PREFACE

It is quite common these days, particularly in standard forms of contracts prescribed by Government and public corporations, to have a forum selection clause to operate in case of any disputes arising out of the contract. Another common feature in such contracts is for reference to disputes to arbitration. Such clauses impose a restraint on the parties from seeking their remedy in any court having jurisdiction. Such restrictions are generally regarded as valid subject of course to the power of the courts to entertain a suit in disregard of such clause in exceptional circumstances.

It is therefore of great importance that Governmental organisations and members of public who deal with them should be clear in their minds about the implications of any such clause in a contract. In view of the growing importance of this branch of procedural law, this Institute had requested Sri P.M. Bakshi, an eminent lawyer, to undertake research and to prepare a monograph on the subject. He very kindly agreed to do so and this monograph is the result of his labours. He has dealt with the subject with his usual thoroughness and precision.

Sri Bakshi has also been participating in the various training programmes at our Institute. Some of his lectures delivered so far at the Institute have also been included in this volume. Anyone going through them cannot fail to be impressed by the range and depth of Sri Bakshi's knowledge and his capacity as communicator.

I am sure this anthology will be found useful not only by persons actively concerned with the administration of justice, but also by governments and public sector organisations.

Institute of Judicial Training
and Research (U.P.)
Lucknow.

K. N. GOYAL
(Retired Judge,
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Honorary Director

THE AUTHOR

Sri P.M. Bakshi was actively associated with the Law Commission of India for a total period of about 28 years. He retired as its Member-Secretary in August, 1980, and was honorary Member of the Commission upto August, 1985. In the Law Commission, he had been in charge of the drafting of a number of its Reports (more than 100 in number), covering various branches of law. He has been Honorary Professor at the Indian Law Institute since December, 1980.

He has specialisation in criminal law, torts law, press law, law reform, family and legislation. Sri Bakshi is the author of a number of books relating to various legal subjects. He is co-editor of Dr. B.K. Mukherjee's Tagore Law Lectures on Hindu Religious Endowments and of Sir Dinshaw Mulla's Transfer of Property Act. In a contribution to be published in the World Legal Encyclopaedia, he has dealt with the entire Indian law. He has contributed a number of articles to leading Indian and foreign legal periodicals.

Amongst the lectures he has delivered are:

(1) Silver Jubilee Lecture on Law Reform (Indian Law Institute, 1982).

(2) Dr. B.R. Ambedkar Memorial Lecture on 'Legislative Process: Ideals and Reality' (Institute of Constitutional and Parliamentary Studies, 1983).

(3) Inaugural lecture entitled "Law and Society: Areas and Perspectives" (Indian Law Institute)(Law & Society Series, 1985).

In March, 1986, he delivered, at the invitation of the Gujarat High Court, the Silver Jubilee Lecture on Civil Liberties. He has also delivered lectures

on legislation at the Commonwealth Institute of Legislative Drafting and at the Universities of Varanasi (B.H.U.) and Kurukshetra.

In 1979, at the invitation of the Australian Law Reform Commission, he attended the Conference of Law Reform Agencies held in Perth (Australia). In February, 1983, he attended the Commonwealth Law Ministers' Conference (Colombo) as a member of the Indian Delegation. He was a member of the Programme Committee of the World Congress on Law and Medicine, 1985. He also prepared the background paper for the International Conference on Health Policy, 1985.

He has participated in several training programmes at The Institute of Judicial Training & Research, U.P. and a collection of his lectures is separately being published. His research monograph on The Continental System of Criminal Justice prepared under the auspices of this Institute has also been published, and a few of the comments received on that monograph are reproduced below:

COMMENTS RECEIVED ON.
SRI P.M. BAKSHI'S MONOGRAPH ON
CONTINENTAL SYSTEM OF CRIMINAL JUSTICE
PUBLISHED BY THIS INSTITUTE

(1) ".....Thank you for your D.O. letter No. IJTR/TRG./88-3736 dated 19 August, 1988 forwarding a copy of the monograph prepared by Shri P.M. Bakshi on 'The Continental System of Criminal Justice' published by the Institute of Judicial Training and Research U.P. I look forward to reading it with much interest. Shri Bakshi is widely known for his scholarship and has already much useful work to his credit....."

- Hon'ble Mr. Justice R.S. Pathak, Chief Justice of India.

(2) ".....I thank you for sending me a copy of the book 'Continental System of Crimiral Justice' published by your Institute. I shall certainly go through it in due course particularly because it is prepared by my good friend Sri P.M. Bakshi....."

- Hon'ble Mr. Justice E.S. Venkataramiah, Judge, Supreme Court of India.

(3) ".....I agree with you that in our country there is great delay in the trial and disposal of criminal cases on account of the procedural delays which is necessary part of British system of Criminal Administration......The problem regarding procedural delays in criminal matters warrants national debate among the Judges, Jurists, Professors and Research Scholars in Law....."

- Hon'ble Mr. Justice K.N. Singh, Judge, Supreme Court of India.

(4) ".....I have received the copy of the monograph on the Continental System of Criminal Justice. I do find it interesting and thought-provoking....."

- Hon'ble Mr. Justice P.C. Jain, Chief Justice, High Court of Karnataka.

(5) ".....It is a very useful work....."

- Hon'ble Mr. Justice V.K. Mehrotra, Acting Chief Justice, High Court of Himachal Pradesh.

(6) ".....an enlightening and a very useful research monograph under the title 'Continental System of Criminal Justice' prepared by Sri P.M. Bakshi under the auspices of Institute

of Judicial Training and Research, Uttar Pradesh....."

- Hon'ble Mr. Justice M. Rama Jois, Judge, High Court of Karnataka.

(7) ".....On page 8 of the book, it has been mentioned that in West Germany, the pre-trial investigation is carried out almost entirely by the police under the authority of the prosecuting attorney. In this connection, the system prevailing in West Germany is mentioned on the bottom of page 9 also. It may be worthwhile trying this system.

The method adopted in France mentioned in para 3.4 on page 19 is worth trying. The Police system as mentioned in para 3. 9 on page 21 should be followed in this country also. In this connection the method in France mentioned in para 3. 14 on page 24 and criminal procedure in West germany given in para 3.17 on page 25 may be considered. Para 3.20 on page 25 may be considered: para 3.20 on page 27 regarding trial is worth pursuing.

The distinction in criminal justice between France and India has been summarised on page 36. This has to be deeply considered. Also kindly see (iii) on page 54. Police investigation is subject to supervision by the prosecutor in France. This should be adopted in India also....."

- Sri Rishi Ram, Senior Advocate, ex-Advocate General, U.P., Allahabad.

(8) ".....I have enjoyed going through it....."

- Sri R. M. Sethi, Secretary, Agriculture Deptt., U.P. Govt.

