J.T.R.I.
JOURNAL

Thirteenth Year, 2008
Issue – XXIX July, 2008

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

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Photographs at the time of inauguration of Training Programme on 'Financial and Office Management' for District Judges/Sr. Addl. District Judges, (Duration 26th May, 2008 to 30th May, 2008)

Chief Justice Hon'ble Mr. Justice Hemant Laxman Gokhale arriving to inaugurate training programme. Shri Vedpal the then Director of the Institute (Now elevated as Judge of Allahabad High Court) is leading the Chief Guest

Photographs at the time of inauguration of Training Programme on 'Financial and Office Management' for District Judges/Sr. Addl. District Judges, (Duration 26th May, 2008 to 30th May, 2008)

Chief Justice Hon'ble Mr. Justice Hemant Laxman Gokhale inaugurating the programme by lighting the lamp. The then Director of the Institute Shri Vedpal (Now elevated as Judge of Allahabad High Court) is seen assisting him.

Photographs at the time of inauguration of Training Programme on 'Financial and Office Management' for District Judges/Sr. Addl. District Judges, (Duration 26th May, 2008 to 30th May, 2008)

Chief Justice Hon'ble Mr. Justice Hemant Laxman Gokhale and Shri V.K. Mathur, District Judge (Present Director of the Institute) on the dais.

Judicial System-Protection to Judicial Officers

- By Hon'ble (Dr.) Justice B.S. Chauhan*

Judicial System is like a shock absorber of the society as it gives expectation to the people that there is a forum available for redressal of their grievances. In fact, it has rightly been said that judiciary is a guardian of civilised life. The executive miserably failed to execute legislative policy. I'll drafted legislation, explosion of population, awareness of rights of the population on large had increased burden of the Courts to the extent that it has become difficult for the Courts to manage its affairs. Thus, there is large number of factors for which the system is not working properly. The persons responsible for resolving the problems have not made any serious efforts to solve the same.

Commissions after Commissions had been appointed and they submitted their reports. Executive has half-heartedly implemented some of them, but we could not receive any satisfactory results.

Rule of law compels citizens not to resort to extra legal means as they generally provide counter productive results on the maintenance of law and order (Vide Gaya Prasad Vs. Pradeep Srivastava, 2001 (2) SCC 604).

The delay scenario is becoming worst day by day and we remain helpless, silent spectators, as we are not

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*Lecture delivered by Dr. Justice B.S. Chauhan, Judge, Allahabad High Court (as His Lordship then was) in the North Zone Regional Judicial Workshop at Shimla on 29th March, 2008. His Lordship is now Chief Justice, Orissa High Court.

able to bring any improvement. Such a helplessness breeds corruption and encourages anti social elements to take over the functions which are exclusively meant for judiciary. Several times, meetings at very high level have been held, decisions have been taken, resolutions have been passed and guidelines have been issued to provide justice expeditiously. It has been resolved to restructure the judicial system with a view to provide cheaper and speedy justice. Repeatedly, it has been resolved that adjournments shall not be granted, as adjournment is a major cause of delay and shall be granted in exceptional circumstances and reasons should be recorded for. granting the same. Delay in disposal of the cases is basically not because of complicated procedural law, but for non-observance of the same strictly.

Suggestion was made that oral arguments should be permitted to the lawyers for a limited period and they may be permitted to submit written submissions, but in vain. Amongst various suggestions for judicial reforms, it has also been suggested that the procedure codes i.e. C.P.C. and Cr.P.C. should be scrapped and re-enacted simplifying the regulations only to meet the requirements of principles of natural justice and essence of adversarial system. Attempt should be made to meet the legislative drafting and adopt modern management of court's including Information and Communication Technology. Development of new professional ethics for the purpose of reforming the bar without undermining its independence; promote Lok Adalats and other cheaper methods of judicial system. The most important thing is to provide infrastructure including the residential accommodation of the judicial officers and provide financial autonomy. It also requires right appointments of judicial officers based on merits, suitability, ability, integrity and proper training. Refresher course, not only to judicial officers, but also for lawyers should be made compulsory. Thus, there is a requirement of over all change and not in piecemeal reforms. Major share of the total workload i.e. up to 90 percent is borne by subordinate judiciary. Most of the cases are disputes relating to land, genuineness of documents and basic civil rights. Such cases can be disposed of quickly if proper assistance is rendered to the Court and there is a conducive atmosphere to work. The administrative work of the Court should be taken up by properly trained officers and they must fix the priority of hearing of the cases and look after the maintenance of the Court.

Judges should sit in the Court punctually and work full time, they should not encourage cessation of work on account of strike in granting adjournment frequently or liberally.

There is a protection of Judges from prosecution and civil litigation to certain extent under the Judicial Officer's Protection Act, 1850.

Section 1 of the Judicial Officers' Protection Act, 1850 reads as under:-

> "No Judge, Magistrate, Justice of the Piece, 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"

Protection under this Act is absolute so long the action has been taken while performing the judicial duty. (Vide Teyen Vs. Ram Lal, ILR (1890) 12 All 115; Anowar Hussain Vs. Ajoy Kumar Mukherjee & Ors., AIR 1965 SC 1651; H.W.F.D' Souza Vs. Chandrikasingh, AIR 1966 MP 223; and Rachapudi Subba Rao Vs. The Advocate-General, Andhra Pradesh, AIR 1981 SC 755).

On the same principle and to provide similar protection, Judges (Protection) Act, 1985 was enacted. It was found necessary to enact the said Act to enable Judges to act fearlessly and impartially in the discharge of their judicial duties. It will be difficult for the Judges to function if their actions in Court are made subject to legal proceedings, either civil or criminal. In State of Rajasthan Vs. Prakash Chand, AIR 1998 SC 1344, the Hon'ble Apex Court observed as under:-

> "Even otherwise, it is a fundamental principle of our jurisprudence and it is in public interest also that no action can lie against a Judge of a Court of Record for a judicial act done by the Judge. The remedy of the aggrieved party against such an order is to approach the higher forum through appropriate proceedings.

This immunity is essential to enable the Judges of the Court of Record to discharge their duties without fear or favour, though remaining within the bounds of their jurisdiction. Immunity from any civil or criminal action or a charge of contempt of court is essential for maintaining independence of the judiciary and for the strength of the administration of justice."

Such a wide immunity has been conferred on judicial orders, so that they may act fearlessly, impartially and with full sense of security. In case of abuse of judicial powers, remedy is provided on the executive side preventing them to exercise such powers any more. The protection so granted does not protect them from disciplinary control by the superior authorities.

A person in judicial service is liable for the consequences if he acts outside the scope of his judicial service. (Vide S. Govinda Menon Vs. Union of India & Anr., AIR 1967 SC 1274; Union of India & Ors. Vs. J. Ahmed, AIR 1979 SC 1022; Daya Shankar Vs. The High Court of Allahabad & Ors., AIR 1987 SC 1469; Union of India & Ors. Vs. A.N. Saxena, AIR 1992 SC 1233; Union of India & Ors. Vs. K.K. Dhawan, AIR 1993 SC 1478; and Union of India & Ors. Vs. Upendra Singh, (1994) 3 SCC 357).

In K. Veeraswamy Vs. Union of India, (1991) 3 SCC 655, the Hon'ble Supreme Court held that no criminal case can be registered against a Judge without prior permission of the Chief Justice.

In Delhi Judicial Service Association Vs. State of Gurajat, (1991) 4 SCC 406, the police misbehaved with a judicial officer and the Hon'ble Supreme Court after expressing his disapproval issued large number of directions as under:

"(A) A Judicial Officer should be arrested for any offence under intimation to District Judge or the High Court Judge 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 shall be recorded nor shall any panchanama be drawn up or any medical tests conducted except in the presence of the legal Advisor 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.

The above guidelines are not exhaustive but these are minimum safeguards, which must be observed in case of arrest of a Judicial Officer. These guidelines should be implemented by the State Government as well as by the High Court."

In U.P. Judicial Officer's Association Vs. Union of India, (1994) 4 SCC 687, the Hon'ble Supreme Court held that incidental to the requirement of maintaining such independence of judiciary, it is important that members of the judicial services should not work under apprehensions of retaliatory action by the Executive or the Police and issue direction not to register any criminal case against judicial officer without permission of the Chief Justice of the High Court of the concerned District Judge.

Similar direction was issued in U.P. Judicial Officer's Association Vs. Union of India, J. T. (2002) 8 SC 133, when any criminal conduct is attributed to a judicial officer in discharge of his duties or in purported exercise or discharge of his duties, no crime of investigation should be registered pursuant to any F.I.R. without the permission of the Chief Justice of the concerned High Court. There must be a fixed ratio of the population and number of Court's so that there may be quick disposal of cases.

In P. Rama Chandra Rao Vs. State of Karnataka (2002) (4) SCC 578, the Apex Court held that it is a constitutional obligation of the Union of India and the State Government to strengthen the judiciary qualitatively and quantitatively by providing requisite funds, manpower and infrastructure.

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"CHILD IN NEED OF CARE AND PROTECTION"

Their Welfare and Rehabilitation

- By Hon'ble Mr. Justice Vineet Saran
Judge,
Allahabad High Court

The Juvenile Justice (Care and Protection of Children) Act, 2000 is the primary legal framework for juvenile justice in India. This is not the first legislation on this subject in the country. Juvenile Justice laws have gradually developed in India in over a century and a half. The first legislation on juvenile justice in India came in the year 1850 with the Apprentice Act, which required that children between the ages of 10-18 convicted by Courts be provided vocational training as part of their rehabilitation process. The said Act was transplanted by the Reformatory Schools Act, 1897 and later by the Children Act, 1960. Juvenile Justice Bill was first introduced in Lok Sabha in 1986 and the Juvenile Justice Act, 1986 was enacted. Then came the present Juvenile Justice Act, 2000 with exhaustive amendments in 2006 by Act No. 33 of 2006. Rules came to be framed thereunder in the year 2007, known as Juvenile Justice (Care and Protection) Rules, 2007. They comprehensively deal with the law relating to "Juvenile in Conflict with Law" and "Child in Need of Care and Protection".

The Juvenile Justice Act was introduced to establish the basis for a national uniform juvenile justice system, addressing care, protection and treatment of neglected and delinquent juveniles. The amendment was brought in to revise the Act in order to strengthen the Act and instill a child-centric rehabilitation and family restoration focused system. It provides for a special approach towards the prevention and treatment of juvenile delinquency and a frame

work for the protection, treatment and rehabilitation of children in the purview of the juvenile justice system. It takes care of every aspect of the children in need of care and protection of the State, which includes their health care, diet, education, vocational training, recreation facilities etc. as also their personal requirements of clothing, toiletries, sanitation etc.

The law on the subject is quite comprehensive. What is needed is its proper implementation. Quite contrary to the objectives of the Act, the practical reality is horrific, and needs to undergo a sea change before it can truly bring forth the legislative intent. And that is where the Judicial Magistrates and caretakers of the juvenile homes come in the picture. A law may be very good on paper but unless implemented in its true spirit, it is meaningless. That seems to be happening in this case also.

The Constitution of India envisages for Indian children a happy and healthy childhood, free of abuse and exploitation. However, the reality of daily life for vast numbers of children is completely disconnected from this vision. In the case of juveniles facing the law enforcement machinery, the situation is even more poignant. The problem of neglected and delinquent children can only be understood and dealt with in the context of the wider concept of child rights. The objectives of the Juvenile Justice (Care and Protection of Children) Act, 2000 are to ensure the care and protection of children, to provide for their development and rehabilitation, and most significantly, to reorient the law regarding juveniles according to the standards and rules prescribed by the United Nations. Large numbers of children in India live in conditions of deprivation and in circumstances which can easily lead them to crime.

Despite the best of intentions, lack of coordination between various Juvenile Justice Agencies causes the whole system to be dysfunctional. A report released by the National Commission for Protection of Child Rights (NCPCR) on February 6, 2008 throws light on the pitiful condition of juvenile delinquents languishing in reform homes in India. Around 5,000 cases against juveniles are pending in Courts. Apart from delayed justice, these children are victims of improper care by reform homes. Over 50 percent of the juvenile homes do not provide any counseling services to

juvenile delinquents, besides more than 80 percent of the caretakers of these homes are not trained. In 70 percent of the juvenile care-centres, physical punishment is a dominant method to discipline children. They are locked up for 24 hours or even more and not allowed to go out and if they even try to peep outside, they are beaten up. The report has suggested that reforms should be undertaken by juvenile homes. Not only this, the caretakers of juvenile homes should be so trained and equipped to deal with the juveniles under them with tenderness and care, as would be required for dealing with such children of tender age.

The Juvenile Homes are generally considered by all children as jails. This impression has to be erased from the mind of one and all. The fact is that in some ways, they are worse than adults' jails. Prisons have enough space for the prisoners but in most juvenile homes there is not even enough space for the juveniles to stay in proper humane conditions. For girls, the situation is even worse. At places, a hundred girls are made to spend their entire day inside one small room in the name of protection.

It is the responsibility of the society and is one of the paramount obligations of those who are in charge of governance of the country to attend to the need of children requiring care and protection and to make them appropriate citizens of tomorrow. The Courts have largely referred to the Juvenile Justice Act as a beneficial piece of legislation, and not a penal statute. It has been seen that in India the entire system bends more towards branding the juveniles as criminals, rather than making an effort to bring them back into the society, by resorting to rehabilitation or therapeutic/psychological methods.

The Juvenile Justice Act 2000 takes care of the "Juvenile in Conflict with Law" and also "Child in Need of Care and Protection". Chapter II of the Act deals with "Juvenile in Conflict with Law". For such purposes Juvenile Justice Board is to be constituted for each district or a group of districts. Such Board is to consist of a Magistrate with special knowledge or training in child psychology or child welfare, and two social workers (of whom at least one should be a woman) who have been actively involved in health education or welfare activities pertaining to child for at least 7

years. Besides this, the Act provides for the establishment of observation homes and special homes in every. district or group of districts for "Juvenile in Conflict with Law". Not only this, there is also provision made that such juvenile be placed in the charge of special juvenile police units and such police personnel are to be specially trained to deal with children and shall be in plain clothes, not in uniform. The Act prohibits publication of name and other identity of juvenile involved in any proceeding under the Act.

All this is being pointed out to show that even a "Juvenile in Conflict with Law" who is alleged to have committed an offence, is also to be dealt with and taken care of with utmost care and responsibility and should not be treated as a criminal in ordinary course. If that is the intention of the legislation with regard to the "Juvenile in Conflict with Law", then the Act takes further special care of children who are not alleged to have committed any offence. Chapter III of the Act deals with "Child in Need of Care and Protection". The Act mandates the State Government to constitute Child Welfare Committees in every district which shall have the final authority to dispose of cases for the care, protection, treatment, development and rehabilitation of the children, as well as provide for the basic need and protection of human rights.

Besides the Child Welfare Committees, the Act provides for establishment of children homes and shelter homes for the welfare of such children who are in need of care and protection. The rehabilitation and social reintegration of a child is to be done in children's home or special home by adoption, foster care, sponsorship and sending the child to an aftercare organization. The Act further provides for establishment of Central, State, District and City Advisory Boards to advise the government on matters relating to establishment and maintenance of homes, mobilsation of resources, provision of facilities for education, training and rehabilitation of "Child in Need of Care and Protection" and "Juvenile in Conflict with Law" and coordination among the various official and non-official agencies concerned. It also provides for constitution of Child Protection Unit for the State and districts for implementation of the Act. Special Juvenile Police units, with specially instructed and trained police officers, are to be established and in

every police station, at least one officer with aptitude and appropriate training and orientation is to be designated as the "Juvenile or Child Welfare Officer" who is to handle the juvenile or the child in coordination with the police.

To give full effect to the provisions of the Act, Juvenile Justice (Care and Protection) Rules, 2007 have been framed. Under section 68 of the Act, every State Government has been empowered to frame their own Rules, and until the same are framed by the State Government, the Rules of 2007 would apply. The Rules take care of setting up of observation homes and special homes for boys and girls with separate residential facilities for different age groups. The functions and powers of the Child Welfare Committees to be established for "Child in Need of Care and Protection" have been given in detail. It also envisages the involvement of voluntary organizations in coordination with the State Government to establish children homes and shelter homes. The Rules specify the standards of care to be taken while dealing with the children. They provide that the homes for "Juvenile in Conflict with Law" and for "Children in Need of Care and Protection" are to function from separate premises. Observation homes, special homes, children homes and shelter homes are all to be separate for boys and girls. The norms for the building or accommodation for such homes have been defined, which also takes care of the needs of the children staying in such homes to be given proper medical health and other facilities. Special care is to be taken of sanitation and of nutritious diet for the children. The Rules also provide for imparting education to the children according to their age and ability, and also for vocational training and recreation facilities.

