The territory lying between the line of strict morality on one side and the intermediate line without landmarks and definite description, is the philosophy of professional ethics, which knows no such line and no such territory. It holds as common sense affirms. A falsehood is equally false and equally wrong, whether it is told to advance the interest of those who are represented or for him, who tells it.

9. A lawyer works as a legal advisor and a defender of the person, who employs him but while he interests himself actively in discharge of his professional duties, he is naturally interested in his clients as individuals. He looks after his needs and is concerned about the failure. The sympathy sometimes gives temptation to cross the line of professional ethics. He often tells himself that he is not doing it for himself but for others and is only trying to save his client, whose interest he has taken upon him and seem to require

such action. This is the point at which clear ideas on the subject of professional ethics becomes important. The need of the client can never exceed the interests of the society or in other words the public interest. No argument to save the client by hook or crook as it is a professional duty, succeeds, to cross such line.

10. The true measure of the duty of a lawyer to his clients, so clearly lies in the sense of his responsibility both towards the society and the Court. The practice of law is not a private occupation. A lawyer owes his duty to the Court in which the general public is deeply interested. The counsels are public officers and appear in Courts with mandate of good behaviour. The practice of law is permitted by Bar Council to only those, who are enrolled on good conduct. The professional conduct towards clients and fellow lawyers as well as towards society, and his duties towards Courts, are no different.

11. A lawyer possesses certain powers and privileges to which others are excluded and consequently assumes certain duties and obligations towards both the Court and the client. He is an officer of the Court and representative of his client. His opportunities for doing good and otherwise are so many that the codes of conduct, throw safeguards around him.

12. The argument that a lawyer may disregard his duty to the Court in the interest of his client, is stripped of all disguise. It is a gross mistake. He is expressly bound by his code of conduct both towards court as well as his client. The high and honourable office of the counsel, attains him, so long as he acts honourably. Where he does not, he is degraded, to that of a mercenary, where he is compelled to do the bidding of his clients against dictates of his conscience.

13. The dealings between counsel and his client are also governed by standards of morality and conduct. A lawyer enjoys confidentiality and trust of his client. If the client is treated like a victim, his distrust, consumes the entire profession. Where a client is swindled and made to pay illegal or excessive fees or charges, and his counsel does not notice it, or advise him to go such conduct unnoticed, brings the entire profession to shame.

14. Many a times a counsel blames his own client, the cunning of the opposite counsel or the Judge. This conduct again brings the entire profession to responsibility, including he himself. What is to be done when a lawyer is engaged to defend a notorious or dangerous criminal or a corrupt officer. It is true and cherished right given by law to every individual to a fair and unprejudiced trial, and the right not to be convicted until competent and satisfactory evidence is brought on record. These rules, however, are not to be treated as a shield of the innocent or the guilty of grounds of acquittal where a person deserves conviction. It is not only the right but the duty of the

advocate to stand guard vigilantly and courageously over the rights of even a guilty client. This duty however, ends and does not extend to working up a defence where there is none, to intimidate and harass the witnesses, to influence the judge or to act in a forbidden manner. A lawyer should not forget that the community stands socked by commission of a crime and if the criminal about whose guilt they have no doubt, is acquitted and turned loose once more on the society, puts a question mark on the integrity of the Bar and the functioning of the Court.

15. The due administration of law is of greater importance than the result of a particular case or the success and failure of any individual. A lawyer is as much guilty of crime if he knowingly sinks his officials duty in what may seem to be his own or his clients temporary advantage. Remember when we lower the standards of profession, we harm the entire society.

16. Law, does not live in the books; it lives with profession. Judges may speak more finally, but only for a moment. They learn from Bar which fabricate the social structure from statutes tailored to the needs of society. The Bar gives shape and meaning to the words of the statute. The learning of the Bar reflects in the opinion of a Judge. Law is a catalyst to social change. It systhesises the change with stability, bridges the past with the present and makes roads for the future. Wisely employed, law is organized societies principle resource for securing public assent and consent of the governed. The Bar acts as a cradle for the growth of law.

17. The activities of the Government are now extending in spheres, where it plays a role of protector, dispenser of social services, industrial manager, economic controller and an arbitrator. These activities continue to affect the individual rights and liberties. The dispensation of administrative justice, through human hands is always fraught with abuse of power. The rights guaranteed by the Constitution of India counter balance the vast powers of the Government. The Bar acts as a sentinel of these rights. The Bar must ensure that there are no deviations from the norms prescribed by law, also ensuring that emphasis on certain type of rights do not hold back the progress of the society and develop few islands of rich and influential, depriving others with benefits of development. The Bar has a responsibility of smooth and orderly progress of the society and to eliminate the causes of tension. The members of the legal profession are always looked upon as leaders of the community.

18. In the words of Holmes, "many an appeal to freedom is a masquerade of privilege or inequality seeking to entrench itself behind the catchword of a principle." No one should be allowed to maneuver the judicial process. The Bar must see that the remedies in law do not remain confined with a chosen

few, confining legal help to create economic and social inequities.

19. The entire judicial system is at trial today. The overburdened and understaffed Courts, outdated procedures, and the deluge of cases without any assistance from the tribunals, which are mostly vacant and the others manned by tired and unspirited people have developed cracks in the system. The society and the Bar blames the Judges for all the inadequacies in the system. May I ask, whether with the given resources and help, that is rendered by the legal profession today, the Judges can do any better. It is easy to critisize a decision but then how much assistance is given by the counsels in deciding the case. Can you expect Judges to give an entirely just and brilliant judgments without any effective assistance, hour after hour, day after day, months after months.

20. The members of the legal profession have to be ready to accept new challenges. At Allahabad we are not yet exposed to latest developments in laws. We do not have lawyers trained in sea laws, space laws, cyber laws, environmental laws and IPR. Very few lawyers are aware of technological advances made in our country, and the need for the law to adopt to these changes. New tools are being forged to deal with arrears and court management. The Courts are changing its focus from dispute resolution to justice dispensation. The judicial enforcement of socio economic rights, calls for representative and distributive justice. How else less than hundred Judges are to deliver justice to two hundred million people of the State. The ADR mechanism and public interest actions will answer the needs for those, who do not have easy access to Courts.

21. The members of legal profession must respond to tackle the increasing crime in society and to break the nexus between crime and politics. A common man may despair, not the lawyers. A trained, intelligent and vigilant lawyer can provide an answer to the evil. The ethics in legal profession can act as a potent vaccine to the acquired immunity deficiency syndrome, breaking up the fabric of society.

22. No reform in judicial system is possible without full cooperation of lawyers and their active assistance. These reforms should begin with legal education, interactive sessions between lawyers, training programmes on new laws, legal methods, court craft and ethics. It is sad to see lawyers fighting on the streets with police to secure their dignity and honour. I also feel sad to read statements issued by lawyers in favour of politicians, political parties and religious institutions. These methods are used by weak and disabled people, who do not have power to respond. An intelligent lawyer with his pen is more effective than thousand demonstrating on streets.

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THE ART OF WRITING JUDGMENT

- By Justice Sunil Ambwani,
Judge,
Allahabad High Court, Allahabad

1. A judgment is the statement given by the Judge, on the grounds of a decree or order. It is the end product of the proceedings in the Court. The writing of a judgment is one of the most important and time consuming task performed by a Judge. The making and the writing of a judgment and the style in which it is written, varies from Judge to Judge and reflects the characteristic of a Judge. Every Judge, of every rank has his own distinct style of writing.

2. A judgment is distinct from a formal order as it gives reasons for arriving at a conclusion. In United States it is called the 'opinion'; the explanation given by a Judge for the order finally proposed or made. The backlog of cases has put a great pressure on the Judges. It is no longer prudent to write a long and verbose judgment, with uncontrolled expressions and citations. The pressure of work and stress on most of the Judges today, demands improving skills in writing judgment, which are brief, simple, and clear without compromising with the quality.

3. In civil matters, the judgments as the requirement of law goes, may be broadly classified into two categories, namely, long and short judgments. In original suits, the final decision of a case requires writing of a long and reasoned judgment. These includes suits for permanent or prohibitory injunction; possession and mesne profit; specific performance of contract; cancellation of documents; partition and possession; dissolution of firm and accounting; redemption or foreclosure of mortgage etc. As compared to it a Judge is required to write short judgments, in the matter of interlocutory orders; summary suits; preliminary issues; review; restoration; accepting compromise etc.

The Code of Civil Procedure, 1908 (the Code) "Judgment" in Section 2(9) as the statement given by the Judge, on the grounds of a decree or order. The "order" under Section 2(14) is defined as formal expression of any decision of a Civil Court, which is not a decree. The "decree" in section 2(2) means formal expression of an adjudication, which, so far as regards the Court expressing it, conclusively determination the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. The rejection of a plaint and determination of any

question under Section 144 is also a decree.

4. Order XX of the Code, deals with "Judgment and Decree", Rule 4 (1) provides that judgment of Court of Small Causes need not contain more than the points for determination and the decision thereon. Sub-Rule (2), provides for a judgment of other Courts to contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decisions. Rule 5 mandates that in suits in which issues have been framed, the Court shall state its finding or decision, with the reasons there of, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit.

5. In criminal matters, Chapter XXVII of the Code of Criminal Procedure, 1973 provides for 'the Judgment'. Section 353 requires the judgment in every trial to be pronounced in open Court immediately after the termination of the trial, or at some subsequent time of which notice shall be given to the parties or their pleaders. The judgment as provided in Section 354, is to be written in the language of the Court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision. The section further provides that the judgment shall specify the offence (if any) of which, and the section of IPC, or other law under it, accused is convicted and punishment to which he is sentenced. If the judgment is of acquittal it shall state the offence of which the accused is acquitted and direct that he be set at liberty. In case of conviction for an offence punishable with death or in the alternative with imprisonment for life, the judgment has to state the reasons for sentence awarded and special reasons for death sentence. In case of conviction with imprisonment for a term of one year or more, a shorter term of less than three months, also requires the Court to record reasons for awarding such sentence unless the sentence is one of imprisonment, till the rising of the Court or unless the case was tried summarily under the provisions of the Code.

6. For orders under Section 117 (for keeping peace and for good behaviour), Section 138(2) (confirming order for removal of nuisance), Section 125 (for maintenance) and Section 145 or 147 (disputes as to immovable properties), the Code provides in sub-section (6) that order shall contain the point or points for determination, the decision thereon and the reasons for the decision. Section 355 provides for a summary method of writing judgment by Metropolitan Magistrate, giving only particulars regarding the case, name, parentage and residence of the accused and complainant, the offence complained of or proved; plea of the accused and his examination (if any); the final order and the date of order, and where

appeal lies, a brief statement of the reasons for the decision. The order to pay compensation where the Court imposes sentence or fine; order of compensation for groundless arrest and the order to pay cost in non-cognizable cases, may be made with the judgment under Sections 357, 358 and 359 of the Code. Section 360 provides for order to release on probation and special reasons in certain cases where the Court deals with accused person under Section 360 or Probation of Offenders Act, 1958.

7. The Code of Civil Procedure, 1908 and Code of Criminal Procedure, 1973 have provided sufficient guidelines for writing judgment. These, however, are not exhaustive. There is a wide discretion left with the Judges to choose their style of writing, language, manner of statement of facts, discussion of evidence and reasons for the decision.

8. The judgment writing consumes the major part of Judge's work. Taking into account the mounting arrears, and the number of cases in the daily cause list, the burden in judgment writing sometimes becomes intolerable. The Judges by their experience, find methods to reduce this burden, by writing brief opinions. The judgment, however should serve the requirement of law without compromising with the quality.

9. A judgment is not written only for the benefit of the parties. It is also written for benefit of legal profession, other judges and appellate Courts. The losing party is the primary focus of concern. The winner is not much interested in the reasons for success, as he is convinced of the righteousness of the cause. The looser, however, in the expensive litigation is entitled to have a candid explanation of the reasons for the decision. It is not only for exercise of any appellate right but also to uphold the intellectual integrity of the system of law, impartiality and logical reasoning. The lawyer is interested in the judgment as he understands the analysis and expositions of legal precedents and principles. The lawyers also examine the judgments for learning they provide, and for the reassurance of the quality of judiciary. They can easily distinguish, the lazy Judge, the Judge prone to errors in fact finding, the Judge having difficulty in understanding of laws of evidence, or the Judge, who has difficulties with complex propositions of law.

10. The other Judges lower in hierarchy, facing common legal problems or in the same Court are also interested in the decisions. The judge is also aware that his decision may be reported and that it may establish a legal principle, binding, until it is set aside by the appellate Court. The best Judges perform their reasoning opinion honestly to the best of their ability without undue concern that the appellate Court may find error or reach a different conclusion.

11. The Judge must state the facts explicitly and consciously as they are found and the reasons for the decision.

12. The judgment is also a reflection of the conscience of a Judge, who writes it, and evidences his impartiality, integrity and intellectual honesty. The judgment writing provides opportunities for judicial officers to demonstrate his own ability and his worthiness to be a participant in the high tradition of moral integrity and social utility.

13. According to Lord Templeton as spoken by him in a BBC interview in 1979, the Judges and their judgments can be broadly divided into three categories; philosophers, scientists and advocates[1]. Mr. Justice V. Krishna Ayer falls in the category of philosopher, and Mr. Justice P.N. Bhagwati, Mr. Justice D.A. Desai and Mr. Justice Kuldeep Singh as social scientists. A Judge falling in the category of Advocate, leave traces of eloquences, in their judgments.

14. Before writing a judgment a Judge must remember that he is performing a public act of communicating his opinion on the issues brought before him and after the trial by observing fair procedures. He is required to tell the parties of the decision, on the facts brought before him, with application of sound principles of law, his decision, and what the parties are supposed to do as a necessary consequent to the judgment or to appeal against it. It is basically a communication to the parties coming before him for a decision.

15. A judgment must begin with clear recital of facts of the case, cause of action and the manner in which the case has been brought to the Court. A Judge must have essential facts in mind, and its narration should be without any mistake. The facts must come from the record and not from the abstract and briefs without any partisanship or colour to its narration. The importance of first paragraph of the judgment cannot be overemphasized. It must answer the questions as to how, when, where, what and why, which is an advise given to judicial cubs. The readability of the opinion improves if the opening paragraph answers three questions namely what kind of case is this, what roles plaintiffs and defendants had in the trial, and what are the issues, which the Court has to decide and answer, giving sufficient information to the reader to proceed with reading the judgment.

16. Ordinarily a brief statement of fact is sufficient if it indicates the context of the dispute so that legal principle chosen for decision can be understood. At times, however, it may be necessary for judgment to record substance of factual context and the details of evidence placed before the Court. If the complexity of the case requires, the Judge may choose to state

the facts chronologically, to understand what is decided. In such case the Judge may ask the respective counsel a chronological statement of facts to focus the attention of the parties to shorten the argument and make it easier to write the judgment. It is easier to write short judgment where legal issues are involved. Where the facts are in dispute, the Judge may prefer to narrate the facts in greater detail. The facts, which are part of the essential reasoning process of the Judge's decision should be indicated and recorded.

17. The issues are settled between the parties before taking evidence. In criminal cases, charges framed by the Court lead to the trial. The judgment must quote the issues/or charges as the case may be immediately after the narration of facts. It is always feasible to decide preliminary issues like jurisdiction of Court before going into the merits of the case.

18. The formulation of issues, should be initiated as early in the proceedings as possible. Once the parties are clear in their mind about the essential questions, they may shorten the proceedings. It also helps to focus the mind of the judge on the precise matters to be determined. When the essential questions of law are clear, the procedure becomes simplier. It is always helpful to quote the statute and the settled law, if it can be found in authority, to proceed further with discussing the evidence. The Hon'ble Dennis Mahoney. AO. QC. In 'Judgment Writing; Form and Function', has opined, with some wisdom:-

"In formulating the question, the judge will no doubt employ the assistance, which can be derived from the counsel. It is, I think, dangerous to attempt to impose the judge's formulation of the determinative question upon counsel. The form of that question must be drawn out by dialogue with counsel for each side. Unless counsels are involved in formulating the question, they are not committed to form of it. And dialogue with counsel is important. There is practical wisdom in the aphorism: "How do I know what I think until I hear what I say."

19. The judge must give the details of the evidence led before it. However, only the relevant evidence must be narrated and that too very briefly giving the purpose for such evidence was led. The documents admitted in evidence after they are proved on record must find their mention along with oral evidence by which they were proved. A brief narration, however, will suffice if it is precise and is clearly stated.

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[1] Hon. Justice Michael Kirby: 'On the Writing of Judgments' based on a lecture to the First Australian conference on literature and the law, University of Sydney

20. A Judgment must briefly state the contentions of the counsels on the points of determination. So far as possible all the contentions raised by the counsels except those, which are wholly frivolous must be mentioned on the record. After the Judge has met with all the contentions he must record, that no other point was pressed. This statement recorded in the judgment, will take care of challenge to judgment on the points, which were not raised before the Judge. The Supreme Court has given sanctity to the statements given in the judgment and insist that where the lawyer challenges any incorrect statement, he should to first file a review petition, to remind the Judge of any error, which may have crept in the judgment.

21. Before deciding a issue or recording finding on a charge, the relevant evidence must be discussed. Every Judge has his own style of discussing the evidence. It is, however, always better to discuss the evidence before giving an opinion to rely upon it.

22. The soul of a judgment are the reasons for arriving at the findings. These are also called 'the opinion' of a Judge. There is no rigid rule, as to how a finding may be recorded. The Judge, however, should give his reasons. It is not sufficient to say that he believes the evidence or agrees with the argument. The Judge must give his reasons for such belief and agreement. An elaborate argument does not always require elaborate answer.

23. A Judge is a human being. He possesses the same strength and weakness in character as a common man. Like all human being a Judge possesses personal preferences and pre-dispositions. It is advisable for a Judge to follow settled norms and practice for writing judgment, in the beginning of his career. With experience he may take liberties of adopting new methods and innovate. The logical reasoning, however, must follow in reaching to a conclusion. A Judge is not free from partiality and bias. There may be a lurking or sub-conscious bias, which may not be known to the Judge himself. The bias may have arisen on account of any factor, which ordinarily affect the life of the human being. The Judge may be influenced by the subjective preferences or biases in an unacceptable way[2]. With experience a Judge may identify such bias and may win over it. The best way to overcome the judgment to be affected by such outside and unknown factor is to follow logical reasoning.

24. The method of arriving at a conclusion is the most important part of judgment writing. The process by which the conclusion is arrived, and the statement in the judgment of that process, tests a Judge of his ability and integrity. It may either be by **syllogistic process, inferential process** or **intuitive process**. 'Syllogism' means, a deductive scheme of a formal

argument consisting of a major and a minor premise and a conclusion. In syllogistic process the Judge adopts a deductive process in which he accepts an argument on a major premise, which over weighs the minor premise to draw his own conclusion. In case of inferential process the Judge relies upon the evidence and reaches to a conclusion. In the intuitive process, the Judge adopts psychological process by which the conclusion is arrived at more by intuition rather than reasons[3]. In such a method the Judge may believe a witness in part or whole and then draw the conclusion by justifying it from the reasoning supplied by him either by belief or experience. In both the methods, in case what is being done is to arrive at a truth, the method may be justified.

25. There is a difference between **neutrality** and **impartiality**. Impartiality requires cool reason uncontaminated thinking without being influenced by personal commitments, biases and preconceptions. The neutrality on the other hand means the Judge is non-aligned. A Judge may begin being neutral and continue to be so in the process of the trial, but at the end he has to decide the case in favour of either of the parties without any partiality. Impartiality requires a Judge to rise above all values and perspectives.

26. A Judge must clearly write the operative portion of the judgment, which pronounces his conclusion over the issues brought before him. He must give clear and precise direction and the manner in which the directions have to be obeyed in conformity with the prayers made in the plaint. The object of good judgment is to conclude the dispute and not to leave the matter undecided. The judgment should leaving nothing to be brought back to the Court. The operative portion of the order should as far as possible self-executing and self-contained.

27. In criminal matters after recording conviction, the Judge has an important task of giving sentence, fine or compensation. The law requires the accused to be heard before awarding sentence. The Judge must give reasons for giving sentence, fine and apportion the compensation to the victim for the sufferance, commensurate with severity of the offence.

28. Plain and simple language has always been appreciated in writing judgments. Brevity, simplicity and clarity are the hallmarks of the good judgment. The greatest of these is clarity. It is better to avoid invidious examples, unnecessary quotations, and lecture. A controlled judgment without any legalese, sharp criticism, pinching comments, and sarcasm invokes respect to the court. Short sentences and para phrasing, head notes and subheading, wherever it is necessary, is a recommended style of writing a

judgment.

29. The chief guidelines for using plain language are:

(1) Achieve a reasonable average sentence length.

(2) Prefer short words to long ones, simple to fancy. Minimise jargon and technical terms.

(3) Avoid double or triple negatives. No reader wants to wrestle with sentences.

The document need not be checked unless it is desired by a party.

The document may be checked, if it is desired by party.

He could not have created the trust, except for the benefit of the defendant.

He could have created trust only for the benefit of the defendant.

(4) Prefer the active voice; single very-object-sentence. Notice must be given compares poorly with *the landlord must give notice.*

Passive Voice: He was acquitted *by the Court.*

Active Voice: The Court acquitted him.

Passive Voice: It was reported by the Court Commissioner that the disputed land was covered by water.

Active Voice: The Court Commissioner reported that the land was covered by water.

(5) Keep related words together, specially subject and very, verb and object.

(6) Break up the text with headings and subheadings.

(7) Use parallel structures for enumerations.

(8) Avoid excessive cross references, which create linguistic mazes.

(9) Avoid over defining.

(10) Use recitals and purpose clauses[4].

(11) Avoid legalism to make your judgment reader friendly.

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[3] Hon. Beverley Melachlin PC, Chief Justice of Canada: A Judicial Impartiality: impossible quest?

[4] The Hon, Dennis Mahooney AO. OC: Judgment Writing: 'Form and Function'.

30. Brevity is the virtue of a wise man and is familiarized by those, who have clarity in mind. No one likes to read long judgments. Brief opinions are comfortable in reading. Shri Gurcharan Das in his article published on 03.10.2003 in "Times of India" said:-

> "Soon after he became prime minister, Winston Churchill wrote to the First Lord of the Admiralty to ask, 'Pray Sir, tell me on one side of the sheet of paper, how the Royal Navy is preparing for the war,' Churchill knew that if he did not qualify his request, he would have received a unreadable 400 page report. Brevity is a great virtue, and nowhere more needed than in India. Our judges write judgements that are too long; our lawyers ramble on; our executives try to impress with lengthy memos; our politicians well try to get in a word.
>
> That less can be more is specially true in good writings. I discovered this at Proctor and Gamble, a company as famous for its legendary one page memos as for its products. Its wondrous one page memo was created out of the same confidence in reason and technology that built America, and is as elegant as Paninis grammer or Euclids geometry. Based on the reasonable assumption that all managers suffer from an overload of paperwork and files, it is simple factual and logical. The reader can scan it in minutes and grasp its contents it has just enough data that a manager needs to make decision and no more. It is clear, precise, eschews hyperbole, and it actually improves the speed and quality of decisions, and hence it can be a source of uncompetitive advantage.
>
> We Indians are verbose, and need to be reminded that humans were born with two ears and two eyes, and one tongue, so that we should see and hear twice as much as we say. Shakespeare too, I, think, must have had us Indians in mind, when he wrote in Richard III; 'Talkers are no good doers.' Hence he offers us this advice in Henry V 'Men of few words are best of men'.

31. The judgment must be designed and structured so that readers find their way through it easily and quickly. There is no such thing as good writing. There is only good rewriting[*]. It is absolutely necessary to revise the judgment. A revised judgment takes care of errors and reassures the Judge of the correctness of his opinion. It also ensures to avoid silly mistakes. It is advisable to the Judges, to read their judgments after a few years, to ensure that same mistakes are not repeated. There is always a room for improvement.

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[*] Byran A. Garner: "A Dictionary of Modern Legal Usage", P. 661

32. The judgments are either given extempore or reserved to be pronounced later. The practical experience shows that extempore judgments given at the close of the arguments, are addressed to the counsels and the parties. The extempore judgments rarely attempt to decide important questions of fact or law. The reserved judgments, on the other hand, survive longer in deciding the issues and in the memory of those for whom it is written.

33. The Privy Council adopted the style of tendering the advice of the Board to Her Majesty in which only one judgment was given. The form is no longer rigidly applied. However, the style of writing judgment namely using simple language with clarity of mind both in writing legal principles and conclusions, adds quality to the judgment.

34. The language employed by a Judge speaks of his character. A humble Judge with human personality avoids using intemperate and unparliamentary language. It is always better to avoid using words 'I', 'can' and 'must' in the judgments. Some examples of temperate language are:

'He is *wrong* in saying .....

He is *not correct* in saying .....'

"The plaintiff's case is *full of falsehood*.....

Between the two I prefer the evidence of defendants.....'

'I do not *believe* him.....

He is *not worthy of belief*.....'

"The witness is *not telling the truth*.....

The witness is *one step removed from being a honest man*.....'

35. The primary purpose of pronouncing a verdict is to dispose of the matter in controversy between the parties before it. A judge, however, is not expected to drift away from pronouncing upon a controversy, and to sit in judgment over the conduct of the judicial or quasi judicial authority, or the parties before him and indulge in criticism and commenting thereon unless such conduct comes, of necessity under review and the expression becomes part of reasoning to arrive at a conclusion necessary to decide the main controversy. So far as possible a judge should avoid derogatory and disparaging remarks. Nonetheless, suble irony, detectable only by the cognoscenti, is a useful in conveying a key point in the reasoning of a judge.

"A Judge entrusted with the task of administering justice should be bold and feel fearless while acting judicially and giving expression to his views and

[5] E.N. Brandis, J., U.S. Supreme Court.

constructing his judgment or order. It should be no deterrent to formation and expression of an honest opinion and acting thereon so long as it is within four corners of law that any action taken by a subordinate judicial officer is open to scrutiny in judicial review before a superior forum with which its opinion may not meet approval and the superior court may upset his action or opinion. The availability of such fearlessness is essential for the maintenance of judicial independence. However, sobriety, cool, calm and poise should be reflected in every action and expression of a Judge[6]*."*

36. The style of judicial writing is constantly changing. The Latinism and legal clichés are the days of past. It may not be wise to use metaphors and idioms, to prove a point. The judges avoid using words or expression showing gender-bias. There is some difference of opinion regarding use of foot notes, appendices, and other adds to communication. The judges in America use foot notes, whereas Judges in Canada and Australia find them offending. Brevity, simplicity and clarity have always been the watch words for effective judicial writing.

37. Diversity of opinion in judgment writing is the strength of the common law judicial tradition. It provides never ending stream of ideas and ways of communicating them. The experimental variety helps to develop the law. It is the privilege of each succeeding generation of judges to nurture the proud heritage and advance this precious legacy.

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[6] In the matter of: 'K' a Judicial officer, In re (2001) 3 SCC 54, by Hon'ble Justice R.C. Lahoti.

BAR TO WRIT PETITIONS IN CONTEXT OF AVAILABILITY OF ALTERNATE REMEDIES

By Justice Ashok Bhushan
Judge
Allahabad High Court

Article 226 of the Constitution of India refers to power of High Court's to issue certain writs throughout the territory in relation to which it exercises jurisdiction.

Article 226 of the Constitution sub clause 1 and 2 are as below:

1. Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government within those territories directions, orders or writs, including writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo-Warranto and Certiorari, or any of them, for the enforcement of any of the rights conferred by part – III and for any other purpose.