(9) ".....I agree with you that we must do some hard thinking on the subject. I am also clear in my mind that we must do so without losing more time...."

- Sri S.A.T. Rizvi,
Secretary to Chief
Minister, Govt.
of U.P., Lucknow.

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PART A

FORUM SELECTION CLAUSE

Chapters I to VI

CHAPTER ONE

INTRODUCTION

1.1. Significance of procedure

Juristic theory divides the corpus of the law into substantive law and adjective law. Adjective law mainly embraces the law of procedure, the law of evidence and the law of limitation. Academic writings on law usually concentrate on areas of substantive law which is concerned with rights and duties. Procedural law is usually relegated to a background in such studies. The practical lawyer and the experienced judge, however, know well that procedural rules are equally important.

1.2. Vast field

The law of procedure itself is a vast field. Even if one confines oneself to procedure in civil suits, the field ranges over topics so diverse and numerous as the doctrine of *res judicata*, the forum for civil suits, interest on monetary claims, liability of legal representatives, modes of execution, interlocutory orders, split trials, multi-party litigation, remedies for public wrongs, special types of suits, inherent powers of courts and so on. Commentaries can give the gist of case law. But only a study in depth can provide an insight into the true principle and constitute a binding thread that can tie up the apparently hanging and loose strings of isolated and scattered judicial decisions. It is felt that the time has come for preparing such studies, linking the fragments of knowledge scattered over or buried in nooks and corners of the legal material, so that a connected picture can emerge. The law, if it is to proceed on rational lines, must be infused with the glow of principle. The glow of principle can come to be imparted, only if the dots of light that stand sprinkled over thousands of tiny spaces are collected together and

woven into a beam of light.

1.3. Scope

With this end in view, the present study seeks to deal with two important procedural topics, namely, forum selection clauses and arbitration clauses. By "forum selection clause" is meant a contractual clause which provides that only a particular court shall have jurisdiction to try a dispute under the contract. By arbitration clause is meant a stipulation in a contract to the effect that disputes under the contract shall be referred to arbitration. Of course, the formula can vary from contract to contract, but the central idea is the same. Parties wish to exclude the jurisdiction of ordinary courts and to confer jurisdiction on the arbitrator.

1.4. Need for study

The need for a detailed study of these two types of stipulations has arisen because of the fact that by now, fairly abundant case law has come into existence about the validity, effect and interpretation of such clauses. Some of these decisions are not reconcilable with each other. A few happen to be not so well known. Besides this, arbitration law, for some reason, has remained a strange and unfamiliar area to many lawyers. But this state of affairs is not satisfactory. Practical experience shows that forum selection clauses are becoming more and more common. It is also seen that, sooner or later, in India, commercial arbitration is likely to occupy a major position as a machinery for dispute resolution.

1.5. Aspects of interest

Forum selection clauses depend on agreement. The foundation of any arbitration (barring statutory non-consensual arbitrations) is the arbitration

agreement. It is proper that legal learning about such fundamental concepts should be marshalled, interpreted and presented in a readable form, so that generations of young judges and lawyers can draw on the accumulated knowledge of the past and also devise avenues of growth for the future. What follows, then, in the succeeding chapters, is a modest attempt to delineate the contours of the legal terrain concerning forum selection clauses and arbitration clauses in agreements. Such clauses have their genesis in contract, but have an impact on the working of the legal system. They thus touch the law of contracts as well as the law of procedure - an aspect which will, it is hoped, enhance the appeal and utility of this study.

CHAPTER TWO

GENERAL RULES AS TO CAUSE OF ACTION

2.1. The Code and forum

The general rules as to forum (place where a civil suit can be filed) are contained mainly in sections 16 to 20 of the Code of Civil Procedure, 1908. The principal section relevant to suits on contract is section 20, under which (to state the gist in brief) such a suit can be filed either at the place where the defendant resides, carries on business or personally works for gain or where the cause of action arose in whole or in part. The locus of the cause of action is thus a material factor conferring jurisdiction in regard to suits on contracts. This Chapter will be devoted to a consideration of some of the important judicial decisions affording guidance for identifying the place where the cause of action in suits of particular types may be said to arise.

2.2. Cause of action: the general concept

"Cause of action" has been variously described.

(a) It means every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to the judgment of the court. *Cook* v. *Gill*, (1873) 8 C.P. 107; *London Bombay Bank* v. *Badee*, (1880) I.L.R. 5 Bombay 42; *Narayan* v. *Secretary of State*, (1906) I.L.R. 30 Bom. 570; *Alexander Braull* v. *Indra Krishna*, A.I.R. 1933 Cal. 706; *Amrit Kunwar* v. *Gurcharan*, A.I.R. 1934 All. 226; *Ram Awalamb* v. *Shankar*, A.I.R. 1969 All. 426; *Ujjal Taluqdar* v. *Netichand*, A.I.R. 1969 Cal. 224.

(b) Everything which, if not proved, would give the defendant a right to an immediate judgment which must be part of the cause of action. *Arthur*

Butler v. *District Board of Gaya*, A.I.R. 1947 Pat. 134; *Reed* v. *Brown*, (1888) 22 Q.B.D. 128; *Joshi* v. *State of Bombay*, A.I.R. 1959 Bom. 363.

(c) It is a bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the suit. *Dhanjishaw* v. *Fforde*, (1887) I.L.R. 11 Bom. 649; *Musa* v. *Manilal*, (1905) I.L.R. 29 Bom. 368; *Raghoonath* v. *Gobinda Narain*, (1895) I.L.R. 22 Cal. 451.

2.3. Pleadings

The cause of action refers entirely to the grounds set forth in the plaint as the cause of action, i.e. the media upon which the plaintiff asks the court to arrive at a conclusion in his favour. *Chand Kaur* v. *Partab Singh*, (1889) I.L.R. 16 Cal. 98, 102 (PC); *Ganda Singh* v. *Zora Singh*, A.I.R. 1950 Pepsu 21. The cause of action must be antecedent to the institution of the suit. *Dominion of India* v. *Nath & Co.*, A.I.R. 1950 Cal. 207.

2.4. Contract

In a suit for damages for breach of contract, the cause of action consists of the making of the contract, and of its breach; so that, the suit may be filed either at the place where the contract was made or at the place where it should have been performed and the breach occurred. *Arthur Butler* v *District Board*, A.I.R. 1947 Pat. 134; *Dhunjishaw* v. *Fforde*, (1887) 11 Bom. 649, 652; *Mulchand* v. *Suganchand*, (1876) 1 Bom. 23 (hundi); *Doya* v. *Secretary of State*, (1884) 14 Cal. 256; *Rampurtab* v. *Premsuk*, (1891) 15 Bom. 93; *Dobson* v. *Bengal Spg. & Wvg. Co.*, (1897) 21 Bom. 126; *Seshagiri Row* v. *Nawab Aksur*, (1904) 27 Mad. 494. Thus, if a contract is made in Poona to be performed in Poona, the whole cause of action arises in Poona and the suit for breach can only be filed in the Poona court.