In fact, the Act and the Rules have taken care of all the needs of the "Child in Need of Care and Protection". It is one thing to have legislation on the subject but what is more important is to ensure that such legislation is implemented in all earnestness. It would not be sufficient to just give lip sympathy and there can also be no justification for non implementation of such beneficial piece of legislation. The Juvenile Justice (Care and Protection of Children) Act, 2000, with its amendments of 2006, is creditworthy, as it incorporates many important aspects regarding juveniles. But besides the Act, much more needs to be done at the ground level to accomplish the objectives set out in the Act. As has been noticed above, the report of National Commission for Protection of Child Rights, issued about two months back,

throws light on how the juveniles are treated in various shelter homes, observations homes, and children homes, which is nowhere close to the objectives and standards laid down under the Act and the Rules. For this, the Magistrates concerned who are in the Juvenile Justice Boards and the caretakers of the observation homes, children homes and shelter homes will have to see that the provisions of the Act and the Rules are complied with in letter and spirit and proper medical, education and other facilities are provided to the children in such homes. Besides this, the society as a whole also has a responsibility towards "Children in Need of Care and Protection".

In the end, I may only mention that the provisions of this beneficial legislation are being violated every day. The most common example is of children who are employed as beggars, an activity which is strictly made punishable under the Act. The plight of the matter is that these activities continue in broad day light, in some of the most vibrant and busy parts of the town and the common man is a mute spectator, and so are the law enforcing agencies. It also need be mentioned here that until the homes provided under the Act are equipped with facilities as are required under Juvenile Justice Act, not much purposes would be served by sending the children in need of care and protection to such homes. So, all that is expected from the concerned Judicial Magistrates and caretakers of the homes, is that due care is taken by them that the provisions of the Act and the Rules are implemented in their true spirit, and children in need of care and protection are dealt with in a humane and friendly atmosphere, so that the objects of this beneficial legislation are fully achieved.

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Principle of Penalogy/Sentencing Policy

- By Hon'ble Mr. Justice D.P. Singh
Judge,
Allahabad High Court

The penology or sentencing policy has been constant issue for judgment writers and legal luminaries since ages. The elimination or survival, inclusion in any main stream of society or expulsion from society, has been discussed from time to time. There was a time when in England, 46 Judges were executed on account of alleged indulgence in corrupt practices. Charles-I was executed to establish the supremacy of Parliament. The sentencing policy has been changed from time to time. Some time the plight and suffering of the accuser has become prime concern for the courts to award a punishment and another time, lenient attitude was adopted under reformative approach. However, conventional and sociological approach of law has been gradually crept in our system. The realistic movement has supplemented legal ideology by making use of statistic sociology, criminology, business practice, administrative practice etc., in order to demonstrate the working of law in the society. The evolution of society depends upon political structure of a society to which the legislative machinery can decide the need for change. The share of law in social evolution is a matter of constant re-examination in the light of changed political, social and legislative condition.

In ancient India, according to description given by Kalidasa in his famous treaties, 'Raghuvansham' moderate approach was adopted by King Raghu to punish the guilts, to quote:

> 'Like the soothing breeze blowing during Vasanta that pleases every one because it neither scorches nor makes people shiver in cold, Raghu was neither harsh nor soft on his subjects. He punished the criminal in proportion to his crime. The public was extremely happy with his fair and judicial approach...His

ministers, the masters of politics and the art of administration tried to teach him how to administer harshly as well as justly. However, Raghu chose to walk on the straight path of justice and gave up being devious.'

...[Raghuvansham Canto 4]

Kautilya (321 BC) , in his famous treaties, 'Arthashastra', by L.N. Rangarajan, (Page 108) while disagreeing with the severity in punishment observed, to quote:

'A severe king [meting out unjust punishment] is hated by the people he terrorises while one who is too lenient is held in contempt by his own people. Whoever imposes just and deserved punishment is respected and honoured. A well-considered and just punishment makes the people devoted to dharma, artha and kama [righteousness, wealth and enjoyment]. Unjust punishment, whether awarded in greed, anger or ignorance, excites the fury of even [those who have renounced all worldly attachments like] forest recluses and ascetics, not to speak of householders. When, [conversely,] no punishment is awarded [through misplaced leniency and no law prevails], then there is only the law of fish]i.e., the law of the jungle]. Unprotected, the small fish will be swallowed up by the big fish. In the presence of a king maintaining just law, the weak can resist the powerful.'

I do not find any literature or research work which may belie the well considered observation made by Kautilya in Arthashastra or by Kalidasa in 'Raghubansham' (supra). The proportionality in punishment has been the main theme of sentencing policy.

Rationale, fair as well as practical approach of the courts should be adopted while giving a verdict in a criminal case punishing the accused. Chief Justice Benzamin Cardoza once said, "Justice due to the accused is due to the accuser also. The concept of fairness must not be constraint till it is narrowed to filament." The sentencing policy

should neither be too liberal nor too severe. The plight of the accuser should always be kept in mind while framing sentencing policy.

The aims and object of the Probation of Offenders Act, 1958 (in short the Act) legislated by the Parliament seems to be based on reformative theory and is limited to certain offences provided under Section 3 and 4 of the Act. Under Section 3, the court has got power to release on admonition for offence punishable for embezzlement not more than tow years or fine or both, if there is no previous conviction. The power is also available under Section 3 of the Act for sentencing in offences with regard to theft and fraud.

Admonition or probation is permissible for a person of any age with the punishment covered by Section 3 or 4 of the Act. In the case of a person under 21 years of age probation becomes mandatory under Section 5. If offence is punishable of embezzlement but not imprisonment for life for such offence Section 6 makes it mandatory that convicting court shall not sentence him to imprisonment unless the court is satisfied that having regard to circumstances of the case, including the nature of offence and the offender's character it would not be desirable to release him on probation. In such a case, the sentence of imprisonment must be accompanied by a reason. Further if offender is not released on probation in such a case, the court should call a report from the Probation Officer and consider the report as well as any other information available to court relating to character and physical, mental condition of offender. Thus, for any person conviction of an offence punishable with imprisonment but not to life imprisonment lie prima facie makes out a case to consider for probation. It is the duty of the court where a convicted offender is 21 years of age to consider for protection in view of the provisions under Section 3 and 4 of the Act. The Act is complete Code in itself. It is not necessary to elaborate the Act containing four sections having no ambiguity.

However, penology has been drastically changed by Criminal Law Amendment Act, 2005 which came with effect from 5.7.2006 as inserted in Chapter XXI-A of Code of Criminal Procedure. To introduce plea bargaining system new sections i.e., Section 265-A to 265-L have been added in the Code of Criminal Procedure. The introduction

of plea bargaining system in our criminal jurisprudence, has been borrowed from American Criminal Statutes. The legislators have tried to relieve the court from their backlogs or overburden work by introducing plea bargaining system.

Before passing a final sentence, safeguards have been provided under Section 235 (2), 248 (2) of CrPC. Sub-section (2) of Section 309 CrPC, however, provides that hearing on sentence is not adjourned to other date, only to enable the accused to show cause against the proposed sentence which may be disadvantageous. Section 360 and 361 have been meant to ensure that even after conviction every case does not call for operation of term of sentence immediately. It shall be obligatory for the courts to come out with consideration amended by Section 360, and 361 CrPC.

Care has been taken in the CrPC to compassionate the complainant under Section 357 (1) (b) CrPC while imposing sentence of fine or any other sentence including fine the whole or part of which can be recovered or applied for payment of compensation to victim for the loss or injuries caused by the offence. Section 357 CrPC further provides that court have to ensure, where court imposes sentence of which fine, does not form a part, even in such cases, the accused person may be ordered to pay compensation for the loss or injuries suffered by reasons of act for which he is sentenced. Sub-section (1) of Section 357 CrPC provides that conviction for offence of non-cognizable offence ,order for payment of reasonable cost to complainant may be made. Under Section 5 of the Probation of Offenders Act, 1958 court may if thinks fit direct the accused to pay compensation caused to the victim of crime. Section 250 of CrPC has been meant to ensure that in a case instituted upon a complaint or information given to police or to a Magistrate on false accusation, the Magistrate may direct for payment of compensation to persons falsely accused. Under Sub-section 1 of Section 358 CrPC courts have to ensure the compensation may be awarded upto Rs.1000/- to a person who is arrested groundlessly on a complaint of a citizen. Sub-section (1) of Section 358 CrPC further contains safeguards that even if a compensation is awarded it shall not absolve the wrong doer of civil or

criminal liability.

It is settled law that right to life, right to live with dignity, right to quality of life, right of privacy are fundamental in nature enshrined in Article 21 of the Constitution. Even the convicted person has got right to be treated with dignity. Every prisoner should be provided facilities to express their grievance faced with the Jail. Article 21 and 23 of the Constitution ensure that no person is subjected to any kind of physical or mental torture, cruel inhumanness, degrading treatment and due care should be taken of health and personal safety of the convicts.

While dealing with sentencing policy we should also keep in mind the various international charters and conventions resolved under United Nations of which the Government of India is signatory. Some of them are the Universal Declaration of Human Rights, 1948; International Covenant on Civil and Political Rights, 1966; Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment., 1984, Convention on the Rights of the Child, 1989; United Nations Code of Conduct for Law Enforcement Officials, 1979 etc. It has been settled by the catena of decisions of Hon'ble Supreme Court that even the international charters and conventions resolved under United Nations of which the Government of India is signatory, are binding and may be enforced by courts in case it is not followed and implemented by the Government.

Resolution under the United Nations, constitutional mandates and statutory provisions shall not be fruitful unless law enforcing agency including the courts are not influenced to their duty.

Justice V.R. Krishna Iyer, elevated to the Bench on July 2, 1968. At the occasion of adoring the office of Judge of Kerala High Court while expressing his view regarding the role of a Judge said that the mission of a Judge is of securing justice to every citizen in the ground and of creating a just society amidst us. To quote :

> "In India today, Judges have not merely to adjudicate on rights and wrongs, but have to be sentinels on the qui vive. They face newer challenges, shoulder a vast range of responsibility in upholding the

Constitution and the laws... The social goals enshrined in the Preamble to our Constitution, the Fundamental Rights chapter and the Directive Principles of State Policy broadly and vaguely project our current philosophy. The judicial organ, being part of the State, shares the national objective and perspective of political and economic democracy and spells out from the Articles of the Constitution and the Corpus juris of India the legal framework of a secular society with egalitarian urges, thus departing from the old order and conservative common law concepts."

The quantum of punishment shall depend upon the facts and circumstances of each case and also how the Presiding Officer or the Judge concerned understands the things in the contemporary social scenario. Hon'ble Supreme Court from time to time ruled that the measure of punishment in a given case must depend upon audacity of crime, the conduct of criminal and the defenceless and unprotected state of victim. The imposition of appropriate punishment is the manner in which a court responds to the societies for justice against the criminal. Justice demand that court should impose punishment fitting to the crime so that court reflect the public abhorrence of the crime. The court must not keep in view of the right of criminal but also the right of victim and crime and the society at large. While considering the imposition of appropriate punishment, aggravating factors should not be ignored and similarly, mitigating circumstances have also to be taken into account. Discretion is given to the Judges and they have to consider these factors apart from others depending upon the facts and circumstances of the case.

In the cases of Prabha Karan Vs. State of Kerla, AIR 2007 SC 2376, Ratan Singh vs. State of Punjab, 1979 A.Cr. R. 484 (SC), Satnam Singh vs. State of Rajsthan, (2001) 1 SCC 662 & State of Karnataka vs. Sharanappa Basnagouda, 2002 (45) ACC 39 (SC), the Supreme Court has held that where a life has been lost due to the rash and negligent driving of the accused, no compassion or leniency u/s. 304-A IPC can be shown and two years imprisionment should be awarded to the accused.

In AIR 1994 SC 104: Pradeep Kumar Vs. State of U.P., Hon'ble Supreme Court deprecated the courts in sending

a minor accused to Jail contrary to provisions contained in U.P. Children Act. Relying upon the case of Dhananjoy Chaterji. Vs. State of West Bengal : (1994) 2 SCC 220=1994 SCC (Cri.) 358, in the case of Bheru Singh Vs. State of Rajasthan: (1994) 2 SCC 467, their lordships held that, no leniency should be imparted where the accused is involved in the barbaric gruesome and heinous type of crime which amounts to revolt against society and affront to human dignity.

Needless to say that punishment provided by court should not always be deterrent nor so abusive that it may not serve the very purpose of awarding sentence. Hard and soft views shall be dependent upon various factors which resulted into the commission of crime.

The discretionary power which the judicial officer or judges possess, is not governed by any statutory provisions. However, the discretion is neither unfettered nor fettered subject to statutory limitation. All is to be done is to see the plight of accused and the compelling circumstances resulting in commission of crime. The discretion may be backward looking or reflective or have a responsive or a reactive character. In some cases it may be strong anticipatory predictive character. However, rich knowledge of past (history) and foresightness in visualising the social interest plays important role.

It has become common beliefs that a notable characteristic of modern system is prevalent of discretionary powers vested in wide varieties of authorities or officials. Statutes book shows that how wide ranging or activities of the State in the matter of social welfare public order, land use resource planning, economic affairs etc. has been left on discretion of authorities. The judicial authorities including judges or quasi-judiciary authorities, have been given wide discretionary power to discharge their constitutional and statutory obligations. While discharging such obligations both, whether judicial or quasi-judicial, authorities have to struck a balance between the socio-economic development in a country vis-a-vis regulate and control the social order. There may be cases where courts or authorities have to keep in mind while formulating the sentencing policy or punishing an accused, the ground realities and prevailing socio-economic condition of the country.

After all, it is the social order of paramount consideration. Too leniency with accused while awarding sentence or formulating sentencing policy may increase the crime rate in various fields like economic offences, fraud, forgery, misappropriation of public fund or other heinous crime. It was to establish the Rule of Law or social order when Arjuna was encouraged and inspired by Lord Krishna to fight for the cause of justice. Virtually, Pandavas fought to establish the Rule of Law in the society. Gita gives a message to punish the guilt is "dharm" or rule of law.

There is one incident in Ramayana which is relevant for the present topic. When in spite of the requests and prayers, the Sagar (ocean) had not given a way to Lord Rama to move towards Lanka, Lord Rama began to sting his bow declaring his intention to shoot an arrow that would be so powerful that it would dry the ocean. This has given a message to the sagar (ocean) who appeared with folded hand and suggested the way as to how he should construct the "Ram Setu" to reach Lanka. The ocean only responded to the threat of punishment and not the request. The punishment of guilt is necessary to restore law and order in the society. Over liberal attitude or approach may be disastrous to society and maintenance of law and order, shall be beyond the reach of system.

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."

(Selected words of Mahatma Gandhi Vol.V Page 373)

In nutshell for a better understanding and to acquire the capacity to deal with accused and accuser a judicial or quasi-judicial authority, should broadly be a historian sociologist, psychologist, reformer, ruler and well versed with law.

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Wild Life (Protection) Act – Is it for the protection of wild life or it's offenders?

- By VIJAI VARMA*
H.J.S.

INTRODUCTION :

Man is the most beautiful offspring of Mother Nature. Even though nature has helped him to grow, man has for material gains exploited nature. The way the nature is being butchered and the flora and the fauna are massacred, the day is not far, when the survival of the mankind itself will be in dire straits. There is an absolute urgent need to stop the exploitation of nature and protect wild life, animals and plants for the survival of the mankind.

Hon'ble Supreme Court in K.M. Chinnappa, T.N. Godavarman Thirumalpad v. Union of India and others, 2002 (10) SCC 606 has held-

> "By destroying nature, environment, man is committing matricide, having in a way killed Mother Earth. Technological excellence, growth of industries, economical gains have led to depletion of natural resources irreversibly. Indifference to the grave consequences, lack of concern and foresight have contributed in large measures to the alarming position......

The tragedy of the predicament of the civilized man is that 'Every source from which man has increased his power on earth has been used to diminish the prospects of his successors. All his progress is being made at the expense of damage to the environment which he cannot repair and cannot foresee'. There is increase in awareness of

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the compelling need to restore the serious ecological imbalances introduced by the depredations inflicted on nature by man. The state to which the ecological imbalance and the consequent environmental damage have reached is so alarming that unless immediate, determined and effective steps were taken, the damage might become irreversible."

Hon'ble Supreme Court in the aforesaid case has shown its serious concern for the protection of flora and fauna in no uncertain terms.

There has also been a spate of international conventions to deliberate upon the ways to safeguard the natural flora and fauna. Our country is no exception and joins the issue with the international community in taking urgent steps to preserve the natural resources and maintain the ecological balance.

The Wild Life (Protection) Act, 1972 as amended in 2002 is the outcome of serious national concern for protection of wild life and animals. This Act has been brought with the avowed purpose of protecting the wild animals, birds and plants with a view to ensuring the ecological balance and environmental security of the country as is well enunciated in the preamble of the Act itself. If we go through the Act we find that some extremely important provisions have been made in the Act such as constitution of the National Board for wild life where a person of no less authority than the Prime Minister of the country is to be a member of the Board as Chairperson and where a number of other ministers and bureaucrats including the chief of the army staff and other important functionaries relating to forestry etc. have been included as members. It is this National Board, which forms the standing committee, which is to perform functions with regard to wildlife protection etc. Similarly a State Board for protection of wild life is to be constituted where the Chief Minister is the prime authority.**PROHIBITION OF HUNTING AND PROVISION FOR PUNISHMENT:**

Sec. 9 of the Act prohibits hunting of wild animals specified in schedule I-IV except as provided U/s. 11 and 12 and under these provisions, exceptions can be made with regard to any animal becoming dangerous to human life or where it is so disabled or diseased as to be beyond recovery or where the animal is killed in good faith in defence of

oneself or of any other person, provided the man was not committing any act, in contravention of the any provision or rule at that time; and the other exception is made with regard to education, scientific research etc. But even such exception shall not be made with regard to any wild animal specified in schedule-I except with the permission of the State Government. The Act provides for punishment and any one who contravenes any provision of the Act or any rule made thereunder. Sec. 51 provides for punishment which ranges from a fine of 2000.00 Rs. or six months imprisonment to a fine of not less than 25,000.00 Rs. and seven years imprisonment depending on the severity of the offence committed by the offender. In some of the offences such as an offence committed in relation to any animal specified in schedule-I or where the offence relates to hunting in a sanctuary, the punishment may be with imprisonment for a term which shall not be less than three years but may extend upto seven years. So the punishment in some of the offences are very severe.