2. The power conferred by Clause (1) to issue directions, orders or writs to any Government, authority or any person also be exercised by any High Court exercising jurisdiction in relating to the territories within which the cause of action, wholly or in part, arises for the exercise of the such power, notwithstanding that the seat of the such government or authority or the residence of such person is not within those territories.

Subject of discussion is confined to bar to writ petitions in context of availability of alternate remedies. Before we proceed further with the discussion, it is necessary to elaborate the concept of bar to writ petitions.

Article 226 of the Constitution of India reserves original jurisdiction to the High Court to issue writs. The first thought which is to be pondered is as to whether the writ petition can be barred or whether there are any circumstances in which jurisdiction of High Court to entertain a writ petition is barred. The bar of entertaining the cases as you all well know can be expressly provided or can be read by necessary implication. Can there be any circumstances in which the writ jurisdiction can be barred by any Parliamentary legislation or by any State Act is the moot question. This aspect of the matter is now well settled and it has been held by the Hon'ble Supreme Court that the jurisdiction of the High Court to entertain a writ petition under Article 226 of the Constitution of India cannot be barred by any Act of Parliament or even by any constitutional amendment.

The right of judicial review granted under Article 226 of the Constitution of India is a basic feature of the Constitution and cannot be amended by even a constitutional amendment. When by any constitutional amendment, remedy of writ before a High Court cannot be barred, same cannot be done by any Parliamentary

legislation or by State enactment. There is one Supreme Court judgement in this context which is relevant to be referred to that is the judgement of Apex Court in 1997 (3) SCC 261., L. Chandra Kumar Vs. Union of India and Others.

The above judgement of L. Chandra Kumar (supra) has been delivered by the Constitution Bench of seven Judges. The matter arose in context of creation of Tribunal in exercise of power under Articles 323-A and 323-B of the Constitution of India, by 42nd Amendment part XIV (a) has been added in the Constitution which provides for adjudication or trial by Administrative Tribunal created by Parliament. Article 323-A (2) (d) provides that law made by the Parliament may exclude the jurisdiction of "all courts" except the jurisdiction of the Hon'ble Supreme Court under Article 136 of the Constitution of India.

In L. Chandra Kumar (supra) the Apex Court considered the validity of the above Article by which the jurisdiction of the High Court was excluded. The Apex Court after considering the earlier judgements of the Apex Court including the celebrity judgement of Kesavananda Bharati Vs. State of Kerala, 1973 (4) SCC 225 held that the jurisdiction of the High Court under Article 226 of the Constitution of India cannot be barred and any law barring the jurisdiction of the High Court under Article 226 of the Constitution of India offends the basic structure of the Constitution and hence not permissible.

Following was laid down in paragraphs

90. "We may first address the issue of exclusion of the power of judicial review of the High Courts. We have already held that in respect of the power of judicial review, the jurisdiction of the High Courts under Articles 226/227 cannot wholly be excluded. It has been contended before us that the Tribunals should not be allowed to adjudicate upon matters where the vires of legislations is questioned, and that they should restrict themselves to handling matters where constitutional issues are not raised. We cannot bring ourselves to agree to this proposition as that may result in splitting up proceedings and may cause avoidable delay. If such a view were to be adopted, it would be open for litigants to raise constitutional issues, many of which may be quite frivolous, to directly approach the High Courts and thus subvert the jurisdiction of the Tribunals. Moreover, even in these special branches of law, some areas do involve the consideration of constitutional questions on a regular basis; for instance, in service law matters, a large majority of cases involve an interpretation of Articles 14, 15 and 16 of the Constitution. To hold that the Tribunals have no power to handle matters involving constitutional issues would not serve the purpose for which they were constituted. On the other hand, to hold that all such decisions will be subject to the jurisdiction of the High Courts under Articles 226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the Tribunal concerned falls will serve two purposes.

While saving the power of judicial review of legislative action vested in the High Courts under Articles 226/227 of the Constitution, it will ensure that frivolous claims are filtered out through the process of adjudication in the Tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter."

91. "It has also been contended before us that even in dealing with cases which are properly before the Tribunals, the manner in which justice is dispensed by them leaves much to be desired. Moreover, the remedy provided in the parent statutes, by way of an appeal by special leave under Article 136 of the Constitution, is too costly and inaccessible for it to be real and effective. Furthermore, the result of providing such a remedy is that the docket of the Supreme Court is crowded with decisions of Tribunals that are challenged on relatively trivial grounds and it is forced to perform the role of a first appellate court. We have already emphasized the necessity for ensuring that the High Courts are able to exercise judicial superintendence over the decisions of the Tribunals under Article 227 of the Constitution. In R.K. Jain case, after taking note of these facts, it was suggested that the possibility of an appeal from the Tribunal on questions of law to a Division Bench of a High Court within whose territorial jurisdiction the Tribunal falls, be pursued. It appears that no follow-up action has been taken pursuant to the suggestion. Such a measure would have improved matters considerably. Having regard to both the aforestated contentions, we hold that all decisions of Tribunals, whether created pursuant to Article 323-A or Article 323-B of the Constitution, will be subject to the High Court's writ jurisdiction under Articles 226/227 of the Constitution, before a Division Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls."

The Apex Court, however in the said judgement further laid down that against the judgement of a Tribunal writ petition under Articles 226/227 of the Constitution of India is entertainable before a Division Bench of the High Court. The Apex Court further laid down that Tribunal created under Article 323-A and 323-B however shall entertain the matters falling in their jurisdiction and it will not be open for the litigants to directly approach the High Court and the remedy is to be first availed in the Tribunal.

Following was laid down in paragraph

99. "In view of the reasoning adopted by us, we hold that clause 2(d) of Article 323-A and clause 3(d) of Article 323-B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323-A and 323-B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is a part of the inviolable basic structure of our

Constitution. While this jurisdiction cannot be ousted, other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution. The Tribunals created under Article 323-A and Article 323-B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the Tribunal concerned falls. The Tribunals will, nevertheless, continue to act like courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned. Section 5(6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated."

Thus, from the above, it is clear that the jurisdiction under Article 226 of the Constitution of India cannot be barred by any constitutional amendment or by any Parliamentary or State Act, but while interpreting the power under Articles 226/227 of the Constitution of India the High Court and the Supreme Court have laid down a self-imposed rule of restriction i.e. jurisdiction under Articles 226/227 of the Constitution of India shall not be exercised if alternate remedy is available to a litigants. Now, it is well settled by catena of decisions that whenever there is alternate remedy available to a litigant, jurisdiction under Articles 226/227 of the Constitution of India which is a discretionary jurisdiction shall not be exercised by the High Court. The alternate remedy may be by way of normal forum of hierarchy of Courts or forum provided in a statutory provision or may otherwise exists. Various facets of this aspect has been examined time and again by the Apex Court which can be illustrated by giving reference to some decided cases of the Hon'ble Supreme Court. Various propositions have been laid by the Apex Court in this context.

AIR, 1958 SC 86, State of U.P. Vs. Mohammad Nooh.

Facts:

The matter arose before the Hon'ble Supreme Court against the judgement of the High Court passed in a writ petition quashing the departmental proceedings against a police constable. A police constable was departmentally proceeded and a dismissal order was passed. The most important feature of the case was that the Deputy Superintendent of Police who conducted the enquiry recorded his own statement in the proceeding. The High Court held that there was a violation of principle of natural justice since the Deputy Superintendent of Police who conducted the proceedings himself appeared as witness in the inquiry which makes a case of strong bias resulting in violation of principle of natural justice. Before the Supreme Court an argument was raised that there being an alternate remedy, the High Court ought not to have entertained the writ petition. In this context, the Apex

Court laid down the principle which provides for exception to the rule of non-entertainability of writ petition when there is an alternate remedy.

Paragraphs 10 and 11 are relevant which are to the following effects:

10. "In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will be only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute, (Halsbury's Laws of England, 3rd Edn., Vol. 11, P. 130 and the cases cited there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior Court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies. In the King v. Postmaster-General; Ex parte Carmichael, 1928-1 KB 291 (E), a certiorari was issued although the aggrieved party had an alternative remedy by way of appeal. It has been held that the superior court will readily issue a certiorari in a case where there has been a denial of natural justice before a Court of summary jurisdiction. The case of Rex v. Wands-worth Justices; Ex parte Read, 1942-1 KB 281 (F) is an authority in point. In that case a man had been convicted in a court of summary jurisdiction without giving him an opportunity of being heard. It was held that his remedy was not by a case stated or by an appeal before the quarter sessions but by application to the High Court for an order of certiorari to remove and quash the conviction. At p. 284 Viscount Caldecote, C.J., observed:

> "It remains to consider the argument that the remedy of certiorari is not open to the applicant because others were available. It would be ludicrous in such a case as the present for the convicted person to ask for a case to be stated. It would mean asking this Court to consider as a question of law whether justices were right in convicting a man without hearing his evidence. That is so extravagant an argument as not to merit a moment's consideration. As to the right of appeal to quarter sessions, it may be that the applicant could have had his remedy if he had pursued that course, but I am not aware of any reason why, if in such circumstances as these, he preferred to apply for an order of certiorari to quash his conviction, the Court should be debarred from granting his application."

Likewise in Khurshed Modi v. Rent Controller, Bombay; AIR 1947 Bom 46 (G), it was held that the High Court would not refuse to issue a writ of certiorari merely because there was a right of appeal. It was recognized that ordinarily the High Court would require the petitioner to have recourse to his ordinary remedies, but if it found that there had been a breach of fundamental principles of justice, the High Court would certainly not hesitate to issue the writ of certiorari. To the same effect are the following observations of Harries, C.J., in 56 Cal WN 453: (AIR 1952 Cal 656) (D) at p. 470 (of Cal WN): (at p. 665 of AIR):

> "There can, I think, be no doubt that Court can refuse to issue a certiorari if the petitioner has other remedies equally convenient and effective. But it appears to me that there can be cases where the Court can and should issue a certiorari even where such alternative remedies are available. Where a Court or tribunal, which is called upon to exercise judicial or quasi-judicial functions discards all rules of natural justice and arrives at a decision contrary to all accepted principles of justice then it appears to me that the Court can and must interfere."

It has also been held that a litigant who has lost his right of appeal or has failed to perfect an appeal by no fault of his own may in a proper case obtain a review by certiorari. (See Corpus Juris Secundum Vol. 14, Art. 40, p. 189). If, therefore, the existence of other adequate legal remedies is not per se a bar to the issue of certiorari and if in a proper case it may be the duty of the superior court to issue a writ of certiorari to correct the errors of an inferior Court or tribunal called upon to exercise judicial or quasi-judicial functions and not to relegate the petitioner to other legal remedies available to him and if the superior Court can in a proper case exercise its jurisdiction in favour of a petitioner who has allowed the time to appeal to expire or has not perfected his appeal e.g., by furnishing security required by the statute, should it then be laid down as an inflexible rule of law that the superior Court must deny the writ when an inferior Court or tribunal by discarding all principles of natural justice and all accepted rules of procedure arrived at a conclusion which shocks the sense of justice and fair play merely because such decision has been upheld by another inferior Court or tribunal on appeal or revision? The case of 1889-22 QBD 345 (C) referred to in 1951 SCR 344: (AIR 1951 SC 217) (B) furnishes the answer. There the manager of a club was convicted under a certain statute for selling beer by retail without an excise retail license. Subsequently he was convicted of selling intoxicating liquor, namely, beer without a license under another statute. Upon

hearing of the later charge the Magistrate treated it as a second offence and imposed a full penalty authorized in the case of a second offence by the latter statute. His appeal to the quarter sessions having been dismissed, he applied for a writ of habeas corpus and it was granted by the King's Bench Division on the ground that the Magistrate could not treat the later offence as a second offence, because it was not a second offence under the Act under which he was convicted for the second time. Evidently the point was taken that if there had been any error, irregularity or illegality committed by the Magistrate, the quarter sessions could have on appeal corrected the same and that the quarter sessions having dismissed the appeal the Court of Queen's Bench Division could not issue the writ of habeas corpus. This was repelled by the following observation of Hawkins, J.:

> "This is true as a fact, but it puts the prosecution in no better position, for if the Magistrate had no power to give himself jurisdiction by finding that there had been a first offence where there had been none, the justices could not give it to him."

11. On the authorities referred to above it appears to us that there may conceivably be cases – and the instant case is in point – where the error, irregularity or illegality touching jurisdiction or procedure committed by an inferior court or tribunal of first instance is so patent and loudly obtrusive that it leaves on its decision an indelible stamp of infirmity or vice which cannot be obliterated or cured on appeal or revision. If an inferior Court or tribunal of first instance acts wholly without jurisdiction or patently in excess of jurisdiction or manifestly conducts the proceedings before it in a manner which is contrary to the rules of natural justice and all accepted rules of procedure and which offends the superior court's sense of fair play the superior Court may, we think, quite properly exercise its power to issue the prerogative writ of certiorari to correct the error of the Court or tribunal of first instance, even if an appeal to another inferior Court or tribunal was available and recourse was not had to it or if recourse was had to it, it confirmed what ex facie was a nullity for reasons aforementioned. This would be so all the more if the tribunals holding the original trial and the tribunals hearing the appeal or revision were merely departmental tribunals composed of persons belonging to the departmental hierarchy without adequate legal training and background and whose glaring lapses occasionally come to our notice. The superior Court will ordinarily decline to interfere by

issuing certiorari and all we say is that in a proper case of the kind mentioned above it has the power to do so and may and should exercise it. We say no more than that."

Labour and Industrial Disputes

Large number of cases come to the High Court in the writ petition challenging the violation of provisions of Industrial Disputes, Act, 1947 and other statutory enactment. The Apex Court laid down the principle that whenever a writ petition is filed for enforcement of right flowing from any statutory enactment, forum of which is provided to be a specific forum, the High Court should decline to entertain the writ petition under Articles 226/227 of the Constitution of India. Some important cases of the Apex Court are:

(2004) 4 SCC 268., U.P. State Bridge Corporation Ltd And Others. Vs. U.P. Rajya Setu Nigam S. Karamchari Sangh.

Facts:

The Corporation had undertaken a work at Betwa Bridge Jhansi. Certain workmen did not report for duty. A notice was published by the Corporation that those workmen who continuously absents for more than 10 days of their service be terminated according to certified Standing Orders of the Corporation. Services of one workman was terminated. He filed writ petition in this High Court. The writ petition was dismissed that the workman could raise an industrial dispute if he so desired.

Another writ petition was filed by the Union of the workman which was allowed by the High Court against which order the Corporation went to the Supreme Court. The Supreme Court in the said judgement again reiterated and laid down principle. It is relevant to refer to paragraphs 11 and 12 of the said judgement.

11. "We are of the firm opinion that the High Court erred in entertaining the writ petition of the respondent Union at all. The dispute was an industrial dispute both within the meaning of the Industrial Disputes Act, 1947 as well as U.P. IDA, 1947. The rights and obligations sought to be enforced by the respondent Union in the writ petition are those created by the Industrial Disputes Act. In Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke [(1976) 1 SCC 496] it was held that when the dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the claimant is to get adjudication under the Act. This was because the Industrial Disputes Act was made to provide

> "a speedy, inexpensive and effective forum for resolution of disputes arising between workmen and their employers. The idea has been to ensure that the workmen do not get caught in the labyrinth of civil courts with their layers upon layers of appeals and revisions and the elaborate procedural laws, which the workmen can ill-afford. The procedurers followed by civil courts, it was

thought, would not facilitate a prompt and effective disposal of these disputes. As against this, the courts and tribunals created by the Industrial Disputes Act are not shackled by these procedural laws nor is their award subject to any appeals or revisions. Because of their informality, the workmen and their representatives can themselves prosecute or defend their cases. These forums are empowered to grant such relief as they think just and appropriate. They can even substitute the punishment in many cases. They can make and remake the contracts, settlements, wage structures and what not. Their awards are no doubt amenable to jurisdiction of the High Court under Article 226 as also to the jurisdiction of this Court under Article 32, but they are extraordinary remedies subject to several self-imposed constraints. It is, therefore, always in the interest of the workmen that disputes concerning them are adjudicated in the forums created by the Act and not in a civil court. That is the entire policy underlying the vast array of enactments concerning workmen. This legislative policy and intendment should necessarily weigh with the courts in interpreting these enactments and the disputes arising under them."[Ed.: So held in Rajasthan SRTC v. Krishna Kant, (1995) 5 SCC 75 at p. 91 to 92b in para 28 after quoting the principles enunciated in Premier Automobiles; as explained in (2002) 2 SCC 542 at 547]

12. Although these observations were made in the context of the jurisdiction of the civil court to entertain the proceedings relating to an industrial dispute and may not be read as a limitation on the Court's powers under Article 226, nevertheless it would need a very strong case indeed for the High Court to deviate from the principle that where a specific remedy is given by the statute, the person who insists upon such remedy can avail of the process as provided in that statute and in no other manner."

(2005) 6 SCC, 725., Hindustan Steel Works Construction Ltd. And Another Vs. Hindustan Steel Works Construction Ltd. Employees Union.

Facts:

Appeal was filed by the Company challenging the judgement of the Andhra Pradesh High Court by which the writ petition was allowed challenging the withdrawal of construction allowances to the workmen. The employer raised objection that the writ petition could not have been entertained, since remedy of the workmen was to raise an industrial dispute.

Following was said in paragraphs 8 and 9 of the said judgement:

8. "In U.P. State Bridge Corpn. Ltd. v. U.P. Rajya Setu Nigam S. Karamchari Sangh [(2004) 4 SCC 268: 2004 SCC (L & S) 637] it was held that when the dispute relates to enforcement of a right or obligation under the statute and specific remedy is, therefore, provided under the statute, the High Court should not deviate from the general view and interfere under Article 226

except when a very strong case is made out for making a departure. The person who insists upon such remedy can avail of the process as provided under the statute. To same effect are the decisions in Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke [(1976) 1 SCC 496: 1976 SCC (L & S) 70], Rajasthan SRTC v. Krishna Kant [(1995) 5 SCC 75: 1995 SCC (L & S) 1207: (1995) 31 ATC 110], Chandrakant Tukaram Nikam v. Municipal Corpn. of Ahmedabad [(2002) 2 SCC 542: 2002 SCC (L & S) 317 and in Scooters India v. Vijai E.V. Eldred [(1998) 6 SCC 549: 1998 SCC (L & S) 1611].

9. In Rajasthan SRTC case [(1995) 5 SCC 75: 1995 SCC (L & S) 1207: (1995) 31 ATC 110] it was observed as follows:

> "[A] speedy, inexpensive and effective forum for resolution of disputes arising between workmen and their employers. The idea has been to ensure that the workmen do not get caught in the labyrinth of civil courts with their layers upon layers of appeals and revisions and the elaborate procedural laws, which the workmen can ill afford. The procedures followed by civil courts, it was thought, would not facilitate a prompt and effective disposal of these disputes. As against this, the courts and tribunals created by the Industrial Disputes Act are not shackled by these procedural laws nor is their award subject to any appeals or revisions. Because of their informality, the workmen and their representatives can themselves prosecute or defend their cases. These forums are empowered to grant such relief as they think just and appropriate. They can even substitute the punishment in many cases. They can make and remake the contracts, settlements, wage structures and what not. Their awards are no doubt amendable to jurisdiction of the High Court under Article 226 as also to the jurisdiction of this Court under Article 32, but they are extraordinary remedies subject to several self-imposed constraints. It is, therefore, always in the interest of the workmen that disputes concerning them are adjudicated in the forums created by the Act and not in a civil court. That is the entire policy underlying the vast array of enactments concerning workmen. This legislative policy and intendment should necessarily weigh with the courts in interpreting these enactments and the disputes arising under them."

(2005) 8 SCC 264., U.P. State Spinning Company Ltd. Vs. R.S. Pandey and Another.

Facts:

A workmen filed a writ petition challenging the termination order. The writ petition was allowed on the ground that services were terminated in violation of the principles of natural justice. Before the Apex Court the Company submitted that the High Court ought not to have entertained the writ petition when there being alternate

remedy available.

Following was laid down in paragraphs 16,17, and 20 of the said judgement:

16. "If, as was noted in Ram and Shyam Co. v. State of Haryana [(1985) 3 SCC 267: AIR 1985 SC 1147] the appeal is from "Caesar to Caesar's wife" the existence of alternative remedy would be a mirage and an exercise in futility. In the instant case the writ petitioners had indicated the reasons as to why they thought that the alternative remedy would not be efficacious. Though the High Court did not go into that plea relating to bias in detail, yet it felt that alternative remedy would not be a bar to entertain the writ petition. Since the High Court has elaborately dealt with the question as to why the statutory remedy available was not efficacious, it would not be proper for this Court to consider the question again. When the High Court had entertained a writ petition notwithstanding existence of an alternative remedy this Court while dealing with the matter in an appeal should not permit the question to be raised unless the High Court's reasoning for entertaining the writ petition is found to be palpably unsound and irrational. Similar view was expressed by this Court in First ITO v. Short Bros. (P) Ltd. [(1966) 3 SCR 84: AIR 1967 SC 81] and State of U.P. v. Indian Hume Pipe Co. Ltd. [(1977) 2 SCC 724: 1977 SCC (Tax) 335].That being the position, we do not consider the High Court's judgment to be vulnerable on the ground that alternative remedy was not availed. /There are two well-recognized exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings themselves are an abuse of process of law the High Court in an appropriate case can entertain a writ petition.

17. Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute. It was noted by this Court in L. Hirday Narain v. ITO [(1970) 2 SCC 355: AIR 1971 SC 33] that if the High Court had entertained a petition despite availability of alternative remedy and heard the parties on merits it

would be ordinarily unjustifiable for the High Court to dismiss the same on the ground of non-exhaustion of statutory remedies, unless the High Court finds that factual disputes are involved and it would not desirable to deal with them in a writ petition.

20. In a catena of decisions it has been held that writ petition under Article 226 of the Constitution should not be entertained when the statutory remedy is available under the Act, unless exceptional circumstances are made out."

Cases pertaining to election.

With regard to cases pertaining to election, the Apex Court has clearly laid down that when the remedy of challenging an election is provided in an enactment, the writ petition challenging an election of an office be not entertained.

In Harnek Singh Vs. Charanjit Singh and Others, (2005) 8 SCC 383.

Facts:

In the election for the post of Chairman, Panchayat Samiti the Returning Officer adjourned the poll and thereafter a date was fixed and election was completed. The High Court entertained the writ petition under Article 226 of the Constitution of India and set-aside the election.

Relevant paragraphs are 15, 16 and 18.

15. "Prayers (b) and (c) aforementioned, evidently, could not have been granted in favoaur of the petitioner by the High Court in exercise of its jurisdiction under Article 226 of the Constitution. It is true that the High Court exercises a plenary jurisdiction under Article 226 of the Constitution. Such jurisdiction being discretionary in nature may not be exercised inter alia keeping in view the fact that an efficacious alternative remedy is available therefore. (See Sanjana M. Wig v. Hindustan Petroleum Corpn. Ltd. (2005) 8 SCC 242: (2005) 7 Scale 290)

16. Article 243-O of the Constitution mandates that all election disputes must be determined only by way of an election petition. This by itself may not per se bar judicial review which is the basic structure of the Constitution, but ordinarily such jurisdiction would not be exercised. There may be some cases where a writ petition would be entertained but in this case we are not concerned with the said question.

18. Yet again in Jaspal Singh Arora [(1998) 9 SCC 594] this Court opined:

"3. These appeals must be allowed on a short ground. In view of the mode of challenging the election by an election petition being prescribed by the M.P. Municipalities Act, it is clear that the election could not be called in question except by an election petition as provided under that Act. The bar to interference by courts in electoral matters contained in Article 243-ZG of the Constitution was apparently overlooked by the High Court in allowing the writ petition. Apart from the bar under Article 243-

ZG, on settled principles interference under Article 226 of the Constitution for the purpose of setting aside election to a municipality was not called for because of the statutory provision for election petition and also the fact that an earlier writ petition for the same purpose by a defeated candidate had been dismissed by the High Court."

Writ petition challenging Assessment Proceedings/Recovery of Tax.

The Apex Court in several cases has held that in assessment proceedings when there are specific statutory remedy available, High Court should not entertain the writ petition.

AIR 1983 SC, 603, Titagurh Paper Mills Co., Ltd., and Another Vs. State of Orissa and Another.

Facts:

The appellant had challenged two assessment orders of Assistant Sales Tax Officer in writ petition under Article 226 of the Constitution of India. The High Court dismissed the writ petition. Against which a S.L.P. was filed.

Relevant paragraphs are 4, 6 and 11

4. "The only contention raised before the High Court was that the impugned orders of assessment being a nullity, the petitioners were entitled to invoke the extraordinary jurisdiction of the High Court under Art. 226 of the Constitution, but the High Court was not satisfied that this was a case of inherent lack of jurisdiction. The High Court while dismissing the writ petitions observed:

> "Having heard the learned counsel for both the parties and having gone through the records, we are not inclined to interfere with the impugned order(s) in exercise with our extraordinary jurisdiction since there is a right of appeal against the same. It is contended on behalf of the petitioner that the impugned order being a nullity is entitled to invoke our extraordinary jurisdiction. We are not satisfied that this is a case of inherent lack of jurisdiction. There is no violation of principles of natural justice."

6. We are constrained to dismiss these petitions on the short ground that the petitioners have an equally efficacious alternative remedy by way of an appeal to the prescribed authority under sub-s. (1) of Section 23 of the Act, them a second appeal to the Tribunal under sub-s. (3)(a) thereof, and thereafter in the event the petitioners get no relief, to have the case stated to the High Court under Section 24 of the Act. In Raleigh Investment Co. Ltd. v. Governor General in Council; (1947) 74 Ind. App. 50: (AIR 1947 PC 78) Lord Uthwatt, J. in delivering the judgment of the Board observed that in the provenance of tax where the Act provided for a complete machinery which enabled an assessee to effectively raise in the courts the question of the

validity of an assessment denied an alternative jurisdiction to the High Court to interfere. It is true that the decision of the Privy Council in Raleigh Investment Company's case, (supra) was in relation to a suit brought for a declaration that an assessment made by the Income-tax Officer was a nullity, and it was held by the Privy Council that an assessment made under the machinery provided by the Act, even if based on a provision subsequently held to be ultra vires, was not a nullity like an order of a court lacking jurisdiction and that S. 67 of the Income-tax, 1922 operated as a bar to the maintainability of such a suit. In dealing with the question whether S. 67 operated as a bar to a suit to set aside or modify an assessment made under a provision of the Act which is ultra vires, the Privy Council observed:

> "In construing the section it is pertinent in their Lordships opinion to ascertain whether the Act contains machinery which enables an assessee effectively to raise in the courts the question whether a particular provision of the Income-tax Act bearing on the assessment made is or is not ultra vires. The presence of such machinery, though by no means conclusive, marches with a construction of the section which denies an alternative jurisdiction to inquire into the same subject-matter."

11. Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the prescribed authority under sub-s. (1) of S. 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under sub-s. (3) of S. 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court under S. 24 of the Act. The Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Art. 226 of the Constitution. It is now well recognized that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Water Works Co. v. Hawkesford; (1859) 6 CBNS 336 at p. 356 in the following passage:

> "There are three classes of cases in which a liability may be established founded upon statute • • • • • • • • • • • • • • • • But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it • • • • • • • • • • • • • • • • • the remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to"

The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspaper Ltd.; 1919 AC 368 and has been reaffirmed by the Privy Council in Attorney-General of Trinidad and Tobago v. Gordon Grant & Co.; 1935 AC 532 and Secretary of State v. Mask & Co.; AIR 1940 PC 105. It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine."