But if the contract is made in Poona to be performed in Belgaum, the suit for its breach can be filed either in the Poona or in the Belgaum court. [*Mulla, Code of Civil Procedure, Abridged Edition*, (1982), page 78].

2.5. Making of the contract

The making of a contract is part of the cause of action and a suit on a contract can always be filed at the place where it was made. *Muhammad Shafi* v. *Karamat Ali*, (1896) P.R. 76; *Sita Ram* v. *Ram Chandra*, (1918) P.R. 26. *Salig Ram* v. *Chaha Mal*, (1912) 34 All. 49, 11 I.C. 712; *Jupiter General Insurance Company* vs. *Abdul Aziz*, (1923) 1 Rang. 231, 76 I.C. 482, A.I.R. 1924 Rangoon 2; *Dobson* v. *Bengal Spg. & Wvg. Co.*, (1897) 21 Bom. 126; *Asa Ram* v. *Bakshi*, (1920) 1 Lah. 203, 53 I.C. 331.

2.6. Offer

In *Baroda Oil Cakes Traders* v. *Parshottam*, A.I.R.1954 Bom. 491, (1954) Bom. 1137, it has been held that mere despatch of an offer is not sufficient to give jurisdiction. Acceptance by phone is part of the cause of action. *Bhagwandas* v. *Girdharlal*, A.I.R.1966, SC 543.

In an Orissa case, after preliminary negotiations at New Delhi, the defendant sent the agreement to the plaintiff and the latter signed it at Bhubaneswar. Thus, the acceptance of the offer was made at Bhubaneswar and therefore the cause of action was held to arise in part at Bhubaneswar. Besides this, payment under the agreement was to be made, and actually part payment had been made, at Bhubaneswar. Hence, the court at Bhubaneswar had jurisdiction. *M.M.T.C. of India Ltd.* v. *Indian Metals and Ferro Alloy Ltd.*, A.I.R. 1980 Orissa 76.

A contract is completed when an offer made is accepted, and the cause of action does not, in part, arise where the offer is made. It is the acceptance that gives rise to the cause of action, and not merely an offer. *Republic Medico Surgical Company* v. *Union of India*, A.I.R. 1980 Karn. 168.

2.7. Contract: acceptance letter

Place of posting of acceptance letter is part of the cause of action, but not the place of its receipt. *American Pipe* v. *State of U.P.*, A.I.R. 1983 All. 186. A suit on contract made by telex between places B and D, can be filed at D, if acceptance is conveyed at D.

A contract by correspondence is made at the place where the letter of acceptance is posted. *Dhanraj Mills Ltd.* v. *Boobna (supra)*; *Arthur Butler* vs. *District Board of Gaya*, A.I.R. 1947 Pat. 134; *Manilal* v. *Venkatachalapathi*, A.I.R. 1943 Mad. 471; *Ratanlal* v. *Harcharan*, (1947) All. 44, A.I.R.1947 All 337; *Kamisetti* v. *Katha*, (1904) 27 Mad. 355; *Muhammad Esuff* v. *M.Haleem & Co.*, A.I.R. 1934 Mad. 581. The contract is repudiated at the place where the letter is received. *Dhanraj Mills Ltd.* v.*Boobna*, A.I.R.1949 Pat. 270. If acceptance is by performance of a condition, the suit may be instituted at the place where the condition is performed. *Sitaram* v. *Thompson*, (1905) 32 Cal. 884.

2.8. Performance

The performance of a contract is part of the cause of action and a suit in respect of breach can always be filed at the place where the contract should have been performed or its performance should have been completed. *Gopikishna* v. *Nikomul*, (1874) 13 Beng. L.R. 461; *Chunilal* v. *Mahiputray*,(1870) 5 Bom. H.C. 33 A.C. ; *Bhuttacharya* v. *Cawnpore Woollen Mills*, (1911) 16C.W.N.325; *Champaklal* v. *Nectar Tea Co.*, (1933) 57 Bom. 306,A.I.R.1938 Bom 179.

2.9. Sale of goods

The usual case is that of a contract for sale of goods and a suit on such a contract may be filed at the place where the goods are deliverable or the price is payable. *Batterpati* v. *Calcutta Glass & Silicate Works*, A.I.R.(1949) Mad. 145; *Llewhellin* v. *Chunni Lal*, (1882) 4 All. 423; *Sheo Charan* v. *Tej Bhai*, (1917) 39 All. 378; *Abdur Rashid* v. *The Sizing Materials Co.*, (1920) 42 All. 480. Thus, if goods for delivery at Allahabad are sold according to sample and paid for in Bombay, the buyer may sue in Allahabad if the goods prove not to be of sample quality. *Sheo Charan* v. *Taj Bhai*, (1917) 39 All. 368. When a buyer at Kasganj ordered dyes from a seller at Delhi, but after paying for and opening the parcel found it to contain only clay, he was entitled to sue for damages at Kasganj. *Ram Lal* v. *Bhola Nath*, (1920) 42 All. 629.

If not otherwise provided by the contract, goods sold are deliverable at the place where they are sold, or if not ready, at the place of manufacture. If they are sent by common carrier at the seller's risk, the contract is performed at the place where they are delivered to the buyer or if at the buyer's risk, at the place where they are delivered to the carrier. *Winter* v. *Way*, (1864) 1 Mad. H.C.200.

The place of performance is generally expressed in the contract and if not so expressed, it may be inferred from the nature of the act. Thus, a contract to repair a house must be performed where the house is situate, and an agreement to register a mortgage must be performed at the place where the law requires it to be registered. *Sami* v. *Gopal*, (1873) 7 Mad.H.C. 176.

2.10. Negotiable instruments assignments

There has been a conflict of decisions on the question whether a suit on a negotiable instrument could be filed in a court within whose jurisdiction it has been assigned. One view is that it is not

part of the cause of action, as to hold otherwise would be to evade section 20(c). *Rameshwar Lal* v. *Gulabchand*, A.I.R. (1960) Raj. 243. But the preponderance of authority is in favour of the view, that it is, as in the case of choses in action, part of the cause of action. *Gopal* v. *Narayana*, A.I.R.(1953) Nagpur 192; *Kothandarama Gupta* v. *Chandrasekhara*, A.I.R. (1966) AP. 334. There is the same conflict of opinion as regards assignment of railway receipts. *Alliance Assurance Co.* v. *Union of India*, A.I.R. (1959) Cal. 563 (sufficient to give jurisdiction); contra *Ramarao* v. *Union of India*, A.I.R. (1961) AP. 282

2.11. Termination of contract

Revocation or termination of a contract constitutes a part of the cause of action and the place where the same takes place can vest jurisdiction in the court existing there. Where the place of performance is not fixed, the question is one of intention to be gathered from the contract and the surrounding circumstances. *Raman* v. *Gopalachari*, (1908) I.L.R. 31 Mad. 223.