CONDITIONS GOVERNING GRANT OF BAIL – WHETHER STRICT ENOUGH :

But the conditions for granting bail by the court concerned appear to be not only ambiguous, vague but also not proper. The conditions governing, granting of bail is provided U/s. 51-A which provides-

"When any person accused of the commission of any offence relating to Sch. I or Part II of Sch. II or offences relating to hunting inside the boundaries of National Park or Wild Life sanctuary or altering the boundaries of such parks and Sanctuaries, is arrested under the provisions of the Act, then notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) no such person who had been previously convicted of an offence under this Act shall, be released on bail unless-

(a) he Public Prosecutor has been given an opportunity of opposing the release on bail; and

(b) here the Public Prosecutor opposes the application, the Court is satisfied that there are

reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail."

From the aforesaid provision it transpires that this provision is applicable, firstly where an offender had already been convicted of an offence under the Act, and secondly if he had already been convicted of an offence then the court has to give an opportunity to the public prosecutor to oppose the release on bail of such an offender, thirdly if the public prosecutor opposes the application and the court has reasonable grounds to believe that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail, then the bail shall be refused.

In other words if the accused had not been previously convicted of an offence under the Act then this proviso is not to apply. So if the person is arrested for the very first offence then it is not clear from any provision of the Act as to how his application is to be dealt with by the court. It is astonishing that the offence whether it is "non-bailable" or not, is not specified any where in the Act. Now since punishment under the different offences, is sometimes more than three years, then as per the provisions of Cr.P.C., the offence will not only be cognizable but also non-bailable one. Hence the bail matter is to be dealt with as per the provisions of Cr.P.C., where the punishment is for three years or more. But from the wordings of the provision of 51-A, it appears that in a situation where the person is arrested for the first time under the provisions of the Act, then it is not necessary to hear the public prosecutor. Moreover, if public prosecutor does not oppose the application, then the court has no reason to reject the bail application. Besides it may also be argued from the side of the accused that since there is no mention of the offence being non-bailable and since for the rejection of bail, the condition required is that the accused should have been convicted of an offence earlier, hence the application for bail of the first offender should normally be allowed by the court. In fact it is a piquant situation for the court as to how to deal with application of a bail where the offender has committed the offence for the first time. He understands that the offence is serious even if it is committed for the first time, but since there is no mention of the offence being non-bailable under the Act, and since stricter provision for bail is there only for committing the offences for the second time, hence the court finds it difficult to reject the bail application of the first offender.

This point became a matter of national debate when Sri Mansoor Ali Khan Pataudi, the ex-captain of Indian Cricket Team was found in possession of black buck and certain other wild animals specified in schedule-I of Part-I of the Act. The offence was a serious one as there was a provision for punishment upto seven years of imprisonment. Mr. Pataudi wanted to have anticipatory bail from sub-ordinate courts and thereafter from the High Court concerned but he did not get any relief and had to surrender before the court concerned. However the court concerned let him off on bail. I presume and what I gather out of the reports published in the news paper is that, Mr. Pataudi had not been convicted of an offence under the Act ever before, hence his bail application could not have been rejected U/s. 51-A of the Act. I am unaware of the merits of the case and the grounds on which the bail application was allowed by the court concerned, but certainly when I went through the provisions of the Act, I found some inherent shortcomings in the Act with regard to grant or refusal of the bail to a person accused of an offence for the first time. In my view considering the concern of the Hon'ble High Court and the Apex Court with regard to protection of the wild life and the flora and fauna and the greener and stricter interpretation of the environmental laws in general and Wild Life (Protection) Act in particular, there should be specific mention of the fact as to whether the offence is cognizable, non-bailable one or not, so that there can be no doubt in the minds of the Court with regard to the manner of granting or refusal of bail in such offence where the responsibility is as much resting on the courts as on the governmental authorities to safeguard and protect the wild life and animals. This becomes all the more important because of the provision of Sec. 51-A as discussed above. Specific mention about the offence being cognizable and non-bailable will certainly obviate any misgiving, which might be there in the minds of the public or the agencies involved in the administration of criminal justice.

In this regard, I would like to mention the provision of N.D.P.S. Act, 1985, an Act, which has been promulgated to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances. Sec. 37 of this Act provides-

"(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for [offences under section 19 or section 24 or section 27-A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail."

From the aforesaid provision, it transpires that the wordings of this section are similar to what is provided U/s. 51-A of the Wild Life (Protection) Act, containing conditions for granting of bail. But in section 37 of the NDPS Act, firstly, the offences have been clearly defined as cognizable and non-bailable, so there is no misgiving about that. Secondly the condition of giving opportunity to public prosecutor and when the public prosecutor opposes the application, the court has to be satisfied that there are reasonable grounds for believing that the accused is not guilty of such an offence and that he is not likely to commit any offence while on bail, then only the court shall grant bail. These two conditions are already provided in the same words in the conditions for granting bail U/s. 51-A of the Wild Life (Protection) Act. But such conditions are to apply under the WLP Act when the person has been arrested under the specified offence of the Act and had been previously convicted of an offence under the Act. If he had not been previously convicted of an offence then these conditions do not apply. In other words these conditions do not apply to the first offender. U/s. 37 of the NDPS Act, no such condition of having been convicted earlier is there, so even if an offender commits an offence for the first time then too the aforesaid conditions applied in bail matters. In my view under the WLP Act also such a provision should be made so that the courts are bound to observe aforesaid conditions

while granting/refusing bail as the aforesaid conditions make it difficult for the court to grant bail. It is interesting to mention here that Section 51(5) provides that nothing contained in the Probation of Offenders Act, 1958 shall apply to a person convicted of an offence with respect to hunting in a sanctuary or national park or of any offence against any provision of chapter V-A, unless such person is under 18 years of age. This provision makes it clear that the benefit of Probation of Offenders Act is not to be given to an offender under the Act under specific provisions. I fail to understand as to why when the offender is not to be given any benefit for committing the offence for the first time under Probation of Offenders Act, 1958, which is normally given to a first offender, then why the conditions laid down U/s. 51-A are to apply for a person committing the offence for the second time only and not to a first offender. Infact provision for not giving any benefit to the first offender provided U/s. 51(5) fortifies my view for providing stricter conditions for bail to the first offender also, which under the Act are applicable to a second offender only.

It is also interesting to mention here that one of the objectives of the Wild Life Protection Amendment Bill, 2002 was to enhance and rationalize penalties prescribed under the Act including the making of suitable provisions on the lines of the provisions of Chapter V-A of the NDPS Act, 1995 in cases of offences pertaining to wild animals included in schedule I and part II of schedule II of the Act.

One of the reasons as to why the wordings of Section 37 of the NDPS Act and those of 51-A of the Wild Life (Protection) Act, appear to be nearly the same except the vital difference that has been discerned and discussed above, is the aforesaid objective of the Bill 2002. Needless to mention here that the provisions of bail provided under the NDPS Act substantially achieve the objective of the Act whereas I am afraid the provisions of bail as enunciated under the WLP Act, might fail to achieve the objective for which the Act has been carved out.

PROVISIONS WITH MISTY AREAS :

Apart from the stricter provision for bail even for the first offence, which should be there in my view in the

Act, I find that there are certain other provisions, which create ambiguity in the exercise of powers by the court or by the specified wild life or forest officer. U/s. 50(4) of Chapter VI (Prevention and Detection of Offences), it is provided-

> "Any person detained, or *things* seized under the foregoing power, shall forthwith be taken before a Magistrate to be dealt with according to law [under intimation to the Chief Wild Life Warden or the officer authorized by him in this regard]".

This provision makes it clear that any person detained or any thing seized under the provisions of this section, should be taken before the Magistrate concerned for being dealt with as per law. Sub-clause 3(A) of Section 50 provides as under-

> "Any officer of a rank not inferior to that of an Assistant Director of Wild Life Preservation or [an Assistant Conservator of Forests], who, or whose subordinate, has seized any captive animal or wild animal under clause (c) of sub-section (1), may give the same for custody on the execution by any person of a bond for the production of such animal if and when so required, before the Magistrate having jurisdiction to try the offence on account of which the seizure has been made]."

From this provision it transpires that Assistant Director of Wild Life Preservation or Assistant Conservator of Forest may give custody of any captive animal or wild animal seized to any person on execution of a bond for producing if as and when required by the Magistrate having jurisdiction to try the offence. Similarly Section 50(6) of the Act provides-

> "Where any meat, uncured trophy, specified plant or part of derivative thereof is seized under the provisions of this section, the Assistant Director of Wild Life Preservation or any other officer of a

gazetted rank authorized by him in this behalf or the Chief Wild Life Warden or the authorized officer may arrange for the disposal of the same in such manner as may be prescribed."

From this section it transpires that Assistant Director of the Wild Life Preservation etc. may arrange for the disposal of any meat, uncured trophy, specified plant or its part under the provisions of this section in such manner as may be prescribed.

Thus from the aforesaid clause 3(A) and clause (6) of section 50, it is borne out that if certain animal or certain animal article or specified plant are seized then the animal can be given in custody to any person by the specified wild life or forest officer and animal article or specified plant seized may be disposed of by the specified Wild Life Protection Officer. These provisions create confusion and in a certain way are in contradiction with what has been provided U/s. 50(4) mentioned above. Thus the things seized such as wild animal or meat or plant etc. as mentioned U/s. 3(A) or (6) of section 50 are to be produced before the Magistrate concerned and it is he who has to deal with those things under the provisions of Cr.P.C. including those under Chapter XXXIV, which deals with the disposal of property. I find that the word 'shall' has been used U/s. 50(4) making it mandatory for the things to be produced before the court and when the things are to be produced before the court then it is the court only which has to pass suitable orders under the provisions of law. Now the important question is whether the word "things" also includes the captive animal or wild animal as used under clause 3 of section 50 and "meat, uncured trophy, specified plant or part or derivative thereof" as used U/s. 50(6). Ostensibly it appears that the word "things" does include the aforesaid words. So if the word "things" includes all the things then the power to dispose of the same rests with the Magistrate as contained in Section 50(4) and if the word "things" does not include wild animal or meat etc. then the power as contained U/s. 50(3)(A) and 50(6) may rest with the wild life authorities and there is no contradiction between the powers of the Magistrate and that of the wild life authorities with regard to disposal of specified things seized. But it is not clear from the provision of the Act whether the word "things" includes captive animal or wild animal meat etc. or it does not and because of this ambiguity there can always be confusion as to whether it is wild life authorities who

have the power to arrange for the disposal of specified things or the Magistrate who is to deal with things brought before it.

Another very important distinguishing feature of this Act is the evidence which can be recorded U/s. 50(8)(d). Section 50(9) provides as under-

> "(9) Any evidence recorded under clause (d) of sub-section (8) shall be admissible in any subsequent trial before a Magistrate provided that it has been taken in the presence of the accused person."

From this section it is borne out that any evidence recorded (under clause (d) of sub section (8) of section 50) by a specified officer of the wild life or the forest department for the purposes of investigation into any offence under the provision of this Act, shall be admissible in any subsequent trial before the Magistrate if it has been recorded in the presence of the accused person. This is a very important and distinctive feature of the Act in as much as any evidence recorded during the investigation is admissible in a trial before a Magistrate, provided it was recorded in the presence of the accused person by a specified officer whereas normally any evidence recorded under 161 of Cr.P.C. by the investigating officer is not admissible in evidence. This distinguishing provision has been made with the main idea of proving the case against the accused easily, though there could be many more reasons for providing such a drastic provision. In my view one of the reasons would be that the witnesses are not generally available with regard to commission of an offence in a forest and lest an accused person may go scot free because of lack of evidence, such a provision has been made. But it is not discernible from the Act as to how such evidence is to be produced in the court and what will be its format and how it will be put to cross-examination etc. Since this is a unique provision hence in my view all these things should be made clear to the authorities concerned as well as to the court, so that not only such evidence is recorded more often by the specified authorities but they are also produced in the court for proving the case against the accused person, and as they are admissible they might be clinching evidence in proving the case

against the accused.

CONCLUSION :

If the ambiguity and the confusion are cleared and the bail provisions are made stricter then there is every possibility that the criminals committing offence under the Wild Life (Protection) Act may not be able to get bail from the courts easily and there could be many more convictions of such offenders which will send correct message and give right signals to the society creating a fear factor and deterrent in the minds of such offenders which might bring in sharp decline in the commission of such offences which is the ultimate objective of the Act.

Let us not forget that this Act is for securing protection of the wild life. The way the wild animals are vanishing from the earth, there is an absolute urgent need to stop hunting or killing of wild animals in general and endangered species in particular. That is why there is the need to take to task, all those who fiddle with the forest, wild animals and kill the animals with impunity. It is in that regard that a stricter action needs to be taken against all such offenders even at the level of granting of bail, lest such offenders may harbour the idea that they can always commit offences and wriggle out of the clutches of the judicial system. The provisions should be such as to create a terror in the minds of the offender. Therefore a re-thinking and re-look at the provisions of the Act is urgently required, which might serve the cause of the wild life, the environment and the nation better.

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प्राचीन न्याय व्यवस्था में दण्ड विधान

- डा० राजेश सिंह
अपर जिला जज,
जालौन स्थान-उरई।

किसी भी भारतीय के लिये यह गौरव का विषय है कि प्राचीन काल मे भारतीय न्यायिक पद्धति तर्क पूर्ण संहिता बद्ध एवं सुविचारित थी। प्राचीन न्याय व्यवस्था मे न्यायाधीश पर यह आबद्धकारी था कि न्याय विषयक् किसी मामले मे यदि संदेह पैदा हो जाये तो वह कितना ही बड़ा विधि विशेषज्ञ क्यो न हो अकेले निर्णय न ले, आपस मे परामर्श करके ही संदेह का निवारण करना न्यायाधीश के लिये उचित था क्योंकि इस प्रकार से लिये गये निर्णय आवश्यकतानुसार नियम का स्वरूप धारण करते थे। इस प्रकार न्यायसभा मे परस्पर विचार विमर्श के समय यदि कोई न्यायाधीश बिना दोनों पक्षों को सुने हुये बिना गम्भीरता पूर्वक मनन किये किसी प्रश्न के सम्बन्ध मे निर्णय देता था तो वह न्यायाधीश पाप का भागी होता था। **महाभारत अनुशासन पर्व ७०-१३-१६-२७।** इस प्रकार आधुनिक न्याय व्यवस्था से तुलना करने पर यह निष्कर्ष निकलता कि प्राचीन न्याय व्यवस्था में भी दोनों पक्षों को सुनने के उपरांत तथा गम्भीर मनन एवं परामर्श करने के उपरान्त ही न्यायाधीश कोई निर्णय सुनाते थे।

प्राचीन न्याय व्यवस्था मे दण्ड को अत्याधिक महत्व दिया गया है। किसी भी समाज मे शांति स्थापित करने के लिये दण्ड का महत्वपूर्ण स्थान होता है और दण्ड भय से ही मनुष्य सन्मार्ग से चलते है। यदि व्यक्ति को दण्ड का भय न रहे तो वह उच्छृंखल होकर समाज की अपूर्णनीय क्षति कर सकता है, यह अपराधी विशेष पर निर्भर करता है कि उसे किससे भय होगा। **-काणे-हिस्ट्री ऑफ धर्मशास्त्र-६६१।** इस प्रकार प्राचीन न्याय व्यवस्था मे दण्ड का बहुत महत्वपूर्ण स्थान था। विधि के समक्ष समानता के अधिकार का सिद्धान्त प्राचीन न्याय व्यवस्था में भी लागू था। प्राचीन न्याय व्यवस्था के अनुसार विधि के समक्ष कोई भी अदण्ड नही था, यहाँ तक कि मन्त्री अथवा न्यायाधीश जिसने अपने कार्य को न्यायपूर्वक न किया हो तो उसे भी सहस्त्र पर्ण से दण्डित करने का विधान था तथा यदि उक्त व्यक्ति उत्कोच लेकर न्याय कार्य को नष्ट करे तो उनकी सम्पत्ति कुर्क करने का भी विधान प्राचीन न्याय व्यवस्था मे था। **-मनु९/२३१**