AIR 1985 SC 330., Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd and Others.

Facts:

Central Excise Department filed a S.L.P. challenging an interim order granted by the Calcutta High Court challenging the proceedings under Central Excise.

The Apex Court in the said judgement also deprecated the practice of granting interim order by the Calcutta High Court on an oral application. The Apex Court further held that in such matters whether the High Court ought not to have entertained the writ petition under Article 226 of the Constitution of India.

Relevant paragraphs 3 and 4:

3. "In Titaghur Paper Mills Co. Ltd. v. State of Orissa (AIR 1983 SC 603) A.P. Sen, E.S. Venkataramiah and R.B. Misra, JJ, held that where the statute itself provided the petitioners with an efficacious alternative remedy by way of an appeal to the Prescribed Authority, a second appeal to the Tribunal and thereafter to have the case stated to the High Curt, it was not for the High Court to exercise its extraordinary jurisdiction under Art. 226 of the Constitution ignoring as it were, the complete statutory machinery. That it has become necessary, even now, for us to repeat this admonition is indeed a matter of tragic concern to us. Art. 226 is not meant to short circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Art. 226 of the Constitution. But then the Court must have good and sufficient reason to by pass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under Art. 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged.

4. In Union of India v. Oswal Woollen Mills Ltd. (AIR 1984 SC 1264), we had

occasion to consider an interim order passed by the Calcutta High Court in regard to a matter no part of the cause of action relating to which appeared to arise within the jurisdiction of the Calcutta High Court. In that case the interim order practically granted the very prayers in the writ petition. We were forced to observe:

> "It is obvious that the interim order is of a drastic character with a great potential for mischief. The principal prayer in the writ petition is the challenge to the order made or proposed to be made under Cl. 8-B of the Import Control Orders. The interim order in terms of prayers (j) and (k) has the effect of practically allowing the writ petition as the stage of admission without hearing the opposite parties. While we do not wish to say that a drastic interim order may never be passed without hearing the opposite parties even if the circumstances justify it, we are very firmly of the opinion that a statutory order such as the one made in the present case under Cl. 8-B of the Import Control Order ought not to have been stayed without at least hearing those that made the order. Such a stay may lead to devastating consequences leaving no way of undoing the mischief. Where a plentitude of power is given under a statute, designed to meet a dire situation, it is no answer to say that the very nature of the power and the consequences which may ensure is itself a sufficient justification for the grant of a stay of that order, unless, of course, there are sufficient circumstances to justify a strong prima facie inference that the order was made in abuse of the power conferred by the statute. A statutory order such as the one under Cl. 8-B purports to be made in the public interest and unless there are even stronger grounds of public interest an ex parte interim order will not be justified. The only appropriate order to make in such cases is to issue notice to the respondents and make it returnable within a short period. This should particularly be so where the offices of the principal respondents and relevant records lie outside the ordinary jurisdiction of the court. To grant interim relief straightway and leave it to the respondents to move the court to vacate the interim order may jeopardize the public interest. It is notorious how if an interim order is once made by a court, parties employ every device and tactic to ward off the final hearing of the application. It is, therefore, necessary for the courts to be circumspect in the matter of granting interim relief, more particularly so where the interim relief is directed against orders or actions of public officials acting in discharge of their public duty and in exercise of statutory powers. On the facts and circumstances of the present case, we are satisfied that no interim relief should have been granted by the High Court in the terms in which it was done.""

(2002) 5 SCC 521., Secretary Minor Irrigation & Rural Engineering Services, U.P. And Others Vs. Sahngoo Ram Arya and Others.

Facts:

In this case the Apex Court held that even if the U.P. Public Services Tribunal has no jurisdiction to pass an interim order that cannot be a ground for bypassing the alternate remedy.

Relevant paragraphs 11 and 12:

11. "These appeals are preferred against the order made by the High Court of Judicature at Allahabad in Civil Misc. WP No. 47130 of 2000 etc. on 1.2.2001. A Division Bench of the High Court of Allahabad by the impugned judgment has held that the petitioner in the said writ petitions has an alternate remedy by way of petitions before the U.P. Public Services Tribunal (the Tribunal), and had permitted the writ petitioner therein to approach the Tribunal and directed the Tribunal to entertain any such petition to be filed by the writ petitioner without raising any objection as to limitation. There was a further direction to the Tribunal to decide the matter expeditiously.

12. Mr. Sunil Gupta, learned counsel appearing for the petitioner contended that the remedy before the Tribunal under the U.P. Public Services (Tribunals) Act is wholly illusory inasmuch as the Tribunal has no power to grant an interim order. Therefore, he contends that the High Court ought not to have relegated the petitioner to a fresh proceeding before the said Tribunal. We do not agree with these arguments of the learned counsel. When the statute has provided for the constitution of a Tribunal for adjudicating the disputes of a government servant, the fact that the Tribunal has no authority to grant an interim order is no ground to bypass the said Tribunal. In an appropriate case after entertaining the petitions by an aggrieved party if the Tribunal declines an interim order on the ground that it has no such power then it is possible that such aggrieved party can seek remedy under Article 226 of the Constitution but that is no ground to bypass the said Tribunal in the first instance itself. Having perused the impugned order, we find no infirmity whatsoever in the said order and the High Court was justified in directing the petitioner to approach the Tribunal. In the said view of the matter, the appeals are dismissed. No costs."

(1981) 4 SCC., 247, V. Vellaswamy Vs. Inspector General of Police, Tamil Nadu, Madras and Another.

Facts:

In this case the Apex Court held that even though there is a power of review under a statutory enactment that cannot be a ground for not entertaining the writ petition under Article 226 of the Constitution of India.

Now, before closing the discussion on this topic, it will be useful to recollect again the exceptions to the principles of not entertaining the writ petition when alternate remedy is available.

The Apex Court in (1998) (8) SCC 1., Whirlpoorl Corporation Vs. Registrar of Trade Marks, Mumbai, considered the said aspect and reiterated the principles and also noticed the exception to the rule.

Relevant paragraphs are 15, 16, 17, 18, 19, 20 and 21:

15. "Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

16. Rashid Ahmed v. Municipal Board, Kairana [AIR 1950 SC 163: 1950 SCR 566] laid down that existence of an adequate legal remedy was a factor to be taken into consideration in the matter of granting writs. This was followed by another Rashid case, namely, K.S. Rashid & Son v. Income Tax Investigation Commission [AIR 1954 SC 207: (1954) 25 ITR 167] which reiterated the above proposition and held that where alternative remedy existed, it would be a sound exercise of discretion to refuse to interfere in a petition under Article 226. This proposition was, however, qualified by the significant words, "*unless there are good grounds therefore*", which indicated that alternative remedy would not operate as an absolute bar and that writ petition under Article 226 could still be entertained in exceptional circumstances

17. A specific and clear rule was laid down in State of U.P. v. Mohd. Nooh [AIR 1958 SC 86: 1958 SCR 595] as under:

> "But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies."

18. This proposition was considered by a Constitution Bench of this Court in A.V. Venkateswaran, Collector of Customs v. Ramchand Sobhraj Wadhwani [AIR 1961 SC 1506: (1962) 1 SCR 753] and was affirmed and followed in the following words:

> "The passages in the judgments of this Court we have extracted would indicate (1) that the two exceptions which the learned Solicitor General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive, and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the Court."

19. Another Constitution Bench decision in Calcutta Discount Co. Ltd. v. ITO, Companies Distt. [AIR 1961 SC 372: (1961) 41 ITR 191] laid down:

> Though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts will issue appropriate orders or directions to prevent such consequences. Writ of certiorari and prohibition can issue against the Income Tax Officer acting without jurisdiction under Section 34, Income Tax Act."

20. Much water has since flown under the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation.

21. That being so, the High Court was not justified in dismissing the writ petition at the initial stage without examining the contention that the show-cause notice issued to the appellant was wholly without jurisdiction and that the Registrar, in the circumstances of the case, was not justified in acting as the "Tribunal".

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HUMANITY IN TURMOIL

- By Justice Devi Prasad Singh*

Judges discharge divine duty. Rich and Poor, happy and sad; all are equal in dispensation of justice. On His thrown are placed side by side the royal crown and beggar's mono chord His law is justice. The law is not created by any human conqueror for a particular concerned people, but by global humanity from its realization of truth. It belongs to universal truth. Thus, Judges are instruments revealing of the Truth. It is the law of Supreme God. Judges have to place the instrument of truth to uphold not only the Constitution of respective countries but also interpret and judicially legislate law securing the interest of the coming generation. However, ultimately, in democratic country, the ultimate power vests in the hands of legislature and bureaucrats and in monarchy, in the king. What Herbert Spencer said long back is still true that greater portion of the people's energy should be devoted to political reform while keeping alive warm smooth for social reform. The system to cheque and balance provided in the constitution of a democratic country, needs to energise more, to meet the challenges which the world is suffering and may suffer more seriously in near future.

Starvation, water related disease, premature death, death during birth, malnutrition, terrorism, global warming and so many other politico, legal and environmental problems, disturb the world's peace, harmony and development.

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".

* -- **Justice Devi Prasad Singh, Judge, Allahabad High Court, Lucknow Bench, Lucknow U.P.**

Francesco Sindico, a University research fellow had presented a lecture at the International 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 waterbodies, rivers and reservoirs to meet out their requirements.

Every year, about 5,36,000 women die during giving birth. (Time Dt. 29.9.2008). In some poor nations, dying in childbirth is so common that almost everyone is a known victim. In some poor countries the ratio of death during childbirth is one in 8. On the other hand, in the U.S. the lifetime chance that a woman will die in childbirth is about ratio one in 4,800 and in Britain the ratio is one out of 8,200. Death are heavily weighted to the poorest and most isolated in each country, which means that many politicians of underdeveloped or developing countries are ignorant of the scale of the tragedy or they have a no sense of duty for their constitutional and moral obligations to their people. Persons residing in urban area, do not know what is happening in their own country in rural. Though, many die in hospital during child birth but researches reveal that riskiest birth are those who are without any nurse, midwife or doctor or attendants and that constitute 35% of all the world's births. In addition to this, a long problem like uncleaned instruments and poor quality of water are the other reasons.

According to reports (In Sunday Express dt. 7.12.2008 Lko. Edn.), the matrimonial mortality rate in India is 301 deaths on every one lakh pregnant women and in Uttar Pradesh it is 517. In the state of U.P., 28,000 women die every year. Thus, 211 pregnant women die every day in India, and 75 of the deaths are recorded in U.P. 15 of the 75 women die due to anaemia, caused by excessive bleeding during childbirth.

According to reports, because of global temperature increase, ice near the poles melts at an increasing rate. As the ice melts, land or open water takes its place. Both land and open water are on average less reflective than ice, and thus absorb more solar radiation. This causes more warming, which in turn causes more melting and this cycle continues. The warming is also triggering variable for the release of methane from sources both on land and on the deep ocean floor, making both of these possible feedback effects. Methane discharge from permafrost is presently under intensive study. Warmer deep ocean temperatures, likewise, could release the greenhouse gas methane from the 'frozen' state of the vast deep ocean deposits of methane clathrate/methane hydrate etc. Ocean ecosystem ability to sequester carbon

are expected to decline as it warms and after some decades, because of its effect some of the cities existing on coastal area, may submerge to some extent like "Dwarika" an ancient holy city was submerged into ocean.

Late Philip E. Clapp, former President of the New York City-based National Environmental Trust, warned, "Global warming is no longer just an environmental issue. It is a rapidly advancing human crisis threatening millions of people, which could undermine the shaky political stability of several other countries. "Expert says that change in climate may be root cause of several wars in coming days. Exploitation of natural resources without any check or regulatory measures causes threat to the survival of human race. Unsustainable development because of political and bureaucratic interest without giving heed to the reports of environmentalists, may be disastrous and majority of developing or under developed countries may suffer great human calamities in near future. Because of unchecked pollution and deforestation, fresh air shall be more precious than the gold, jewel or diamond.

Every person borne on this earth, has got certain legible rights. They include right to clean and healthy environment and right of pursuing life's basic necessities enjoying and defending their lives and peace, acquiring, possessing and protecting property subject to permissibility under the law and seeking their safety, health and happiness in lawful manner. However, enjoying these rights, every person recognised corresponding responsibilities. It is not possible to protect these rights only through State machineries. Every citizen should be conscious to protect and perpetuate the healthful environment and coming generation may also be taught accordingly. Law with regard to public trust and sustainable development should be enforced with all vigour. The community participation in environmental interest resource management should be secured from gross root level and people should be made aware with regard to importance of environmental protection and ecological balance.

From time to time, Supreme Court of India as well as high courts and supreme courts of various countries have given recognition to the concept of entire generational understanding. Every person has responsibility to the next generation to preserve the environment for the full enjoyment of a balanced and healthy atmosphere. Right to life, right to quality of life, right to live with dignity in a healthy atmosphere should be secured for generations to come. Right to development should be fulfilled so as to meet equitable development and environmental needs of the persons and future generation.

Human Rights Resolution 1995/14: "Human rights and environment recognised, to quote:

"Environmental damage has potential negative effect on human rights and the enjoyment of the life, health and a satisfactory standard of living."

The concept of sustainable development provides a viable framework within which to situate the environmental rights of children, particularly in terms of applying existing human rights. However, the concept of sustainable development should not be confused with the idea of development per se, as development may not always be sustainable and does not necessarily relate to development in an environmental context. Primacy should be given for the protection and preservation of environment over the development activities in case we have got little sense for the survival of coming generation.

According to report, in terms of environmental contaminants and pathways, "children breathe more air, drink more water and eat more food than adults do per unit body weight and this higher rate of intake results in greater exposure to pathogens and pollutants. Equally, on account of their narrow airways children have a more rapid rate of respiration. As a result, in polluted areas, children inhale more pollutants per kilogram of body weight than adults. (UNISEF Children in the New Millennium and Environmental Impact on Health 2002).

According to UNEP-UNISEF-WHO, asthma is the leading chronic disease among children in developing countries. In the United States alone, asthma affects 4.8 million children under the age of 18 and asthma related hospitalization and death rates are increasing. Air pollution, both indoor and outdoor, is one of the triggers for asthma episodes. High concentrations of ozone in the air have been directly linked to the development of asthma in children exercising outdoors. The children under 15 years of age bear 15.4% of the global burden of disease associated with environmental factors. Such diseases include Acute Respiratory Infections (ARIs). The biggest causes of childhood morality are ARIs caused by bacteria that thrive in unclean environments, diarrhoeal diseases and malaria. Nitrate absorption has also been linked to blue baby syndrome. Children are not only affected in terms of direct health impacts. There are other issues that are either a symptom of, or contributor to, environmental problems, issues or degradation that may also impact on the life quality of children or render children vulnerable. These include personal displacement, food security and standard of living. 149 million children are currently malnourished with two thirds of them located in Asia. The absolute number of malnourished children has also increased in Africa.

The more we go deeply, the more we will find the problems are acute. Needless to say that environmental damages has direct effect on the enjoyment of human rights such as right to life, right to health, right to a satisfactory standard of living, right to sufficient food, right to housing, right to education, right to work, right to culture, right to non-discrimination right to dignity and harmonious development of a man's personality including security and safety of family with peace of life.

In the United Nations, Conference on Human Environment in Stockholm, 1972, Smt. Indira Gandhi then Prime Minister of India, on behalf of this country, had cautioned the world with regard to environment hazards and stated, to quote:

> "One cannot be truly human and civilised unless one looks upon not only all fellow men but all creation with the eyes of a friend. Throughout India, edicts carved on rocks and iron pillars are reminders that twenty-two centuries ago Emperor Ashoka defined a king's duty as not merely to protect citizens and punish wrongdoers but also to preserve animal life and forest trees."

Again, the then Prime Minister proceeded to observe as under:

> "The environmental problems of developing countries are not the side-effects of excessive industrialisation but reflect the inadequacy of development. The rich countries may look upon development as the cause of environmental destruction, but to us it is one of the primary means of improving the environment for living, or providing food, water, sanitation and shelter; of making the deserts green and the mountains habitable. The research and perseverance of dedicated people have given us an insight which is likely to play an important part in the shaping of our future plans. We wee that however much man hankers after material goods, they can never give him full satisfaction. Thus, the higher standard of living must be achieved without alienating people from their heritage and without despoiling nature of its beauty, freshness and purity so essential to our lives."

[1500-2000BC]

Long back our forefathers in the great treatise Atharvaveda said that the natural bounties are as precious as our lives and think to

become immortal to enjoy earthly pleasures. I wish to read a hymn from Atharvaveda to quote:

"Man's paradise is on earth;
This living world is the beloved place of all;
It has the blessings of Nature's bounties;
Live in a lovely spirit;
Do not die before your assigned time.
Remember anything which is born must die,
But die not a thousand deaths
Before your destiny calls you.

(Atharva.5.30.6)

Terrorism has become a way of life. We do not know whether we will return home safe after doing our job. There appears to be inaction and ill-managed state of affairs dealing with the terrorism. Thanks to media because of which we become aware of what is happening worldwide.

In India since 2004, about 4000 persons succumbed to injuries caused by the bullets of terrorists. Report of Transparency International with regard to rampant corruption in all three wings of governance is alarming.

Media is a powerful weapon to change the society but journalism also today, seems to be in danger. To some extent market forces and political interest are changing the role of journalism. Because of speculator change in the field of information, technology, media may play great role to arouse the conscious of the people to fight against the odds in the society but the media has also suffered great set backs from the muscle men according to report of Reporters Without Borders.

According to the "Reporters without Borders", in 2003, 42 journalists lost their lives while pursuing their profession and that, in the same year, at least 130 journalists were in prison as a result of their occupational activities. In 2005, 56 journalists were kidnapped, 63 journalists and 5 media assistants were killed, at least 807 media workers were arrested, 1,308 media personnels were physically attacked or threatened and 1,006 media outlets were censored. According to a report, on March 21, 2006, 137 journalists and 60 cyber dissidents were confined in various prisons. In 2006, 82 journalists and 32 media assistant were killed, at least 871 media workers were arrested, 1472 media persons were physically attacked or threatened and 912 media outlets were censored. Recently, in Mumbai (26th to 28th November, 2008) media men at the risk of their life played great role to inform the world with regard to the terrorists attack. Some of the media men suffered injuries. These figures show that the persons associated with media, press or electronic

media are under constant threat which is constantly on rise. In majority of the countries where the press or media have been gagged and media persons have been assassinated or persecuted, it has been noticed that the judiciary in these countries are either not independent or committed or loyal to ruling class.

The problem which the majority of the population of the world is facing is enormous. Downfall of morality and values may be of disastrous consequences. Political figures have their own compulsions. In such scenario judicial fraternity must be manned by learned, honest and upright judges keeping reasonable distance with politicians. Meeting of mind or nexus of the members of judiciary with the politicians and bureaucracy is antithesis to rule of law and democratic norms. In present state of affairs, an upright and honest person suffers more adversities and opposition than those who are moving with the flow of dirty water. But it does not mean to give up the fairness and honesty in action. Pluto's protests that there would be no government in the world unless philosophers become kings, may be treated as human perfection and should be a sort of fusion between high thought and just action. In the great war of Mahabharata, Arjun was perturbed by various duties realistic and ethical, that the war will result in confusion of caste and indifference to the ancestors as well as in the violation of sacred duties for reverence for teachers etc. Lord Krishna told him not to worry about these laws and damages but to trust Him and trust His will. Lord Krishna advised Arjun that if he consecrates his life, actions, feelings and thoughts and surrender himself to God, He will guide him and consider fate of life and he need have no fears. If we are to realise our destiny, we must stand in naked and guileless before the Supreme. We now and then try to cover ourselves, up and hide the truth from law. Truth is supreme and truth is God and truth is nature and it is our duty to protect the nature and fight with the wrong doers by judicially and justly discharging our assigned duties. It is said that God help those who help themselves. Judges must make an inroad in the complex problems to secure the interest of coming generation.

Even Mahatma Gandhi the propounder of Ahinsa or non-violent, once said, to quote:-

> "A government cannot succeed in becoming entirely non-violent, because, it represents all the people. I do not today conceive of such golden age."

Not only the terrorism but corruption, castism and communalism must be dealt with firm hand through an independent body. Judiciary should be geared up to decide cases involving related crime promptly giving maximum priority or preference.

Civilisation is the mode of conduct which points out to man the path of duties. We are civilised only on surface underneath the cannibal lives on and perpetuate. It is the animal instinct which in case permitted to remain unchecked causes great human pain and sufferings to humanity in the form of terrorism and exploitation in different manner.

I do feel that the steps taken by our political leaders, are not sufficient and forceful to meet out the challenges which the world or our country is facing and likely to become more serious in coming days. It requires consistent efforts with meeting of mind, unanimity and feeling of mutual co-existence with commitment to move in right direction.

The task of judges is to drop a pebble into the pond of time, even if we may not see the ripple touching the distant shore. We may plant the seed but may not see the harvest which lies in the hands higher than our own. But sure the future generation shall be benefited. According to "Gita" man is term of transition. Man should be conscious of his own, to rise from his animal ancestry to divine deal. The pressure of nature, heredity and environment can be overcome by the will of man.

I wish to conclude reciting a couplet of Sri Aurobindo:-

"I have been digging deep and long
Mid a horror of filth and mire...
A voice cried, "Go where none have gone !
Dig deeper, deeper yet
Till though reach the grim foundation stone
And knock at the keyless gate."

•••

RE-INVENTING LEGAL EDUCATION:CHALLENGES & OPPORTUNITIES

By Justice S.P. Mehrotra
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High Court, Allahabad

The topic is of wide import having many facets. The endeavour in this article is to high-light certain essential points which require our attention.

The advent of concepts of globalization and free economy has resulted in the countries vying with each other to grow faster and become richer. Our country is no exception. Various International Agreements are being entered into having far reaching bearing on municipal laws and giving rise to numerous commitments. There has been drastic change in the entire out-look and life style of the people.

An era has dawned where specialization, computerization, electronic media, internet, consumerism, foreign investments, mergers and take-overs, insurances etc. are becoming the order of the day. Arrival of Multi- national corporations, private banks including foreign banks, Non-resident Indians etc. are throwing up new challenges before the field of trade and commerce.

New problems at individual as well as social levels are coming-up. Novel methods of committing frauds and crimes including cyber crimes are coming to light.

These developments have required enactment of new laws and rules etc. in various fields including intellectual property rights, information technology, investments, banking, taxation, arbitration, environment, consumer protection, etc..

There is, therefore, need for experts in law- drafting as well as lawyers and judges having deep knowledge of the specialized fields of electronics, computers, information technology, banking, taxation, investment, environment, and others.

Legal education in modern times is required to cater the needs of variety of fields-Legal profession, Lower Judiciary including Tribunals, Corporate Sector, Multi- National Corporations, International Banking, Arbitration including International Arbitration, Academics, etc.

• Based on speech delivered on February 16, 2008 at ALUMNI CONVENTION, 2008 of Allahabad University

Good lawyers are necessary not only for our higher courts but also for district and tehsil courts where work is normally conducted in Hindi or regional language of the State concerned.

Lawyers are also to be trained in their social responsibility, alternative modes of dispute- resolution, legal aid, etc.

Legal education today is, thus, facing numerous challenges so that the needs of the Indian society may be synthesised with the needs to keep pace with the latest developments.

The field of law today is full of challenges and opportunities. Numerous careers connected with the field of law are coming up. The legal education is becoming increasingly relevant in modern era. Meritorious students are keen to get legal education and start career in various fields connected with law.

Question is whether our existing legal education system provides adequate means and opportunities to meet the challenges coming up in modern era.

In order to appreciate this, it is necessary to consider the present scenario of legal education in India, and appreciate the merits and demerits of the existing system, and make an endeavour to suggest the improvements which may be made in the existing system to make it compatible with the requirements of Indian society while keeping pace with the latest developments.

Present Scenario:

Let us consider the present scenario of legal education in India.

Two systems are operating simultaneously.

One system of legal education is Three-Year Law Course introduced by the Bar Council of India in 1967. For admission in Three-Year Law Course, a person must be a graduate having Bachelor's Degree in the discipline of Science, Arts, Commerce, Medicine or Engineering, etc..

Other system is Five-Year Law Course initiated by the Bar Council of India in 1982. This system has since been gradually adopted in various Universities and Colleges. In 1987, NLS was established at Bangalore by the Bar Council of India.

In the Five-Year Law Course, a student is admitted to the Course at the end of twelve years of schooling, and completes the course in five years.

First two years of the Five year Course are devoted to Pre-Law Course where seven compulsory subjects are to be studied, namely (i)

General English, (ii) Political Science, (iii) Economics, (iv) History, (v) Sociology, (vi) Legal Language including legal writing, (vii) History of Courts, Legislatures and Legal profession in India.

Remaining three years of the Five-Year Course are devoted to the study of law subjects.

In some Universities, certain law subjects are included in the first two years when Pre-Law Course is taught.

Some Universities, such as Pune University award Bachelor's Degree on completion of three years of the Five-Year Course.

Comparative Study :

A comparative study of the two systems is necessary to appreciate their respective merits and demerits, and their relevance and adequacy to fulfil the variety of objectives of the legal education.

(I) ***Inclusion of new subjects*** : At present, several National Law Schools and institutions have come-up where Five-Year Law Course is taught. Various Universities have introduced Five-Year Law Course while continuing with the existing Three-Year Law Course.

In order to equip the students with the knowledge of new subjects in the field of law, the same have been included in the syllabus of the Five-Year Law Course as well as the Three-Year Law Course.

(II) ***Division in Semesters*** : Both the Five-Year Law Course and the Three-Year Law Course have been divided in Semesters.

(III) ***Relevance of subjects from the disciplines of science,etc.*** **:** The students pursuing Three-Year Law Course join the course after getting Bachelor's Degree in the discipline of Science, Arts, Commerce, Medicine or Engineering, etc.. Having graduated in different disciplines, they tend to adopt distinct and novel approaches to the legal problems, and thus make the legal profession rich. Legal problems requiring specialized knowledge in different fields are dealt with competently by such lawyers.

In the Five-Year Law Course, the students are required to study specific Arts subjects in their pre- Law Course, namely, Economics, Sociology, History and political Science. No place has been given to the subjects from the fields of Natural Science, Medicine, Engineering etc.. These subjects are equally relevant for the students in order to appreciate various problems now coming before the law courts, particularly, pertaining to intellectual property laws, cyber law, environmental laws, etc.

Further, the students who pass 10+2 in Science subjects, face difficulty in coping with the vast syllabus of Arts subjects prescribed in the

Pre-Law Course. Lack of proper staff and guidance in various institutions coupled with the time-limitation of semesters makes the task of these students cumbersome.

(IV) *Financial* aspects : Expensive infrastructure including building, library, computers, hostel, etc. is required for starting Five-Year Law course.

On account of huge financial involvement in establishing and running Five-Year Law Course, various Universities and Colleges have resorted to self- financing system for establishing and running Five-Year Law Course.

This in turn puts heavy financial burden on the students taking up Five-Year Law Course. They are required to pay heavy fee under various heads including tuition and examination.

The students coming from modest back ground, therefore, find it difficult to join Five-Year Law Course.

In Three-Year Law Course also, there has been upward revision of fee-structure, but it is still manageable for all sections of the society.

(V) *Language* : In the Five-Year Law Course, there is great emphasis on English. Two compulsory papers in English have been prescribed. Besides, medium of instruction and examination is normally in English.

In a number of States, the medium of instruction is Hindi upto the higher secondary level. A large percentage of students answer their questions in Hindi. It is not easy for these students to suddenly switch over to English medium. This deprives a big section of students from taking-up Five-Year Law Course.