2.12. Place where money expressly or impliedly payable

Part of the cause of action arises where money is expressly or impliedly payable under a contract. In *Lal Singh* v. *Kadir Baksh*, (1922) 3 Lah L.J. 499, the suit could be instituted at Sialkot as it was an implied term of the contract that the agent should pay his principal there. When the place of payment is not specified, the court will be guided by the intention of the parties. *Gally & Co.* v. *Dahi China Appalaswami Naidu*, A.I.R. 1946 Mad. 300. *Dhunjishaw* v. *Fforde*, (1887) 11 Bom. 649; *Darragh & Co.* v. *Purshotam*, (1881) 4 Mad. 372; *Sailendra Nath* v. *Ramsundar*, (1912) 16 C.L.J. 279. The amount due on a balance struck at foot of an account is payable at the place where the balance was struck although the transactions which were the subject of the account

took place elsewhere. *Hanraj* v. *Ram Bux*, (1866) 1 Agra 115. When a cheque is honoured, payment must be held to have been made at the place where the cheque is received and not at the place where it was cashed. *Commissioner of Income-tax* v. *Ogale Glass Works* A.I.R.(1954) SC. 420, (1955) 1 S.C.R. 185, *Jagdish Mills* v. *Commissioner of Income-tax* A.I.R. (1959) SC. 1100.

2.13. Debtor should seek the creditor

There has been a divergence of judicial opinion on the question whether the common law rule that a debtor should seek the creditor if no place is specified for performance in the contract, is applicable in India. One view is that when the debtor does not apply under section 49, and the agreement does not expressly name any place of payment, it would be reasonable to invoke such a rule. *Bharumal* v. *Sakhawatmal*, A.I.R. (1956) Bom. 111; *Borakur Engineering and Foundry Works* v. *State of Bihar* A.I.R. (1960) Cal. 513; *Shoba Singh* v. *Saurashtra Iron Foundry*, A.I.R.(1968) Guj. 276. See also *Johrimull* v. *Hiralal*, A.I.R.(1961) Pat. 198. On the other hand, it has been held that to adopt the technical rule of common law would abrogate the provisions of the Code. *Firm Hira Lal* v. *Brijnath* (1950) I.L.R. 2 Punj. 291, A.I.R. 1960 Punj. 450 (FB). Great caution, however, is required in the application of the rule. *Kadiresa* v. *Shanmuga*, I.L.R. (1960) Ker. 150, A.I.R. 1960 Ker. 188. The rule does not apply if there is no debtor-creditor relationship. In the case of a deposit in a bank, the bank promises to repay only at the branch where the money is deposited. *Arab Bank Ltd.* v. *Barclays Bank Ltd.*, A.I.R.(1954) Cal. 495. *State-aided Bank of Travancore* v. *Dhrit Ram*, A.I.R.(1942) PC. 6.

2.14. Creditor's residence

A few judicial decisions in India have, following the principle that the debtor must find the creditor, held that the court having jurisdiction where the creditor resides can try a suit on the debt. The decisions are of the High Courts of Allahabad and Gujarat. *State of U.P.* v. *Ramlal*, A.I.R.(1966) All. 159; *H.S. Shobha Singh* v. *Saurashtra Iron etc. Works*, A.I.R.(1968) Guj. 276.

However, the High Court of Madhya Pradesh has held the common rule to be inapplicable to suits for recovery of salary by employees, against an employer who had a large number of workers. *Ramswaroop* v. *Polsons Ltd.*, (1972) M.P.L.J. 1053.

If deposit is made and repayable outside India but the depositee comes to India and resides at Z in India, a suit to recover the deposit can be filed at Z. The Madras High Court has so held, giving two reasons for the conclusion; (i) Place of defendant's residence gives jurisdiction. (ii) Plaintiff can seek the debtor and file a suit according to the law of the country where he seeks to file the same. *E.M.E.S. Chettiar* v. *A.Chettiar*, A.I.R. (1974) Mad. 305, (1974) 1 Mad. L.J. 321.

2.15. Plaintiff's place

In a Punjab case, the consignee did not take delivery of goods. Defendant merely agreed to take delivery of goods on behalf of the plaintiff at its request. Goods were to be returned to the plaintiff and necessary expenses incurred by the defendant were to be paid. Plaintiff failed to pay the expenses. Goods were not sent back. No cause of action or any part thereof, it was held, arose at the place of the plaintiff. There was no privity of contract between the parties. *Vasant Gambhir Navgale* v. *Jagadhri*, A.I.R.(1986) P&H. 319.

2.16. Insurance

A suit for insurance money against the Life Insurance Corporation will lie in a court within whose jurisdiction the insured person died, because death is undoubtedly a part of the cause of action in such suits. *L.I.C.* v. *Iqbal Kaur*, A.I.R.(1984) J&K. 1.

CHAPTER THREE

CAUSE OF ACTION IN SPECIFIC SUITS

3.1. Agency

In suits for an agent's account, the cause of action arises at the place where the contract of agency was made or the place where the accounts are to be rendered and payment is to be made by the agent. *Ramdass* v. *Dhanpat*, A.I.R. 1925 Lah. 387; *Annamalai Chettyar* v. *Daw Hnin U.*, A.I.R. 1936 Rang. 251. It does not arise at the place where accounts are demanded. *Master Dharam* v. *Ramlal*, A.I.R.1961 Punj. 567.

3.2. Bailment

In a contract of bailment, the payment of bailee's charges is part of performance of the contract, *Boseck* v. *Mandleshan*, (1906) P.R. 70; and part of the cause of action also accrues at the place where the goods are stored. *Ganesh Prasad* v. *Bansidhar*, (1917) 15 All. L.J. 513.

3.3. Bank Draft

A bank draft was obtained at Madras payable at Bombay. Instructions were issued to stop payment, but the Madras branch nevertheless paid it. A suit against the bank can be filed at Madras where the draft was issued, since the cause of action which arose out of the draft arose (in part) at Madras [*Vijaya Bank* v. *Kiran & Co.*, A.I.R. (1983) Mad. 357].

3.4. Corporations

The "office" mentioned in section 20, Explanation, need not be a miniature replica of the head office of the Corporation. *F.C.I.* v. *Ranjit Mishra*, A.I.R. 1980 Orissa 152.