प्राचीन भारतीय न्याय व्यवस्था मे पक्षपात रहित न्याय पर अत्यधिक बल दिया गया। यदि न्यायाधीश भूल से अथवा जानबूझकर कोई अन्याय करता था तो उसके लिये दण्ड एवं प्रायश्चित की व्यवस्था थी। न्यायाधीश के लिये यह आवश्यक था कि वह न्यायिक कार्य करते समय निष्पक्ष रह कर न्यायिक प्रक्रिया का अनुपालन करें। न्यायाधीश के लिये यह आवश्यक था कि वह सदैव वादी एवं प्रतिवादी की बातों को सुनने के लिये विद्वान पुरुषों को बैठाये रखे क्योंकि विशुद्ध न्याय पर ही राज्य प्रतिष्ठित होता है। न्यायाधीश को तब तक कोई निर्णय नही करना चाहिये जब तक न्यायाधीश सत्यता को न जान लें। **-महाभारत अनुशासन पर्व-१४५।**

प्राचीन न्याय व्यवस्था से भ्रष्ट न्यायाधीशों को दण्डित करने का भी विधान था। कौटिल्य न्यायाधीशों के अपराधों का उल्लेख करते हुये कहते हैं कि वादी को धमकाना, फटकारना, निकाल देना, न पूछने योग्य बात को पूछना, और पूछने योग्य बात को न पूछना, और ऐसे न्यायाधीश जो रिश्वत लेने में रुचि रखते हो, पराई स्त्रियों के जिनके संबंध हो जो विशेषतः कठोर दण्ड देने के पक्षपाती हो तथा झूठा फैसला देते हो उन न्यायाधीशों को देशकाल एवं अपराध की गम्भीरता को देखते हुये दण्डित किया जाना चाहिये। विधि विशेषज्ञ शुक्र ने रिश्वत लेकर निर्णय देने वाले न्यायाधीशों/सभ्यों को उनकी सम्पत्ति छीन कर उन्हें देश से निकाल देने का प्रावधान किया। **शुक्र नीति सार-४-५,६३,६४**

प्राचीन न्याय व्यवस्था मे मुख्यतः निम्न दण्ड के प्रावधान थे।

१- धिक दण्ड, भर्त्सना करना।
२- वाक् दण्ड, चेतावनी।
३- अर्थ दण्ड।
४- शारीरिक दण्ड।

प्राचीन न्याय व्यवस्था मे विधि वेत्ता एक ओर जहाँ कठोर दण्ड का प्रावधान कर रहे थे, वहीं छोटे-छोटे अपराधों के लिये तथा प्रथम बार अपराध करने वाले एवं किशोरवय अराधियों के लिये चेतावनी तथा झिड़की देने या धिक्कारने का भी दण्ड विधान था। आधुनिक विधि व्यवस्था मे भी छोटे अपराधियों के लिये भी चेतावनी एवं भर्त्सना किये जाने का प्रावधान किया है। इस सम्बन्ध मे दण्ड प्रक्रिया संहिता की धारा ३६० में अभियुक्त को सदाचरण का पर्यविक्षा या भर्त्सना के पश्चात् छोड़ने का उपबन्ध है। इसी प्रकार कम आयु के अपराधियों को सदाचरण की पर्यविक्षा पर छोड़ने का उपबंध आधुनिक भारतीय न्याय व्यवस्था मे उपलब्ध है।

गम्भीर अपराधों के लिये प्राचीन भारतीय न्याय व्यवस्था मे अपराधियों को जेल में बन्द करना, बेड़ी डालना, अंग छेदन करना, तथा पीड़ा पहुंचाने का दण्ड विधान था। इसके अतिरिक्त अपराधी को छोटे अपराधों के लिये समाज में अपमानित करने के उद्देश्य से उसके सिर के बाल मुड़वाने, गधे में बैठाकर नगर भ्रमण करवाने तथा चिन्हांकन करने का भी दण्ड दिया जाता था। इसके अतिरिक्त अपराधी को देश से बाहर निकलने का भी दण्ड विधान मौजूद था। सामान्य अवधारणा यह है कि प्राचीन न्याय व्यवस्था में अपराधों के लिये सामान्यतः मृत्यु दण्ड विधान था, परन्तु प्राचीन न्याय व्यवस्था के गम्भीर अध्ययन के उपरांत यह निष्कर्ष निकलता है कि आधुनिक काल की तरह ही प्राचीन न्याय व्यवस्था में भी सामान्यतः मृत्यु दण्ड देने को निषेधित किया गया। प्राचीन न्याय व्यवस्था में न्यायाधीशों को यह स्पष्ट निर्देश था कि जहाँ तक सम्भव हो अन्य प्रकार के दण्ड से अपराधी को दण्डित किया जाये। परन्तु कतिपय गम्भीर अपराधों के लिये प्राण दण्ड की व्यवस्था की गयी थी जैसे राजद्रोह के लिये मृत्युदण्ड का उपबन्ध था। मृत्युदण्ड का उद्देश्य एक ओर अपराधी को पुनः अपराध करने योग्य नहीं छोड़ना था तथा दूसरी ओर भावी अपराधियों के हृदय में इसके द्वारा भय उत्पन्न करना भी था ताकि वे इस प्रकार के अपराध न करें। प्राचीन न्याय व्यवस्था में मृत्यु दण्ड प्रायः सार्वजनिक स्थानों में नगाड़ों की धुन के साथ दिया जाता था। अपराध की विधिवत् घोषणा की जाती थी। मृत्यु दण्ड के तरीके के बारे में महाभारत के आदि पर्व में विस्तार से वर्णन किया गया है।

आज भी बुद्धिजीवियों, न्यायविद्धों, विधि विशेषज्ञों के मध्य यह मंथन का विषय है कि मृत्युदण्ड उचित है अथवा अनुचित। प्राचीन भारत का बौद्धिक वर्ग भी इस संबंध में यथेष्ठ विचारशील था। मनु से लेकर आज तक माननीय सर्वोच्च न्यायालय के न्यायाधीशों ने गम्भीर अपराधों के लिये मृत्युदण्ड की आवश्यकता को स्वीकार किया है और उसे विधि के विरूद्ध एवं असंवैधानिक नहीं माना है। प्राचीन न्याय व्यवस्था के अनुसार शीघ्रता में किसी को प्राण दण्ड देना नहीं चाहिये। प्राण दण्ड देकर अपराधी का मूलोच्छेद नहीं किया जाना चाहिये। किसी की जड़ उखाड़ना सनातन न्याय नहीं है। अतः न्यायाधीश को अपराध की गम्भीरता के अनुसार ही न्यायोचित दण्ड देना चाहिये। कम गम्भीर अपराधों के लिये प्राचीन न्याय व्यवस्था यह विधान करती है कि अपराधी को उसका सर्वस्व छीन लेने का भय दिखाया जाना चाहिये, उसे कैद कर लेना चाहिये, अपराध की गम्भीरता के अनुसार अंग-भंग करके अपराधी को कुरूप कर दिया जाना चाहिये, परन्तु प्राण दण्ड देकर उनके कुटुम्बियों को क्लेश पहुंचाना उचित नहीं है। आधुनिक न्याय व्यवस्था में भी प्राण दण्ड के औचित्य को स्वीकार किया गया है। बचन सिंह बनाम पंजाब राज्य, १९८० एस०सी०सी० ६८४ में माननीय सर्वोच्च न्यायालय ने मृत्यु दण्ड को संवैधानिक माना है और विरलों से विरलतम मामले में मृत्यु दण्ड दिये जाने को उचित माना है। आज से करीब पाँच हजार साल पूर्व जो न्यायिक व्यवस्था भारत वर्ष में लागू थी उसमें भी न्यायाधीशों को यह स्पष्ट निर्देश था कि मृत्यु दण्ड विरलों से विरलतम मामले में ही दिया जाये। न्यायविद् भीष्म ने स्पष्ट विधान किया है कि मृत्युदण्ड को अत्यन्त गम्भीर एवं विरलों से विरलतम मामलों में ही अन्तिम हथियार के रूप में प्रयोग करना चाहिये। अपने सुधारात्मक दृष्टिकोण को आगे बढ़ाते हुये वह कहते हैं कि जब प्रजा में दण्ड का भय उत्पन्न किया जाता है तब प्रजा सत्कर्म परायण होती है अतः भय दिखाकर प्रजा को न्याय के रास्ते में लगाना ही दण्ड का उद्देश्य है किसी का प्राण लेना

नही। -शान्तिपर्व २६७/२५। इस प्रकार प्राचीन न्याय व्यवस्था से जब आधुनिक न्याय व्यवस्था की तुलना हम करते हैं तो एक आश्चर्यजनक समानता दोनों मे दृष्टिगोचर होती है।

प्राचीन न्याय व्यवस्था मे सामान्यतः अपराधियों की दो तरह की प्रवृत्तियों का विवरण मिलता है। प्रथम सामान्य अपराधी जिसने पहली बार अपराध किया है, दूसरा आदतन अपराधी। प्राचीन विधि व्यवस्था मे यह स्पष्ट रूप से प्रावधान था यदि किसी व्यक्ति से प्रथम बार अपराध हुआ है तो उसे कम एवं सरल दण्ड दिया जाना चाहिये ओर यदि अपराधी आदतन अपराधी है तो उन्हीं अपराधों के लिये अधिक दण्ड अथवा अन्य कोई कठोर दण्ड दिये जाने का निर्णय होता था। दण्ड देते समय अपराधी की स्थिति, अपराध का स्वरूप तथा अपराध की पुनरावृत्ति के बारे में न्यायाधीश भली-भांति विचार करें, ऐसी विधि व्यवस्था थी। -गौतम-१२/५१

अपराध की परिस्थितियो पर भी प्राचीन न्याय व्यवस्था मे विशिष्ट उपबंध मौजूद थे। किसी भी न्यायाधीश के लिये यह उचित था कि वह अपराधी को दण्ड देते समय अपराध किन परिस्थितियों में किया गया है। इसका ध्यान रखें, प्राण रक्षा हेतु किसी भी प्रयास को अपराध की श्रेणी में नही माना जाता था। दुर्भिक्ष काल मे क्षुधा पीड़ित महर्षि विश्वामित्र ने चाण्डाल के घर से कुत्तों का मांस चुराने का प्रयास किया था। परन्तु उसे अपराध नहीं माना गया। आधुनिक विधि व्यवस्था मे भी भारतीय दण्ड संहिता की धारा-१०० से लगाकर १०६ तक किसी व्यक्ति को शरीर एवं सम्पत्ति की व्यक्तिगत प्रतिरक्षा के अधिकार की व्यवस्था की गई है, जोकि प्राचीन न्याय व्यवस्था में पूर्व से ही पायी जाती थी।

विद्वतजनों, प्राचीन न्याय व्यवस्था बहुत ही विस्तृत संहिताबद्ध, सुविचारित एवं तत्कालीन समाज के अनुकूल विरचित की गई, जिसमें समय-समय पर आवश्यकतानुसार संशोधन भी किये गये। प्राचीन न्याय व्यवस्था के अध्ययन से यह निष्कर्ष निकलता है कि आधुनिक विधि व्यवस्था के वे तथ्य जो न्याय संरचना के आधारभूत तत्व है, प्राचीन न्याय व्यवस्था मे पहले से ही उपलब्ध थे और हमें बहुत कुछ प्राचीन न्याय व्यवस्था से ग्रहण किया है और आवश्यकता इस बात की है कि प्राचीन न्याय व्यवस्था के गौरवशाली अध्याय को सामने लाने के लिये और अधिक शोध किया जाये।

Role of sub-ordinate judiciary in the protection of Human Rights

- By S.S. Upadhyay[*]
HJS

Human rights are not conferred by any ruler, constitution or statute. A human is born with human rights. With the declaration of human rights on December 10, 1948, India became one of the signatory countries of the world having made commitment to respect and protect the human rights declared and accepted by the United Nations Organizations. The UNO had required the signatory countries to incorporate the universally acknowledged human rights in their Constitutions and domestic laws. India being signatory to these UNO Declarations of human rights, incorporated the human rights as fundamental rights in the Indian Constitution enforceable since January 26, 1950. Our Constitution specifically empowers the judiciary to protect the human rights in the form of fundamental rights enumerated in our Constitution and in case of any violation of the fundamental rights of the citizens, judiciary has been empowered to protect and restore the same. The sub-ordinate judiciary being easily accessible to the common citizenry is supposed to come first to the rescue and protection of human rights of the citizens. Since the inception of Constitution, the country is governed by rule of law and not by the whims of any individual authorities. The object behind various legislations and creation of different organs of the State is nothing but to ensure the overall welfare of the citizens and to protect their life, liberty, dignity and fundamental or human rights. Apart from the higher judiciary, the sub-ordinate courts do also play very important role in protecting the human rights of the citizens. The sub-ordinate

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judiciary being easily accessible by the masses, comes first to protect the human rights of the citizens. Different agencies of the executive like police, jail and others are often blamed for violation of human rights of the citizens. The Supreme Court has over the years taken much pains in issuing directions and guidelines to the sub-ordinate judiciary for protection of human rights of the citizens. Different agencies of the executive have also been repeatedly directed by the Supreme Court not to violate the human rights of the citizens. Most of the complaints regarding violation of human rights are made against the police and the jail authorities. The various legislations and the judicial pronouncements by the Supreme Court for the protection of human rights of the citizens need to be discussed here.

Arrest of a citizen by the police and the treatment with him thereafter by the police has always been the area of concern for the courts. In the case of Joginder Kumar v. State of U.P., (1994) 4 SCC 260, the Hon'ble Supreme Court has clarified that an accused named in a FIR should not be arrested soon after the registration of the FIR. He should be arrested by the investigating officer only after collecting some evidence showing his involvement in the commission of the offence.

In the famous cases of D.K. Basu v. State of West Bengal, (1997) 1 SCC 416 and A.K. Jauhari v. State of U.P., (1997) 1 SCC 416, the Hon'ble Supreme Court has issued following guidelines for the arresting officers to be observed at the time of arrest of a person and treatment thereafter with him.....

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) The police officers carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable member of the locality from where the arrest is made. It shall be countersigned by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation center or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at a particular place unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district and the police station of the area concerned telegraphically within a period of 8 to 10 hours after the arrest.

(5) The person arrested must be made aware of his right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requires, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and it's copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director Health Services of the state or union territory concerned. Director, Health Services should prepare such a panel for all Tehsils and Districts as well.

(9) Copies of all the documents including the Memo Of Arrest referred to above should be sent to the Illaka Magistrate for his record.

(10) The arrestee may be permitted to meet his Lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all District and State Headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest within 12 hours of effecting the arrest and the police control room it should be displayed on a conspicuous notice board.

A full bench of the Allahabad High Court has in the matter of Ajeet Singh v. State of U.P., 2006 (6) ALJ 110 (Full

Bench), held that any violation of the guidelines issued by Hon'ble Supreme Court in the cases of D.K. Basu and A.K. Jauhari would not only provide a ground to the accused to question the correctness of his arrest but the arresting officer would also stand exposed to the contempt proceedings for non observance of the aforesaid guidelines of the Hon'ble Supreme Court. The guidelines issued by Hon'ble Supreme Court in the cases of D.K. Basu and A.K. Jauhari in the year 1997 have now been incorporated in Sec. 50-A of the Cr.P.C. through the amendments since June, 2006. Under the newly added Sec. 50-A (4), a duty has been cast upon the Magistrates to ensure at the time of production of the arrested accused before them that the guidelines contained in Sec. 50-A of the Cr.P.C. have been complied with by the arresting officer. The introduction of these provisions in the Cr.P.C. through amendment is aimed at protecting the human rights of the arrestee from the tortures and atrocities committed by the police.

Respecting the human rights of the female accused a new sub-section (4) to Sec. 46 Cr.P.C. has been added since June, 2006 which provides that save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of the first class within whose jurisdiction the offence is committed or the arrest is to be made. However, in the case of State of Maharashtra v. Christian Community Welfare Council of India, (2003) 8 SCC 546, the Supreme Court while interpreting the provisions contained U/s 41 and 46 Cr.P.C. for the arrest of a female accused, has clarified that it is not necessary that a lady constable must be present at the time of her arrest and in case a lady constable is not present to effect the arrest of the female accused then the arrest can be made by the male police officer also provided there would be undue delay in the arrest of the female accused and that would impede the investigation.

Torture of an accused in police custody, custodial deaths and atrocities on prisoners in jails have also been one of the major area of concern as regards the human rights. The Hon'ble Supreme Court has in a plethora of cases (noted below) clarified that if a person in the custody of police is subjected to any torture, inhuman treatment or violence or custodial death takes place then courts can not only take appropriate action against the responsible police officer but can also provide compensation to the dependents of the deceased or the victim of the illegal torture or violence......

1. Shakila Abdul Gafar Khan (Smt.) v. Vasant Raghunath Dhoble, (2003)7 SCC 749
2. Raghbir Singh v. State of Haryana, (1980) 3 SCC 70
3. Gauri Shankar Sharma v. State of U.P., AIR 1990 SC 709
4. Bhagwan Singh v. State of Punjab, (1992)3 SCC 249
5. Nilabati Behera v. State of Orissa, AIR 1993 SC 1960
6. Pratul Krishna v. State of Bihar, 1994 Supp. (3) SCC 100
7. Kewalpati v. State of U.P., (1995) 3 SCC 600
8. Inder Singh v. State of Punjab, (1995) 3 SCC 702
9. State of M.P. v. Shyam Sunder Trivedi, (1995)4 SCC 262
10. D.K. Basu v. State of W.B., (1997) 1 SCC 416
11. Sheela Barse v. State of Maharashtra, (1983) 2 SCC 96
12. State of Maharashtra v. Christian Community Welfare Council, (2003) 8 SCC 546
13. Sube Singh v. State of Haryana, 2006(54) ACC 873 (SC)

With the introduction of a new Sec. 176 (1-A) in the Cr.P.C. by the Parliament with effect from June, 2006, a

duty has been cast upon the Judicial Magistrates exercising local territorial jurisdiction to conduct judicial inquiry in the matters of fake encounters, custodial deaths or extra judicial killings caused by the police and subject to the result of the inquiry to take appropriate further legal action in such matters against the responsible police officer or the arresting officer.