In the Three-Year Law Course, certain papers in English language have been prescribed. However, for other subjects, both English and Hindi are available as medium of instruction and examination.

(VI) Course-Content & *Time Frame* : The course-content in the Three-Year Law Course as well as in the Five-Year Law Course has been made too vast. This includes traditional subjects, such as Contract, Tort, Constitutional Law, Criminal Law, Civil Procedure, Company Law, Public International Law, Family Law, Jurisprudence, Labour Laws, Administrative Law, Transfer of Property, Easements, etc.. In addition, a number of new subjects have been added in the syllabus in an anxiety to teach all possible latest subjects. For instance, Intellectual Property Laws, Consumer Protection Law, Environmental Laws, Investment Laws, Insurance Laws, Cyber Law, Human Rights, Public Lawyering ,etc.

These new subjects have been added either by condensing the

contents of the traditional subjects or by condensing the time for study of vast traditional subjects to one semester of about six months.

It is ignored that mastering basic concepts of law is equally important, and for this, sufficient time for study of traditional subjects is necessary. It is not appreciated that capacity of students is not unlimited. For instance, studying Constitutional Law of India or I.P.C. or Property Laws in one semester alongwith other equally lengthy subjects and assignments rarely gives time to appreciate basic concepts underlying "these laws.

(VII) ***Objects -Not fulfilled*** **:** The objects of introducing Five-Year Law Course is to ensure that lawyers of better quality enter the legal profession.

The students persuing Five-Year Law Course are serious about persuing the study of law. They have clear objectives. The students coming from different places interact amongst themselves and participate in moot courts/ group discussions/seminars, etc.. They are required to undertake case studies, attend chamber of a lawyer, submit project report on a legal topic, attend Lok Adalats, understand Pre-Trial preparations and participate in Trial proceedings, etc..

All this gives them good exposure, and they are full of enthusiasm and confidence as they come out with LL.B. Degree.

However, the students coming out of the institutions imparting education in Five-Year Law Course, particularly, National Law Schools, rarely join legal profession, excepting those who have family background of legal profession. Most of these students join corporate sector where they get heavy pay-packets in the beginning itself. Hard Labour involved in legal profession with attendant uncertainties deters them from joining legal profession.

Again, having studied in an atmosphere of lap-tops, internets, etc. these students even if they join legal profession, prefer to practice in the higher courts or tribunals. They do not want to become mofussil lawyers going to the District Courts or Tehsil Courts.

These needs are, therefore, satisfied by the students undertaking Three-Year Law Course. It may be added that various aspects of practical training have been added in the Three-Year Law Course.

(VIII) ***Day Time Education*** **:** Knowledge of law is not only desirable but necessary for personnel in various services particularly those connected with judicial administration.

In Five-Year Law Course as well as in the Three-Year Law Course, the system of day-time classes has been introduced. This has deprived the

personnel in employment from taking legal education.

SUGGESTIONS:

Having noticed various relevant aspects of the two prevalent systems of legal education, certain suggestions may be given.

(1) Keeping in view the needs of Indian Society, it is **necessary** that **both the systems** of legal education, namely, Three-Year Law Course and Five-Year Law Course should be continued. However, this will require availability of adequate competent and sincere staff as well as separate infrastructures for the two systems. Expecting members of the existing staff to run both the systems is to put undue strain on them. Similarly, using the same infrastructure for both the systems creates practical problems.

(2) While **teaching** various **subjects in Pre-Law Course** of the Five-Year Law Course, care must be taken of the students coming from Science background in 10+2 who may not be having elementary knowledge of such subjects.

(3) Certain aspects of **Natural Science, Computer, etc.** may be introduced in Pre-Law Course so that the students may have better appreciation of certain new branches of law, e.g. Patent Law, Cyber Law, etc..

(4) There is need to **restructure the course content** keeping in view the vastness and relevance of particular subjects, and the time available for their studies. Wherever necessary the subjects should be divided in two semesters.

The subjects should be arranged scientifically so that easily comprehensible and interesting subjects are taught in the initial semesters, while the subsequent semesters should be devoted to the study of subjects requiring understanding of abstract concepts.

(5) There should be greater emphasis on **mastering basic concepts** of traditional law subjects rather than on increasing the number of new subjects to be taught.

The idea is not to diminish the relevance of new law subjects. What is to be appreciated is that once basic concepts are clear to a law student, he is able to understand any law subject.

(6) **Arrangements** for the students **to undertake practical training**, such as attending chambers of lawyers, participating in trial proceedings, attending Lok Adalats, etc., should be made by the institutions rather than leaving the students to manage for themselves.

(7) There should be **greater interaction** between the practicing lawyers and the law teachers. Teaching of procedural laws should be entrusted to the sincere practicing lawyers.

(8) **Young lawyers** joining profession may be associated with the **legal aid programme, Lok Adalats, etc.** in the early years of their practice. However, this should be done under the guidance of an experienced lawyer.

(9) Arrangements for legal education should be made for the **personnel in service** so that where necessary they may get legal education on the pattern of M.B.A.

In conclusion, it may be said that the present dual system of legal education with all its deficiencies provides adequate opportunities and means to meet various challenges facing the legal education in India. There is, however, scope for further improvements so that the legal education in India may be better equipped to meet the challenges and provide fullest opportunities to our meritorious students to grow and contribute their best for the progress of the country.

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HUMANISM IS THE HIGHEST LAW WHICH ENLIVENS THE PRINTED LEGISLATIVE TEXT WITH THE LIFE BREATH OF CIVILIZED VALUES" THE JUDGE WHO FORGETS THIS RULE OF LAW ANY DAY REGRETS HIS VERDICT SOME DAY""

- By Mushaffey Ahmad
H.J.S. (U.P.)

'ISM' denotes practice ad-nauseam. Of the divers isms the most cherishable is humanism, the others serve as means fair or foul to that end. Man is beset with isms and becomes intractable to systems because of them. He is in or out of his humour. It is rarely that he is himself and without 'ism'.

H. W. Fowler* seems to take humanism for the scope of studies to the humanists who rationalized the human conduct of yore, or a Religion of Humanity. Our forensic maven takes humanism for all that collectively makes a creature up a 'happy and dignified' Man. We sometimes look up to 'uns' (love) for Insaaniyat, salt to preserve him from corruption, or Rahim's Paani to deliver man. Of all the creatures man alone may react differently in similar circumstances, that is, he remains too kaleidoscopic in conduct and protean in nature. His power to think and devise is unique and has been enigmatic to both the legislators and the jurists. Laws are based on inductions and deductions from human activities. When Human nature is so complex and idiosyncrasy varies from man to man, the legislators and jurists gape for what Justice J.S. Verma proposes in his lecture on 'New Dimension of Justice.'

'Law as it is may fall short of law as it ought to be for doing complete justice in a cause, the gap between the two may be described as the field covered by morality.'

.....1997, 3 S.C.C (J) 3

Law strives to be what it ought to be by developing new dimensions to Jurisprudence. Hon'ble Justice Verma continues:

'There is no doubt that the development of the law is influenced by law is influenced by the principles of equity natural justice as effective agencies of growth. The ideal state is when the rules of law satisfy the requirement of justice and the gap between the two is bridged. It is the attempt to bridge the gap which occasions the development of New Jurisprudence.'

(Ibid)

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* A Dictionary of Modern English usage

" **Justice V.R. Krishna Iyer;** (1978 SCC 424, Para-13).

What is morality and what new dimensions to Jurisprudence need be added, answers to these questions we shall quest for here-in-after. With the interminable scope of variations in the human activities, laws which have for their object streamlining the normal and prohibiting and sometimes punishing the abnormal especially lag far behind.

Man apes his parents, mates, masters, teachers, colleagues, etc., and takes upon himself what he takes to. The society at large has projected innumerable and indelible lessons to man. Principles and practices develop in the society and depend for the quality upon the way of living it has adopted.

Modern India has taken much after her conspicuous heroes. I mean saintly Mr. M.K. Gandhi and impressive Mr. Jawahar Lal Nehru. One stood for culture hemmed-up with 'Mariyadas', the other for modernization dominated by development. The one inculcated subjectivity, the other objectivity; though both struggled for independence and progress. Mr. Nehru subscribed to adaptability according to the circumstances as the art of life, Gandhiji stuck to Satya and Ahimsa as his modus-operandi. The majority drank deeply adaptability to circumstances and bucked at 'Mariyadas' of Indian Culture. Adaptability but to an extent, within limits, or in a proper measure would have reconciled the two heroes. Infraction of law and consequent inhumanism may be traced in quite some measure to this limitless adaptability.

Brothers of the west have been at best in their ingenious faculty. Their claim that Civil Laws of England are the brightest jewels worth having is literally correct. Application of those laws in India as elsewhere, however, shows up futility of their claim. Their efficacy and efficiency may be assayed in the crucible of history. The milieu miasmic or congenial that attended the advent of the British Laws to India has a sordid story to tell. Making a retrospection we find that when State of Satara was annexed by the English, Rango Bapoji went to England to lay the grievances of Satara before the Home Authorities, who found the claim unsustainable and turned down the entreaty. Queen Banka of Nagpur tried to get justice from England, fee'd expensive barristers with lacs of rupees but in vain. Nana Sahab Peshwa of Bithor sent Azim Ullah his advisor to England to plead his case; Azim Ullah returned disappointed but fully convinced that justice could rather be wrested than be entreated and, therefore, advised Nana Sahab and the Badshah Bahadur Shah Zafar to wield their swords for what they were entitled to.

The British ingenuity badly replaced humanism, One would wonder if the laws given by them could be a means to humanism. A page of history close upon the advent of the Laws in India may disenchant many jurists who trust justice can be attained only through the laws inherited. Sri V.D. Savarkar

writes in the 'Indian War of Independence of 1857' (Pages 189-191).

'After the Benaras rising, General Neill organized detachment of the English and (some persons of a community that sided with the English) to keep order in the neighbouring villages. These bands used to enter villages occupied by defenceless peasants. Anybody whom they met was either cut down or hanged. The supply of those to be hanged was so great that one scaffold was soon found insufficient, even though worked day and night. Therefore, a long line of permanent scaffolds was erected. Though, on this long range, people were half killed and thrown away, still there was a crowd of waiting candidates. The English Officers gave-up as hopeless the silly idea of cutting down of trees and erecting scaffolds; so, thenceforth the trees themselves turned into scaffolds. But if only one man was to be hanged on each tree what has God given so many branches to a tree for? So natives were left hanging on every branch with their necks tightly roped to them. This military-duty and this..... mission went on incessantly night and day. No wonder the brave English got tired of it. So the necessary seriousness in this religious and noble-duty was mixed with a serious humour for the sake of amusement. The rude manner of catching hold of peasants and hanging them on trees was altered to suit the taste of art. They were first made to mount on elephants, then the elephants were taken near a high branch, and after the necks were tied tightly to it, the elephants would be moved away, still when the elephants were gone, the countless unshapely corpses used to hang on the branches and the English passers-by were bored with unchanging monotony of the scene. Therefore, when the natives were hanged, instead of being hanged straight they were made into all sorts of figures. Some were killed in the shape of the English figure '8' and some in the shape of '9'.'

'But in spite of these various efforts in different directions there were still hundreds of thousands of 'Black' men living. Now to hang all these would require an amount of rope that could not easily be had. The 'civilized' nation of England was landed in this unthought-of difficulty. By the grace of their God Himself they hit upon a new plan, and the

first experiment was so successful that, thenceforth, hanging was abandoned for the new and scientific method. Village after village could thus be razed to the ground: After setting villages on fire and keeping the guns in position to overawe them, how long will it take to burn thousands of natives? This setting fire to villages on all sides and burning the inhabitants, was so amusing to many Englishmen that they sent letters to England giving a humorous description of these scenes. The fires were so quickly and skillfully lighted that no villager had any chance of escape at all. Poor peasants learned Brahmins, harmless Musalmans, school children, women with infants in their arms, young girls, old men, blind and lame, all were burnt in the mass of flames. Mothers with suckling babes also succumbed to these fires: old men and women, and those unable to move away even a step from the fire, were burnt in their beds. And if a solitary man were to escape the fire, what then? One Englishman says in his letter, "We set fire to a village which was full of them. We surrounded them, and when they came rushing out of the flames, we shot them.'" (Charles Ball's, Indian Mutiny, Vol. I, Page 243-244 quoted)

And when the war of independence was near a close the British offered general pardon and husk of law but thousands of Rana Prataps sensing inhuman ism behind the tantalizing rules preferred starvation and risk to life at the claws of fierce beasts in the dense forest of Nepal.

To probe a little further into history of British law and its enforcement in India, we turn to momentous proclamation of Nov. 1858, by the queen of England.

'We hereby announce to the native princes of India that all treaties and engagements made with them by or under the authority of the Hon'ble East India Company are by us accepted and will be scrupulously maintained, ... we desire no extension of our present territorial possessions..... We shall respect the rights, dignity and honour of native princes as our own and we desire that they, as well as our own subjects, should enjoy that prosperity and that sole-advancement which can only be secured by mutual peace and good Government.'

'Our clemency will be extended to all offenders save

and except those who have been and shall be connected of having directly taken part in the murder of British subjects.'

'To all others in arms against the Government, we hereby promise unconditional pardon, amnesty and oblivion of all offences against ourselves our crown and dignity, on their return to their houses and peaceful pursuits.' (Sri V.D. Savarkar's 'Indian War of Independence of 1857', Pages 514-515).

This magna-carta was published to extinguish the revolution. The Begum of Oudh did not care even to glance at it. She saw through the artifice and published the following counter- proclamation :

'In the proclamation, it is written that all the contracts and engagements entered into by the Company will be accepted by the Queen. Let the people carefully observe this artifice. The Company has seized on the whole of Hindustan and if this arrangement be accepted, what is there new in it? The Company professed to treat the Chief of Bharatpur as a son and then took his territory. The Chief of Lahore was carried off to London never to return again. The Nawab Shamsuddin Khan, on the one hand, they Salaamed to him. The Peshwas they expelled from Poona and Satara and imprisoned for life in Bithor. The Raja of Benaras they imprisoned in Agra, They have left no names and traces of the Chief of Bihar, Orissa and Bengal. Our ancient possessions they took from us on pretence of distributing pay and in the 7th Article of the treaty, they wrote on oath that they would take no more from us. If then the arrangements made by the company are to be accepted what is the difference between the former and the present state of things? These are old affairs, but even recently in defiance of oaths defiance of oaths and treaties and notwithstanding that they owed us millions of rupees without reason and on pretence of misconduct and discontent of our people, they took our country and property worth millions of rupees. If our people were discontented with our Royal predecessor Wajid Ali Shah, how comes it then that they are content with us? And no ruler ever experienced such loyalty and devotion of life and goods as we have. What then is wanting that they do not restore to us our country? Further it is written, in the proclamation that they want no increase of their territory and yet they cannot refrain

from annexation, if the queen has assumed the Government, why does she not restore our country to us when the people have unmistakably shown their wish to this effect?

'It is written in the proclamation that they who have harboured the rebels or who caused men to rebel shall have their lives, but that punishment shall be awarded after deliberation to them, that murderers and abettors of murders shall have no mercy shown to them and all the rest shall be forgiven. Now even a silly person will see that, under this proclamation, no one, be he guilty or innocent, can escape. Everything is written and yet nothing is written. But one thing they have clearly said that is that they shall let off no one who is implicated; and so in whatever village or province our army was halted the inhabitants of that place cannot escape. Deeply, are we concerned for the condition of our beloved people on reading this proclamation which palpably teems with enmity?'

(Ibid, Page 515-517)

Thus responds the Begum to the feel good declaration of the English, sensing full well hidden artifice behind it. The English had offered clemency through rule of law only to enslave, and heroes and heroins opted for privations and risks at the claws of beast in the dense forests of Nepal. V.D. Savarkar estimates sixty thousands of them taking to jungles, spurning British clemency and rule of law. Not thousands but millions lost lives in the sacrificial bonfire of war of Independence of 1857.

Similar saturnalia of inhumanism followed the two world wars brought about by the most reasonable and civilized. Retributism crashed the tower of corporatism; counter ism was begot to dispense justiceism through blistering bombs where humans surrendered were shattered. to the splinters of bombs and life was extrac'ed from caged hawks. Humanity groans helplessly in Iraq and Afghanistan under recent donquixotism.

India is fast receding from her culture of Maryadas. Undefined functionalism has spawned threats to institutionalism. It may be quoted, **'Injustice anywhere is a threat to justice everywhere.'**

Do they not know? .....BANI ADAM AZAE EK DIGARAND KE DAR AFRINASH J EK JOHARAND. (Gulistan by Sheikh Saadi). (Progeny of Adam are a part to each other, for they are born of the same stuff). Then why inhumanism? Because they have not had faith in the universal humanism.

Ingenuity begot science and art, which contributed a little to human

welfare. Science deals with matter and devised laws and formulas applicable to the inanimate world. Humans have suffered as much from scientific development as availed themselves of it. Facilities and amenities have multiplied and so has augmented human dependence on them. Intensity in realization has come down proportionately. A thirsty man thrills on a draught of cool water; the cloyed nauseate at it. If science has bettered life, it has bettered too much to sustain the dignity of it. Besides, science has created Frankenstein's monster ready to devour its masters, if let off.

Science has its sibling in the garb of Art, which has the potential of infecting the many with its sinister tendency to convincing them of its falsehood. Both have gone down deep in human nature. One has made him weak the other, capricious. Affluence in the material world obviates the need for being strong; the art screens the reason for it. The result is that man has lost the verve to encounter temptation or terror, oppression or flavour, or personification, ramifications or amplification of any of them. The truth endures no embellishment:

> 'The world looks like a multiplication table or a Mathematical equation, which, turn it as you will, balances itself. Take what figure you will, its exact value, nor more nor less, still returns to you. Every secret is told every crime is punished; every virtue rewarded every wrong redressed, in silence and certainty.'
>
> ....
>
> 'crime and punishment grow out of one stem. Punishment is a fruit which unsuspected ripens within the flower of pleasure which concealed it. Cause and effect, means and ends, seed and fruit cannot be separated. The same dualism underlies the nature and condition of man. Every excess causes a defect, every defect an excess. Every sweet has its sour every evil its good. Every faculty which is a receiver of pleasure has an equal penalty put on its abuse ..... For everything you have missed you have gained something else, and for everything you gain, you lose something. If riches increase, they are increased that use them. If the gatherer gathers too much, nature takes out of the men what she shuts into his chest, swells the estate, but kills the owner.'
>
> -R. W .Emerson 'Compensation'.

So each of us is subject to inevitable and immitigable law of compensation. The shylock of cosy life demands an usurer's interest for each pleasure. Material progress is, however, not to be grudged. What is

desiderated is the Maryadas on its use for the sake of others. Affluence has given humans its own curse. The fabled complacent peasant could have done well if he had followed his dubious friend IMP till the latter guided him to prosperity, and eschewed his ways leading to lavishness, for, then, falling in the dirt because of over-drinking would not have put him to remorse.

(Reference is to the story 'IMP and Peasant' by Leo Tolstoy))

Nature has retaliated ruthlessly on the scientific advancement fobbed on through overpopulation .....a problem which jeopardizes the very institutional existence. The inefficient norms of life fall one by one and jurisprudes yell for help and draw desperately upon logomachic logickism. This, however, opens flood-gates of crimes irrespective of collar white or blue. Blend of science and art have reduced human conductivity. For, the whole realm of scientists revelling in Physics & Chemistry has not yielded KIMIAYE- SAADAT, and those dabbling in scientificism and pleading and preaching substitution of scientific institutions for MANDIR, MASJID, CHURCH, etc. (Religion and the Constitution, AIR 2002 Journal 61 & Sharif Saifi vs. State of U.P., 1999(I)AII.L.J. 210) forget:

'The basis of all systems, social, political, rests upon the goodness of men. No nation is greater or good because Parliament enacts this or that. But its men are great and good. Religion goes to the root of the matter' (Vivekananda in 'Complete Work', Vol. V, Eighth Edition. Pages 192-193 quoted in A.S. Narayan versus State of A.P., AIR 1996 S.C. 1765, Para-42). A judicial inquisition commences with oath, which is a matter of faith, and sanctity of which decides the ultimate result.

Man does not always go by scientific formulae. He, however, does by his faith good or bad, complete or incomplete, implicit or volatile. His relations with his fellow beings differ because of variable faith and consequent outlook unto others. Faith has had its own tyranny. When it is not man friendly it is fanatism; when it is unreasonable it is superstition; when it tacks a comprehensive scheme for symbiosis it is parochialism. No doubt God the creator and sustainer is the centre of all faith but when the concept of God is restricted to a community or land humanism suffers from having no universal fraternity. So for a sustainable faith, let God be sustainer of all the worlds - Rubb-ul-ul-Almin - Master of the day of Judgement of Hell and Heaven and Source of comprehensive human systems or a defined (It means the same as in the path is defined by rows of trees) way of life. Over stretching of any virtue is ludicrous and systems sans faith in holistic approach to life preached by Mothers, or Sisters or Fathers is treacherous. The beguiled meet with Cassious Kilay fate before long. Fraternity based on love and equality cannot be bought by charity shows, where Pauls are paid after Peters have

been robbed. Where is sacrifice, the base of charity? A way of life which can be any way of life is no way of life. Such a way of life can sustain no system as it is pliant to any shade or colour and holds no future for mankind. It can yield to the pressure or make for fanatism, a bane to humanism and institutions. Faith in God and His scheme of punishment and reward has governed men more than legislated texts the world over.

Legislated laws have touched, only the brink. Much remains yet to be recognized. They seek to bridge abysmal gap with ambiguous but gilded terms such as, 'equitable', 'reasonable', 'good-faith', 'good-conscience', 'morality', 'honesty', and many others yet to be devised. How and how far they have worked on humanity may be verified from historical facts. Recent Political-Scenario and consequent social bathos shows up the garrulity broken on them. Conscience as it is fielded is a fallacy. Even persons like George Washington were taken in by the term when he says:

> 'Labour to keep alive in your breast that little spark of celestial fire called conscience.'
>
> (Referred to by Justice R.R. Yadav in 'Conceptualization of Justice'
>
> -AIR 2001 Journal 267).

He means conscience is innate in human nature but history belies it and holds out numerous instances to show that the undefined conscience led the powerful to egregious inhumanism and justice bade adieu at their hands. Conscience, however, seems to be accumulated impression a person receives as acceptable from society. Can a person brought up in a pack of wolves have any conscience, or humanism in the least. In the same way morality from mores is conventionalism depending for its modes upon the popular practice. 'Naitikta' if it is an abstract of 'Niti' confounds itself to a stratagem or contrivance to serve one's purpose. 'Chanakyaniti' to the present 'Rajniti' barring occasional personal perceptions made by a few or those held out for guidance of a few testify to the view-point.

Lawmen struggled to usher-in foolproof legal systems. The process then lengthened and over-shadowed the end. Learned Hand summarizes the legal process only as a means to inhumanism; "As a Litigant, I should dread a law suit beyond almost anything else short of sickness and death." (Quoted by N.A. Palkhiwala in 'We The Nation', Page 214).

Reasonable restrictions have had their day. With the spread of civilization and with faith vanishing, reasonableness varies from person to person, place to place, and time to time. Judicial hierarchy proves the point. Restrictions are not Maryadas inasmuch as they are not attached to faith. Implicit faith in a well defined path of virtue (ACHCHI TARAH SE

MARYADIT GUNWAN JIVANAPATH) is the desideratum, even to have precedence over volumes of legislated laws. To elucidate a little, dereliction of 'HAYA AND HIZAB' unknown to the west but Maryada in Indian Culture, has brought about havoc in the life of better half of mankind. Hizab not only rendered fair sex fairer but also guarded her against competition, facilitated justice to the under privileged or those not so fair, preserved the most important institution -- family, where love prevailed and the offspring brought up to bruit about love and Maryadas holding against tantalizing equality, liberty, wealth, etc. short of love, peace and humanism. The civilized even hold out prizes, trophies and titles to outrage the Maryada. The institution of family escaped the death blow in the failure of civilized agenda of sexual liberty fielded by World Women Conference held in China.

Success of a system is to be verified by the effect it carries on the society. Rising crime graph and vertical moral bathos speak ominous for the legislated laws. Nani A. Palkhiwala, first censures the Judicial System through a dialogue with Naushirvan Engineer -- Advocate General of India in 1947 ('We The Nation', Page 211) but then takes up cudgels for the prevalent system. He says on the same page; 'If we did not have the rules of British Jurisprudence, it would be impossible to administer justice in this country.' Not that the laws need vetting but they do want 'IMANDAARI' for their sustenance. Why? Are not conscience, reasonable restrictions, morality, good-faith, equity, etc. sufficient and capable of sustaining systems? No. Certainly not, they lack faith in and observance of a well-defined path of virtue. The propounders use them as legerdemain to secure their hidden agenda --- legalism.

Let us come down to the basics of laws. 'The maxims of law", says Justinian, 'are these; live honestly; hurt no one; and render everyone his due.' The West has adopted the formula and expatiated on them according to their need. Justinian added the last two clauses because he did not find them included in "live honestly". If the thieves distribute the booty equally among them, they act honestly. What is due may be reasoned out to be anything and hurting may be justified in punishing the rogues. This is what the West has gone by and that is what the powerful have been doing the world over.

We Indians have so far been interpreting honesty as 'Imandaari'. 'Imandaari' has been the under current of all our activities, our Indian culture, subject of literature, and devotion of seers. It is now subject to much emulation and simulation. Its meaning and purport we do, however, now fight shy of. Courts have been touching its edges only. Infatuated by civilization and its fanfare, they have been evading the direct import and importance of it. In a vainglorious fiat it is often snubbed as superstition and

obscurantism. Even the most scientific on excogitation are bound to admit its potentiality to sustain the entire humanity and all its systems and relieve mankind of the unnecessary burden of strife and struggle, and insulate it from cosmic disasters and perpetuate Justice Ayer's Humanism till day of Judgement. Man friendly, world-friendly, universe-friendly, tested and tried over ages, it provides standard to mankind, distinguishable from all other creations of God. It is holistic to mankind. Justice is only a facet of Imandaari, which permeates all human systems with humanism. It is a faith, it is a religion. It is a well-defined path of virtue. It is power, it is restraint. It is gist of philosophies; unfailing gain where rights and duties are inseparably mingled and sacrifices adorn fraternity and love of man. What is it which is so conspicuous yet little recognized? Yes, it is 'Imandaari' a most significant term man has known. 'Daar' of 'Imandaar' is from Persian Dastan (to have) and like maaldar means 'a person who has'. So Imandaar is one who has faith, for 'Iman' is faith implicit. But the term is much more significant. When the Muslims fielded it, they meant, thereby implicit faith in the 'Kalma Tayyaba', which literally means nothing is worshipable but God Hazrat Mohammad (Blessings, and peace be upon him) is the prophet of God. The Kalma is a whole and not a combination of segments detachable at will. Any part of it detached makes every thing incomplete. It begins with supremacy of God over all other things and at the same time presents a model conduct to be followed. The construction begins with an emphatic negative to emphasize that no power is worth our surrendering to but God, that is, if we surrender to temptation or terror, oppression or flavour, or any other power save God's, or any implication, ramification, modification, manifestation of any of them, we may be anything but 'Imandaar'. We have also to surrender to Him to account for our deeds. The concept immediately necessitates indefatigable will-power to face the terrestrial forces. Animalism abuts on the concept and gets morphosed into humanism. Banditry surreptitious or overt, common or non-pareil occurs when the perpetrators believe that no one sees them and to none they are responsible, without realizing that they are subject to law of compensation and within the four-corners of mortality, and they have to account for their deeds before their maker. The weak degrade themselves to become Dhan Pashus. This part of the Kalma is, however, as incomplete and ambiguous as any other term we employ to cool down our pedantry with. The remaining part of the Kalma is as much indispensable as the first. It connotes 'FOLLOW THE WELL DEFINED PATH OF VIRTUE', for the Muslims saw the complete NIZAM-E- HAYAT (system of life) -- well defined path of virtue in following the prophet' . The viability of the dictum lies in the fact that the NIZAM-E- HAYAT has been criticized and abhorred but the world

has not been able to present alternatively so comprehensive and man friendly a system. I stress **implicit faith in surrendering to nothing but God and following a well defined path of virtue,** which not only subserves justice but also upholds humanism reducing diverse isms to the minimum.