3.5. Suit against corporation: section 20, Explanation II

Irrespective of the provisions of the Companies Act, the domicile of a trading company is fixed by the situation of its principal place of business, *Jones* v. *Scottish Accident Insurance Co.*, (1886) 17 Q.B.D. 421; that is to say, its chief office where the central management and control are actually to be found. *De Beers Consolidated Mines Ltd.* v. *Howe*, (1906) A.C. 455, 458 (PC). In the case of a company registered under the Companies Act, the controlling power is, as a fact, generally exercised at the registered office, and that office, is, therefore, not only for the purposes of the Act, but also for other purposes, the principal place of business. *Watkins* v. *Scottish Imperial Insurance Co.* (1889) 23 Q.B.D. 285. This is not, however, necessarily the case, *Keynsham Blue Lias Co.* v. *Barker*, (1863) 2H. & C. 729; and the question whether that or some other place is the principal place of business of the company is in each case a pure question of fact, to be determined upon a scrutiny of the course of business and trading. *De Beers Consolidated Mines Ltd.* v. *Howe*, (1906) A.C. 455 (PC). But a company may have subordinate or branch offices in fifty different jurisdictions and it may be sued in any one of such jurisdictions in respect of a cause of action arising there. *People's Insurance Co.* v. *Benoy Bhusan*, (1943) 1 Cal. 564, A.I.R. (1943) Cal. 190, 207 I.C. 68; *Bank of Bengal* v. *Sarat Chandra*, (1919) 4 Pat.L.J. 141.

3.6. Damages

A suit was instituted at Karur (Tamil Nadu) for the recovery of damages, on the ground that consignment of goods entrusted (to the defendant's agent) at Karur for being carried to Calcutta and for being delivered to the consignee there, had not been so delivered. Defendant's head office was at Bangalore and branch office at Karur. It was held that the suit could be instituted in the court at Karur, notwithstanding the fact that copy of the Lorry receipt contained a clause that disputes between the parties were subject to Bangalore court's jurisdiction only. *Prakash Roadlines* v. *P. Muthuswamy Gounder*, A.I.R. 1985 Mad. 84.

A suit for damages for breach of contract can be filed at the place where the contract was made or where it should have been performed and the breach occurred. Performance (in an agreement of sale of goods) consists not only of delivery of the goods, but also of payment of the price. Thus, the cause of action arises, in part, where the price would be payable on delivery. Title would not pass and delivery cannot be taken until the price is paid. *Sreenivasa Pulversing Industries* v. *Jai Glass & Chemicals*, A.I.R. 1985 Cal. 74.

3.7. Deposits : residence of depositor

A widow residing at Simla deposited money in fixed deposit in a bank at Chandigarh. She demanded payment from the Chandigarh branch of the bank where, however, re-payment was refused on certain grounds. The fixed deposit receipt did not have any condition that the payment would be made only at Chandigarh. She filed a suit at Simla, where the bank had a branch, for a declaratory decree that she was entitled to receive the principal amount. It was held that the Simla court had jurisdiction, since the bank had a branch at Simla and the widow (depositor) was residing there. *Pushpawati* v. *U.Co. Bank*, (1980) 50 Comp. Cases 838 (H.P.).

3.8. Oral contract

A suit on an oral contract can be filed at the place where money is payable under the contract. *Criterion Publicity Private Ltd.* v. *Golden Plastics*, I.L.R. (1979) 1 Mad. 471.

3.9. Foreign judgment

A suit on foreign judgment has to satisfy the requirements of section 20. *Rajaratnam* v. *Muthuswami*, A.I.R. 1958 Mad. 203. A suit for money simpliciter, based on foreign judgment cannot be filed in a court merely on the basis that certain immovable property of the defendant is situated within its jurisdiction. *Ponnuswami* v. *Periasami Pillai*, (1980) 2 M.L.J. 155, 162, 163, para 15.

3.10. Goods in transit

Suit for damage to goods in transit by railway cannot be filed at the place of headquarters of the railway (in view of section 80, Railways Act), according to the Bombay High Court, *Union of India* v. *Indian Hume Pipes*, A.I.R. (1981) Bom. 414, though it can be filed at (i) the place of consignment; (ii) the place of destination; or (iii) place of damage [See also para 3.13, *Infra*].

3.10A. Government

There was a suit against Government, seeking a declaration that a contract entered between the parties was not a valid contract. Disputes between the parties were referred to an arbitrator at Bombay and he made his award at Bombay. Since no part of the cause of action arose at Delhi, suit could not be filed at Delhi, simply because the Union of India functions at Delhi. *Prahlad Rai Dalmia* v. *Union of India*, A.I.R. 1986 Delhi 76 (DB).

3.11. Insurance

(a) Suit on an insurance policy can be filed at the place of death. *L.I.C.* v. *Iqbal Kaur*, A.I.R. 1984 J & K 1(b) [See also para 2.16, *supra*]. According to the Patna High Court, a clause prescribing a particular forum is not binding. *Barbigha Cold Storage* v. *National Insurance*, A.I.R. 1981 Pat. 21. This seems to be contrary to the general principle that forum selection clauses are valid, where the forum chosen is otherwise competent. *Hindustan Tiles* v. *Kisanlal*, A.I.R. 1979 Orissa 69; *Chandeswar Singh* v. *Dahu Mahato*, A.I.R. 1983 Pat. 257 (FB). [See also paragraph 4.5(vi), *infra*].

3.12. Maintenance

A wife s claim for maintenance allowance and for permanent injunction restraining the husband from undergoing a second marriage can be tried at the place where the first marriage took place. *Subhash Chandra Jain* v. *Vidyut Jain*, A.I.R. 1978 All. 234. [For 'Stridhana' see paragraph 3.15, *infra*].

3.13. Railways

Section 80, Railways Act overrides section 20, C.P.C. according to the Bombay High Court. *S.E. Rly.* v. *Govindlal*, A.I.R. 1984 Bom. 223. But the Madras High Court holds a contrary view. *Hindustan Machine Tools* v. *Union of India*, A.I.R. 1985 Mad. 130 [See also paragraph 3.10, *supra*].

3.14. Sale of goods

In a contract for the sale of goods, suit can be filed at the place where payment is made through bank on receipt of documents. *R.K. Janakiah* v. *A.K. Mohan*, A.I.R. 1980 A.P. 41.

Suit for damages for breach of contract of sale can be filed in court within whose jurisdiction the price was payable. *Sreenivasa Pulversing*

Industries v. *Jai Glass & Chemicals*, A.I.R. 1985 Cal. 74 [See also paragraph 3.17 *infra*].

3.15. Stridhana

In a suit by the wife for return of Stridhana, being ornaments received as gift at the time of her wedding at Etah, the cause of action arises, in part, at Etah, the place where the wedding was solemnised. *Subhash Chandra Jain* v. *Vidyut Jain*, A.I.R. 1978 All. 234[For maintenance, see paragraph 3.12, *supra*].