A new Sec. 436-A has also been added in the Cr.P.C. since June, 2006 which provides that where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the Punishments under the law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties.

The purpose behind the incorporation of the aforesaid new provisions in the Cr.P.C. through amendments w.e.f. June, 2006 is to protect the human rights of the arrestees and the accused persons as directed by the Hon'ble Supreme Court in the abovenoted cases. The sub-ordinate courts particularly the magisterial courts have been assigned the task of ensuring the observance of the aforesaid new provisions in the Cr.P.C. and the guidelines issued by Hon'ble Supreme Court from time to time in the abovenoted cases.

With the passage of Protection of Human Rights Act, 1993, special courts of sessions have been constituted and empowered to deal with the cases of violation of human rights. The 1993 Act, no doubt, doesn't contain any penal provision in itself for punishing the violator of the human rights but Sec. 30 of the Act makes it sufficiently clear that the cases regarding violation of human rights are to be exclusively dealt with by such special courts only. The

Allahabad High Court, vide it's C.L. No. 18/2006/Admin.(A-3)/Dated: Allahabad: 10.5.06 in consonance with the U.P. Government's Notification No. A-20/VII-Nyaya-8-05-36G-2000, dated May 2, 2005, has notified and authorized different Additional District & Sessions Judges in different districts in the State of U.P. to try the cases involving violation of human rights. The procedure laid down in the above noted C.L. issued by the High Court provides that the complaints regarding the violation of human rights would be instituted in the courts of the judicial magistrates exercising local territorial jurisdiction over the area and if after inquiry in the complaint the judicial magistrate finds that some prima facie case of violation of human rights is made out, he shall commit the case for trial to the court of Special Additional Sessions Judge constituted for the purpose. As per the procedure laid down by Allahabad High Court in the aforesaid C.L. dated 10.5.2006, the special courts constituted U/s. 30 of the 1993 Act cannot take cognizance of the offences relating to the violation of human rights directly but these special courts can take cognizance of the offences only after the case has been committed to the court of sessions. It is thus abundantly clear that a complainant alleging violation of human rights has to file a complaint in the court of the judicial magistrate having jurisdiction over the area within which the offence regarding violation of human rights is alleged to have taken place. In case the Special Court of the Additional Sessions Judge finds the accused guilty for the violation of the human rights, it would recommend for initiation of proper prosecution of the violator of the human rights for the offences under the appropriate penal sections attracted to the case and such an accused would then be prosecuted for the sort of offences which are declared penal in the IPC are any other penal law for the time being inforce. Since the 1993 Act itself does not provide any penalty and as such the general penal law contained in the IPC or any other penal law for the time being inforce may be applied by the courts to award appropriate penalty or sentence upon the violator of the human rights as per the provisions in the relevant penal law.

Putting hand-cuff to the accused or the prisoners or subjecting them to any other manner of inhuman treatment has also been deprecated by the Hon'ble Supreme Court and various guidelines have been issued in this regard to the effect that without the prior permission of the courts no authority including jail authorities would hand-cuff or fetter the prisoners. Any violation of the guidelines issued by Hon'ble Supreme Court to that effect has been declared punishable as contempt of court in the following cases....

1. Altemesh Rein Advocate, Supreme Court of India v. Union of India, AIR 1988 SC 1768
2. Prem Shanker Shukla v. Delhi Administration, AIR 1980 SC 1535
3. State of Maharashtra v. Ravikant S. Patil, (1991) 2 SCC 373
4. Sunil Batra v. Delhi Administration, (1978) 4 SCC 494
5. Sunil Gupta v. State of MP, (1990) 3 SCC 119
6. Rudal Shah v. State of Bihar, (1983) 4 SCC 141
7. Citizen for Democracy through it's President v. State of Assam, AIR 1996 SC 2193
8. D.K. Basu v. State of W.B., (1997) SCC 416
9. A.K. Jauhari v. State of U.P., (1997) SCC 416
10. In re; M.P. Dwivedi and others, AIR 1996 SC 2299
11. R.P. Vaghela v. State of Gujarat, 2002(2) JIC 951 (Gujarat) (FB)

A duty has been imposed upon the courts that no undertrial prisoner is produced before the courts hand-cuffed or fettered. In the case of M.P. Dwivedi & others, AIR 1996 SC 2299, a judicial magistrate who had failed to take suitable action against the police constables producing the accused hand-cuffed in his court, was summoned by the

Supreme Court and was severely reprimanded for not having observed the guidelines issued by the Hon'ble Supreme Court in relation to the hand-cuffing of the accused persons. The judicial magistrate, in this case, was being sent to jail by the Supreme Court but on request having been made by the senior advocates of the Supreme Court then present in the court room and looking into the fact that the concerned judicial magistrate was a new entrant in the judicial service and was not aware of the pronouncements of the Hon'ble Supreme Court on the subject, was spared with the warning not to commit such omissions in future and the court strongly disapproving his conduct directed the observations of the Supreme Court to be kept on his personal service record.

The Parliament has passed the Legal Services Authority Act, 1987 to give effect to the provisions of Art. 39-A of the Constitution to provide free legal aid to the poor and the needy. The District Legal Services Authorities constituted under the aforesaid Act have been specially required to provide assistance to the poor litigants, convicts, undertrials and the litigants belonging to the poor sections of the society in the form of court fees, expenses of the litigations and the Advocates fee etc. A litigant belonging to the aforesaid categories may apply to the Secretary of the DLSA to avail the free of cost assistance as noted above. These provisions are also aimed at protecting and promoting the basic human rights of the citizens.

In the case of M.H. Hoskot v. State of Maharashtra, AIR 1978 SC 1548, the Supreme Court has directed the jail authorities to prefer jail appeals of such convict prisoners who are unable to prefer appeals to the higher courts due to poverty or other reasons and the expenses therefore are to be borne by the state. These directions of the Supreme Court are to protect the human rights of the poor convict prisoners. The convicting trial court and the DLSA have also been directed in the case noted above to ensure that the jail appeal, if desired by the convict, is preferred to the higher courts

at the cost of the state.

Regular monthly inspections and even surprise inspections of the jails are made by the district magistrates, superintendents of police of the districts, district judges and the chief judicial magistrates to ensure that the human rights of the prisoners are not violated in the jails. Ailing prisoners are to be provided with necessary medical care as per the provisions contained under para 1058 of the U.P. Jail Manual. Courts of Judicial Magistrates and other district courts are specially empowered under various provisions of law to direct the jail authorities for providing adequate care and necessary medical facilities to the prisoners in the jail. These provisions are also aimed at protecting the basic human rights of the prisoners. It has to be kept in mind that the human rights or the fundamental rights of a citizen do not extinguish with the imprisonment of the citizen in a jail. Only the personal liberty to go beyond the jail premises is curtailed and regulated under the authority of the law but in no case the basic human rights of a citizen or human can be curtailed or finished in jail. Even a foreigner is entitled to claim protection of his human rights in another country.

The Hon'ble Supreme Court, while interpreting the provisions of Mental Health Act, 1987, has in the case of Sharda v. Dharam Pal, AIR 2003 SC 3450, declared that the sub-ordinate courts can issue necessary directions for the protection of human rights of a mentally ill person.

As is clear from the various legislations and the judicial pronouncements of the Hon'ble Supreme Court quoted above, the sub-ordinate judiciary is to play major role for the protection of human rights of the citizens. It is the sub-ordinate judiciary that can respond first and rapidly to the rescue of a citizen whose human rights are in jeopardy at the hands of the police, jail or other agencies of the executive.

In the coming times, the sub-ordinate judiciary has to play major role in protecting the human rights of the citizens. Apart from the State Human Rights Commissions and the National Human Rights Commission, the special courts constituted under the Protection of Human Rights Act, 1993 need to be given more teeth to deal with the cases of violation of human rights. It is hoped that in the days ahead, the scenario regarding the respect and protection of human rights in the country will improve.

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Necessity of passing speaking & reasoned orders

- By S.S. Upadhyay*
HJS

Recording of reasons for the opinion in support of the conclusions arrived at in a judgment or order by the Courts in our judicial system has been recognized since the very inception of the system. Right to know the reasons for the decisions made by the Judges is an indispensable right of a litigant. Even a brief recording of reasoned opinion justifying the decision made would suffice to withstand the test of a reasoned order or judgment. A non-speaking, unreasoned or cryptic order passed or judgment delivered without taking into account the relevant facts, evidence available and the law attracted thereto has always been looked at negatively and judicially de-recognized by the courts. Mere use of the words or the language of a provision in a order or judgment without any mention of the relevant facts and the evidence available thereon has always been treated by the superior courts as an order incapable of withstanding the test of an order passed judicially. Ours is a judicial system inherited from the British Legacy wherein objectivity in judgments and orders over the subjectivity has always been given precedence. It has been judicially recognized perception in our system that the subjectivity preferred by the Judge in place of objectivity in a judgment or order completely destroys the quality of the judgment or order and an unreasoned order does not subserve the doctrine of fair play as has been declared by the Apex Court in the matter of Andhra Bank v. Official Liquidator, 2005(3) SCJ 762. For a qualitative decision arrived at judicially by the courts, it is immaterial in how many pages a judgment or order has been written by the Judge as has been declared by the Apex Court in the matter of Union of India v. Essel Mining &

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Industries Ltd., (2005) 6 SCC 675.

Even in administrative orders, recording of reasoned opinions in favour of the orders passed by the authorities is sine qua non for a proper and justifiable administrative order. The Hon'ble Supreme Court has, in the matter of State of Rajasthan v. Rohitas and others, 2008 (61) ACC 678 (SC), opined that order disposing of an application necessarily requires recording of reasons in support of the conclusions arrived at in the order irrespective of whether such an order is passed in exercise of judicial or administrative powers vested in the court or the authority and failure to give reasons amounts to denial of justice. Reasons in support of the conclusion arrived at by the court or the authority in the order can be equated to heartbeats of every conclusion and without the same it becomes lifeless as expressed by the Apex Court in the Case of Raj Kishore Jha v. State of Bihar & others, 2003 (4) ACC 1068 (SC). An opinion expressed or conclusion arrived at in an order or judgment by the courts without recording reasons has always been declared as illegal and unjustifiable by the Hon'ble Supreme Court and such practices have not only been deprecated over the years but such sort of orders have been judicially de-recognized in the below-mentioned cases......

1. Paul George v. State, 2002 SCC (Cri) 340 – (The legal words and phraseology like illegality, impropriety or jurisdictional error used in Sec. 397 Cr.P.C. were merely repeated in the revisional order by the Addl. Sessions Judge without any mention of the facts of an application moved U/s. 156(3) of the Cr.P.C.)

2. Chandrika Prasad Yadav v. State of Bihar, (2004) 6 SCC 331 – (The Munsif had failed to analyze and apply his mind to the evidence adduced by parties in an election petition.)

3. Chairman & Managing Director, United Commercial Bank v. P.C. Kakkar, (2003)4 SCC 364 – (Non reasoned disciplinary proceedings)

4. Cyril Lasrado v. Juliana Maria Lasrado, (2004) 7 SCC 431 – (Case of non-application of mind to the facts and evidence on record)

5. MM RDA Officer's Association v. Mumbai RDA, 2005(1) SCJ 126 – (Case of non-application of mind to the facts and evidence on record)

6. Damoh Panna Sagar Rural Regional Bank v. Munna Lal Jain, 2005(1) SCJ 59 – (Non reasoned departmental enquiry report)

7. Andhra Bank v. Official Liquidator, 2005(3) SCJ 762 – (Non reasoned order)

8. Union of India v. Essel Mining & Industries Ltd. (2005)6 SCC 675 – (Non reasoned order)

9. State of Rajasthan v. Rohitas & others, 2008(61) ACC 678(SC) – (Non reasoned order)

10. State of U.P. v. Battan & others, 2001(10) SCC 607 – (Non reasoned order)

11. State of Maharashtra v. Vithal Rao Pritirao Chawan, AIR 1982 SC 1215 - (Non reasoned order)

12. Jawahar Lal Singh v. Naresh Singh & others, 1987(2) SCC 222 - (Non reasoned order)

13. Ram Babu Gupta v. State of U.P., 2001(43) ACC 50 (All- Full Bench) – (Magistrate disposing of application U/s. 156(3) of the Cr.P.C. by cryptic order without applying mind to the facts of the application.)

14. Shishu Pal Singh v. Govt. of India, 2003(50) ALR 230 (All) – (Explanations and grounds taken by the appellant were not dealt with by the first appellate court)

15. Yogendra Singh v. State of U.P., 2003(46) ACC 1008 (All) – (The Magistrate had merely narrated the words used in Sec. 156(3) of the Cr.P.C. without mentioning the relevant facts contained in the application while rejecting the same.)

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SALIENT FEATURES OF NATIONAL PLAN FOR MEDIATION

- By Rajiv Gupta*

Over a century ago, Abraham Lincoln, then President of the United States of America said:

"Discourage litigation, persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough."

However the actual Mediation process was initially started in USA sometime in year 1970 and with in 20 years (by the end of year 1990). Now professionally managed private as well as court annexed mediation centres have been able to solve almost 90% of the disputes.

In Salem Advocates Case [2005 (6) SCC 344], Supreme Court has appreciated the suggestion that expenditure of compulsory conciliation/mediation envisaged in Section 89 of CPC should be borne by the Government since it may encourage parties to come forward and make attempts at conciliation/mediation.

Accordingly a National Plan for Mediation, has been prepared by National Judicial Academy, which envisages systemizing and institutionalizing mediation, training of mediators, preparation of training material, organizing awareness programmes and setting up Mediation Centres in all Districts of the country, in three phases, spread over for a period of five years, for resolution of disputes through settlement.

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The Mediation and Conciliation Project Committee (MCPC) has been constituted on 9th April 2005 to provide centralized direction and support for mediation efforts in India.

The objectives of National Plan are as:

- To encourage amicable settlement of disputes.
- To provide speedy justice to litigants.
- To provide inexpensive justice to litigants.
- To provide quality justice to litigants.
- To save mental harassment.

In the National Plan, a group of trained" mediators shall be made available in every district to resolve disputes between parties whose cases are pending in a court.

The National Plan deals with the method of certification also, somewhat akin to the Bar Council for advocates or the Medical Council for doctors, which will certify a mediator who has undergone the requisite training, settled a required minimum number of cases and is otherwise qualified as a certified mediator. This body (after an Act being passed by Parliament) will have disciplinary control over all mediators.

Phase I - *(year* 2007) During this phase, a massive countrywide awareness programme will be launched to make *(the litigating public and all other stakeholders in the justice delivery system)* aware of what mediation is all about and the benefits of settlement of disputes though mediation.

This phase will see a pilot programme being launched in 10 selected districts. This is a manageable number of districts and requires a manageable number of mediators for training so that an effective monitoring and coordination

of a training programme is possible with course corrections being made, before the judicial mediation training programme is extended nationwide in the second and third phases. During this phase, the required 20% (almost 240) of all judicial officers in these '10 districts will be trained in the art and technique of mediation.

These mediation centres will be run under the supervision of senior most judge mediator.

Phase II - (*year* 2008) The first few months of this phase will be utilized in carrying out a review of the successes and failures of phase I and using the results of that review as a platform for further expansion of the mediation programme in about **100 districts of the country.**

The process of increasing the number of mediators through training professionals such as lawyers and family counselors will also be undertaken.

Phase III - (*year* 2009 *to* 2011) By the time the third phase begins, it is expected that mediation would have been firmly rooted in our justice delivery system and, therefore, it would be easier to expand the mediation programme to the balance districts of the country in line with the developments in the first and second phases.

If a referral rate of 15% of civil case in 10 districts is achieved in Phase I, it will be feasible to increase this percentage each year by augmenting the strength of trained mediators so that by the end of the fifth year when the National Plan comes to an end, it would be possible to achieve a referral rate of about 90%.

Qualification of a Mediator

The qualifications of a mediator are of considerable importance. The Rules approved by the Supreme Court postulate that a mediator must have at least 15 years of experience at the Bar.

That Delhi mediation Centre has devised a programme of at least **40 hours** of training, the time period being internationally accepted. In addition thereto, a trained mediator from the Delhi Mediation Centre is required to successfully mediate at least 10 cases independently before he/she can be recognized as a fully qualified mediator as per its expectations.

BUDGET AND FINANCE

For establishing and running the mediation programme, Almost One Crore is required for every District Mediation Centre, as Total estimated cost in entire this 5 years National Plan is estimated Rs. 408 crore, which includes the establishment expenditure as well as fee of mediators.