Laws inherited, indigenously legislated; adopted or thrust suffer from lack of Imandaari -faith in responsibility unto God and following a well defined path of virtue. No doubt, they are a fine display of semanticism. Logic and rhetoric are on the move to circumvent human functionalism. Reality, however, leers at them. Cumbrous cacophony adds but to the woes of man. Where realism is a viable blend of principles and practice, faith alone enlivens it. Until Judges, legislators, executors, and the laity observe Imandaari, humanism is the occasional episode in the general drama of legalism.

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* Dedicated to the memory of Shamsuddin Altmash – a great saint, who being flummoxed by the Will of Khwaja Bakhtyar Kaki that the last prayers for him be led by him, who fulfilled three conditions relating to abstinence from common vices and dedication to offering prayers, exclaimed, 'Ay Khwaja! What have you done! If I do not lead your last prayers, you will be buried without prayers, and if I lead the prayers, my humble secretes will be out

STARE DECISIS AND SUPREME COURT

- By A.K. Awasthi
Additional District
Judge,
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Stare decisis and Art. 141, Constitutin of India

The principle of stare decisis is embedded in latin Maxim 'stare decisis et non quieta movere', firmly entrenched in British system of doctrine of binding proceedent and embodied in Artiele 141 of the Consitution of India, in short 'Constitutin' if provides that the law declared by Supreme Court shall be binding on all courts within the territory of India. The expressions 'binding' and 'on all courts' catch our eyes. It is to be discerned as to what is binding and determined whether the Supreme Court is bound by its own decisions.

Meaning of Stare decisis

'Stare decisis' means 'to stand by decided cases'. Wh have hierarchy of courts. The Supreme Court is at the top of pyramid. It decides cases with a seal of finality. The decision is an authority for what it actually decides. What is of essence in a decision is it ratio, and not every observation found therein,1 nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent[1].

Law declared binding

It is 'aw declared' that is binding. The decision not express, nor founded on reasons, nor proceeding on consideration of the issue cannot be deemed as 'law declared'[2].

Lis

It is basal to common law doctrine of binding precedent that there should be a lis for adjudication before the Court, a set of material facts and the

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[1] State of Orissa and others vs. Mohd. Hiyas, AIR 2006 DV 258

[2] Per Sahai, J., in State of U.P., and another vs. Synthetics and Chemicals Ltd. And another, (1991) 4 SCC 139

[3] Mittal Engineering Works (P) Ltd. Vs. Collector of Central Excise, Meerut, (1997) 1 SCC 203

[4] Mathura Prasad Sarjoo Jaiswal vs. Dossibai N.B. Jeejeebhoy, AIR 1971 SC 2355

[5] As held in Sarwan Singh Lamba and ors. Vs. Union of India and ors., AIR 1955 SC 1729

[6] Dadu Dayalu Mahasabha, Jaipur (Trust) vs Mahaant Ram Niwas and another, AIR 2008 SC 2187

Judge has to apply the reasoning to justify decision after putting the facts in a legal pigeon-hold. Indeterminacy of precedent authority must not sway away the mind of a Judge. A case is an authority for what it decides. A decision cannot be relied upon in support of a proposition that it did not decide[3].

Res Judicata and Ratio decidendi

A decision on a matter in issue alone is res judicata; the reason for the decision is not res judicata. It may resolve a controversy inter partes and may also formulate enunciation of law. The former is res judicata, while the latter is the reason for decision i.e., ratio decidendi[4].

Ratio decidendi and Obiter dicta

It is ratio decidendi that is binding, and not casual remarks, something said by the way, statements on hypothetical fact-situations, or problems, which are passed for as obiter dicta. The obiter dicta is the incidental question which may arise, indirectlly connected with the main questions, for consideration. Normally even an obiter dictum of Supreme Court is expected to be obeyed and followed[5]. The observations on unreal questions decided in personam are not binding as precedent[6].

Ratio binds, not rationes

It is easy to define A ratio decidendi, but difficult to determine it. Obiter is easy to show, and ratio difficult to demonstrate. There may be indeterminacy of decision or wilderness of single instances. There are large prescriptions of case law defying space which can wrap the whole orb several times all over. There is an esoteric quality about the type of reasoning required for unraveling of cases. It is ratio that is binding, not rationes.

Dismissal in limine

The dismissal of a case in limine is not res judicate[7] nor a assumption or a point not deliberated upon[8].

Statute and judgments, if at par

There is difference between enacted laws and declared laws. One represents vox poppuli, other aequitas. Words of a statute are living flames, tongues of dynamic fire potent to mould the future as well as guide the

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[3] Supreme Court Employees Welfare Association vs. Union of India and others, AIR 1990 SC 334

[4] Amit Das vs. State of Bihar, AIR 2000 SC 2264

[5] State of West Bengal vs. Anwar Ali Sarkar, AIR 1952 SC 75

[6] Bharat Petroleum Corporation Ltd. And another v. N.R.Vairamani and Another, AIR 2004 SC 4778

[7] [(1944 (2) All ER 293

present". The Judge takes living facts in his stride and evolves law by use of judicial methos where there is non. Interpretation puts gloss over words in their contextual colour. It puts flesh on dry bones of law and, thus, provides for non liquet fact situation.

Judges interpret statutes, not judgments

Judgments, even of summit court, are not scriptural absolutes but relative reasoning[12]. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and, that too, torn out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

Sub silentio

The decisions 'sub silentio' and 'per incuriam' are not binding.

Sub silentio decisions flow when the particular point of law involved in the decision is not perceived by the court of present to its mind. A point not argued or considered by court is said to pass sub silentio.

Per incuriam

'Inciroa' literally means 'carelessness'. In practice per incuriam is taken to mean per ignoratium. English courts have developed this principle in

[12] Nirmal Jeet Kaur v. State of M.P., (2004) 7 SCC 558 and Mayuram Subramanian Srinivasan vs. CBI, (2006)3 SCC (Cri) 83

[13] Salmond: Jurisprudence' P.215(11th edition), quoted in Ambika Prasad Misra vs. State of U.P. (1980 RD 227) by Krishna Iyer, J.

[14] Mattulal vs. Radhe Lal, AIR 1974 SC 1956, Union of India and another vs. K.S. Subramanian, AIR 1976 SC 2433, and Commissioner of Income Tax, Bihar vs. Trilok Nath Mehrotra and others, (1998) 2 SCC 289

[15] AIR 1991 All. 114(F.B.)]

[16] [(1985)3 SCR 844

[17] AIR 1965 SC 845

[18] Dwarka Das Shrinivas vs. Sholapur Spg. Wvg. Co. Ltd., AIR 1954 SC 119

[19] C.N.Rudramurthy vs. K. Barkathulla Khan, (1998)8 SCC 275

relaxation of the rule of stare decisis. The "quotable in law", as held in Young vs. Bristol Aeroplane Co. Ltd.[11], is avoided and ignored if it is rendered, "in ignoratium of a statute or other binding authority". Same has been accepted, approved and adopted by the Apex Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. The above position was highlighted in State of U.P. vs. Synthetics and Chemicals Ltd. (supra). To perpetuate an error is no heroism. To rectify it is the compulsion of the judicial conscience[12].

"A decision does not lose its authority merely because it was badly argued, inadequately considered and fallaciously reasoned.[13]"

Confilicting decisions of the Supreme Court

The conflicting decisions of the Supreme Court is another grey area. Where there is a conflict between the decisions of two benches of different strength, the decision of larger bench would prevail[14]. Intransigent discord between the decisions of the apex court of the country having equal binding force leads to an embarrassing situation. The question arises which of the conflicting decisions should be followed? A Full Bench of Allahabad High Court in Ganga Saran vs. Civil Judge, Hapur[15], answered the question thus:

"..... The courts must follow the judgment which appear to them to state the law accurately and elaborately."

Circumstances destroying precedent

There may be circumstances destroying or weakening the binding force of precedent. There can be legislative nullification of judicial decision, as was done by Muslim Women (Protection of Rights on Divorce) Act, 1986 by which the ratio in Mohd. Ahmad Khan vs. Shah Bano Begum[16], was abrogated. Affirmation of reversal on different ground or a judgment rendered in ignorance of statute may also render it otiose. Even though per incuriam rule does not apply to apex court decisions, in case of conflict between co-ordinate benches of the Supreme Court, the decision subsequent in time shall prevail.

Finality of decisions

This adverts us to the finality of a judgment passed by the Supreme Court. In Sajjan Singh vs. State of Rajasthan[17], held that the doctrine of stare decisis may not strictly apply and no one can dispute the possition that the said doctrine should not be permitted to perpetuate erroneous decisions pronounced by the Apex Court to the detriment of general welfare. Earlier also, the view taken was that the Supreme Court is not bound by its own

decisions and may overrule its previous decisions[18]. The overruling may be either by express exposition or by not following them in a subsequent case[19].

Interest reipublicae ut sit finis litium

A final judgment passed by Supreme Court cannot be assailed in an application under Article 32 of the Constitution of India. The Superior Courts of Justice do not fall within the ambit of State or other authorities under Article 12. However, the Supreme Court to prevent abuse of its process and to cure a gross miscarriage of justice may re-consider its judgments in exercise of its inherent powers. The principle of finality is insisted upon not on the ground that a judgment given by the apex court is impeccable, but on the maxim Interest reipublicae ut sit finis litium, it concerns the State that there be an end of law suit. Article 137 confers the power to review its own judgments. It can re-open the final seal of decisions ex debito justitiae. It is now time that proceedural justice system should give way to the conceptual justice system and efforts of the law courts ought to be so directed[20]. The curative petitions can be entertained to achieve this purpose.

Theory of logical plenitude of law

A critic may say that a subordinate Judge is not bound to worship the golden idols of the past if they have feet of clay, but while a Judge may not revere, he is bound to follow such precedents as are binding upon him. Distinguish or follow is the pearl of wisdom. A Judge may not refuse to decide a case on the ground that law is silent or obscure. The theory of logical plenitude of law impels him to invent a rule where there is none. Since the Supreme Court is the Court of last speak, its enunciations of law are binding leaving aside ultra vires enunciations known as obiter[21].

Wise to revise

The twin attributes of a judge are consistency and predicability. Clinging to consistency is no virtue at the costs of denial or sacrilege of justice. Where justice is amiss, it is no folly to be wise to correct, review and revise. To err is human, so do judges. An infallible judge is yet to be born, as is epigrammatically said. It is always better to be right and stand corrected than be consistently and persisteently wrong. Perpetuating an error is no heroism. Who knows this better than a judge, be it of a subordinate court or summit court.

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[20] Rupa Ashok Hurra vs. Ashok Hurra and another, AIR 2002 SC 1771

[21] See also, Saiyada Mossarrat vs. Hindustan Steel Ltd., Bhilai Steel Plant, AIR 1989 SC 406; Municipal Corpn. of Delhi vs. Gurnam Kaur (1989)1 SCC 101 and A.R.Antulay vs. R.S.Nayak, AIR 1988 SC 1531, wherein held that well considered obiter of the apex court are binding

सूचना के अधिकार की संक्षिप्त रूप-रेखा

- अरूण कुमार गुप्ता
एच.जे.एस०
अपर जिला जज,
रायबरेली।

अपने देश में जनता के लिए वर्तमान शताब्दी के प्रारम्भ का एक अमूल्य उपहार है 'सूचना का अधिकार'। भारत का संविधान २६ जनवरी, १९५० को लागू हुआ। संविधान के अनुच्छेद १९(१-क) 'वाक् और अभिव्यक्ति की स्वतंत्रता' को प्रावधानित करता है। वाक् और अभिव्यक्ति की स्वतंत्रता प्रजातांत्रिक व्यवस्था की आधारशिला है। माननीय सर्वोच्च न्यायालय ने रामेश थापन बनाम मद्रास राज्य, ए.आई.आर. १९५० सु०को० पृष्ठ सं०-१२४ में यह मत व्यक्त किया है कि इस स्वतंत्रता के बिना जनता की तार्किक एवं आलोचनात्मक शक्ति को, जो प्रजातांत्रिक सरकार के समुचित संचालन के लिए आवश्यक है, विकसित करना सम्भव नहीं है।

प्रभुदत्त बनाम भारत संघ, ए.आई.आर. १९८२ सु०को० पृष्ठ सं०-६ में माननीय सर्वोच्च न्यायालय द्वारा यह व्यवस्था दी गयी है कि प्रेस की स्वतंत्रता में सूचनाओं तथा समाचारों को जानने का अधिकार (Right to know) भी शामिल है। राज्य प्रति चास्लता जोशी, ए.आई.आर. १९९९ सु०को० १३७९ में माननीय सर्वोच्च न्यायालय ने यह व्यवस्था दी गयी है कि जेल में विचाराधीन कैदियों के साक्षात्कार करने का अबाध (Unfettered) अधिकार नहीं है।

उपरोक्त विधि व्यवस्थाओं एवं इसके आधार पर उत्पन्न चर्चाओं को देखते हुए दिनांक ५ दिसम्बर, २००२ को सूचना की स्वतंत्रता का अधिनियम निरस्त करते हुए सूचना का अधिकार अधिनियम, २००५ पारित हुआ। यह सम्पूर्ण भारत में (जम्मू एवं काश्मीर राज्य को छोड़कर) १२ अक्टूबार, २००५ को लागू किया गया। शासन, प्रशासन एवं सार्वजनिक जीवन में पारदर्शिता बनाए रखने के लिए यह प्रभावशाली यंत्र है।

शासकीय गुप्त बात अधिनियम, १९२३ और अन्य किसी कानून के प्रावधानों के बावजूद इस अधिनियम के प्रावधान प्रभावी है। इस अधिनियम द्वारा भारत के सभी नागरिकों को सूचना प्राप्त करने का अधिकार प्रदान किया गया है।

'सूचना' से तात्पर्य अभिलेख, दस्तावेज, मेमो, ई-मेल, विचार, परामर्श, प्रेस रिलीज, परिपत्र, आदेश, लाग-बुक्स, संविदा, प्रतिवेदन कागजात बानगी, नमूने, किसी भी

रूप में रखी हुई इलेक्ट्रानिक सांख्यिकी सामग्री व निजी संकाय से सम्बन्धित ऐसी सूचना जो लोक प्राधिकरण द्वारा किसी भी कानून से प्राप्त की जा सकती है, सम्मिलित है। इसमें राजकीय पत्रावली पर की गयी टिप्पणी सम्मिलित नहीं है।

सूचना के अधिकार से अभिप्राय लोक प्राधिकरण के पास या उसके नियंत्रण की सूचना की पहुँच तक के अधिकार से है। इसमें निम्नलिखित अधिकार सम्मिलित है:-

कार्यों-दस्तावेजों, अभिलेखों का निरीक्षण करना, दस्तावेजों या अभिलेखों की प्रमाणित प्रतिलिपियाँ या सारांश का उद्धरण लेना, सामग्री के प्रमाणित नमूने यदि सूचना कम्प्यूटर व अन्य किसी तरीके से रखी गयी है तो डिस्केट्स, फ्लोपिज, टेप, वीडियो कैसेट या अन्य इलेक्ट्रानिक तरीके से प्रिन्ट आउट प्राप्त करना।

सूचना प्राप्त करने हेतु आवेदन-पत्र लिखित या इलेक्ट्रानिक माध्यम से अंग्रेजी या हिन्दी भाषा में शुल्क सहित प्रस्तुत किया जाना चाहिए, परन्तु जहाँ आवेदन-पत्र लिखित में नहीं दिया जा सकता है, लोक सूचना अधिकारी मौखिक रूप से आवेदन करने वाले व्यक्ति को उसे लिखकर देने में समस्त युक्तियुक्त सहयोग देगा। आवेदन-पत्र लोक सूचना अधिकारी या सहायक लोक सूचना अधिकारी को प्रस्तुत होगा। आवेदन-पत्र में वांछित सूचना का विवरण होना चाहिए, उसका कारण बताना आवश्यक नहीं है। गरीबी रेखा से नीचे रहने वाले व्यक्ति को छोड़कर सभी व्यक्ति नियमावली में निर्धारित शुल्क अदा करेंगें। सामान्यतया आवेदन-पत्र की तिथि से तीस दिनों में सूचना मिल जानी चाहिए, किन्तु किसी व्यक्ति के जीवन या उसकी स्वतंत्रता से सम्बन्धित सूचना ४८ घंटे में प्राप्त होनी आवश्यक है। यदि आवेदन-पत्र सहायक लोक सूचना अधिकारी को दिया गया है तो सूचना उपलब्ध कराने की अवधि ५ दिन अधिक होगी।

मानवीय अधिकारों के हनन के आरोपों के संबंध में सूचना केन्द्रीय सूचना आयोग या राज्य सूचना आयोग जैसी भी स्थिति हो, के पूर्व अनुमोदन पश्चात् ४५ दिन में सूचना उपलब्ध कराई जावेगी।

निर्धारित समय सीमा में सूचना उपलब्ध कराने में असफलता स्वतः अस्वीकृति मानी जावेगी। सूचना प्राप्त करने का आवेदन-पत्र निम्नलिखित कारणों के आधार पर निरस्त किया जा सकता है:-

१- यदि वह सूचना के प्रकटीकरण से छूट में शामिल है।

२- यदि वह सरकार के अतिरिक्त किसी व्यक्ति के कापीराइट का उल्लंघन करती है।

निम्नलिखित सूचना को देने की बाध्यता नहीं है:-

१- सूचना, जिसका प्रकटीकरण भारत की संप्रभुता एवं आखण्डता, राज्य की

सुरक्षा, बौद्धिक वैज्ञानिक या आर्थिक हितों, विदेशी संबंधों के लिए घातक हो या किसी अपराध को प्रेरित करे।

२- सूचना जिसका प्रकाशन न्यायालय या अधिकरण द्वारा स्पष्ट रूप से निषेध हो या जिसका प्रकटीकरण न्यायालय की अवमानना करता हो।

३- सूचना जिसके प्रकटीकरण से संसद या विधानसभा के विशेषाधिकार का हनन होता हो।

४- सूचना द्वारा वाणिज्यिक विश्वास, व्यापारिक गोपनीयता, बौद्धिक सम्पदा जिसका प्रकटीकरण तृतीय पक्ष की प्रतिस्पर्धी स्थिति को हानि पहुँचावे, परन्तु यदि सक्षम अधिकारी संतुष्ट हो जावे कि ऐसी सूचना के प्रकटीकरण की व्यापक जनहित में आवश्यकता है, तो सूचना का प्रकटीकरण किया जा सकता है।

५- सूचना जो किसी व्यक्ति को वैश्वासिक संबंध में प्राप्त हुई हो परन्तु यदि सक्षम अधिकारी संतुष्ट हो जावे कि ऐसी सूचना के प्रकटीकरण की व्यापक जनहित में आवश्यकता है, तो सूचना का प्रकटीकरण किया जा सकता है।

६- विदेशी सरकार से प्राप्त सूचना।

७- सूचना जिसका प्रकटीकरण किसी भी व्यक्ति के जीवन या शारीरिक सुरक्षा को खतरे में डाले या विधि के प्रवर्तन या सुरक्षा प्रयोजनों के लिए दी गयी सहायता या सूचना के स्रोतों की पहचान करावे।

८- सूचना, जो अन्वेषण प्रक्रिया, अपराधियों की गिरफ्तारी या अभियोजन में अवरोधक हो।

९- मंत्रिमण्डलीय कागजात मय मंत्रिपरिषद, सचिवों एवं अन्य अधिकारियों के मध्य हुए विचार-विमर्श का अभिलेख लेकिन मंत्रिपरिषद के निर्णय, ऐसे निर्णय लेने के कारण, निर्णय के लिए आधारभूत सामग्री को निर्णय के पश्चात् एवं मामले के पूर्ण या समाप्त हो जाने के बाद सार्वजनिक करना होगा लेकिन अधिनियम में दी गयी छूट से सम्बन्धित प्रकरण प्रकट नहीं किये जाऐंगे।

१०- वैयक्तिक सूचना, जिसके प्रकटीकरण का किसी भी लोक क्रिया-कलाप से कोई संबंध न हो या जो किसी व्यक्ति की एकान्तता में अनुचित हस्तक्षेप करें, लेकिन यदि लोक सूचना अधिकारी या अपील अधिकारी संतुष्ट हो

जाये कि ऐसी सूचना का प्रकटीकरण किया जा सकता है एवं जो सूचना संसद या विधानसभा को देने से मना नहीं की जा सकती है उसको देने से मना नहीं किया जायेगा।

लोक प्राधिकरण ऐसी सूचना जिसका प्रकटीकरण जनहित में सुरक्षित हितों के महत्व से बढ़कर मानता है तो सरकारी गोपनीयता अधिनियम के अर्न्तगत छूटों के बावजूद सूचना देने की स्वीकृति प्रदान कर सकता है।

निम्नलिखित संगठन इस अधिनियम की सीमा से बाहर है:-

१- असूचना ब्यूरो
२- मंत्रिमण्डल सचिवालय की अनुसंधान और विश्लेषण शाखा
३- राजस्व आसूचना निदेशालय
४- केन्द्रीय आर्थिक आसूचना ब्यूरो
५- प्रवर्तन निदेशालय
६- आपक नियंत्रण ब्यूरो
७- विमानन अनुसंधान ब्यूरो
८- विशेष सीमांत बल
९- सीमा सुरक्षा बल
१०- केन्द्रीय रिजर्व पुलिस बल
११- भारत-तिब्बत सीमा पुलिस बल
१२- केन्द्रीय औद्योगिक सुरक्षा बल
१३- राष्ट्रीय सुरक्षा गार्ड
१४- असम राइफल्स
१५- विशेष सेवा ब्यूरो
१६- विशेष शाखा सी०आई०डी०
१७- अपराध शाखा सी०आई०डी०, सी०बी० दादर एवं नगर हवेली
१८- लक्षद्वीप की पुलिस की विशेष शाखा
१९- केन्द्रीय व राज्य सरकार की गुप्तचर शाखा को भी इस अधिनियम से बाहर रखा गया है।

इस अधिनियम के लागू होने से समाज में एक क्रान्ति आ गयी है, जिसका परिणाम शासन के व अन्य कार्यों में पारदर्शिता का हो जाना है। न्यायालयों से सम्बन्धित सूचना के अधिकार सम्बन्धी पृथक नियमावली उच्च न्यायालय द्वारा निर्मित की गयी है, उसी नियमावली के तहत सूचना निर्धारित रू०५००/- शुल्क प्रदान करके प्राप्त की जा सकती है।

सम्पूर्ण अधिनियमों का उल्लेख इस संक्षिप्त लेख में संभव नहीं है, किन्तु जन सामान्य को सामान्य जानकारी हेतु इस लेख को सम्पादित किया जा रहा है।

"लोक हितकारी वादी में न्यायालय की सक्रियता और शक्ति प्रथकक्करण संवैधानिक अवधारणा का द्वन्द"

- सुरेश सिंह यादव,
अपर जिला एवं सत्र न्यायाधीश,
शाहजहांपुर।

न्यायपालिका को लेकर संसद में हालिया बहसों से ऐसा लगता है कि जन प्रतिनिधि न्यायपालिका की अतिसक्रियता से बेहद चिन्तित है और उनकी मुखर होती चिन्ताओं ने लगभग आलोचनात्मक रूप से कहना प्रारम्भ कर दिया है कि न्यायिक पुर्नविलोकन और लोकहित कारी वादों में न्यायपालिका की अतिसक्रियता ने कुछ नवीनतम सिद्धान्त भी प्रतिपादित कर दिये हैं, जिनके लिये संविधान में कोई स्पष्ट आधार नहीं है। यदि यह प्रवृत्ति रोकी नहीं जाती है तो इसके गम्भीर परिणाम होंगे, चाहे इसके उद्देश्य कितने ही उत्तम क्यों न हों। क्योंकि :-

(अ) इसके कारण भ्रम और अनिश्चितता होगी और यह न्यायालयों के लिये भी आत्मचिन्तन का विषय होना चाहिए कि उनकी यह शक्ति भी अनिश्चितता और भ्रम को बढ़ा रही है।

(ब) अब विधान मण्डल और न्यायपालिका सिद्धान्ता या न्यायिक सक्रियता के माध्यम से एक-दूसरे को नीचा दिखाने जैसा प्रयास करते नजर आ रहे है जो कड़वाहट बढ़ा रहे है।

(स) इस बात की प्रत्याभूति नहीं है कि इन नवीन सिद्धान्तों के विस्तार की सीमा क्या होगी, क्योंकि अंतिम निर्वचन की अधिकारिता न्यायपालिका परिणामतः संवैधिानिक सिद्धान्त की अवकारिता भी ग्रहण करती प्रतीत हो रही है, जबकि संविधान का अनुच्छेद ३६८ विर्निदिष्ट रूप से यह शक्ति विधायी तंत्र को सौंपता है।

(२) लोक हितकारी वाद अब लोकहित के प्रति न्यायिक पुर्नविलोकन की शक्ति अपनी सृजनात्मक प्रयोग से हटकर चलाने की अतिसक्रियता की तरफ बढ़ रहा है जो शक्ति प्रथकक्करण के सिद्धान्त में मूल उद्देश्य और भावना से भटकाव है।

(३) बढ़ती लोकहितकारी याचिकायें और इनके अतिसक्रियता की वृत्ति से न्यायपालिका भी उन बुराइयों से संक्रमित हुई प्रतीत होने लगी है जिनके चलते कार्यपालिका और विधायिका असफलता का पर्याय प्रमाणित हुई है।

(४) अतिसक्रियता का मनमाना पन चाहे वह न्यायपालिका का क्यों न हो निश्चित रूप से "चेक एण्ड बैलेन्स" के सिद्धान्त पर कुठाराघात है जो संविधान की भावना के विपरीत

है। क्योंकि इससे शक्ति प्रथकक्करण की संवैधानिक अवधारणा को क्षति पहुंच रही है।

(५) अब न्यायालय उन मामलों में भी रूचि प्रदर्शित करने लगे हैं जो उनके क्षेत्राधिकार में ही नहीं है, जिससे अनावश्यक रूप से शासन से अंगों में भटकाव के बीज पड़ रहे हैं और इस सक्रियता की जवाबदेही के लिये न्यायालय के दायित्व का निर्धारण करने की गूंज विगत दिनों संसद में भी सुनाई पड़ी है। न्यायिक तंत्र पर नियंत्रण की आवश्यकता को अपरिहार्य बताया जाने लगा है।