3.16. Advocate

An advocate's liability to his client as regards the client's money in the advocate's hands is a liability to account, and is non-contractual. The cause of action is possession of the property by the person liable to account in accordance with ownership (which is in the person seeking the aid of the court). An advocate receives moneys from his client in his chambers and realises money on his behalf as fruits of litigation in the court where he acts for the client; or, shortly put, he receives both kinds of moneys at the place where he carries on his profession. This determines the place where the cause of action in such suits arises and also determines the forum for the institution of a suit against him by his client to account for the moneys paid by the client to him and realised by him on behalf of his client. *K. Sankaranarayana Pillai* v. *M/s Mysore Fertiliser Co.*, (1979) Ker.L.T. 236: A.I.R. 1979 Ker. 167.

3.17. Supply of goods: Money payable

In a suit for breach of a contract for the supply of certain goods, the court at the place where the money is payable has jurisdiction. *Lajpat Rai Kukam Chand* v. *Cheddi Ram Raj Kumar*, A.I.R. 1979 pat. 120. See also *Criterion Publicity* v. *Golden Plastics*, I.L.R. (1979) 1 Mad. 471 [See also Paragraph 3.14 *supra*].

3.18. Termination of services

A suit for wrongful termination of services lies at the place where services were terminated. *T.R.S. Mani* v. *T.R.P. Radio (P) Ltd.*, I.L.R. (1962) Mad. 1141: A.I.R. 1963 Mad. 30.

CHAPTER FOUR

FORUM SELECTION CLAUSES

4.1. Validity

Where two (or more) courts have jurisdiction to try a suit, there is nothing contrary to public policy if the parties agree that the dispute between them shall be tried in only one of them. *Bhagat Ram* v. *Ramnivas*, A.I.R. 1949 Ajmer 44; *National Petroleum Co.* v. *Meghraj*, A.I.R. 1937 Nag. 334; *Ganpatrai* v. *F.C.I.*, A.I.R. 1984 Cal. 35; *Cawnpore Transport* v. *Gherulal*, (1985) Cur. Civ. Cas. 642.

4.2. Clause must be consensual

Such a clause in a contract, in order to be effective, has to be consensual. Both the parties to the contract must have knowingly agreed to such a stipulation. In an Orissa case, a purchase order was sent by the defendant to the plaintiff, by which the defendant placed orders with the plaintiff for supplying certain varieties of pig iron from the plaintiff's concern at Barbil in the Keonjhar district to the defendant in Calcutta. At the top of the purchase order, there were printed the words - "All subject to Calcutta jurisdiction". The purchase order was typed on the defendant's letter-head and issued by the defendant, and had not been signed by the plaintiff. It was held that by the mere recital by the defendant of the said words at the top of the purchase order, and by his sending the same to the plaintiff, it could not be said that the plaintiff agreed to confine the settlement and adjudication of all disputes between the parties relating to the contract *only at one place*, i.e in the courts at Calcutta and nowhere else. *Surajmal Shiubhagawan* v. *Kalinga Iron Works*, A.I.R. 1979 Orissa 126.

4.3. Notice of forum selection: small print

In a Bombay case, an unsigned consignment note delivered by the common carrier (a road transport operator) to the consignee contained, on the reverse in a *very small print*, a condition that only the courts in the city of Calcutta shall have jurisdiction in respect of claims under the consignment. The consignee filed a suit at Sangli for short delivery of goods, since the goods were to be delivered at Kirloskarvadi (Sangli). It was held that the claim was properly instituted. As the consignment note had not been signed by the parties, nor was the term printed in a manner so as to give adequate notice by the carrier to the consignee, the restriction as to jurisdiction, contained in the consignment note, was not binding on the consignee. *Road Transport Corpn.* v. *Kirloskar Brothers Ltd.*, A.I.R. 1981 Bom. 299; (1981) 83 Bom. L.R. 173 [See also paragraph 4.6 *infra*].

4.4. Clarity

Forum selection clause must be clear and unambiguous. *Salem Chemicals* v. *Bird & Co.*, A.I.R. 1979 Mad. 16. A condition in the bill "subject to Delhi jurisdiction" cannot mean that *only* the Delhi court shall have jurisdiction. *Jaishree Luxury House* v. *Kathotia Sons*, A.I.R. 1980 Raj. 42. The importance of this requirement (resulting from case law) is illustrated by some specific rulings noted below.

4.5. Specific rulings

The following clauses in a contract were held not to exclude the jurisdiction of courts otherwise competent to entertain the suit.

(i) Contract would be deemed to have arisen at headquarters of the offeror, and all causes of action in relation to the contract shall be deemed to have arisen at headquarters of offeror. (Reason jurisdiction of the court where the defendant was carrying on business was not excluded *expressly*). *Hindustan Laminators* v. *F.C.I.*, AIR 1978 NOC 165, 166.

(ii) Bill printed with the clause "subject to jurisdiction of .... court". (Reason - Parties had not applied their mind and agreed to the clause. The clause was only in the Bill). *Patel Brothers* v. *Vadilal Kashidas*, A.I.R. 1959 Mad. 227: (1959) 1 M.L.J. 406.

(iii) "Legal jurisdiction in all matters concerning State lottery shall be CL". (Reason - This is a bare statement, with nothing *excluding* the jurisdiction of other courts). *Naziruddin* v. *P.A. Annamalai*, (1978) 2 M.L.J. 254: A.I.R. 1978 Mad. ; *Cf. Special Secretary, Government of Rajasthan*, A.I.R. 1984 A.P. 5.

(iv) "Subject to Delhi jurisdiction". (Reason - The word "only" is not used in the clause). *Jaishree Luxuru* v. *Kathotia Sons*, A.I.R. 1980 Raj. 41. Such clauses do not exclude the jurisdiction of other competent courts. *Secy. Vikalanga Sevak* v. *Sheth Brothers*, (1983) Ker. L.T. 652.

(v) A statement at the bottom of the letter pad (on which a contract was written), read as under; "All offers are without engagement unless otherwise stated, subject to Hamburg jurisdiction". (Reason - Other party may not have consented). *Maganlal* v. *Satya Narayan*, A.I.R. 1978 All. 455.

(vi) A clause in an insurance policy providing for choice of forum. (Reason - Section 46, Insurance Act confers, *inter alia*, a right to sue for any relief in respect of the policy in any court of competent jurisdiction in India, except in case of marine insurance). *Isaq Mohd.* v. *United India Fire Ins.*, A.I.R. 1978 Guj. 46. [See also para 3.11, *supra*].