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"CIGARETTES AND OTHER TOBACCO PRODUCTS ACT, 2003 IN LIGHT OF THE CONSTITUTION"

- By Amit Yadav*

The spate of court cases with numerous challenge and aspersions on the validity of the Cigarettes and Other Tobacco (Prohibition on Advertisement and Regulation of Production, Supply and Distribution), Act, 2003 (COTPA) has stalled the implementation of certain key regulations under the Act; this atrocious effort of the tobacco industry is to dilute the significance of the law with hand to globe with certain quarters of the policy makers. There has been a constant lobbying to undermine the impact of the ill effects of tobacco use by the industry. All this lack the realization that COTPA is a social and public health legislation with profound backing in the fundamental law of the country i.e. the Constitution of India besides the mandate of WHO Framework Convention on Tobacco Control (FCTC), to which India is a party.

The Constitution is the basic premise for each law that the parliament contemplates and enacts to have effect thereafter; every law has to be in conformity with the constitutional mandates and not otherwise. The COTPA is no exception to this and gets its fundamental avowal but in the Constitution at the following references:

A. Preamble to the Constitution

The Preamble aims at a social order with sovereign citizens and elected Government that is accountable to the public at large. The Power of the government is restricted by the rights of the citizen to the extend guaranteed under the Constitution. The Preamble magnificently captures this idea and the Constitution is to be read with and not in isolation of this declaration in the preamble.

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Cigarettes and Other Tobacco Products Act, 2003 is a social legislation, drafted in public interest to improve public health, the enforcement of which shall secure the social justice as envisioned under the Preamble. Similarly, the economy is adversely affected by larger production and consumption of tobacco as the revenue collected by the government is less than the expenditure made on public health concerns attributable to tobacco use. Every individual has been assured of his dignity; whereas, smoking by one person injures not only his own dignity but the environmental tobacco smoke he generates puts the dignity and life of another person who has to inhale the smoke involuntarily, in jeopardy.

Tobacco use stands clearly in violation of the Preambular declarations[1] in general and objectives of the COTPA in particular. Every individual has the same rights and liberties as another. If one person has the liberty to smoke it must be subjected to another's right of not to take the smoke involuntarily, as all have been granted *"equality before the law and equal protection of the laws"* [Article 14] by the Constitution of India.

B. Fundamental Rights

Protection of life and personal liberty: *(Article 21: "No person shall be deprived of his life or personal liberty except according to procedure established by law.")*

The second hand tobacco smoke[2] contains three times more nicotine, three times more tar and about 50 times more ammonia. Therefore there is no doubt that smoking in a public
place will vitiate the atmosphere so as to make it noxious to the health of persons who breathe in such a polluted vicinity. It is certain that fresh air is necessary for life and polluting it with tobacco smoke would be hazardous to life within the meaning of Article 21 of the Constitution as it adversely affects the life of the citizens by slow and insidious poisoning thereby reducing the very life span itself.

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[1] Of restoring individual's dignity and assuring social and economic justice to all.

[2] Second-hand tobacco smoke contains about 4000 chemicals, all harmful the exposure to which causes a host of serious diseases like lung cancer, breast cancer, respiratory diseases and heart disease. Second-hand smoke also exacerbates a number of pre-existing health conditions, including asthma, bronchitis, other respiratory ailments, and heart disease. In some cases, it can trigger severe, even life-threatening reactions in individuals.

Exposing innocent individuals to second hand smoke with serious health consequences amounts to taking away their life, not by execution of death sentence but through a slow and gradual process of robbing them of all the qualities and grace of life. The mandate of Article 21 undertakes minors and women as a special group and the COTP envisage the same by prohibiting advertisement of tobacco products, putting sanction against passive smoking, sale to minors and selling of tobacco products within radius of 100 yards from educational Institutions. It thereby, upholds the right of every Individual for healthy body, which is the very foundation for all human activities.[3] As observed by the Supreme Court:

> "...*maintenance and improvement of public health have to rank high as these are indispensable to the very physical existence of the community and on the betterment of these depends the building of the society of which the constitution makers envisaged. Attending to public health is of high priority--perhaps the one at top.*"[4]

In 1995 the Supreme Court for the first time explicitly held that:

"*The right to health ...is an integral facet of a meaningful right to life*"[5]

Finally, in *Murli S. Deora* v. *Union of India*[6] the Apex Court observed,

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[3] *Vincent v. Union of India AIR* 1987 SC 990; (1987) 2 SCC 165
[4] Ibid
[5] *Consumer Education and Research Centre v. Union of India* AIR 1995 SCC
[6] (2001) 8 SCC 765

"Fundamental right guaranteed under Article 21 of the Constitution of India, inter alia, provides that none shall be deprived of his life without due process of law. Then why a non-smoker should be afflicted by various diseases including lung cancer or of heart, only because he is required to go to public places. Undisputedly smoking is injurious to health and may affect the health of smokers but there is no reason that health of passive smokers should also be injuriously affected. In any case, there is no reason to compel non-smokers to be helpless victims of air pollution".

C. Restrictions on certain Freedoms in public interest:

The Constitution of India provides certain freedoms to all the citizens of the country including the right "to freedom of speech and expression" [Article 19 (1) (a)] and "to practice any profession, or to carry on any occupation, trade or business" [Article 19 (1) (g)]. However it may so happen that exercise of such fundamental right by one may infringe upon the rights of another or the public in general; keeping this in mind the Constitution allows certain restrictions on the exercise of the fundamental rights.

If any direct or indirect expression (through press, media or art) incites anyone to commit an offence (smoking in public place) a restriction on such expression may very well be imposed under the mandate of Article 19 (2). An advertisement promoting drugs and commodities, the sale of which is not in public interest, could not be regarded as propagating any idea and as such, could not claim the protection of Article 19(1) (a) besides the fundamental right to healthy environment of the general public, if constitutionally weighed, is much higher than that of the film or ad

makers freedom to expression.

Further it is legitimate for the state to regulate any trade, business, profession or vocation if it is detrimental to the interests of the general public as Article 19 (6) would allow imposition of such restriction. This is where the parliament through COTPA, realizing the health hazards of tobacco use, its adverse affect on minors and women and it being a high social and economic burden on the State, has decided to impose the total prohibition on advertisement of the tobacco products and to regulate its trade and commerce, production, supply and distribution. The Law restricted tobacco industry from propagating their business interests above public health. It is significant to note that if the State can ban old buses plying in New Delhi in the name of public health then in furtherance of the same premise, ban on the sale of tobacco products should seriously be contemplated by the law makers.

Though the Supreme Court has held that 'Commercial Speech' was within the definition of 'Free Speech'[7] it also said that Article 19 (2) mentions grounds of reasonable restrictions upon this right[8]; moreover, it has further been observed by the Apex Court that the extent of advertisement required for a product, among other things, highly depends upon the nature of the product.[9] The validity of COTPA on the grounds of Article 19 and Article 14 of the Constitution need also to be upheld as there is a rational connection in the Law and the object it seeks to achieve, besides the fact that it is in the interest of public health and is being enforced with the minimal impairment[10] of the right to commercial

[7] *Tata Press Ltd. v Mahanagar Telephone Nigam Ltd.*, AIR(1995) 5 SCC 139

[8] *Hamdard Dawakhana v Union Of India*, AIR 1960 SC 554 in the instant cast the Court upheld the law where its predominant object was not merely to curb advertisements offending decency or morality, but also to prevent self medication by prohibiting instruments which might be used to advocate or spread the evil. It stated that, advertisement, no doubt, is a form of speech, but its true character is to be determined by the object which it seeks to promote.

[9] *Society for Civil Rights v Colgate Palmolive Ltd.*, AIR (1991) SCC 72

[10] In *RJR Macdonald Inc. v. Canada (Attorney General)* it was held that the test of Minimal Impairment provides that the law that prohibits lifestyle advertising, advertising aimed at young people, but which allows advertisements which are of the nature of information dissemination is to be upheld. ([1995] 3 S.C.R 199)

speech.

Accordingly the Apex Court in *Laxmikant v. Union of India and others*[11] ruled that the ban on use of tobacco in toothpaste and toothpowder should totally be imposed since it is prone to cancer. Hence, the COTPA mandate of imposing complete ban on tobacco products advertisement is well justified by Article 19 (6) of the Constitution; it may seem infringing upon the right to carry on trade guaranteed under Article 19 (1) of the Constitution but is in the larger 'public interest'.

Also "Trade" under 19(1) (g) includes only activities which are of a commercial or trading nature. Tobacco products which serve no social purpose and in fact are prejudicial to public interest need not be regulated by the yardstick of reasonableness under 19(6) but on the adage of *res extra commercium.*[12]

Banning the sale of tobacco inside college campus, the Kerala High Court, reiterated the fact that students are bound by a code of conduct once they are admitted in the college and such code falls under reasonable restrictions and does not violate fundamental rights.[13]
In *Ghodawat Pan Masala Products* (I) *Ltd. and Anr. Vs. State of Maharashtra*[14], the Court held that levy of luxury tax on tobacco products cannot be held to be violative of Article 301 of the Constitution, because violation of Article 301 takes place when legislature or Executive imposes restriction on trade or commerce, but here the purpose is to discourage consumption of tobacco amounting to a reasonable restriction and not open to challenge

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[11] 1997 SCC (4) 739
[12] *State of Bombay* v. R.M.D.C., AIR 1957 SC 699.
[13] *Sojan Francis* v. *M.G University* AIR 2003 Ker 290
[14] 2002(6) Bom CR 466

under Article 301. The Court held that it is the supreme duty of the Central Government to uplift the Public Health of the citizens and in doing so, if certain restrictions are to be imposed on the sale, purchase and consumption of tobacco products, then it would fall under reasonable restrictions.

In the light of the above it may be said that fundamental rights are not free from restrictions and rather impose duties on the part of those exercising the rights. The constitution requires observance of this duty when it calls every citizen of India to abide by the constitution and respect its ideals.....; [Article *51A]* also it imposes a duty to preserve the natural environment, second hand tobacco smoke being a pollutant every citizen should refrain polluting environment and affecting public health by giving up lighting of tobacco.

D. Directive Principles

The Directive Principles are fundamental in the governance of the Country and it is the duty of the State to apply these principles in making of the laws. The COTPA is a social legislation; it was framed for the purpose of enacting a comprehensive law on tobacco in public interest and to protect public health. It echoes the mandate in part IV of the Indian Constitution with a view to achieve improvement in public health. It is significant to note that, "The provisions of Parts III and IV are supplementary and complementary to each other and not exclusionary of each other and that the fundamental rights are but a means to achieve the goal indicated in Part IV."[13]

The COTPA seeks to ensure, the highest standards of public health and wellbeing, what the Constitution had foreseen as an important issue; the fact is mentioned in Article 39 that requires State to direct its policy towards

[13] *Unni Krishnan, J.P. v. State of A.P.*, (1993) 1 SCC 645

securing, among other things, that the health and strength of workers, men and women, and tender age of children are not abused; the legislation further aims to implement article 47 of the Constitution which, inter alia, requires the State to endeavour to improve public health as among its primary duties. The courts in India has elaborated these provisions of the Constitution and consistently emphasized the rights of community and the individual to health as inseparable aspects of the right to life and personal liberty enshrined in Article 21 of the Constitution.

Directive principles are also held to be relevant for determining the reasonableness of a restriction under 19(6),[16] and since a regulation under 19(6) can extend to a complete prohibition[17], the words reasonable restriction under 19(6) can also be contemplated by the legislatures to justify a complete ban on tobacco products.

E. Constitution and the International Obligations:

Besides, the constitution specifically states that "*the state shall endeavour to foster respect for international law and treaty obligations in the dealings of organised peoples with one another*[18]" and the Parliament is vested with the powers to legislate to give effect to the obligation under any international treaty, agreement, or convention.[19] This is very well reflected in the following decisions of the Apex Court as well.

[16] *State of Bomay v. Balsara AIR* 1951 SC 318.

[17] *Mirzapur Moti Kureshi Jamat v. State of Gujarat* AIR 1998 Guj. 220.

[18] *Article 51 (c)*

[19] Article 253 " *Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.*"

In absence of express laws the courts have taken recourse to international instruments and held that if the Convention law does not come into conflict with any of the law passed by the Parliament, then international law must be accommodated and observed in Indian laws.[20] In *Vishaka v. State of Rajasthan*[21] the Court went to the extent of issuing guidelines in absence of specific legal provisions regarding 'sexual harassment'. It even declared that the customary principle of international law, if there is nothing in the domestic law, would form part of the law of the land.[22] Similar observation was made by the Court in *Gramophone Company of India Ltd. v. Birendra Pandey*,[23] wherein the Court held that international law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with the Acts of the Parliament.

The rules and regulations under COTPA not only conform to the *Act per se* but also navigate India's obligations under WHO FCTC.

Keeping the constitutional mandates in mind the Act is materialized as the solitary ray of hope amidst noxious obscurity and is the only one to target against different forms of tobacco use and its proliferation in any manner. The constitutional object of the law can be succinctly explained in the words of noted libertarian J .S. Mill, when he said:

> "*If either a pubic officer or anyone else saw a person attempting to cross a bridge which has been ascertained to be unsafe, and there was no time to warn him of his danger, they might seize him and turn him back, without any*

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[20] *Nilabati Behra v. State of Orissa* AIR 1993 SC 1960
[21] (1997) 6 SCC 241

[22] *PUCL v. Union of India* (1997) 2 SCC 301
[23] AIR 1984 SC 671

real infringement of his liberty, for liberty consists in doing what one desires, and he does not desire to jail into the river."

I don't think anyone desires to suffer cancer either. ..!!!

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The prime scope of this study is that where Constitutions such as that of India provide for a constitutional authorization which circumvents the executive power to impinge upon the fundamental rights and individual freedoms during the state of emergency. There is a need for similar and efficient regulatory mechanism to ensure the working of the executive within the bounds of that power.

A view from this angle makes it clear that the judicial power to interpret the constitution, imposes upon the court the constitutional duty to provide adequate safeguards against the abuse of state power affecting the individual rights. The apex court has now and then, observed that it is not an act of 'judicial invention'[1], rather the court has brought to the fore what has been incorporated in the constitution by the founding fathers of the constitution, i.e., the philosophy of 'constitutionalism'[2] which talks about the in-built limitations within the provisions of the constitution upon the powers of the legislature and the executive to prevent them from becoming arbitrary and uncontrolled.

The judiciary has done nothing, but performed its duty of reading those 'implied' restrictions on the powers of the government. The power of judicial review remains available notwithstanding even the non-obstante clause in any of the legislations. This concept of judicial review as a source of control is examined in the light of the experience of India during periods of constitutional emergency. The different approaches of the court in India in striking a right balance between emergency powers of the state and individual rights are explained in terms of divergent views that the S.C. has adopted with respect to the nature of the judicial review.

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[1] Supreme Court as addressed by Mrs. Indira Gandhi, the then Prime Minister, during the persistence of emergency.

[2] "An independent judiciary with powers of judicial review, the doctrine of rule of law and separation of powers, fundamental rights of the people, federalism is some of the norms which promote constitutionalism in a country." -Jain, M.P., Indian Constitutional Law', Wadhwa and company, Nagpur, Fifth Edition, 2005 Pg. no.6

[3] AIR 1971 SC 1643

Judicial creativity and innovation gave birth to India's own original concept, i.e. the basic structure theory, which is discussed in this project.

This philosophy and the judicial pronouncements given later have gone a long way in securing the sanctity and legitimacy of the Constitution.

Basic Structure vis-a-vis Judicial Review

The two words that changed the entire course of Indian judiciary were first uttered by M.K. Nambiar while arguing for the petitioners in the Golaknath case[3], but it was only in 1973 that the concept surfaced in the text of the apex court's verdict. Basic structure is primarily those fundamental and inherent features of the Constitution which forms the very basis of it and without them our constitution would be impaired of its legitimacy. These provisions or this 'structure', if edited or amended or repealed would have far reaching consequences and the constitution and the whole country will become a mere puppet of whims and fancies of the ruling party which, ironically, does not even represent the majority in our country. These features can also be said to be 'inherent restrictions' on the powers of the three arms of the state so as to prevent any arbitrary and absolute exercise of power.

Basic structure can be understood better in terms of 'judicial review' which prevails in countries bestowed with written constitutions. It basically says that the constitution is the supreme law of the land and no law can bypass a constitutional mandate. This means that any law inconsistent with it would be struck down by judiciary as unconstitutional and hence, void.

The process of judicial scrutiny of legislative acts on the touchstone of the Constitution is technically called 'judicial review'. The doctrine of judicial review is enforcement of rights guaranteed under the Constitution through Constitutional remedies. It is one of the great assets of federalism and protector of fundamental rights. The constitution of India explicitly establishes the doctrine of judicial review in several articles such as 13, 32, 226, 131-

136, 143.

It was A.13 [2], which gave rise to most of the conflict between the legislature and the judiciary, wherein the parliament always tried to restrain the biggest barrier in way of its socio-economic policies and other legislations, i.e., the 'fundamental rights' of the people. Using its 'constituent' power in a manner so as to restrict the provisions of part III of the constitution, the parliament was infringing the rights of the people and putting legislations under the judicially immune umbrella of the IX schedule.