(६) यह सही है कि न्यायापालिका में सुधार की बहुत गुंजाइस है और लम्बित मुकदमों की सं० को तर्क देकर यह कहा जा सकता है कि यह अपना मुख्य कर्तव्य यानी नागरिकों को न्याय देने की विफलता के कगार पर पहुंच गयी है। यह भी आक्षेप लगाया जा रहा है कि न्यायालयों में लम्बित वादों के निस्तारण की समय, श्रम और व्यय की लम्बी एवं दुरूह प्रक्रिया ने न्यायालयों की क्षमता एवं दक्षता पर आशंका उत्पन्न कर रही है लेकिन आक्षेप करते समय यह विस्मृत कर दिया जाता है कि इसकी पृष्ठभूमि में कार्यपालिका की सक्रियता और स्वेच्छाचारिता भरे आदेशों से जनि विवादों की बहुलता तथा न्यायतंत्र में उपलब्ध संसाधनों का अभाव एक बड़ा कारण है। उदाहरणार्थ ३०.६.२००८ को उ०प्र० में ५४०, महाराष्ट्र में ३७८, म०प्र० में २६२, बिहार में २४३, गुजरात में १६० पदउ अधीनस्थ न्यायालयों में रिक्त थे। (दैनिक हिन्दुस्तान टाइम्स ०६.१२.२००८) इसके साथ ही जिस व्यवस्था पर केवल ०.०७८ प्रतिशत की धनराशि खर्च हो रही हो तो क्या वह संसाधन युक्त कही जायेगी, यदि नहीं तो केवल जज्बा ही मानक तय करेगा परिणाम नहीं।

(७) लोकतंत्र में विधायिका सर्वोपरि है इसमें कोई शक नहीं है, लेकिन इस शक्ति सम्पन्नता का श्रोत संविधान है ओर न्यायपालिका को विधायिका का कोन सा फैसला संविधान का उल्लंघन करता है यह अधिकार संविधान ने ही दिया है। बुनियादी सवाल आम नागरिकों के मौलिक अधिकारों का है जिसका लोकतंत्र की संस्थाओं (कार्यपालिका तथा विधायिका) के ठीक से काम काज न करने की वजह से हनन हो रहा है। जनप्रतिनिधियों की चिन्ता के पीछे वस्तुतः संविधान की मूल भावना की रक्षा के आग्रह उतना नहीं है जितना अदालत के ताजा फैसलों से हुई असुविधा है।

(८) स्वतंत्रोत्तरकाल साक्षी है कि सामाजिक भ्रष्टाचार, राजनैतिक अपराधीकरण, न्यायिक सुधारी का अभाव शीघ्र सस्ता और सुगम न्याय मिलने की निराशा आदि समस्याओं ने व्यवस्था को कुंडित किया है। लोक कल्याण ओर संवैधानिक निर्देशों के प्रति आवश्यक जागरूकता का परिचय नहीं दिया है और कार्यपालिका राजनैतिक संकल्पों के हित संवर्धन का साधन हो गई। राजनैतिक इच्छाशक्ति की कमी और और कार्यपालिका की अर्कमण्यता ने यदि संविधान नहीं तो हमें असफल प्रमाणित किया है, लेकिन इस निराशा के

गहन अंधकार में आशाजनक तथ्य यह है कि भारतीय न्याय तंत्र ने वर्तमान में राजनीतिक उथल-पुथल के वातावरण में भी अपनी संवैधानिक भूमिका का निर्वहन किया है।

(९) कदाचित यह चिन्तायें इसलिये भी उत्पन्न हुई है क्योंकि न्यायिक तंत्र में विधायिक और कार्यपालिका की निरंकुशलताओं को किसी सीमा तक नियंत्रित किया जिससे नागरिकों का विश्वास न्यायिक तंत्र में न केवल बना रहा बल्कि और प्रगाढ़ हुआ है, क्योंकि न्यायिकतंत्र ने अपना संवैधानिक प्रतिबद्धता से प्रेरित होकर ही "लोकस स्टैण्डाई" के सूत्र में लोक समस्याओं और हितों के परिप्रेक्ष्य में विधिक जटिलताओं में शिथिलता की मान्यता की जनहित कारी खोज की है जो न्यायपालिका की मानवीय समस्याओं के प्रति प्रतिबद्धता और जागरूकता का परिचायक है।

(१०) तेजी से बदलते सामाजिक परिवेश में न्यायपालिका से अपेक्षायें बढ़ी हैं और सभी को बराबरी के स्तर पर सस्ता, सुलभ न्याय देना न्यायालय ने अपनी प्रतिबद्धता स्वीकार करते हुए लम्बित कारी वादों की अवधारणा को मूर्तिमान किया है तथा लोकहितकारी वादों की सफलताओं ने न्याय निर्णय के क्षेत्र को क्रान्तिकारी आयाम दिया है और यह सफलता पूर्वक स्थापित किया गया है। भारत में विधि का शासन है व्यक्तियों का नहीं। न्यायपालिका ने कार्यपालिका के अत्याचारी ओर लोकहित विरोधी विधायन के विरूद्ध व्यक्ति के अधिकारों की रक्षा की है और मनमाने पन को मर्यादा का पाठ पढ़ाया है।

(११) न्यायालयों ने लोकहितकारी वादों के माध्यम से जनमानस में जन्मी हताशा तथा न्यायालयों की क्षमता के प्रति आशंकाओं को निर्मूल किया है। निरन्तर सफल हुई विधायिका और कार्यपालिका की तुलना में न्यायपालिका जनसामान्य की आशाओं का केन्द्र प्रमाणित हुआ है। समय साक्षी है कि आरक्षण, आन्ध्रप्रदेश, तमिलनाडु, प्रदेशों के मध्य कावेरी नदी जल विवाद, गुजरात के बांध की ऊंचाई, दुर्दान्त वीरप्पन के विरूद्ध कार्यवाही और दिल्ली में पर्यावरण को शुद्ध करने के लिये प्रदूषण फैलाने वाले उद्योगो को बाहर करने व सी.एन.जी. का उपयोग न्यायिक तंत्र के हस्तक्षेप से ही सम्भव हुआ है, जबकि इनके समाधान में या तो कार्यपालिका या विधायिका असफल रही या चिन्तन भी नहीं कर सकी।

(१२) लोकहितकारी वादों में अपनी सक्रियता से संविधान द्वारा निर्धारित नागरिकों को सस्ता, सुलभ और त्वरित न्याय की विधायिका दोनों का श्रेष्ठ सम्पूरक होना सार्थक किया है तथा इस सक्रियता को कार्यपालिका या विधायिका से प्रतिबद्धता की श्रेणी में रखना जनहित को विस्मृत करना है। और इस तथ्य को न्यायतंत्र की सक्रियता को शक्तिप्रथक्करण के संवैधानिक अवधारणा पर क्षति निर्धारित करने वालों को विस्मृत नही करना चाहिए।

PROTECTION TO JUDICIAL OFFICERS AGAINST FIR, ARREST & PROSECUTION ETC.

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SUB-TOPICS

1.	The Judicial Officers' Protection Act, 1850	2.	The Judges (Protection) Act, 1985
3.	The Judges (Inquiry) Act, 1968.	4.	Conduct of Judicial Officers in and out of Court
5.	Protection to Judicial Officers against Arrest & Prosecution---- When Available?	6.	Acting in good faith --- when to be inferred?
7.	FIR & Arrest of Judicial Officers-- Pre Conditions?	8.	Powers of Judicial Officers u/s. 228 IPC & Sec. 345 Cr.P.C.
9.	Use of unfair means by Judicial Officer in LL.M. Examination--- Protection not available.	10.	Magistrate issuing NBW against acquitted accused-- Not entitled toprotection.
11.	Judicial Officer's Prosecution for defamatory comments on Transfer Application & Sec. 197 Cr.P.C.	12.	No protection under the 1850 Act when not acting judicially

1. The Judicial Officers' Protection Act, 1850

The Judicial Officers' Protection Act, 1850 contains only one section and is aimed at providing protection to the judicial officers acting in **good faith** in their **judicial capacity**. Sec. 1 of the 1850 Act reads as under---

"Sec. 1--- Non liability to suit of officers acting judicially, for official acts done in good faith, and of officers executing warrants and orders—No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction : Provided that he at the time in good faith, believed himself to have jurisdiction to do or order the act complained of; and no officer of any Court or other person, bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of Peace, Collector or other person acting judicially shall be liable to be sued in any

Civil Court, for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same.

2. The Judges (Protection) Act, 1985

Parliament passed The Judges (Protection) Act, 1985 to provide certain more protections to Judges and Magistrates in addition to what was already available to them under The Judicial Officers' Protection Act, 1850. Certain important provisions contained under the Judges (Protection) Act, 1985 are as under---

"Sec. 3--- Additional Protection to Judges--- (1) Notwithstanding anything contained in any other law for the time being in force and subject to the provisions of sub-sec. (2), no Court shall entertain or continue any civil or criminal proceeding against any person who is or was a Judge for any act, thing or word committed, done or spoken by him when, or in the course of, acting or purporting to act in the discharge of his official or judicial duty or function.

(2) Nothing in sub-sec. (1) shall debar or affect in any manner the power of the Central Government or the State Government or the Supreme Court of India or any High Court or any other authority under any law for the time being in force to take such action (whether by way of civil, criminal, or departmental proceedings or otherwise) against any person who is or was a Judge."

"Sec. 4--- Saving—The provision of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force providing for protection of Judges."

3. The Judges (Inquiry) Act, 1968

The Judges (Inquiry) Act, 1968 has been enacted by the Parliament to regulate the procedure for the investigation and proof of the misbehaviour or incapacity of a Judge of the Supreme Court or of a High Court and for the presentation of an address by Parliament to the President and for matters connected therewith. This Act does not cover the matter of protection to the Judicial Officers of the subordinate judiciary and exclusively deals with the matters like misbehaviour or incapacity of the Judges of the Supreme Court and High Courts.

4. Conduct of Judicial Officers in and out of Court

Judicial Officers are bound to conduct themselves in a dignified manner. Judicial Officers cannot have two standards, one in the court and another outside the court. They must have only one standard of rectitude, honesty and integrity. They cannot act even remotely unworthy of the office they occupy. See---- **Daya Shankar vs. High Court of Allahabad, AIR 1987 SC 1469**

5. Protection to Judicial Officers against Arrest & Prosecution---- When Available?

(i) Where an Executive Officer/Sub-divisional Officer was holding two offices----one an Executive Office as a Sub-divisional Officer and other a Judicial Office as a Sub-divisional Magistrate and had ordered the arrest of a person for an offence u/s. 436 IPC but the proceedings were closed without any trial and thereafter the aggrieved person filed a suit for damages against Sub-divisional Officer, the Supreme Court, interpreting the scope of Sec. 1 of the Judicial Officers' Protection Act, 1850, held as under----

"In view of the admission made by the SDO that he had not taken cognizance as a Magistrate of the offence against the plaintiff before ordering his arrest, and his main defence that he had acted under the direction of his Superior Executive Officer, he must be held to have acted in his executive capacity and not in discharge of his duties as a Magistrate and hence was not entitled to protection under the 1850 Act. The Judicial Officers Protection Act, 1850 protects a judicial officer only when he is acting in his judicial capacity and not in any other capacity. If the act done or ordered to be done in the discharge of judicial duties is within his jurisdiction, the protection is absolute and no inquiry will be entertained whether the act done or ordered to be done was erroneous, irregular or even illegal, or was done or ordered without believing in good faith, that he had jurisdiction to do or order the act complained of. If the act done or ordered to be done is not within the limits of his jurisdiction, the Judicial Officer acting in the discharge of his judicial duties is still protected, if at the time of doing or ordering the act complained of, he in good faith believed himself to have jurisdiction to do or order the act. The expression "jurisdiction" does not mean the power to do or order the act impugned, but generally the authority of the Judicial Officer to act in the matter." See--- **Anowar Hussain vs. Ajoy Kumar Mukherjee, AIR 1965 SC 1651**

(ii) In the case noted below an Additional Subordinate Jude dismissed the suit of the plaintiff/appellant and decreed that of the then defendant. During the pendency of the decree holder's petition for execution of the decree and that of the appellant for its stay, the plaintiff/appellant issued a notice to the judge inter alia alleging that in his judgment he had created new facts by making third version without evidence; that he had intentionally, with bad faith and maliciously, distorted the existing oral and documentary evidence; that he had maintained different standards in the same judgment; that he had side-tracked the binding direct decisions of the High Courts and the Supreme Court; and that in the circumstances he could be said to have acted with mala fide exercise of powers without jurisdiction and therefore, he was liable for

damages for the loss incurred by the appellant and for the injury. The Supreme Court, interpreting the provisions of Sec. 1, Judicial Officers' Protection Act, 1850 held as under---

"If the judicial officer is found to have been acting in the discharge of his judicial duties, then, in order to exclude him from the protection of Sec. 1 of the Judicial Officers Protection Act the complainant has to establish that--- **(i) the judicial officer complained against was acting without any jurisdiction whatsoever; and (ii) he was acting without good faith in believing himself to have jurisdiction.** The expression "jurisdiction" in this section has not been used in the limited sense of the term, as connoting the 'power' to do or order to do the particular act complained of, but is used in a wide sense meaning 'generally the authority of the judicial officer to act in the matters'. Therefore, if the judicial officer had the general authority to enter upon the enquiry into the cause, action, petition or other proceedings in the course of which the impugned act was done or ordered by him in his judicial capacity, the act, even if erroneous, will still be within his 'jurisdiction', and the mere fact that it was erroneous will not put it beyond his 'jurisdiction'. Error in the exercise of jurisdiction will not put in beyond his 'jurisdiction'. Error in the exercise of jurisdiction is not to be confused with lack of jurisdiction in entertaining the cause of proceeding. Initiation of criminal contempt proceedings against the appellant was held proper by the Supreme Court. See--- **Rachapudi Subba Rao vs. Advocate General, A.P., (1981) 2 SCC 577"**

6. Acting in good faith---- when to be inferred?

Word "good faith" has been defined in Sec. 52 of the IPC which reads as under-----

"Sec. 52 IPC—'Good faith'—Nothing is said to be done or believed in 'good faith' which is done or believed without **due care and attention."**

7. FIR & Arrest of Judicial Officers----- Pre Conditions?

The leading Supreme Court Case on the subject is **Delhi Judicial Service Association vs. State of Gujarat, (1991) 4 SCC 406- Three Judge Bench.** The facts of this case are as under------

"Soon after the posting of 'P' as Chief Judicial Magistrate at Nadiad in the State of Gujarat in October 1988, he found that the local police was not cooperating with the courts in effecting service of summons, warrants and notices on accused persons as a result of which the trials of cases were delayed. He made complaint against the local police to the District Superintendent of Police and forwarded a copy of the same to the Director General of Police but nothing concrete happened. On account of these

complaints, 'S', the then Police Inspector Nadiad, became annoyed with the Chief Judicial Magistrate and withdrew constables posted in the CJM Court. When 'P' directed the police to drop the criminal cases against certain persons who had caused obstruction in judicial proceedings on their tendering unqualified apology, 'S' reacted strongly to the direction and made complaint against the CJM to the Registrar of the High Court through District Superintendent of Police. On September 25, 1989, 'S' met the CJM in his chamber to discuss a case where the police had failed to submit charge-sheet within 90 days. During discussion 'S' invited the CJM to visit the police station to see the papers and further assured that his visit would mollify the sentiments of the police officials. Accordingly, at about 8.40 p.m. 'S' sent a police jeep at the residence of 'P and on that vehicle 'P went to the police station. When he arrived in the chamber of 'S' in the police station he was forced to consume liquor and on his refusal he was assaulted. He was handcuffed and tied up with a thick rope by the Police Inspector, a Sub-Inspector, a Head Constable and a Constable. This was deliberately done in defiance of Police Regulations and Circulars issued by the Gujarat Government and the law declared by Supreme Court in Prem Shankar Shukla vs. Delhi Administration, (1980) 3 SCC 526. A panchnama showing the drunken state of 'P' was prepared on the dictation of 'S' and was signed by 'S' as well as two panchas—a Mamlatdar and a Fire Brigade Officer. Thereafter, 'P' was taken to Civil Hospital handcuffed and tied with thick rope where he was deliberately made to sit outside in the verandah on a bench for half an hour to enable the police to have a full view of the CJM in that condition. A press photographer was brought on the scene and the policemen posed with 'P' for the press photograph. The photographs so taken were published in newspapers. A belated justification for this was pleaded by the notice that 'P' desired to have himself photographed in that condition. A request made by 'P' in the casualty ward of the Civil Hospital, to the doctors to contact the District Judge and inform him about the incident was not allowed by 'S' and other police officers. On examination at the hospital, the body of 'P' was found to have a number of injuries. His blood was taken and chemical examination conducted without following the procedure prescribed by the Rules and Circulars issued by the Director of Medical Services, Gujarat. The Chemical Examiner submitted the report holding that the blood sample of 'P' contained alcohol on the basis of the calculation made by him in the report, though he later clearly admitted that he had never determined the quantity of liquor by making calculation in any other case before. At the initial stage only one case was registered against 'P' by the police under the Bombay Prohibition Act, but when lawyers met 'S' for securing release of 'P' on bail, the offence being

bailable, 'S' registered another case u/ss. 332 and 506 IPC in order to frustrate the attempt to get 'P' released as offence u/s. 332 IPC is non-bailable. The then District Superintendent of Police did not take any immediate action in the matter; instead he created an alibi for himself alleging that he had gone elsewhere and stayed in a Government Rest House there. The register at the Rest House indicating the entry regarding his stay was found to have been manipulated subsequently by making interpolation. All these facts were found established by a then sitting Judge of Allahabad High Court who was appointed as Commissioner by the Supreme Court to hold inquiry and submit report after the Court took cognizance of the matter and issued notices to the State of Gujarat and other police officers pursuant to the writ petitions under Article 32 filed and telegrams sent to the Court from all over the country by Bar Councils, Bar Associations and individuals for saving the dignity and honour of the judiciary.

Directions issued by Supreme Court-----

(A) **A Judicial Officer should be arrested for any offence under intimation to the District Judge or the High Court as the case may be.**

(B) **In case of necessity for immediate arrest of a Judicial Officer only a technical or formal arrest may be effected.**

(C) **The fact of such arrest should be immediately communicated to the District and Sessions Judge of the concerned District and the Chief Justice of the High Court.**

(D) **The Judicial Officer so arrested shall not be taken to a police station, without the prior order or directions of the District and Sessions Judge of the concerned district, if available.**

(E) **Immediate facilities shall be provided to the Judicial Officer for communication with his family members, legal advisers and Judicial Officers, including the District and Sessions Judge.**

(F) **No statement of a Judicial Officer who is under arrest be recorded nor any panchnama be drawn up nor any medical tests be conducted except in the presence of the Legal Adviser of the Judicial Officer concerned or another Judicial Officer of equal or higher rank, if available.**

(G) **Ordinarily there should be no handcuffing of a Judicial Officer.**

Note: The relevant Circular Letters of the Allahabad High Court and the G.Os. issued by Central Government for strict observance of the directions of the Apex Court in the abovenoted case are as under----

(i) **C.L. No. 54/IX-f-69/Admn. 'G' dated October 22, 1992**

(ii) **C.L. No. 190117/4/90-Jus. Dated 26.4.1990/3.5.1990**

(iii) **Central Government's G.O. No. VII-11017/15/88-G.P.A. II, dated 4.10.1988**

(iv) **Central Government's Letter No. 19017/3/92-Jus., dated 3.4.1992/23.4.1992**

(v) **Central Government's Letter No. VI-25013/42/89-G.P.A. II, dt. 31.3.1992**

8. Powers of Judicial Officers u/s. 228 IPC & Sec. 345 Cr.P.C.

In case any person intentionally offers any insult or causes any interruption in the judicial functioning of the court, the presiding officer may proceed summarily against such person u/s. 345 Cr.P.C. and may punish him u/s. 228 of the IPC.

9. Use of unfair means by Judicial Officer in LL.M. Examination-Protection not available

Where a Munsif Magistrate had appeared in LL.M. examination held by the Aligarh Muslim University and was caught by the invigilator using unfair means and was first suspended and after departmental enquiry by the Allahabad High Court, was removed from service, the Supreme Court held that judicial officers cannot have two standards, one in the Court and another outside the Court. They must have only one standard of rectitude, honesty and integrity. They cannot act even remotely unworthy of the office they occupy. A judicial officer, who has been found guilty of using unfair means in the LL.M. Examination, is undoubtedly not a fit person to be retained in judicial service and as such the Supreme Court refused to extend the benefit of Sec. 1 of the Judicial Officers' Protection Act, 1850 to the delinquent Munsif Magistrate. See.---- **Daya Shankar vs. High Court of Allahabad, AIR 1987 SC 1469**

10. Magistrate issuing NBW against acquitted accused-Not entitled to protection

Where an accused was convicted by the trial court but on appeal was acquitted by the Allahabad High Court and even after the order of the High Court having been notified to the Judicial Magistrate concerned, he issued NBW against the acquitted accused and got him arrested, it was held by the Allahabad High Court that a committal Magistrate complying with an order certified u/s. 425 does not act under that provision but only performs a ministerial and not a judicial or a protected executive function. If he negligently signs arrest warrants against acquitted persons he is not protected

by **Sec. 1 Judicial Officers' Protection Act, 1850.** Even if he does so out of the negligence of his subordinate he will still be liable for damages. He will not be relieved of his liability by the failure to implead that subordinate in the suit for damages, even if the latter can be considered a joint tortfeasor. See--- **State of U.P. vs. Tulsi Ram, AIR 1971 All 162**

11. Judicial Officer's Prosecution for defamatory comments on Transfer Application & Sec. 197 Cr.P.C.

(A) Where the appellant, a Munsif Magistrate by a letter to the District Judge submitted his remarks against the allegations made by the respondent, an advocate in a transfer petition for transfer of a suit pending in appellant's Court and while so doing called the respondent **'rowdy'**, **"a big gambler"** and **"a mischievous element"** and on this letter being read in open court the respondent filed criminal complaint against the appellant without the sanction contemplated u/s. 197 Cr.P.C., it was held that the act complained of had no connection with the discharge of official duty by the appellant. Hence Sec. 197 Cr.P.C. was not in any way attracted. See--- **B.S. Sambhu vs. T.S. Krishnaswamy, AIR 1983 SC 64**

(B) **Protection to Judges u/s. 77 IPC**---- Nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.

12. No protection under the 1850 Act when not acting judicially

Where some record sent by the court of Magistrate to a Sarpanch acting under U.P. Panchayat Raj Act, 1947 got lost and on enquiry against the Sarpanch, plea was taken by him regarding protection under the provisions of the Judicial Officers Protection Act, 1850, it was held by the Allahabad High Court that **since the Sarpanch was not acting as a court or judicial tribunal,** therefore he was not entitled to any protection u/s. 1 of the 1850 Act. See---- **Indra Pati Singh vs. State of U.P., 1986 All.L.J. 1258 (All)**

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DISCUSSIONS ON THE PROVISIONS OF RIGHT TO INFORMATION ACT, 2005

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CONTENTS

1. **Object behind the enactment of RTI Act, 2005**---- Mal-administration, mismanagement, corruption and delays are some of the melodies plaguing the public offices which a common person has to face in his daily life. With a view to curb corruption and mal-administration etc. in the public offices and to promote transparency and accountability amongst the public officers, the Parliament enacted a new legislation in the year 2005 namely, The Right To Information Act, 2005. Prior to the passage of the RTI Act, 2005 and because of the stringent provisions contained in the **Official Secrets Act, 1923**, it was almost impossible for a citizen to obtain any information regarding the official working and performance of a public officer holding a public office. The RTI Act, 2005 not only promotes transparency and accountability amongst the public servants regarding their performances in their public offices but also ensures that the **concept of rule of law** is not subverted and foiled. This new legislation has brought about the sense of devotion towards duty and tendency to adhere to the laws and norms amongst the public servants in discharge of their official duties as they have been made to realize under this Act that any willful breach of the laws, norms and the official duties on their part may invite punitive action against them under the provisions of the RTI Act, 2005. See---- **Jitendra Singh vs. State of U.P., 2008 (2) AWC 2067 (All)**

2. **Composition of various authorities under the RTI Act, 2005**---- Various authorities constituted under the RTI Act, 2005 are as under----

(1) **Central Information Commission**—Sec. 12 of the RTI Act, 2005 0provides for the constitution of a Central Information Commission to be headed by the Central Information Commissioner (CIC). Such Commission has already been constituted and made functional with its office in New Delhi, the capital of the country. Former union cabinet secretary Sri Wazahat Ullah is presently heading the Central Information Commission as its Chief Information Commissioner (CIC).

(2) **State Information Commission**—Sec. 15 of the RTI Act, 2005 provides for the Constitution of State Information Commission in every State with the Chief Information Commissioner (SIC) as its head. Such a State Information Commission has already been constituted and notified in the State of U.P. with its head office at Lucknow. There are several other Information Commissioners appointed and notified by the Govt. of U.P. to discharge their duties as per the provisions of the RTI Act, 2005.

(3) **First Appel (Sec. 19 of the RTI Act, 2005)**---- Generally, Head of Departments (HOD) of various public offices in U.P. have been notified as first appellate authorities u/s. 19(1) of the RTI Act, 2005 against the orders passed by the CPIOs. Limitation period for preferring an appeal is 30 days

from the date of order of the CPIO or from the date of deemed rejection.

(4) **Second Appeal (Sec. 19(3) of the RTI Act, 2005)----** A second appeal u/s. 19(3) of the RTI Act, 2005 shall lie to the CIC or SIC from the date when the decision should have been made. The limitation period is 90 days from the date of the decision of the first appellate authority.

(5) **Central Public Information Officer (CPIO)** – Sec. 5(c) of the RTI Act, 2005.

3. **Rules and regulations to give effect to the provisions of the RTI Act, 2005**----- Various Rules and Regulations formulated by the Central Government, the Government of U.P. and the Allahabad High Court to carry out the provisions of the RTI Act, 2005 are enumerated as under.....

(1) **The Right to Information (Regulation of Fee and Cost) Rules, 2005.**

(2) **Uttar Pradesh Right to Information (Regulation of Fee and Cost) Rules, 2006.**

(3) **U.P. State Information Commission (Procedure of Appeal) Rules, 2006**

(4) **The Central Information Commission (Appeal Procedure) Rules, 2005.**

(5) **Allahabad High Court (Right to Information) Rules, 2006.**

(6) **Different G.Os. and Notifications issued by Govt. of U.P.**

4. **Extent of right to seek information under the RTI Act, 2005**--- Sec. 3 of the RTI Act, 2005 provides that subject to the provisions of the Act, 2005, any citizen has got a right to have any information from any public office of the Central Government or the State Governments. Sec. 8 & 9 provide for certain prohibitions with regard to the furnishing of certain information. Any person, subject to the bar contained U/s. 8 & 9 of the Act, 2005, may seek any information from any public office by moving an application in writing to the CPIO. **Sec. 5** of the Act mandates every public authority to appoint a CPIO in his office to provide information to the applicants under the Act, 2005. **Sec. 22 of the Act, 2005 provides that the provisions of this Act shall have overriding effect over the provisions of the Official Secrets Act, 1923 or any other contrary law for the time being in force.** This means that subject to the exemptions contained in Sec. 8 & 9 of the RTI Act, 2005, any contrary provisions contained in the **Official Secrets Act, 1923** or in any other general or special enactment will not come in the way of furnishing information to an applicant under the provisions of the RTI Act, 2005.