4.6. Forum clause in small print

Contracts containing, in small print, vital terms restricting the rights of parties have, in recent times, been supplying rich material by way of case law. In an Andhra Pradesh case, there was printed, on the reverse of a lottery ticket, a

condition regarding jurisdiction. It was printed in small print and was not brought to the notice of the purchaser of the ticket. It was held that the purchaser was not bound by the condition so printed on the reverse. *Special Secretary, Government of Rajasthan* v. *Venkataraman*, A.I.R. 1984 A.P. 5.

Jurisdiction cannot be excluded by a clause in small print letters, appearing on a consignment note. Such letters do not give adequate notice. *Road Transport Corporation* v. *Kirloskar Brothers*, (1981) 83 Bom. L.R. 193: A.I.R. 1981 Bom. 299 [See also paragraph 4.3, *supra*].

4.7. Restriction on one party only

A condition in the order form that any legal proceeding in respect of any dispute etc. shall be instituted by the *purchasers* in the Delhi court, which alone should have jurisdiction, does not apply to a suit instituted by the seller (i.e. the other party). *Jaishree Luxury House* v. *Kathotia Sons*, A.I.R. 1980 Raj. 42.

4.8. Third parties

A stipulation in a contract that the suit will be filed only at a particular place, does not bind third parties. *Bombay Jaihind Roadways* v. *Chellarama Garments Pvt. Ltd.*, (1979) 1 M.L.J. 338: I.L.R. (1979) 1 Mad. 444.

4.9. Incompetent court

It is also to be noted that parties cannot, by agreement, confer jurisdiction on a court which, under the law, has no jurisdiction to try the particular dispute. *Prakash Roadlines* v. *P. Muthuswamy Gounder*, A.I.R. 1985 Mad. 84.

4.10. Cases of oppression

Though, as stated above, it is open to the parties to stipulate that all disputes arising out of it should be subject to the jurisdiction of a particular court alone, and such a contract would not be void as being opposed to public policy under section 28, Contract Act, there are certain circumstances in which it would not have the effect of ousting the jurisdiction of the other courts also, which are competent to entertain such suits. If it would be oppressive to compel the plaintiff to seek his remedy in the court specified by the terms of the contract, then, according to recent rulings, the court otherwise competent may entertain the suit, even ignoring the terms of the contract. In a Gujarat case relating to a claim for loss of goods consigned through the defendant, the entrustment of the goods was made at Ahmedabad; all the witnesses to the agreement and the entrustment were at Ahmedabad and the claim was only for Rs. 1,200/-. The suit was laid at Ahmedabad. The defendant contested the jurisdiction of the Ahmedabad court, pleading that the contract term stipulated that courts at Delhi alone have jurisdiction. It was held that in view of the facts and in view of the stakes involved, it would be oppressive to compel the plaintiff to file the suit at Delhi and it was rightly entertained by the Ahmedabad court, ignoring the term in the contract. *Rajasthan Golden Transport Co. Pvt. Ltd., Delhi* v. *The United India Fire and General Insurance Co. Ltd., Ahmedabad*, A.I.R. 1980 Guj. 184. (See also A.I.R. 1975 Guj. 77). Courts do claim jurisdiction to disregard stipulations as to forum, if they are oppressive. *Patnaik Industries* v. *Kalinga Iron*, A.I.R. 1984 Orissa 180; *Indra Cotton* v. *Rakecha & Co.*, A.I.R. 1983 Mad. 201.

According to the Madras High Court, where the contract gives exclusive jurisdiction to one of two or more courts which can possibly have jurisdiction, the general rule is that the suit can be filed only in that court. However, the excluded court can disregard the stipulation if, having regard to the surrounding circumstances, including the stakes involved, the stipulation is regarded by the court as oppressive. *Renown Biscuit Co.* v. *Kamalanathan*, (1979) 2 M.L.J. 377 (following A.I.R. 1975 Guj. 77).

4.11. Inconvenience not proved

But inconvenience must be proved. In a Calcutta case, there was a clause in the contract, providing that all disputes between the parties shall be settled in the court at Lucknow. It was held that in view of the dispute as to whether any part of the cause of action arose within the jurisdiction of the Calcutta court, it could not be said that the balance of convenience was in favour of the Calcutta court to try the suit. In the facts and circumstances of the case, the alleged hardship or inconvenience of the plaintiff was not a sufficient consideration to allow the plaintiff to file a suit in breach of the terms of the agreement. Consequently, the leave granted under clause 12 of the Letters Patent, to institute the suit in the court at Calcutta, in breach of the forum selection agreement, was liable to be revoked. *Biswanath Choudhury* v. *U.P. Forest Corporation*, A.I.R. 1986 Cal. 334 (R.N. Pyne, J.).

4.12. Position summed up

A judgment of the Gauhati High Court, reviewing the case law, summarises the principles on the subject, as under:-

(a) The agreement to exclude other forums must be clear and unambiguous.

(b) One-sided declaration of intention (by one party) is ineffectual, to exclude jurisdiction.

(c) Court must be satisfied that party sought to be bound by the agreement had knowledge of the restrictive clause.

(d) Plea of waiver (of the forum clause), if taken, must be examined.

(e) The court mentioned in the agreement must be one which has jurisdiction (*de hors* the agreement) to entertain the suit.

(f) The court may disregard the agreement, if there are countervailing oppressive circumstances.

(g) A revisional court will not interfere unless there is failure of justice. *All Bengal Transport Agency* v. *Hare Krishna Bank*, A.I.R. 1985 Gauhati 7.

CHAPTER FIVE

ARBITRATION LAW IN INDIA

5.1. The concept

As a legal technique for resolving disputes by referring them to a third party for a binding decision, arbitration is now being increasingly discussed in India.

Arbitration must be distinguished from mediation or conciliation. In conciliation or mediation, the parties seek the help of a third person, who will offer a recommendation for a settlement, or for helping the parties to reach a compromise. The final decision rests with the parties in conciliation or mediation. In contrast, in arbitration, the arbitrator himself gives a ruling. He is a private judge.

Historically, commercial arbitration was used in resolving controversies between mediaeval merchants, in fairs and market places in England and on the European continent, and in the Mediteranean and Baltic sea trade. It was also used extensively in India. The increased use of commercial arbitration became possible after courts were empowered to enforce the agreement of parties to arbitrate. The courts play an important role in implementing an arbitration agreement and in making judicial assistance available against a recalcitrant party. This concept of modern arbitration law, which recognises the irrevocability of arbitration agreements and the enforceability of awards, is found in the arbitration statutes of nearly all countries of Europe and Asia, including India. Latin American procedural laws generally provide only for court enforcement of agreements to arbitrate *existing* disputes and do not provide for the enforcement of subsequent disputes that may arise under the arbitration agreement. In this respect, they are narrower than the English and Indian arbitration laws. In India, future differences can also be referred to arbitration.

5.2. Arbitration Act

In India, the present law of arbitration is contained mainly in the Arbitration Act, 1940. Stray provisions as to arbitration are also scattered in special Acts. These supplement the Arbitration Act. Foreign awards are regulated by a separate law.