Jurisprudence prior to 1973:-

The parliament has always used its constituent power under A.368 of the constitution as a shield against judicial pronouncements. The power to amend the constitution has been misunderstood by the policy-makers as to mean a blanket provision which grants immunity to their action of amending the 'essential' characters of the constitution. Within one year of the commencement of the constitution conflict between A. 13 and A. 368 seemed to arise.

Shankari Prasad vs. UOI[*]:

The apex court observed that-

- Power to amend the constitution including the fundamental rights is contained in A. 368
- The word 'law' in article 13(2) includes only an ordinary law made in exercise of the legislative powers and doesn't include the constitutional amendment which is made in the exercise of constituent power.

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[*] AIR 1951 SC 458

- Constitutional amendment will be valid even if it takes away any of the fundamental rights.

Meaning thereby that an amendment of the Constitution was not law within the meaning of Article 13 of the Constitution and as such was not prohibited by Article 13(2).

Sajjan Singh vs. State of Raiasthan:

It was held that the words- "amendment of the constitution" means amendment of all the provisions of the constitution. Gajendragadkar, C.J. said- Had it been the intention of the constitution-makers to exclude the fundamental rights from the operation of amending power they would have made a clear provision in that behalf. The narrow interpretation accorded to the fundamental rights by the court was heavily criticized.

Golaknath vs. State of Puniab:

This landmark verdict brought the phenomenal concept of indestructible [read "Basic"] character of the constitution to its inception. The petitioner's contention in this case seems to have lead to this majestic judicial creation of doctrine of Basic structure. It was contended that there are certain 'indestructible' characters in a constitution, which, if tampered would injure the sanctity of the document. The fundamental rights were argued to be part of the basic structure. Also, the definition of "law' under article 13(2) was sought to be extended to a constitutional amendment too.

The S.C. ruled that-

Article 368, that contained provisions related to the amendment of the Constitution, merely laid down the amending procedure. Article 368 did not confer upon Parliament the power to amend the Constitution. The amending

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AIR 1965 SC 845

AIR 1971 SC 1643

power (constituent power) of Parliament arose from other provisions contained in the Constitution (Articles 245, 246, 248) which gave it the power to make laws (plenary legislative power). Thus, the apex court held that the amending power and legislative powers of Parliament were essentially the same. Therefore, any amendment of the Constitution must be deemed law as understood in Article 13 (2).

Article 13, according to the majority view, expressed an 'implied limitation' on the powers of Parliament. Parliament could not modify, restrict or impair fundamental freedoms due to this very scheme of the Constitution and the nature of the freedoms granted under it. The judges stated that the fundamental rights were so sacrosanct and transcendental in importance that they could not be restricted even if such a move were to receive unanimous approval of both houses of Parliament.

To negate the effect of this ruling, 24th amendment to the constitution was brought up in 1971, which added new clauses to Article 13 and Article 368 to exclude the application of A. 13 over a constitutional amendment.

Jurisprudence laid down in 1973 and thereafter:-

His Holiness Kesavananda Bharati[7]: A Constitutional Yardstick

Till now, the tussle between the legislature and judiciary came out wide open. There was an article 32 writ petition filed against 24th amendment. The matter was heard by 13 judges. The constitutional validity of the 24th amendment was upheld. Meaning thereby, a constitutional amendment does not come under the purview of 'law' as set out by article 13.

[7] AIR 1973 SC 1461

In this decision of the majority of the thirteen-judge bench (7:6) the Supreme Court held that although Parliament had the power to amend the Constitution of India under Article 368, this power of amendment is **'limited'** and cannot be exercised so as to damage the basic features or destroy the 'basic structure' of the Constitution of India. However, there was no clinching agreement that Fundamental Rights in Part III were per se beyond the pale of amendment.

According to Khanna, J ., no particular provision of the Constitution of India, including the Part III rights were immune to the amendatory process. The only check on the 'constituent' power of amendment, vested in the Parliament, would be that of 'basic structure'. Most importantly seven of the thirteen judges in the Keshavananda Bharati case, including Chief Justice Sikri who signed the summary statement, declared that Parliament's constituent power was subject to inherent limitations. Parliament could not use its amending powers under Article 368 to *'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure'* or framework of the Constitution.

Minerva Mills*

further clarified the ratio of Keshavananda in the following terms: "Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features."

Keshavananda Revisited:

From Minerva Mills [Keshavananda reasserted] the following propositions have emerged:

*AIR 1980 SC 1789

- Article 368 confers a limited power of Amendment in that it does not empower Parliament to amend the basic structure of the Constitution;
- There is no bar on Amendment of any Article in Part III as such. However there are certain principles which are basic to the Constitution, based on inalienable values and rights and any Amendment that abrogates these principles would be violative of the basic structure of the Constitution; and
- The principles of equality, liberty, freedom of conscience and free speech, among others, enshrined in Article 14 to 19 are part of the basic structure of the Constitution.

In the famous **Election case**[9], where an appeal was filed against the decision of Allahabad H. C. invalidating election to P.M.'s office on the ground of corrupt practices. In the meanwhile parliament enacted 39th amendment to overcome the effect of the judgment. Following Keshavananda bharati, the S.C. upheld the contention that the purported amendment affected free and fair elections and judicial review which were parts of "unamendable" basic structure of the constitution. Also, the amendment consequentially affected democracy of the country which in turn also forms part of the basic structure. A wide range of characteristics and constitutional philosophies were made part of the 1973 concept in the later judgments of the apex court.

BASIC FEATURES:-

The court in its later pronouncements starting from the Indira Gandhi case[10] has made it clear that the list of basic features given in the 1973 ruling was not exhaustive and that the essential features of the document would be decided case to case based on the facts and circumstances of each case. In each n' every case the court included some feature or the other to the never-ending list of basic features of the constitution. A few of such recognized features are being enumerated below:

[9] Indira vs. Rajnarain AIR 1975 S.C. 2299

Supremacy of the constitution[11], rule of law[12], doctrine of separation of powers[13], judicial review[14], federalism[15], secularism[16], democratic structure[17], free and fair elections[18], limitations on amending power conferred by A. 368[19] etcetera are some of such characters which are subject to judicial addition in the near future.

Constitutional emergency powers of the Executive

In India, the constitutional consequences of a proclamation of Emergency arise either by virtue of the proclamation itself or as a result of the exercise of discretionary emergency power by the president. The suspensions of fundamental rights[20] such as the freedom to speech, the freedom of association, the freedom of movement etc are the immediate constitutional consequence of a proclamation of emergency. The suspension of the right to seek judicial remedy, with respect to the infringement of a fundamental right, requires further executive action in form of a presidential order issued in that behalf, during the pendency of a proclamation of emergency. The constitutional responsibility for the declaration of an emergency, and from the suspension of enforcement of fundamental rights is expressly vested in the executive.[21]

Legislative control can come into operation only after the legal consequences of the proclamation and the presidential order have already taken effect. The question of the scope of judicial scrutiny in relation to the emergency power of the executive therefore assumes significance.

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[10] Ibid
[11] Kesavananda Bharati Vs UOI AIR 1973 SC 1461
[12] State of Rajasthan vs. UOI AIR 1977 SC 1361
[13] Indira vs. Rajnarain AIR 1975 S.C. 2299
[14] Minerva Mills vs. UOI AIR 1980 SC 1789
[15] Golaknath vs. State of Punjab AIR 1971 SC 1643
[16] Indira vs. Rajnarain AIR 1975 S.C. 2299
[17] Ibid
[18] Indira vs. Rajnarain AIR 1975 S.C. 2299
[19] Golaknath vs State of Punjab AIR 1971 SC 1643
[20] A. 358
[21] A. 352(1), A. 356

Types of Emergencies:-

In the constitutional provisions there are three kind of emergencies enumerated, namely-

1. National Emergency (A. 352)
2. State Emergency (A. 356)
3. Financial Emergency (A. 360)

NATIONAL EMERGENCY: CONDITION PRECEDENT AND JUSTICIABILITY OF THE EXECUTIVE DISCRETION:

Article 352 presupposes existence of certain conditions prior to the proclamation of emergency by the union executive. As it was originally enacted, A. 352 enabled a proclamation of emergency to be made if the president was satisfied that a grave emergency existed whereby the security of India was threatened by <u>war or external aggression or internal disturbance.</u>

As drafted by the constituent assembly the provision suffered from a serious defect – although in form the proclamation is issued on the satisfaction of the president but in reality the satisfaction was influenced by the union or its better to say the Prime Minister, who is the real head of the nation, without the authority of the cabinet.[22] But now the situation has changed after the 44th amendment which prevents the P.M. to advise the president for proclamation of emergency on his own and that, he requires to have the sanction of the union cabinet in that regard has been communicated to the president in writing.[23] Another major change made in the provision would be substitution of the ground of "internal disturbance" to "armed rebellion" by the 44th amendment in 1978. Prior to that amendment this

[22] As done by Mrs. Indira Gandhi, the then P.M., in emergency of 1975

[23] A. 352(3)

ground was made basis of proclaiming emergency in 1975 which, actually was politically influenced and with ulterior motive to hold on to power by the then P.M. This expression was, therefore, too 'vague and broad' for any ruling party to misuse it for its own purpose this was done with a view to restrict the invocation of A. 352 only to more serious situations where there is an actual threat to the security of India.

Before discussing the justiciability of a Presidential proclamation before a court of law it is quintessential to discuss two amendments made by the ruling parties in 1975 and thereafter in 1978 to this provision. These two amendments changed the face of the provisions relating to emergency. The first one could be said to be politically motivated and the later one as a rectification for the first one.

38th Amendment, 1975

A clause was included to the main body of A. 352 which exclusively excluded the satisfaction of the president from judicial review. Meaning thereby, the recommendation made by the union cabinet was made unjusticiable before judiciary. It couldn't have been questioned on the grounds of malafide and other superfluous foundations. This alteration made to the constitution was after the landmark Keshavananda ruling which made judicial review an inviolable part of the basic structure. But this aspect was overlooked by the unbridled P.M.

44th Amendment, 1978

This amendment was made by the Janata party after coming to power and trying to set right the excesses done during exigency and to make it impossible for another person to repeat the 1975 incident.

- Clause 5 of A. 352 which made the satisfaction of the president 'final and conclusive' was withdrawn by this amendment.

- 'Internal disturbance' ceased to be a valid ground for emergency and it would be replaced by 'armed rebellion'.
- A. 359 was so amended that the presidential power to suspend fundamental rights would not apply to A. 20 and A. 21 [this could be said to avert in future the situation which arose in the Shukla case[24]]
- A. 352 (3) was included which made it mandatory for the P.M. to have a ratification of the recommendation to proclaim emergency from the union cabinet and only then can president decide whether such an emergent situation is existent or not.

According to A. 352(1) the president may make a proclamation of emergency only when he is satisfied as to a threat to the security of India or any part thereof. Thus, the question that, whether a threat lies or not, vests within the subjective satisfaction of the president acting on the advice of the cabinet. The controversy as to justiciability of this satisfaction has arisen now and then.

In Bhut Nath vs. State of West Bengal[25], the supreme court refusing to hold the continuance of the emergency under A. 352 'void' stated that the question is "a political, not justiciable issue" and therefore court can not be approached seeking a remedy.[26] Also in a previous case[27], the apex court left the issue open for a debate as to whether the subjectivity of the nominal head could be questioned before a court of law. The 38th amendment act in 1975 seems to materialize this view taken by the S.C. into the constitution wherein the clause 5 to A. 352 was inserted making the satisfaction of the president beyond reach of judicial scrutiny.

Minerva Mills vs. UOI

But now, the forty-fourth amendment to the constitution has repealed A. 352(5). Therefore the *status quo ante*

[24] Additional District Magistrate, Jabalpur v. Shivakant Shukla ;AIR 1976 SC 1207

[25] AIR 1974 SC 806

prevailing before 1975 has been restored. This means that -

1. The adequacy of the grounds for such satisfaction or the correctness of the facts upon which the satisfaction is based cannot be questioned by any court.

2. But since the satisfaction is a *condition precedent* for the exercise of the power, the validity of the proclamation can be challenged on the following grounds-

   - there was no satisfaction at all

   - it was malafide or based on wholly irrelevant or extraneous grounds.[28]

"It is true that by reason of clause (5) (a) of Article 352, the satisfaction of the President is made final and conclusive and cannot be assailed on any ground, but, the power of judicial review is a part of the basic structure of the Constitution and hence this provision debarring judicial review would be open to attack on the ground that it is unconstitutional and void as damaging or destroying the basic structure."[29]

Further, after the S. C. decision in Bommai,[30] in which the Supreme Court did go into the validity of proclamation of the president issued under A. 356, it can now be safely asserted that a proclamation of emergency under A. 352 is reviewable by the court on the grounds mentioned above. Also, now the judicial review has been accorded the status of a basic characteristic of the unamendable 'essential' features of the constitution and hence any proclamation of president to invoke A. 352 would be open for the court to decide upon its constitutionality.

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[26] Jain, M.P., Indian Constitutional Law", Wadhwa and company, Nagpur, Fifth Edition, 2005
[27] Ghulam Sarwar vs. State of Punjab AIR 1967 SC 1335
[28] Minerva Mills vs. UOI AIR 1980 SC 1789, Bhagwati, J.
[29] Justice Bhagwati in Minerva mills case
[30] AIR 1994 SC 1918

Article 356: An Introduction

Article 356 of the Indian Constitution has acquired quite some unsavory reputation due to its alleged misuse. The essence of the Article is that upon the breach of certain defined state of affairs, as ascertained and reported by the Governor of the State concerned, the President concludes that the 'constitutional machinery' in the State has failed. Thereupon the President makes a Proclamation of Emergency, dismissing the State Legislature and Executive. During a state of emergency, the President is vested with tremendous discretionary powers.

Judicial Review and State Emergency

The susceptibility of a Proclamation under Article 356 to judicial review is beyond dispute, because the power under Article 356(1) is a conditional power. In the exercise of the power of judicial review, the court is entitled to examine whether the condition has been satisfied or not. Supreme Court boldly marked out the paradigm and limitations within which Article 356 was to function in Bommai case[31].

S. R. Bommai v. Union of India

After the Supreme Court's judgment in the S. R. Bommai case, it is well settled that Article 356 is an extreme power and is to be used as a last resort in cases where it is manifest that there is an impasse and the constitutional machinery in a State has collapsed.

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[31] Ibid

The power conferred by Article 356 upon the President is a conditioned power. It is not an absolute power. The existence of material -which may comprise of or include the report(s) of the Governor -is a pre-condition. The satisfaction must be formed on relevant material. Further, the Proclamation under Article 356(1) is not immune from judicial review. The Supreme Court or the High Court can strike down the Proclamation if it is found to be malafide or based on wholly irrelevant or extraneous grounds. The deletion of clause (5) [which was introduced by the 38th amendment] by the 44th amendment, removes the cloud on the reviewability of the action.[32]

Thus it can be seen from the conclusions of this Bench of the Supreme Court that the President's power under Article 356 is not absolute or arbitrary. The President cannot impose Central rule on a State at his whim, without reasonable cause.

Rameshwar Prasad vs. UOI[33]

The most recent addition in this line up occurred in 2005, when there was a political turmoil in Bihar and acting on the governor's report the president proclaimed state emergency, a challenge was made to the proclamation suspending the legislative assembly of Bihar.

S.C. ruled that if political party with support of other political party stakes claim to form government and satisfies the Governor about its majority to form stable government, Governor cannot refuse formation of Government and override the majority claim because of his subjective assessment that majority was cobbled by illegal and unethical means. Grounds of mal-administration by State Government enjoying majority is not available for invoking power under Article 356. Hence, the impugned proclamation was held to be unconstitutional.

[32] Ibid
[33] AIR 2006 SC 980

"It is not a power conceived to preserve or promote the interests of the political party in power at the centre for the time being nor is it supposed to be a weapon with which to strike your political opponent. The very enormity of this power -- undoing the will of the people of a State by dismissing the duly constituted Government and dissolving the duly elected Legislative Assembly --must itself act as a warning against its frequent use or misuse, as the case may be."[34]

The judiciary has attempted to stop misuse of this provision which is often done in the circumstances when the ruling party at centre and that at the state belong to different political parties.

Fundamental Freedoms During Emergency

358 provide the conditions when the fundamental freedoms guaranteed under A. 19 can be suspended. They can be superseded by the state when proclamation of emergency is in force on the grounds of war and external aggression[35]. Prior to 1978 [44th amendment], the suspension of fundamental rights was complete, in the sense that, as soon as the proclamation was in force it had the effect of automatically suspending the basic freedoms of the citizens. And the legislative or the executive action which contravened A. 19 could not be questioned even after the proclamation was over. Then the history took its course and a case[36] came before the S.C. for consideration where the question before the court was- whether an executive action without any legislative authority, could operate legally while the proclamation of emergency is in force?

The apex court answered it negatively observing that proclamation of emergency would not authorize taking of detrimental executive action affecting fundamental freedoms under A. 19 and that, a 'law' would be required to that effect. This judgment is said to have effected the 44th amendment which makes any law violating A. 19 invalid on the

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[34] Ibid

[35] The additional ground of 'armed rebellion' was removed from the text of this provision by the 44th amendment as it was too vague a ground for the politicians to misuse it for serving their ulterior purposes.