Extent of "information" as defined u/s. 2(f) of the RTI Act, 2005-- -- The information required to be supplied by a public authority to a citizen on request are not confined to the information mentioned in Sec. 4. That Section only casts certain obligations on public authorities for maintaining records and publishing the particulars mentioned therein. That does not amount to laying down that only those information which the public authority are required to publish u/s. 4(b) alone need be supplied to the citizens on request. The information mentioned in Sec. 3 is not circumscribed by Sec. 4 at all. Obligations laid down u/s. 4 are to be compulsorily performed apart from the other liability on the part of the public authority to supply information available with them as defined under the Act subject of course to the exceptions laid down in the Act. The information detailed in Sec. 4 has to be compulsorily published by the public authority on its own without any request from anybody. Further, there is no indication anywhere in the Act to the effect that the 'information' as defined in Sec. 2(f) is confined to those mentioned in Sec. 4 of the Act. Therefore, it cannot be held that only information mentioned in Sec. 4 need be supplied to citizens on request. See--- Canara Bank vs. The Central Information Commission, Delhi, 2007 (5) ALJ (NOC) 916 (Kerala)

When the RTI Act, 2005 makes the same applicable to 'public authorities' as defined therein there is need to give a restricted meaning to the expression 'public authorities' strait-jacketing the same within the four corners of 'State' as defined in Art. 12 of the Constitution, especially keeping in mind the object behind the Act. The definition of 'public authority' has a much wider meaning than that of 'State" under Art. 12. Further, the definition of "State" under Article 12 is primarily in relation to enforcement of fundamental rights through Courts, whereas the Act is intended at achieving the object of providing an effective framework for effectuating the right to information recognized under Art. 19 of the Constitution of India. See--- M.P. Varghese vs. Mahatma Gandhi University, AIR 2007 Kerala 230

The scope of furnishing information under the Act is so wide that the Sec. 8 of the Act itself makes it clear that the information which cannot be denied to Parliament or to a state legislature, the same cannot be denied to any person as well.

5. **Information which cannot be furnished under the RTI Act, 2005 (Sec. 8 & 9)**— The exemptions and prohibitions against furnishing

information under the RTI Act, 2005 have been provided u/s. 8 & 9 of the RTI Act, 2005 which read as under--

"Sec. 8- **Exemptions from disclosure of information-** (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,-

(a) information, disclosure of which would prejudicialy affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;

(b) information which has been expressly forbidden to be published by any Court of Law or Tribunal or the disclosure of which may constitute contempt of Court;

(c) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;

(d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;

(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

(f) information received in confidence from foreign Government;

(g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;

(h) information which would impede the process of investigation or apprehension or prosecution of offenders;

(i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other

officers;

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:

Provided further that those matters, which come under the exemptions specified in this section shall not be disclosed;

(j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information :

Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

(2) Notwithstanding anything in the Official Secrets Act, 1923 (19 of 1923) nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.

(3) subject to the provisions of clauses (a), (c) and (i) of sub-section (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under Section 6 shall be provided to any person making a request under that section:

Provided that where any question arises as to the date from which the said period of twenty years has to be computed, the decision of the Central Government shall be final, subject to the usual appeals provided for in this Act."

"S. 9 – Grounds for rejection to access in certain cases. – Without prejudice to the provisions of Section 8, a Central Public Information Officer or a State Public Information Officer, as the case may be, may reject a request for information where such a request for providing access would involve an infringement of copyright subsisting in a person other than the State."

5(A). <u>A private body, institution or organization etc. financed by govt.</u>

are covered within the definition of "public authority" u/s. 2(h)(d)(ii) of the RTI Act, 2005 ---- Whenever there is even an iota of nexus regarding control and finance of public authority over the activity of a private body or institution or an organization etc. the same would fall under the provisions of Section 2(h) of the Act. The provisions of the Act have to be read in consonance/and in harmony with its objects and reasons given in the Act which have to be given widest meaning in order to ensure that unscrupulous persons do not get benefits of concealment of their illegal activities or illegal acts by being exempted under the Act and are able to hide nothing from the public. The working of any such private body owned or under control of public authority shall be amenable to the Right to Information Act. The petitioner being an institution recognized under the provisions of U.P. High School and Intermediate Education Act, 1929 and receiving grant-in-aid from the State Government is therefore, covered under the aforesaid Act. Even in cases where a private or a non-Government organization college received financial grant from the State Government or is regulated by the provisions of Act such as the U.P. Intermediate Education Act, 1921 and payment of Salaries to Teachers and Other Staff Act, 1971 it would still be covered by the definition given in Sec. 2(h) of the Right to Information Act, 2005. See----

1. **Committee of Management, Azad Memorial Poorva Madhyamik Vidyalaya Koloura vs. State of U.P., 2008 (5) ALJ 88 (All)**
2. **Dhara Singh Girls High School, Ghaziabad vs. State of U.P., AIR 2008 Allahabad 92**
3. **Principal M.D.S.D. Girls College, Ambala vs. State Information Commissioner, Haryana, AIR 2008 P & H 101 (D.B.)**
4. **Committee of Managemnt, Shanti Niketan Inter College, Ghazipur vs. State of U.P., 2008 (3) AWC 3027(All)**
5. **M.P. Varghese vs. Mahatma Gandhi University, AIR 2007 Kerala 230**

5(B) Access to evaluated answer books permissible under the RTI Act--- Interpreting the provisions of Sec. 2(j), 6, 3, 8, 10 of the RTI Act, 2005 and Article 19 of the Constitution, the Calcutta High Court has ruled that an examinee has got a right of access to evaluated answer scripts and the consequences of making over of such information is immaterial. Such access to the evaluated answer scripts is not exempted u/s. 8 of the RTI Act, 2005. Refusal to furnish answer sheet to examinee to

keep examiner's identity concealed so that examiner is not threatened is not proper. A ground founded on apprehended lawlessness may not justify natural operation of a statute. However, procedure may be evolved such that the identity of examiner is not apparent on face of evaluated answerscript. See--- Pritam Rooj vs. University of Calcutta, AIR 2008 Calcutta 118

5(C) Disclosure of information regarding transfer, posting and promotion of staff of nationalized bank [Sec. 8(1)(e)]---- The information requested for by the employee of Nationalized Bank related to transfer and promotion of employees of the bank. Such information does not pertain to any fiduciary relationship of the petitioner bank with anybody coming within the purview of Sec. 8(1)(e). The information relating to posting, transfer and promotion of clerical staff of a bank do not pertain to any fiduciary relationship of the bank with its employees within the dictionary meaning of word 'fiduciary' such information cannot be said to be held in trust by the Bank on behalf of its employees and therefore cannot be exempted under this Sec. 8(1)(e). In fact, without knowing this information, one employee cannot know his rights vis-à-vis other employees. In this connection, it has to be noted that one of the information requested for its transfer guidelines pertaining to clerical staff. Any member of the staff of the bank is, as of right, entitled to know what are those guidelines, even apart from the Right to Information Act. Further, these informations have necessarily to be divulged if we are to have an informed citizenry and transparency of information which are vital to the functioning of the bank and to contain corruption so as to hold the bank which is an instrumentality of the State, accountable to the people, which are the avowed objects of the act, as proclaimed in the preamble to the Act. Disclosure of information relating to transfer of employee of nationalized bank does not cause unwarranted invasion of privacy of other employees and such an information cannot be withheld u/s. 8(1)(j) of the RTI Act, 2005. See-- Canara Bank vs. The Central Information Commission, 2007 (5) ALJ (NOC) 916 (Kerala)

5(D) Information regarding the names of beneficiaries under the U.P. Chief Ministers Discretionary Fund Rules, 1999 is permissible under the RTI Act, 2005----- Information as to names of all persons having received more than Rs. 1 lakh from the U.P. Chief Minister's Discretionary Fund is not exempted u/s. 8 of the RTI Act, 2005. An applicant is entitled to such information under the 2005 Act as such fund is part and parcel of the Consolidated Fund of the State of U.P. and it is

public money. Public has right to know about it. See— Public Information Officer, Chief Minister's Office, Civil Secretariat, Govt. of U.P., Lucknow vs. State Information Commission, U.P., 2008 (4) AWC 3574 (All--LB) (D.B.)

5(E) Disclosure of voluminous information— (i) Where the disclosure of information regarding transfer, posting and promotion etc. of the employees was refused by the Canara Bank on the ground that the information sought for of the last five years was quite voluminous and required tremendous man power and time, it has been held by the Kerala High Court that the information sought for as noted above could not have been withheld as being exempted u/s. 8 of the RTI Act, 2005. See— Canara Bank vs. The Central Information Commission, 2007 (5) ALJ (NOC) 916 (Kerala)

(ii) Where the applicant had submitted her application for recruitment to the post of Clerk in the respondent bank but the application did not reach the bank within stipulated time and was therefore not considered by the bank and this fact was also communicated to the applicant by the bank and the communication was never challenged by the applicant, it has been held by Madras High Court that the applicant was not entitled to the details of recruitment of clerical posts under the provisions of RTI Act, 2005. See— B. Bindhu vs. Secretary, Tamilnadu Circle Postal Co-operative Bank Ltd., Chennai, AIR 2007 Madras 13

5(F) Adjudication of disputes or discrimination etc. not permissible under the RTI Act, 2005— The RTI Act, 2005 does not provide for any adjudication or to give reasons as to why a particular person, is being discriminated in payment of his salary. On an application the District Information Officer was required to furnish the information, as it was available in his office. He is not supposed to give reasons for any action or inaction of the department in a matter in which the persons may be aggrieved. If the office of the District Inspector of Schools was not aware of the dismissal of the miscellaneous appeal filed by the State Government, it was not required to give justification for the same. The information as it is available in the office has to be furnished to the petitioner. There was no material to establish that the District Inspector of Schools was communicated with the Dismissal if misc. appeal filed by the State Government against the order of Civil Judge. The manner in which the application uses the information is not the concern of the authorities nominated under the Right to Information Act. See— Jitendra Singh vs. State of U.P., 2008 (2) AWC 2067 (All)

6. **Allahabad High Court (Right to Information) Rules, 2006**---Rule 26 of the Allahabad High Court (Right to Information) Rules, 2006 provides that the CPIO in the District Courts and in the High Court will not entertain any application from any person for providing any information relating to any case pending for adjudication before the High Court or the subordinate judiciary.

Note: Under the Provisions of Rule 24 of the Allahabad High Court (Right to Information) Rules, 2006, the Registrar General, in the matters of High Court and the District Judge of the District, in the matters of the District Judiciary, have been notified as Appellate authorities against the decisions made by the CPIOs.

7. **Procedure for obtaining information:** (i) Application in writing in Hindi or English accompanied by the requisite fee will be presented by the applicant to the CPIO. (S. 6)

(ii) Disclosure of reasons or purpose in the application for obtaining information is not required. **[S. 6(2)]**

(iii) Where the applicant is incapable of reducing to writing his request for information, the CPIO is under obligation of law to assist him in reducing his request for information in the form of an application. **[Proviso to S. 6(1)]**

(iv) In case the application is made to an authority not concerned with the information sought for, such authority will transfer such application to the authority concerned or department concerned for disposal of the same. **[S. 6 (3)]**

(v) CPIO is bound to dispose of the application within 30 days from the date of receipt of the application. **[S. 7(1)]**

(vi) Rejection of the application by the CPIO requires reasoned order. **[S. 7(1)]**

(vii) In case the information required relates to the life or liberty of a person, the same must be furnished within a period of 48 hours from the time of receipt of the request/application. [Proviso to S. 7(1)]

(viii) Deemed rejection of the application - ..... in case the CPIO fails to grant or reject the application **within a period of 30 days** from the date of its receipt, it shall be presumed that the CPIO has refused to furnish the required information. **[S. 7(2)].** Similar provision has been made by the Allahabad High Court under Rule-17 of the Allahabad High Court (Right to Information) Rules, 2006.

8. **Fee for obtaining information: U.P. Right to Information (Regulation of Fee and Cost) Rules, 2006 regulates the payment of fee**

required for furnishing information or copies of any documents.

Vide G.O. No. 993/43-2-2005 dated 19 October, 2005 of Administrative Reforms Section-2 of the Government of U.P., the fee structure for obtaining information or certified copies of any documents has been provided as under:-

1.	For obtaining any information U/s. 6(1) of the Act, 2005 Provided that a person producing the certificate regarding below poverty line (BPL) will be exempt from paying any fee.	**Rs. 10/- per Application**
2.	For a certified copy of any documenon A-4 size paper or A-3 Size paper.	**Rs. 2/- per page**
3.	For certified copy on larger size paper	**Real cost per page.**
4.	For Samples or Models and printed information.	**According to their real cost.**
5.	For Inspection of Records for the 1 st one hour and thereafter for every 15 minutes	**Rs. 10/- per hour and thereafter Rs. 5/ - for every 15 minutes**
6.	For information through Diskette or Floppy or Compact Disc	**Rs. 50/- per mode**
7.	For information from any printed material	**@ prescribed by the Publisher.**
8.	For Photostat copies of any quotations contained in any published material.	**Rs. 2/- per page**

NOTE: 1- The fee prescribed as above shall be payable by the applicant in cash or through demand draft or banker's cheque and a receipt for the same will be given to the applicant.

NOTE: 2- Rule 4 of the Allahabad High Court (Right to Information) Rules, 2006 provides that the fee payable by an applicant shall be paid in cash or through draft or pay order of Rs.500/- per application drawn in favour of the Registrar General of the Allahabad High Court or the District Judge of the District as the case may be.

9. **Reasons behind information or order not permissible under the RTI Act----** The expression "information" as defined u/s. 2(f) of the RTI Act, 2005 although means and includes material in any form including records, documents, memos, e-mails, opinions, advice, press releases, circulars, orders, log books, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by any public authority under any other law. **But the**

definition cannot include within its fold answers to question "why", which would amount to asking reasons for justification of a particular thing. Hence, in facts of the instant case, as the CPIO had not furnished any wrong information by stating **not available** and clarifying the same by stating **'do not know'** in view of the nature of questions asked in seeking information. As such, the impugned order of the Goa Information Commissioner holding the CPIO guilty of furnishing incorrect, incomplete and misleading information to the applicant was found not sustainable and was set aside by the Goa Bench of the Bombay High Court. See---- **(Dr.) Celsa Pinto vs. Goa State Information Commission through State Chief Information Commissioner, 2008(63) ACC (Bombay-Summary) 29**

10. Powers of information commissions u/s. 18 & 20 of the RTI Act, 2005----- While enquiring into a complaint u/s. 18 of the RTI Act, 2005, the Commission can issue necessary directions for supply or disclosure of information asked for if it is satisfied that information was wrongly withheld or not completely given or incorrect information was given which is otherwise liable to be supplied under the RTI Act, 2005. See---- Public Information Officer, Chief Minister's Office, Civil Secretariat, Govt. of U.P., Lucknow vs. State Information Commission, U.P., 2008 (4) AWC 3574 (All--LB) (D.B.)

11. PENALTY (S. 20)---- In case of refusal to receive the application or not disposing of the same within the prescribed period of 30 days from the date of it's receipt, the CPIO or the State Public Information Officer shall be liable to pay Rs. 250/- each day till the application is received or the information is furnished. However, the total amount of such penalty shall not exceed Rs. 25,000/-.

NOTE - 1: The proviso to S. 20 makes it imperative that before imposing the above noted penalty upon the CPIO or SPIO, a reasonable opportunity of hearing shall be given to them.
NOTE - 2: In case of non-compliance of any orders/directions of the CIC or the SIC or furnishing any false or misleading or incomplete information, the CIC or the SIC may recommend for disciplinary action against the CPIO or the SPIO. [S. 20(2)]

12(A). APPEAL: S. 19 of the RTI Act, 2005 provides for appeals. A person aggrieved by a decision of the CPIO or the SPIO under S. 7 of the Act may, within 30 days from the date of such decision, prefer an appeal

to the Appellate Authority. The Appellate Authority has been empowered to condone the delay in preferring the appeal if the appellant is able to show sufficient reasons for not being able to prefer the appeal within 30 days from the date of the decision by the CPIO or the SPIO.

12(B). The Central Information Commission (Appeal Procedure) Rules, 2005 – The procedure laid down under these rules apply to the Appeals preferred to the CIC.

The procedure for preferring Appeals against the decisions of the CPIO or the SPIO has been clarified by the Govt. of U.P. vide its G.O. No. DOL No-Bha.Sa.-43/43-2-05-15/2(2)/03TC-2 dated 27th September, 2005 of Administrative Reforms Section – 2 which reads as under:-

सूचना का अधिकार अधिनियम, २००५ की धारा-१९ में जन सूचना अधिकारी के निर्णय के विरूद्ध याची को उच्चाधिकारी के समक्ष ३० दिन के अन्दर अपील करने का अधिकार है। ऐसी स्थिति में प्रदेश भर में एकरूपता व सुविधा को दृष्टिगत रखते हुए अपील हेतु सक्षम अधिकारी नामांकित किए जाने के सम्बन्ध में आपके विचारार्थ सुझाव प्रेषित है कि सब-डिवीजन स्तरीय कार्यालय में सहायक जन सूचना अधिकारी के निर्णय के विरूद्ध अपील उस विभाग के जिला स्तरीय कार्यालय के जन सूचना अधिकारी के यहाँ, जिला स्तरीय कार्यालय के जन सूचना अधिकारी के निर्णय के विरूद्ध अपील उस विभाग के मण्डल/जोन स्तरीय कार्यालय के जन सूचना अधिकारी के यहाँ, मण्डल/जोन स्तरीय कार्यालय के जन सूचना अधिकारी के निर्णय के विरूद्ध अपील उस विभाग के विभागाध्यक्ष कार्यालय के जन सूचना अधिकारी के यहाँ तथा विभागाध्यक्ष कार्यालय के जन सूचना अधिकारी के निर्णय के विरूद्ध अपील शासन स्तर पर विभागाध्यक्ष से वरिष्ठ अधिकारी के समक्ष प्रस्तुत किया जाना उचित होगा।

Note: **Under the Provisions of Rule – 24 of the Allahabad High Court (Right to Information) Rules, 2006, the Registrar General, in the matters of High Court and the District Judge of the District, in the matters of the District Judiciary, have been notified as Appellate authorities against the decisions made by the CPIOs.**

13. **Engaging Lawyers not permissible under RTI Act**----- The State Information Commission, U.P. has ruled that an applicant cannot engage a lawyer to represent him for the purpose of seeking information from a CPIO or Appellate Authority (Source-- Report dated 28.11.2006 published in the Aligarh issue of Daily Newspaper Dainik Jagran)

14. **Nature of decisions of SIC and CIC to be quasi-judicial and binding**---- The CIC has ruled that no public authority, government or

statutory organization can claim to be above law and the decisions of the CIC are quasi-judicial in nature and binding upon the concerned authorities. (Source—Report dated 1.2.2007 published in the New Delhi issue of Daily Newspaper Times of India)

15. **Contempt power sought by CIC**—— The CIC has suggested the Central Government to suitably amend the RTI Act, 2005 so as to give power to CIC to initiate contempt proceedings against the violators of the orders of the CIC. (Source—Report dated 12.10.2006 published in the New Delhi issue of Daily Newspaper Times of India)

16. **CIC empowered to review its previous decisions**—— The CIC has ruled that it is empowered under the provisions of RTI Act, 2005 to review its previous decision. (Source—Report dated 23.9.2006 published in the New Delhi issue of Daily Newspaper Times of India)

17. **S. 23 of the RTI Act, 2005 bars the jurisdiction of the Courts to entertain any suit, application or other proceedings against any orders passed under this Act.**

18. **Firms, Associations, Corporate entities and HUF to be treated as applicants under the RTI Act**—— The Central Information Commission has observed that an application or appeal from an association or a partnership firm or a Hindu undivided family (HUF) or from some other group of individuals constituted as a body or otherwise should be accepted and allowed under the RTI Act, 2005. Elaborating the objectives of the RTI Act, the CIC has further observed that the objective behind the RTI Act is to secure access of information to all citizens to promote transparency and accountability. The CIC has also clarified that since all superior courts have been admitting applications in exercise of their extra ordinary jurisdiction from companies, societies and associations under the provisions of the Constitution of which the RTI Act, 2005 is a child and if the courts can give relief to such entities, the CPIOs should also not throw them out on a mere technical ground that such applicants happen to be a legal person and not a citizen. (Source Times of India published from Agra).

19. **Information relating to Vigilance/Departmental Enquiries**—— The Central Information Commission has ruled that an official facing vigilance or departmental enquiry is entitled to make inspections of the file of such enquiries and can also seek permissible information available on the record of such enquiries. (Source—Report dated 3-7-2006 and 11.8.2006 published in the New Delhi issue of Daily Newspaper Times of India)

20. **Addl. District Judges as CPIOs penalized by the UPSIC**—— **(A)** Where the Addl. District Judge, Hathras had failed as CPIO in furnishing

information to the applicant under the RTI Act, 2005 within the statutory period of 30 days and had also failed in appearing before the State Information Commissioner at Lucknow despite repeated opportunities having been given for the same, the Information Commissioner of U.P., Sri Virendra Kumar Saxena awarded Rs. 25,000/- as penalty against the CPIO concerned (ADJ, Hathras) and indicting the aforesaid CPIO/ADJ directed to take further severe action in case of non compliance of the order of the Information Commissioner (Kindly see the report dated 8.1.2008 in the issue of leading Daily Newspaper Dainik Jagran published from Agra)

(B) Where the **Addl. District Judge, Meerut** had failed as CPIO in furnishing information to the applicant under the RTI Act, 2005 within the statutory period of 30 days and had also failed in appearing before the State Information Commissioner at Lucknow despite repeated opportunities having been given for the same, the Information Commissioner of U.P., Dr. Ashok Kumar Gupta awarded Rs. 25,000/- as penalty against the CPIO concerned (ADJ, Meerut). (Kindly see the report dated 12.1.2008 in the issue of leading Daily Newspaper Dainik Jagran published from Agra)

21. Information regarding proceedings of DPC---- The Central Information Commission has ruled that an official is entitled to obtain information under the RTI Act, 2005 concerning the proceedings held by the departmental promotion committee (DPC) about his own promotion and also of other co-officials. (Source-- Report dated 24-9-2007 published in the New Delhi issue of Daily Newspaper Times of India)

22. Information regarding file notings by Bureaucrats---- The CIC has clarified that an applicant under the RTI Act, 2005 is entitled to access to file notings recorded by the Bureaucrats unless such notings are exempted under the provisions of Sec. 8 & 9 of the RTI Act, 2005. (Source—Reports dated 29.8.2006, 12.9.2006, 17.10.2007 published in the New Delhi issue of Daily Newspaper Times of India)

23. Information regarding the list of the names of corrupt officials accessible---- The CIC has ruled (regarding the names of Senior Customs & Excise Officials) that an applicant is entitled to information under the RTI Act, 2005 regarding the names of those officials who are known for their indulgence into corrupt practices in any department and also the names of such officials against whom complaints asto corruption have been made or are pending. (Source—Report published in the New Delhi issue of Daily Newspaper Times of India)

24. RTI Act exposes DGP for fraud and corruption regarding admission of his son in Engineering College---- Where the former DGP of

Madhya Pradesh had managed admission of his son in an Engineering College in NRI quota by depositing the fee in foreign currency (US $16,500) through an America based NRI, FIR against the DGP on the basis of information obtained by a journalist/applicant was ordered to be registered regarding the fraud, forgery, cheating and corruption indulged into by him. (Source—Report published in the New Delhi issue of Daily Newspaper Times of India)

25. Development Authorities or Builders bound to furnish information under RTI Act, 2005 regarding flats, maps, sanction orders of buildings etc. ---- An applicant is entitled to obtain certified copies of or information regarding the sight plans, flats, buildings and sanction orders etc. from the Development Authorities or the Private Builders and Contractors. (Source—Report dated 18.8.2006 published in the Agra issue of Daily Hindi Newspaper Dainik Jagran)

26. Information regarding ACR are accessible under the RTI Act, 2005---- (i) The CIC has ruled that an official/officer is entitled under the RTI Act, 2005 to access to information regarding his annual assessment or entries recorded in his ACR. A recent decision from the Supreme Court has also ruled that an employee is fully entitled to know about his annual character roll entries whether commendatory or condemnatory. (Source—Report dated 4.5.2006 published in the New Delhi issue of Daily Newspaper Times of India)

(ii) In the case of **Dev Dutt vs. Union of India & Ors., 2008 (4) Supreme 462,** the Supreme Court has also ruled that every entry (and not merely a poor or adverse entry) relating to an employee under the State or an instrumentality of the State, whether in civil, judicial, police or other service (except the military) must be communicated to him, within a reasonable period, and it makes no difference whether there is a bench mark or not. Even if there is no bench mark, non-communication of an entry may adversely affect the employee's chances of promotion (or getting some other benefit), because when comparative merit is being considered for promotion (or some other benefit) a person having a 'good' or 'average' or 'fair' entry certainly has less chances of being selected than a person having a 'very good' or 'outstanding' entry.

Note: But relying upon an earlier decision reported in Satya Narain Shukla vs. Union of India, 2006 (9) SCC 69, the Supreme Court has in the case of **K.M. Mishra vs. Central Bank of India, 2008 (6) Supreme 698** ruled as under--- "As regards the confidential reports of an official, it is for the government to consider how to streamline the procedure for selection and see how to streamline the whole procedure so that even remarks like "good" or

"very good" made in ACRs should be made compulsorily communicable to the officers concerned so that an officer may not lose his chance of empanelment at a subsequent point of his service. It is not the function of the Court to issue such directions.

27. **Information regarding private properties of bureaucrats accessible under RTI Act, 2005**— The CIC has ruled that an applicant is entitled to get information under the provisions of RTI Act, 2005 regarding the movable and immovable property of any Govt. Servant. (Source—Report dated May, 2008 published in the Agra issue of Daily Hindi Newspaper Dainik Jagran)

28. **Cabinet decision accessible under RTI Act, 2005**— The CIC has ruled that once the decisions taken by cabinet are declared, all the documents relating to the cabinet decisions become accessible to an applicant under the provisions of RTI Act, 2005. (Source—Report dated 27.10.2008 published in the Lucknow issue of the Daily Hindi Newspaper Dainik Jagran)

29. **Income Tax Returns of political parties accessible under RTI Act**— The CIC has ruled that a citizen is entitled under the RTI Act, 2005 to seek information from political parties regarding their funding and income tax returns. (Source—Report published in the English Daily Newspaper Times of India)

30. **Disqualification of the State Chief Information Commissioner**— **In the case noted below, disqualification of the Chief Information Commissioner, Uttaranchal was sought on the ground of holding other office of profit but the Commissioner had tendered his resignation from his earlier office on date of his appointment itself and the appointment of Commissioner was to take effect only from the date of assuming office. The Commissioner assumed office on the date when his resignation was already accepted, it was held by a Division Bench of the Uttaranchal High Court that the Commissioner was not disqualified from holding his post. Allegations against the Commissioner that his appointment was ill-motivated and that it was made due to undue influence and that there were allegations of corruption and irregularities against him was also not established and under these circumstances the appointment of the Commissioner u/s. 15(3) of the RTI Act, 2005 was found valid and disqualification was refused. See— Rural Litigation and Entitlement Kendra vs. State of Uttaranchal, 2006 (6) ALJ 430 (Uttaranchal High Court—D.B.)**

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ALTERNATE DISPUTE RESOLUTION IN INDIA

- By Sunil Singh*

Today when about more than two and half crores (As per the Ministry of Law and Justice press release 48,838 cases are pending in Supreme Court, 38,82,074 cases pending in high Court and 2,52,40,185 are pending in subordinate courts as on 31.1.2008) of case pending in our courts, that means at least five crore people are directly involved in litigation that about 4 percent of our population, and we have only 12,500 judges at lower court level and about 647 judges at various High Court and 26 judges in Supreme Court of India. Our Justice Administration system is "adversarial" in nature in which there are two parties and they are on face to face with each other in the Court, and we have seen that its not the legal issues which are involved in most of the cases put before us rather its ego which come in between and it ultimately ends in blood amongst the litigants, and hatretism.