[36] Benett Coleman vs. UOI; AIR 1973 SC 106

ground that it does not 'contain a recital to the effect that such law is in relation to the proclamation of emergency in operation when it was made."[37]

Emergency, Fundamental Rights And The Courts:

The kind of legislative or the executive action that is required to deal with exigencies of a national predicament often involves some degree of interference with the civil and political rights, which citizens normally enjoy. In countries where constitution restricts the powers of the state to infringe upon the rights of the individual, an emergency presupposes curbing of such rights.

Makhan Singh[38] Jurisprudence

The government had by presidential orders suspended the right of citizens to move the courts to enforce some of those rights during the emergency. The Supreme Court held that, for as long as the presidential orders remained in force, any such challenge would fail. The court further held that the power conferred on the President by Article 359(1) was wide enough to enable him to make an order suspending any of the fundamental rights contained in Part III of the constitution. This was an act of self-denial by the S.C. where it out of its own volition gave away the power of judicial review accorded to it by the constitution.

Post- Makhan Singh Decisions:

In yet another case[39], S.C. decided that a challenge to the detention order would be valid if the detention [act of state] made, is in violation of the provision of the rules and orders mentioned in the presidential proclamation.

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[37] A. 358(2)(a)
[38] Makhan Singh v. State of Punjab AIR 1964 SC 381
[39] Ram Manohar Lohia vs. State of Bihar AIR 1966 SC 1740

Justiciability Of The Presidential Proclamation Suspending Right to Enforce part III

In Mohd. Yakub vs. State of J&K[40], S.C. noted that an order by the President u/A. 359(1) was not 'law' within meaning of A. 13 and its validity could not be challenged with regard to part III.[41]

ADM Jabalpur[42] and Court's Self-denial Of Judicial Power:

This case held that, notwithstanding a presidential order under Article 359 of the constitution suspending the right to enforce fundamental rights, the higher courts could, in appropriate cases, entertain applications for habeas corpus. Rejecting that view, the Supreme Court held that, as long as the presidential order was in force, the individual had no remedy against detention, even in cases where he could show that the detention was vitiated by malafides or was ultra vires of the statute.

According to the court, "Article 21 of the constitution was the sole repository of the right to personal liberty and no other right could be invoked in support of a challenge to an order of detention passed against an individual."[43]

Meaning thereby, in light of the proclamation of emergency in force no fundamental rights would be available to the people nor will they be allowed to approach the court seeking their enforcement.

The only dissent came from H. R. Khanna, J. who said that suspension of A. 21 against the spirit of rule of law. This dissent led to the Parliament to mould A. 359 in a better manner and thus, 44th amendment came into being, which inserted a clause in A. 359 which expressly excluded A. 20 and A. 21 from the operation of presidential proclamation. Also, it was made mandatory for suspension of enforcement of fundamental rights, to have a

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[40] AIR 1968 SC 765

[41] Jain, M.P., 'Indian Constitutional Law', Wadhwa and company, Nagpur, Fifth Edition, 2005

[42] Additional District Magistrate, Ja[illegible]lpur v. Shivakant Shukla AIR 1976 SC 1207

[43] Ibid

Presidential order to that effect specifically mentioning for the same.

Today keeping in view the Minerva Mills case, where the proclamation for emergency u/A. 352 is liable to judicial scrutiny, a person aggrieved by an order u/A. 359 also may challenge the proclamation itself.

CONCLUSION:-

Democracy has long before been defined as "a government of the people, by the people, for the people."

The functions of a welfare state always make a mention of the protection and preservation of social and political rights of an individual. These 'Basic' rights when abrogated by the state, a remedy is provided by the constitution which is the supreme 'lex' of a country. But in a situation of exigency, such rights are suspended and the role of judiciary comes to picture which has often acted as a watchdog of fundamental rights and freedoms of the people.

As judicial activism and judicial restraint are the two sides of the same coin, efforts must be made to see that the former does not lead to judicial adventurism. But, it must be seen that the judiciary must not become over-zealous in holding the executive or legislative action during the proclamation as unconstitutional. Judge must always apply his judicial mind on the material present before him. The constitution has vested the power to decide the constitutionality [judicial review] of an action in the courts and it must be exercised keeping in mind the constitutional mandate.

The power of judicial review, being "the very soul of the Constitution," is certainly a delicate exercise. There has to be a clear demarcation made in a valid and invalid legislation or executive action. The difference, however, is

Minerva Mills Vs UOI AIR 1980 SC 1789

Abraham Lincoln

very thin.

The Court has laid down a two-fold test: (a) whether an amendment or a law is violative of any of the Fundamental Rights in Part III (b) if so, whether the violation found is destructive of the basic structure of the Constitution.

It can be inferred from the above deliberation on this topic that Indian Supreme court has moved on from being a non-interventionist, positivist interpreter of the law, which accorded primacy to the Black letter 'law' to become a more liberal and judicial activist, proactive, watch dog against violation of fundamental rights, a final arbiter and guardian of the legitimacy of constitution in this country. There is a very thin line of demarcation amongst the trinity existent in the Indian polity, even a slightest of the change imbalances the power equations. The legislature, the executive and the judiciary should function within the parameters of the Constitution and hence, an equilibrium need to be maintained but, whenever there is a violation of this constitutional mandate, the judiciary is duty bound to intervene.

During the last 55 years, India had cultivated a democratic culture. The people enjoyed not only voting rights but also freedom of expression and equality. Whenever there was a threat or challenge to democracy, it had come from the administration. The Emergency, during the mid-Seventies, was the biggest such challenge.

Yet, the people triumphed in overthrowing that challenge, mainly because the Constitution was upheld by the judiciary with the support of people. This has been proved now and then. The S.C. has proved to be a vigilant watchdog of the constitution which never fails in upholding its legitimacy by 'reading between lines' and giving birth to innovative ideas by 'thinking outside the box'. A judicial analysis as to whether the satisfaction of the President was valid or not becomes necessary in light of the grave consequences an emergency entails. It suspends the very basic rights and freedoms of the citizens and no one can approach the court of law for suspension of such rights.

The constitution is a living document. It is symbolic of the faith and will of people of a respective country .An impersonal and mechanical meaning given to its provisions demean that popular will. The doctrine propounded 34 years back has become a hallmark of Indian constitution in eyes of other judiciaries. The sanctity and legitimacy of this social and political document goes down to the very fabric of Indian polity and therefore need to be maintained.

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SOCIALISM, GLOBALISATION AND THE INDIAN CONSTITUTION

- By Sri Bhanu Pratap*

RECENT DEVELOPMENT:

On 15th January, 2008 an interesting fact was reported in "The Times of India". PIL challenges the insertion of the word "Socialism" in the Indian Constitution. It is also challenging an amendment in the Representation of People's Act in 1989 where it is compulsory for political parties to take an oath of allegiance to socialism during registration. Even Swatantra Party's challenged the amendment a decade ago. This amendment seriously affects Article 19(I)a - Freedom of Speech and Expression ,and Article 19(1)(c)Right to form Associations and Unions.

It clearly shows the "Symbiotic" relationship between socialism and the ruling parties. On one hand we have adopted a free market economies to a certain extent and on the other hand whenever there is need to justify the Government's actions on Reservation or justify the Government's Policies as in the inst, "Socialism" is use as shield.

"Socialism, in short, is like a hat that has lost its shape, because everybody wears it."[CEM Joad]

"The inherent virtue of Socialism is the equal sharing of miseries."[Winston Churchill]

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The newly found LPG model (liberalisation, Privatisation and Globalisation) of the Indian State has brought new dimensions to our society. Socialism seems like Samson's riddle. Its basic tenets has been twisted and turned according to the whims and fancies of the ruling Political Parties. Even if we trace the history of the word "Socialism" in the Indian Constitutional history, we will find that there has never been a single, unified opinion on the actual meaning or implementation of the scheme of Constitution. Since after our independence, we adopted a mixed system of economy, it was clear that we did not adhere to any particular set of ideology. The Indian Constitution, initially, was a compromise between Individualism and Socialism.

It is because of the following conditions that "Socialistic Pattern of Society" and not "Socialism" was declared to be the objective of planning by Pandit Nehru [D.D. Basu - Introduction to the Constitution of India.]

In Pt. Nehru's words, "Socialism to some people means the things:

a) Distribution which means cutting off the pockets of the people who have too much money and

b) Nationalisation:

Both these are desirable objectives, but neither is by itself Socialism. Any attempt to distribute by affecting the productive machinery is utterly wrong to do so would be to weaken ourselves.

.................I think it is dangerous merely to nationalise something without being prepared to work it properly."

(Hindustan Standard, Delhi 17-5-1958, Second Five Year Plan Pg: 22]

The then Prime Minister Indira Gandhi explained, "....We have our own brand of Socialism."........ Just nationalisation is not our type of Socialism [Statesman 25- 10- 1976, D.D. Basu. "Introduction to the Constitution of India"-Pg-26]

The original preamble did not contain the word "Socialism" because the Indian State was a mixed economy and was not committed to a particular economy structure [speck of Alladi Krishnaswami Ayyar, Pg. 134, B.K. Sharma Pg.42- introduction to the Constitution of India]. "The word "Socialism" was outsided, though Directive Principles of State Policy serves as a beacon light for any ideal welfare state."

The views and ideas of the founding Fathers of the Indian Constitution were set aside and by the 42nd Amendment the words, "Socialist" was inserted. It is worth mention that the 42nd Amendment came into force during the 'emergency era of 1975- 1977'.

Directive Principles though not justifiable in the courts (Under Article 27) have guided the policies of the govt. on number occasions. It is interesting to note that in an era where the neo liberals, neo consecutives and economists like F.A. Hayek have propounded the doctrine of catallaxy "where the state merely acts."

As a policeman and the doctrine of ***laiseez*** *faire is being are injected, the Courts of India have always inspected the ideals of Directive Principles and have equated it Fundamental Rights. It is to be noted that in an era where there is*

continuous roll back of the State from the welfare functions, the courts have always maintained a fire balance between Directive Principles and Fundamental Rights. In the era of globalisation the concept of "Priming of Pump" [Keyne's theory of employment is being replaced by Adam Smith "Invisible Hand".]

Judiciary and Directive Principles: Initially the Supreme Court paid less attention the Directive Principles, as they were not justifiable under the Constitution. But with the passage of time and with a number of cases the courts considered the idea that there was no conflict between Directive Principles and Fundamental and both aimed at the establishment of a Welfare State.

In "Keshavnand Bharti Versus State of Kerela" the Supreme Court took the view that both Directive Principles and Fundamental Rights are supplementary and complementary to each other. Directive Principles are the ends to which Fundamental Rights are the means.

The Supreme Court has given the Directive Principles of State Policy, the status of Fundamental Rights.

In "Unikkrishnan vs. State of Andhra Pradesh" [1993] I SCC 645- the Supreme Court has said that directive principles in Article 45 [puss for early childhood care and education to children below the age of six years] has been raised to a Fundamental Right.

Supreme Court put it within the ambit of Article 21 of the Constitution. "The right to education flows directly from right to life".

86th Amendment Act 2002- This amendment has added a new Article 21A "The State shall provide free and compulsory education to all children of the age of 6 to 14 years in such manner as the state may, by law, determine."

In Randir Singh Vs. Union of India [AIR 1982 SC 879]- "equal pay for equal work" has been held to be a fundamental right.

In H.M. Hokshot Vs. State of Maharashtra –"Legal Aid" and 'Speedy Trial' are fundamental rights under Article 21. [Article 39-A Free legal to poor and speedy trial of under tried prisoners]

Era of Globalisation in India and its effect on law making -

In early 1990s due to severe balance of payment deficit [which happened partly due to Gulf War, which led to a rise in prices of oil and heavy speculative outflow of NRI Funds held in India upto $1billion-East Asia] The govt in 1991 adopted NEP (New Economic Policy) and a new Structural Adjustment Package [SAP] has introduced new Industrial Policy of 1991 was adopted and "Licence Raj" came to an end [MRTP Act was made less effective]

Privatisation: All public sector economic activities that are in operation, should be closed down or passed on to the private sector. Public Ownership was allowed to operate only in cases of defence and other matter of national importance.

Disinvestment followed by a New Industrial Policy raised the Foreign Equity Ownership from 50 percent to 51 percent.

India signs the Marekesh GATT Treaty in 1994 and joint the WTO in 1995 as a founding member. Here India also accepted the Exclusive Marketing Rights (EMR) TRIPS and subsequently Product Patenting System.

Here, a relation can be established between Article 38, Article 39 of Directive Principles and the PDS [Public Distribution Systems] and Patent Rights as amended in 2005.

Article 38 States- that state should promote the welfare of the people by giving a social order in which justice- social, economic and political. State should minimise inequalities in income and try and eliminate inequalities status.

Article 39- Article 39(b)-Distribution of ownership and control of the material resources of the community to the communities to the good.

Article 39(c)-Prevent concentration of health in a few hands.
Article 47- Duty to raise the standard of living and improvement of health.

Public Distribution System-It is prim..rily a social welfare and poverty alleviation programme of the govt. that stabilised the price in the grain market. Ess..ntial commodities like rice, wheat, sugar and edible oil are supplied at a reasonable price. It is an essential part govt.'s food security problem. But the govt.'s performance has been far from satisfactory.

About 2 years back, government could not procure the targeted foodstuff and had to import grain, rice etc. from USA and Argentina. This had happened approximately after 40 years of PL 480 Programme of 1963 where India imported Foodstuff from USA.

Biplab Das Gupta in his book "Globalisation - India's Adjustment Experience" has put forward the following view ".....The Commercialisation of Indian Crops had increased. The trend under globalisation was not to build and develop a public distribution system, but to dismantle it wherever it existed. While the World Bank and its two ideological partners liked withers the PDS, they knew that such a decision could not be easily implemented due to political opposition"........

Hence Targeted PDS was introduced in 1997. It involved identification of poor and makes the infrastructure more expensive.

Patent Laws and the Indian Experience with WTO; India became member of WTO in 1995 and accepted the TRIPS Laws on "Product Patenting"

The following changes have occurred due to the new patent laws.

a) *Now there is no difference between "Product Patent" and "Process Patent". Earlier under Indian Patent Law, 1971 Process Patenting was allowed.*

Indian Pharmaceutical Company brought a process of making a particular medicine and paid royalty to the patent holder in foreign and use inexpensive material. Due to this life saving drug were available at a cheap price

But after the adoption of Product Patent TRIPS medicines will have to be bought at exorbitant prices.

b) *The period of patent has been increased to 20 years. Earlier it was 14 years.*

Socialism, Right to Strike and Judiciary

The unique relationship of socialism with the ideals can also be studied with the help of decided cases on 'Strike'.

In T.K. Rangarajan Vs. Govt. of Tamil Nadu and others, the Govt. of Tamil Nadu terminated the services of all its employees who had gone to the court. Appeals were filed in the Supreme Court after matter was decided by the High Court and Administrative Tribunals. Justice Shah said that the govt. employees had 'no fundamental right to strike'. He also said 'Apart from statutory rights, govt. employees cannot claim that they can 'take the society to ransom by going on strike.'

The following Judgement has been criticized by eminent constitutionalist A.G. Noorani in his book "Constitutional Questions and Citizen's Right" According to A.G. Noorani. "If some obiter in this case were uncalled for, this case is no relevance at all as a precedent on the right to strike".....

India is a party to the International Covenant on Economic, Social and Cultural Rights adopted by United Nations General Assembly on 16 December 1966.

Article 8(1)(d) of the covenant reads :

The State parties to the Present Covenant under to ensure.

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country

[A.G. Noorani, Constitutional Questions and Citizen's Rights (Right to Strike xvi-xxi)].

Further the learned author has summarized his criticism in a nushell:

".....While discussing constitutional requirements, court and counsel must never forget the core principle embodied in the international conventions and instrument as far as possible, give effect to the principle contained in the international instruments. The Courts are under an obligation to give regard to international conventions and norms for construing domestic laws more so when there is no inconsistency between them and there is bid in domestic law." (A.G. Noorani, Constitutional Questions and Citizen's Rights [Right to Strike XX]

In a number of cases the judiciary has frowned upon the idea of strike.

In Crompton Greaves Vs. Workmen (AIR 1978 SC 1389) it was held that in order to be entitled for wages during the strike period the strike should be

a) legal

b) as well as justified

The Courts further adopted a harsher attitude towards the strike in "Bank of India Vs. T.S. Kelewala" [(1990) 4 SCC 7447]. The Supreme Court held that the management has the power to deduct wages whether the strike was legal or not.

In Indian General Navigation and Railway Company Ltd. And another Vs. Their Workmen [AIR 1960 SC 219]. It was held that workmen are not entitled to wages and compensation and they are also liable to punishment by

dismissed.

It is interesting to note that in an era of globalization where ideology itself is being led to a slow demise, how come amendments in Representative People's Act (Where Party has to take an oath to abide by the Socialistic Policy) hold any valid ground. The govt. has openly violated the norms laid down in Land Acquisition Act to please the corporate world. May be we are headed towards the era where the unscrupulous words of Dang Xiaoping [It does not matter if it is a black cat or white cat, if it catches the rat it is a good cat] echo universally.

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