It is also observed that our courts have very limited time for example 10:00 AM to 5:00 PM we are in Court but during that time we have to manage out time for various things like signing of files, and day to day orders, meetings, compliances of directions of higher courts, and other miscellaneous work, which a judge has to see.

What is justice, in layman's term its something which a aggrieved person deserves and it has been encroached upon by another, and now our conventional system of justice needs overhauling and need to develop a new approach, the alternative dispute resolution is an steps towards that end, and in India we have yet not developed a full fledged system, the time has come that as a judge we need to take initiative at the court of first instance, which plays the most important role in the justice delivery system, as the seed of justice is sowed over there, because the case takes off from there and we lack a strong system at that which can be easily rectified, the Shetty Commission envisages 50 judges per million we have only 10.5 judges per million, the judges really are over burdened with work, and due to this the work is hotched potched and become out of control, which can be easily managed by systematic approach and firstly by enhancing the number of judges, not that we should right now recruit all the judges at one go, but in a phased manner, the Hon'ble Supreme Court has pronounced in its judgment that the living conditions of the judges at lower level should be improvised and they deserve better living standard and all states and Centre should take initiative because we implement laws which are passed by both Parliament and State

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legislature, and its joint liability of both the state and Centre to make budgetary allocation to fulfill the need of the courts. I am sure the Presiding officer of the court will be able to work with more efficiency if his basic needs are taken care properly.

Judge's work is divine work and the justice is done by god and we are doing delegated work of God so, as a judge we should never forget that our judgments have direct impact on the society, and public have lots of expectations from us, and we should try to come up to their expectations.

Today we have seen that everyone take resort to strikes, road blocks, and other modes of disobedience, this situation has not arisen over night, rather it's a consistent development, people are slowly losing their faith in judicial system also, as they end up getting justice at a very later stage, which is too late, as justice delayed is justice denied. Today the public at large gave lost faith in government and police deptt; their FIRs are not getting registered, which is a settled law, law is social engineering, and the role of judges is the important in this whole episode, and law is governed by two rules, firstly equality before law, and no one is above law.

The Legal Services Authorities Act, 1987 has also been amended from time to time to endorse use of ADR methods. Section89 of the Code of Civil Procedure as amended in 2002 has introduced conciliation, mediation and pre-trial settlement methodologies for effective resolution of disputes. Mediation, Conciliation, Negotiation, Mini-Trial, Consumer Forums, Lok Adalats and Banking Ombudsman have already been accepted and recognized as effective Alternative dispute resolution methodologies.

Alternative dispute resolution has greatly expanded over the last several years to include many areas in addition to the traditional commercial dispute in the form of arbitration; mediation has become an important first step in the dispute resolution process. Arbitrators and mediators have an important role in resolving disputes. Mediators act as neutrals to reconcile the parties' differences before proceeding to arbitration or litigation. Arbitrators act as neutral third parties to hear the evidence and decide the case. Arbitration can be binding or non-binding.

What is ADR? In simple terms it is Alternate Dispute Resolution the conventional Courts use formal system of redressal applying various rules of law, as we have erstwhile mentioned that our system is adversial. The concept of Conflict Management through Alternative Dispute Resolution (ADR) has introduced a new mechanism of dispute resolution that is non adversarial. A dispute is basically 'lis inter parties' and the justice dispensation system in India has found an alternative to Adversarial litigation in the form of ADR

Mechanism in which two parties contest their case and one party wins and the other party looses, but in case of alternate dispute resolution (Section 89 – Code of Civil Procedure), which can be categorized in four broad heads which are-

1. arbitration;
2. mediation;
3. conciliation;
4. judicial settlement including settlement through Lok Adalat.

It is win – win situation and no party wins no party looses, today the need of time is that we resort to non conventional systems as well, we should not forget that its not something new to us, we had for ages, like panchayats etc, it was self sufficient, every village has panchayat and it was a powerful authority for redressing the disputes. The best part of ADR is that since both parties come face to face and they work out the modalities and reach to an amicable solution, there is no likelihood of winning or losing the case, i.e. it's a win – win situation and thereafter no appeal, and thus it reduces the burden of appellant courts as well, the arbitration and conciliation Act, 1996 provides for Arbitration and the award given by the arbitrator is deemed to be a decree. It was step towards the ADR. The labor legislation has already incorporated conciliation and mediation system in their enactments, to have an amicable solution in case of tussle between the labor and the management. The conventional courts are already overburdened with loads of cases, and at least a sizable number of cases can be disposed off by way of ADR. The CPC envisages for use of ADR in section 89 in amended section as mandatory for court to refer the dispute after the issues are framed for settlement of disputes outside the Court (Clause 7 of the CPC Amendment (Bill), 1999). The Law Commission of India in its 129th Report recommended for the Alternate modes of Dispute Redressal to be obligatory on the courts after framing of issues. It is only after the parties fail to get their disputes settled through any one of the alternate dispute resolution methods that the suit shall proceed further in the court where it was filed.

The purpose of this special provision seems to help the litigant to settle his dispute outside the Court instead of going through elaborate process in the court trial. This is a special procedure for settling the dispute outside the courts by a simpler and quicker method. The litigants on the institution of the suit or proceedings may request the Court to refer the disputes and if the court feels that there exist any element of settlement which may be acceptable to the parties; it may refer them to any of the forums abovementioned at any stage of the proceedings. In fact new rules in Order X were inserted in

consequence to the insertion of the sub section (1) of section 89. These new rules namely 1A, 1B and 1C have been inserted by the Amending Act. The settlement can be made by adopting any of the modes specified in the section 89 of the CPC inserted by the Amendment Act. As per the Rule 1A the parties to the suit are given an option for settlement of the dispute outside court. When the parties have exercised their option it shall fix the date of appearance before such person as may be opted by the parties. As per the Rule 1-B the parties are required to appear before such forum opted by them. Rule 1C provides for the Presiding Officer of the Forum to refer the matter again to the Court in case he feels that in the interest of justice he should not proceed with the matter.

On the basis of above analysis it is apparent that the ADR is the best and most effective solution to reduce the Himalayan pendency in various courts of our country. It is not to forget that the ADR is more effective as it is an amicable solution and both parties are in win – win position and brings about harmonious relationship between both the parties unlike in the conventional courts, thus it is permanent solution to any dispute, as it don't lead to appeal or revision, and hence reducing the burden of appellate courts as well and also it saves valuable time and energy of the courts which can be utilized erstwhile in other matters pending before court and it renders justice on time (Justice delayed is justice denied, but ADR saves time and timely judgment is possible). As a judge it is our duty as envisaged by the new CPC to encourage the ADR, in civil maters in the interest of justice. Despite many advantages of using Alternative dispute resolution mechanisms, our society has been reluctant to give it its due recognition. The predominant reason being that a litigation ridden society is generally unable to explore consensual dialogue or arrive at an amicable solution. The ADR practitioner therefore acts like a healer of conflicts rather than a combatant. It is similar to the Panchayat system we have in our villages. The resolution of disputes is so effective and widely accepted that Courts (In *sitanna v. Viranna*; AIR 1934 SC 105, the Privy Council affirmed the decision of the Panchayat and Sir John Wallis observed that the reference to a village panchayat is the time-honoured method of deciding disputes) have more often recognized them. It avoids protracted litigation and is based on the ground realities verified in person by the adjudicators and the award is fair and honest settlement of doubtful claims based on legal and moral grounds.

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LAWYERS' ROLE IN REDUCTION OF LITIGATION

- By Brahmatej Chaturvedi
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To criticize judiciary for delaying in administration of justice is in vogue. Newspapers, News Channels and other wings of government are going on and on about huge number o cases pending in the courts at every level. And when it comes to judiciary they mean judges/judicial officers only. Undoubtedly the huge pendency of cases is a major hindrance to the progress of country but what about frivolous suits? Let us have a look on two examples:

(1) A suit for permanent injunction along with an application seeking temporary injunction until the disposal of the suit is instituted in a civil court. Presiding officer of the court, after seeking no urgency in the case, orders for issuing notice to opposite party and invites objection for the disposal of the above mentioned application. The plaintiff, on the date fixed for the disposal of application regarding temporary injunction, surprisingly moves an application under Order 23 Rule 1 of The Code of Civil procedure, 1908 (in short CPC) for the withdrawal of the suit. Interestingly this application is without the prayer seeking permission to withdraw from the suit with liberty to institute a fresh suit. As the court remained busy hearing of other cases, another date is fixed for the disposal of this new application. On the next date, defendant turns up the files his objection on the application regarding withdrawal of the suit with certified copy of the order or another Court granting temporary injunction in favour of the plaintiff in respect of same property in another suit instituted later on the basis of same cause of action as was drafted in the previous suit. The defendant alleges that the plaintiff, before the other Court, has concealed the fact of this suit and has got the order of temporary injunction. Defendant also moves an application to the same effect in the other Court.

(2) In a suit for permanent injunction, along with an application seeking temporary injunction until the disposal of the suit, notices are issued to opposite party and objections are invited for the disposal of the above mentioned application. After some days, while going through the files of freshly instituted suits. Presiding Officer recalls that she or

he has seen the same description of property in suit (while going through another case) and suddenly he recalls that the counsel for plaintiff is also same. Presiding officer sends for records of recently instituted suits. Thereafter the presiding officer is taken aback to find that THE PARTIES, THE PROPERTY IN SUIT, THE CAUSE OF ACTION and more interestingly THE COMPUTER GENERATED PLANT (except the date of institution) of new suit and those one of previous one are the same...

The dots in the last of these examples show that the story never ends.

These are just two examples of untoward situations the subordinate judiciary is facing today. What should the judicial officer do in these circumstances? A lot of energy (which can be used to hear the genuine cases) will now be spent to overcome these frivolous situations. Now an entirely new series of litigation (Civil as well as Criminal) will start and litigants have to spend a lot of money and time. Flatly speaking these incidents also cause confrontation between judicial officers and bar.

Judiciary does not mean only judicial officers. It includes bar also. Our judicial system has its roots in British legal system where lawyers play an important role in administration of justice. Actually it is the counsel for either party who draws the attention of the court towards a specific provision of law or interpretation of law which goes in favour of her or his party and the counsel for opposite party tells something different and the judicial officer listens to the arguments of the learned counsels and goes through the record in order to do justice. A good argument always helps the judge interpret law in the interest of justice. Suffice to say that without the co-operation of the bar good judgments could not be possible. More over we should not forget that bar is the mother of very great number of judges.

Undoubtedly legal profession is a very pious profession and it is a very strong pillar of our judicial system but there are very few lawyers who do not leave a stone unturned to tarnish the image of their profession. As our society is passing through its transition phase, every institution is facing the deterioration of ethics. The legal profession, which is considered the profession of learned, calm and self-controlled people, is now a days going in the hands of such persons who adopt this pious profession just to make a quick buck and nothing else. They can do anything to achieve this goal. Gone are the days when lawyers told their clients very clearly that their case was weak. Now some of them assure their clients that the judgment will be in their favour by hook or crook.

The above mentioned examples confirm this changing attitude of legal profession.

A fistful of such lawyers can file a number of vexatious suits in order to achieve their goal. Sometimes they encourage their clients for litigation even though they know very well that this is a futile exercise. The suits are being filed just to pressurize the other party.

Suppose there are some clashes between husband and wife and after a hot discussion the wife leaves the house of her husband. Some habitual litigants incite the wife to file a complaint under section 498-A of Indian Penal Code against her husband to teach him a lesson. Thereafter she plans to move an application under Section 125 of The Code of Criminal Procedure. Now, in order to collect the evidence of his innocence, the husband moves an application for the restitution of conjugal rights under section 9 of The Hindu Marriage Act and so on.....

I am sure that almost every complaint under section 498-A of Indian Penal Code also brings the above mentioned litigation. I am not saying that every suit is vexatious one but in the above example the counsels did not try to make their clients understand that they can solve their disputes peacefully or rather they encouraged the litigation.

In its 131st report **"The Role of Legal Profession in Administration of Justice"** the **Law Commission of India** says –

> "It is unquestioned that in any unorganized profession, there are bound to be some persons who are unaware to maintain the high standard of profession. In some cases evidence reveals a sordid state of affairs in lawyer-client relationship. This itself can not be sufficient to condemn the profession as a whole but this aspect can not be ignored also. It is here the question of accountability of the profession to their litigants and system comes to fore. The leaders of the bar must show a deliberate concern with the fate of the poor and the indigent by volunteering to take up their cases in court of law."
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> "..... Therefore, the first step that is required to be taken is not to encourage litigation but to reduce litigation. The role of the legal profession is to reduce disputes and only in the last resort the matter should be permitted to go to court."

Our Constitution provides many fundamental rights to citizens. The judgments of Hon'ble Supreme Court and Hon'ble High Courts have also paved the path of real freedom: but we should not forget that a big section of our society is illiterate and does not understand law. When these people face some legal problem they go to a lawyer. Now it is the duty of lawyers to reduce disputes and only in the last resort the matter should be permitted to go to court but I am sorry to say that this role is not being played by few lawyers.

They are deviating from ethical values. They do not understand the importance of their duty. They are busy making fast back. They invoke the laws in order to encourage the litigation. Really it is not a hopeful scenario.

Lawyers have played a leading role in every field of life and they should also try their best to reduce the burden of huge pendency of cases without worrying about their income because frivolous suits die their own death without any result and thus they whittle away the image of this profession. On the other hand, if a lawyer gives her or his client a good advice it pays to her or him in the form of good clientage. I know that this is difficult to understand because very few people have farsightedness. Furthermore there is a risk to lose the client as in this age of internet everyone wants quick results. Nevertheless it has been experienced that even if a client runs away after getting your realistic advice he comes back soon as a disappointed one and now he becomes your best advertiser. Thus honesty is the best policy.

Development of society is not possible by making laws only. Legislature amends the existing laws with a view to make them fit for the needs of changing society. Nowadays many laws are being framed or amended in order to reduce the litigation but unless a large section of society is ready to get benefited by this effort everything is futile. As it has been said above laymen, because of illiteracy, go to lawyers for legal consultancy and believe them therefore it is the duty of lawyers to cooperate with the efforts of government by giving their clients such advice that can solve their problems in a peaceful way without unnecessary litigation and more problems. Hopefully bar will understand its role in reduction of litigation and our country, after getting rid of these chains, will achieve its deserved positioning the world.

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MISINTERPRETING THE JUDICIAL INDEPENDENCE

- By ANOOP KUMAR
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From the *'Basic Structure doctrine*[1]*'* to the *'Natural Justice principle*[2]*'*, from *Golaknath* [3] judgment to the *Keshavanand Bharati*[4] judgment, the Indian judiciary has treaded a long way to act as a guardian of the Constitution rather than mere an adjudicating body. Whenever the Executive or Legislature tried to exceed their jurisdictions, it was the Judiciary, which always got both the wings back to the track. Due to the spate of its landmark judgment, the judiciary in India commanded a profound respect. Those who tended to question the freedom and impartiality of the Judiciary had to think many a times before harbouring such fallacies. No doubt, the previous impressive record of the Indian judiciary is evident of its viability.

But can the judicial accountability be relied any more? Does the judiciary in India command the same respect, it had earlier? Is the judiciary making right use of its freedom? These issues are the stigma on the judiciary.

Till recently, the people of India felt pride that the judiciary in India was a successful machinery to uphold the 'Rule of Law', making the right use of its independence. Not only that, it was the only mechanism to keep the Executive and Legislature within their jurisdictions. But the present scene of the 'judicial independence', seems to be subject to corrupt practices. The corruption in the higher judiciary is an open secret, as at one point of time, the former Chief Justice Sam Piroj Bharucha lamented over the rampant corruption in the higher judiciary. He further brought to the notice that around 20 percent of the higher judiciary is corrupt, but to add fuel to the fire, no concrete result has been witnessed after the investigation against the corrupt judges in the last 15 years[5].

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[1] Laid down in the landmark case of *Kesavananda Bharati* v. *State of Kerala, AIR 1973SC 1461*

[2] Propounded in the landmark judgment of **Menaka Gandhi Vs. Union of India,** (1978) 1 SCC 248

[3] Golaknath v. State of Punjab, AIR 1967 SC 1943.

[4] *AIR 1973SC 1461*

[5] http://www.outlookindia.com/dossiersind.asp?id=652

If we go over the 2005 India Corruption Study, the data reveals a clear picture. The value of corruption in judiciary has been estimated to be around Rs. 2630 crore per annum[6]. Around 64 percent of those who have interacted with the judicial process claim that the corruption in the judiciary has increased.

Till a very long period of time, there was an image of the judge in the mind of the people, which depicted the true character of the judiciary. This image was that of a statue, with its eyes covered by a dark cloth and a balance in one hand. This image tended to show the unbiased nature of the judge. But its role changed rapidly from mere an adjudicating body to a guardian of the Indian Constitution. Its larger than life role in keeping the other two wings within their respective jurisdictions, gave credence to the judicial accountability.

But the recent incidents of the disclosure of the recommendation by the Chief Justice of India for the impeachment of a Calcutta High Court judge[7], alleged involvement of some high-profile judges in the Ghaziabad provident fund case[8] and money received at the residence of a judge of Punjab and Haryana High Court[9], call for an effective mechanism to ensure the accountability and transparency of the judiciary.

At present, in our Constitution, the only legal method for looking into the misconduct of the High Courts and Supreme Court is the removal from office by vote of Parliament on the ground of "proved misbehaviour". The framers of our Constitution, probably, did not give credence to such large scale misconduct by the judges of the higher judiciary. Further, in 1993, the failed attempt of impeachment of the Justice V. Ramaswamy, a Supreme Court judge discerned the flawed and political aspect of the impeachment process. The contention is not that no investigation is initiated in such matters. Rather the contention touches upon the flaw of the investigation process. Such investigations, conducted by the judges appointed by the Chief Justice of India, are secret and reports remain undisclosed. This, in turn, results in the loss of confidence of the people in our judiciary, resulting to the wrong impression that the judges enjoy immunity.

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[6] http://www.cmsindia.org/cms/events/judiciary.pdf

[7] http://www.hindu.com/2008/09/09/stories/2008090958460100.htm

[8] http://news.webindia123.com/news/Articles/India/20080911/1049931.html

[9] http://in.news.yahoo.com/48/20080823/814/tnl-cash-scam-high-court-judge-who-goes.html

The *Veeraswamy*[10] judgment of the Supreme Court in 1992, has further led to the fragile faith in our judiciary. The judgment entailed the necessity of the prior sanction of the CJI, to initiate the criminal prosecution of a judge of higher judiciary.

There was a dense hue and cry over the issue of appointment of the judges of higher judiciary. In 1982, controversy that arose in the landmark *SP Gupta*[11] case was grounded in the pretext of the political interference in the freedom of judiciary. It was laid down in that case that the recommendation made by the CJI, will not have the primacy. After much hullabaloo, the situation changed around ten years later, when in the landmark judgment of *Supreme Court in Advocates on Record Association vs Union of India*[12], the SP Gupta case was overturned. With effect of that judgment, the recommendation of the CJI in the matter of appointment of judges of higher judiciary was held to be the final. That day would have been the day of rejoice for the judiciary.

There have been few instances, that discern the bitter reality that judiciary has several times tried to escape its accountability. Hackle was raised by the present Chief Justice of India, Justice KG Balakrishnan over the application of the Right to Information Act, 2005 over the judiciary[13], in the name of freedom of the judiciary. The Parliamentary Standing Committee on Personnel, Law and Justice cleared the stand that except the "judicial pronouncements", other aspects of judiciary come under the purview of the Act[14].

But instead of criticizing the judicial independence, we must focus on the steps taken to reform the judiciary. In an attempt to weed out the corruption in the judiciary, in 2005, the Law Commission of India in its 195th report laid down the provision of Judges (Enquiry) Bill to ensure the proper functioning of the judiciary[15]. The Judges (Enquiry) strives to form the National Judicial Council (NJC) to look into the misbehaviour or incapacity of the high court and the Supreme Court judges. The Constitution (98th Amendment) Bill to establish a National Judicial Commission bill was an attempt to secure judicial accountability, which failed in 2003 due to the

[10] http://judgesplot4plot.com/Plot4Plot/049_04.htm
[11] S.P. Gupta vs Union of India, AIR 1982 SC 149.
[12] MANU/SC/0073/1994.
[13] http://timesofindia.indiatimes.com/articleshow/1917524.cms
[14] http://www.financialexpress.com/news/Judiciary-comes-under-RTI-ambit-says-House-panel/303342/
[15] http://www.hindu.com/2006/02/01/stories/2006020115770900.htm

dissolution of the Lok Sabha. The Judges (Enquiry) Bill, 2005 was presented in 2006 by the Law Commission. The bill tends to replace the Judges (Inquiry) Act, 1968, which looks into the matters of misbehaviour and incapacity of the high court and the Supreme Court judges[16]. The bill also lays down the provisions which can be relied upon, such as, the camera trial of the accused judge, disclosure of the assets of the judges, the filing of complaint by any individual before the NJC, et al. Once the recommendations of the report are applied, there would be an easy mechanism to weed out the corruption from judiciary.

However the doubts have been raised over the working of the Council, as the committee formed by the NJC to investigate the charges comprises of the members of the NJC, i.e., the judges of the higher judiciary. But the doubts seem to be groundless, as the same pattern is followed in the countries like United States, United Kingdom, Canada, Germany and Australia, keeping in view the independence of the judiciary[17]. In 1998, the Supreme Court upheld the earlier decision that only judges would oversee the judicial appointments[18]. Moreover, when it provides for the camera trial, how can one doubt on the impartiality of the committee.

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[16] http://www.indiatogether.org/2008/jan/law-judges.htm
[17] http://www.indiatogether.org/2008/jan/law-judges.htm
[18] Presidential Reference A.I.R. 1999 SC 1.

Trial by Media vs. Right of fair trial

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Media is regarded as one of the pillars of democracy. Freedom of media is the freedom of people to be informed of public matters. Free and healthy press is indispensable to functioning of the democracy. Democracy means making of the government by the people and to have active participation in the community decision. It is, therefore, needed that the people be informed about current and burning affairs of society. Duty of the press and media is to make the people enlightened over issues relating to public importance. It is why freedom of speech and expression has been extended to include freedom of press and media. The right to freedom of expression is contained in Art.19 of the Indian Constitution. But this freedom is not absolute. Reasonable restrictions are permitted by sub-clause (2) of the same article. Freedom of expression does not mean the freedom to commit contempt of court.

Parties to a litigation have a constitutional right to have a fair trial in court of law by an impartial tribunal, free, fair and uninfluenced by any pressure. This right of fair trial may be defeated if the media while reporting a matter use such a language which may have an effect to influence the mind of a Judge and control the judicial processes. With the growth of Cable Television and Channels, Local Radios, News Papers and Magazines, Networks and Internet the range and reach of media has increased a lot. In recent time there have been numerous instances in which media has conducted the trial of an accused and has passed the verdict even before the court passes its judgment. This phenomenon is popularly called as media trial. Trial is a word, which is associated with the process of justice. Presumption of innocence is the basis of criminal jurisprudence and it is the essential component of any judicial system that the accused should receive a fair trial. Needless to remind that in recent times, in order to sensationalize the reporting and to increase its commercial value, the media starts naming and blaming the suspect or accused. Photographs and other materials in the form of interview etc. are published and shown along with public reaction. The problem is more visible when the matters involve big name and celebrities. In such cases media reporting can swing popular sentiments either way. It is, therefore, necessary to make a balance between the constitutional guarantee of free media on one hand and the individual right to fair trial on the other.

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In **Saibal Kumar vs. B.K. Sen**[1], the Supreme Court tried to discourage the tendency of media trial and remarked,

> *"No doubt, it would be mischievous for a newspaper to systematically conduct an independent investigation into a crime for which a man has been arrested and to publish the results of the investigation. This is because trial by newspapers, when a trial by one of the regular tribunals of the country is going on, must be prevented. The basis for this view is that such action on the part of a newspaper tends to interfere with the course of justice, whether the investigation tends to prejudice the accused or the prosecution."*

Although our judicial system relies on the competence, impartiality and fearlessness of the trial judge and one can argue for unrestrained media converge of court proceeding on the ground that it will not influence the judgment. But even in England there has been divergence of opinion. In view of Lord Denning, a professional judge will not be influenced by media coverage which affects only common man. This concept of judicial superiority was not endorsed by Lord Dilhorne[2]. Even in United States the judiciary has been of the view that the court cannot function properly if a reporting is calculated to disturb the judicial mind. In **John D. Pennekamp vs. State of Florida**[3], it was observed,

> *"No Judge fit to be one is likely to be influenced consciously, except by what he see or hears in court and by what is judicially appropriate for his deliberations. However, Judges are also human and we know better than did our forbears how powerful is the pull of the unconscious and how treacherous the rational process—and since Judges, however stalwart, are human, the delicate task of administering justice ought not to be made unduly difficult by irresponsible print."*

It is correct that contempt of court is one of the ground on which reasonable restriction can be imposed on the freedom of speech. The Contempt Of Court Act defines contempt by identifying it as civil and criminal. Criminal contempt has further been divided into three types: Scandalizing or prejudicing trial and hindering the administration of justice. The provision of contempt has its origin to the principle of natural justice i.e. every accused has a right to a fair trial along with the principle that justice should not be done only but it must also appear to have been done. There may

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[1] (1961) 3 SCR 460

[2] See Attorney General v. British Broadcasting Corporation, 1981 AC 303 (HL)

[3] (1946) 328 US 331

be many ways to prejudice a trial. If it is allowed, a person may be held guilty of an offence, which he has not actually committed. No publication, which is calculated to poison the mind of a Judge, a witness or a party or cerate an atmosphere in which the administration of justice would be difficult or impossible, amounts to contempt. No editor has the right to assume the role of an investigator so as to prejudice the court against any person. But law of contempt can only be attracted to prevent comments when the case is sub-judice. If the case is not pending in the court, it is of no avail. In our legal system, the courts do not have any power to impose prior restraints on the publication of prejudicial material during the pendency of court proceedings.

In **M.P. Lohia vs. State of West Bengal**[4] the Supreme Court has strongly deprecated the media for interfering with the administration of justice by publishing one-sided articles touching on merits of cases pending in the courts.

Pointing out that the article was a one-sided version of the case, N. Santosh Hedge Justice said that the facts narrated therein are materials that may be used in the forthcoming trial in this case and that this type of article appearing in the media would certainly interfere with the administration of justice. He remarked-

> *"We deprecate this practice and caution the Publisher, Editor and the journalist who are responsible for the said articles against indulging in such trial by media when the issue is sub-judice. Others concerned in journalism would take note of this displeasure expressed by us for interfering with the administration of justice."*

Restriction on media trial is necessary so that the people may not have a wrong perception of the administration of Justice system. Some times it is necessary to protect the privacy of individual. But the major concerned is, and which is the core issue of this work is the need to check prejudicial effect caused by a sensational reporting of a sub-judice matter. So far as a criminal trial is concern media reporting has a more negative influence rather than a positive effect. The media cannot be granted a free hand in court proceedings. The media has to be properly regulated. One way is the recourse to the Law of Contempt. But, in the interest of democracy, it is better to have a self-regulated and self disciplined media in comparison to a media regulated by the court and the state.

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[4] (2005) 2 SCC 686

CORRIGENDUM

In Issue No. XXIX of the Journal the name of the esteemed author of the article 'Principles of Penology/Sentencing Policy' was inadvertantly mentioned as 'Hon'ble Mr. Justice D.P. Singh, Judge, Allahabad High Court' instead of the correct and complete name 'Hon'ble Mr. Justice Devi Prasad Singh, Judge, Allahabad High Court, Lucknow Bench'. The mistake is deeply regretted.

Editor