5.3. Agreement

Arbitration is founded on agreement. An arbitration agreement must be in writing, but it need not be registered. The agreement might make a reference about present or future differences. The arbitrator may be named in the agreement, or left to be designated later, either by consent of the parties or in some other manner specified in the agreement. Generally speaking, all justiciable matters of a civil nature can be referred to arbitration. However, there are certain exceptions to the rule. For example, it is not permissible to refer a matrimonial dispute to arbitration, since the issues are not only those of fact or law, but also involve questions of public welfare. Very often, the rules of prestigious commercial bodies lay down that a persön who becomes a member of the association must accept the machinery of arbitration created or recognised by the rules of the association.

5.4. Arbitration clauses

Arbitration has been used customarily for the settlement of disputes between members of trade associations and between different exchanges in the securities and commodities trade. Their contracts contain a standard arbitration clause referring to the arbitration rules of the respective organisation. Numerous agreements between parties in industry and commerce also provide for the arbitration of controversies arising out of contracts for the sale of manufactured goods, for terms of service of employment, for construction and engineering projects, for financial operations, for agency and distribution arrangements, and for many other undertakings.

5.5. Present and future differences

Strictly speaking, once an arbitration agreement is entered into for submitting future differences to arbitration, it should not be necessary to obtain the fresh consent of all the parties for a reference to the arbitration at the time when the dispute actually arises. However, unfortunately, in India, there existed for some time a shade of judicial opinion which insisted that fresh consent must be obtained when the dispute actually arises. This view is now being slowly discarded.

5.6. Arbitrators

The method of selecting arbitrators is an important aspect of the arbitration process, for the arbitrator's ability and fairness is the decisive element in any arbitration. The general practice is for both parties to select an arbitrator at the time a conflict arises or at the time the arbitration agreement is concluded. The two arbitrators then select a chairman, forming a tribunal. Selection of arbitrators is also often made by agencies administering commercial arbitration under pre-established rules of procedure. These organisations - various trade associations, produce exchanges and chambers of commerce in many countries - maintain panels of expert arbitrators. The parties may either make their own selection or entrust the appointment of the arbitrators to the organisation.

5.7. Procedure of the arbitrator

There are very sketchy rules in the Arbitration Act as to procedure. The arbitration process is governed by the rules to which the parties refer in their agreement. Failing special provisions in the agreement, the procedure will be determined by the arbitrators, subject to the mandatory provisions of the Arbitration Act, including the Schedule to that Act. The arbitration proceedings

must be conducted so as to afford the parties a fair hearing on the basis of equality. The arbitrator generally has the authority to request the parties and third persons to produce documents and books and to enforce such a request by issuing subpoenas. If a party fails to appear at a properly convened hearing, without showing a legitimate cause, the arbitrator in most instances will proceed in the absence of that party and render an award after investigation of the matter in dispute.

The technical rules of evidence do not apply to arbitrators. (Section 1, read with section 3, Indian Evidence Act, 1872).

In India, the Arbitration Act adopts the approach that in the working of arbitration agreement, the parties are free to lay down provisions regarding various matters of procedure, but, in the absence of an agreement, the rules contained in the First Schedule to the Arbitration Act would apply. An arbitrator can be removed by the court for misconduct. In applying this concept, Indian courts generally follow the wide construction adopted in most commonwealth countries, so that it is not merely misconduct involving moral turpitude that attracts this power, but also misconduct of a technical nature, for example, a breach of the rules of natural justice.

Detailed provisions exist in the law for settling the problems that might arise where two or more arbitrators are contemplated by the arbitration agreement and differences of opinion arise between them.

5.8. The substantive law to be applied

A much disputed question in commercial arbitration concerns the substantive law to be applied by the arbitrators. Generally, the award must be based upon the law as determined by the parties in their agreement. This failing, the arbitrator must apply the law he considers proper in accordance with the rules of conflict of laws. In both the

cases, the arbitrator will have to take account of the terms of the contract and the usage of the specific trade. If, during any arbitration proceeding, a compromise is reached by the parties, that compromise may be recorded as an award by the arbitrator.

The statutory law of various countries and the rules of agencies administering commercial arbitration contain provisions relating to the form, certification, notification and delivery of the award. The arbitrator must comply with these requirements.

5.9. The arbitrator and the court

Challenges to the arbitration process are not uncommon. For example, a party may claim, that no valid arbitration agreement came into existence because the person signing the agreement had no authority to do so, or that a condition precedent to arbitration had not been fulfilled. More often, arbitration is contested on the ground that the specific controversy determined (or proposed to be determined) is not covered by the agreement. In such cases, the issue of whether the arbitrator has authority to deal with the conflict is ultimately determined by a court.

Applications made before the court, challenging the award, cannot be excluded by agreement of the parties, since the fairness of the arbitration process as a quasi-judicial procedure has to be maintained. Court control over arbitration is, however, confined to specific matters. These are usually enumerated in the arbitration statutes and cover such matters as misconduct of the arbitrator in denying a party the full presentation of its claim or in not granting a postponement of the hearing for good cause. A review of the award by a court will not generally deal with the arbitrator's decisions as to facts, or with his application of the law. In other words, the court will not go into the merits of the case. The competence of the court is thus restricted. The arbitration process must

be the end, and not the beginning, of litigation.

5.10. The award

An award made by the arbitrator must be filed in the court and a decree obtained in terms thereof; the decree once obtained, can be executed like any other decree of the court. However, the court may, instead of confirming the award, remit it to the arbitrator, modify it or set it aside for the specified causes. This part of the law is in an unsatisfactory condition, and needs a lot of pruning. Specific recommendations have been made by the Law Commission of India in its Report on the Arbitration Act [Law Commission of India, 76th Report].

The court having jurisdiction under the Arbitration Act is the court in which a suit on the matter under dispute could be instituted. Provisions have been enacted in the Arbitration Act to deal with questions concerning the cost of arbitration and the procedure to be followed by the arbitrators regarding filing of the award. In case of difference of opinion between an even number of arbitrators, the parties can provide for the appointment of an "umpire". Generally, most of the provisions applicable to arbitrators apply, with necessary modifications, to umpires also.

5.11. Delay in arbitration

A serious complaint is often voiced in India about the time taken in arbitration proceedings, which drag on for an unduly long time. Some of the causes of such delay do lie in certain sections of the Act which (as mentioned in the preceding discussion) need amendment. However, there are also other factors, connected not with the text of the Act, but with the attitude of parties and certain arbitrators, that are accountable for the delay. Here one finds an illustration of the "human" element which no amount of law reform can eliminate.

5.12. Procedure: compliance with the Act and natural justice

In general, the sources of procedural rules to be followed by the arbitrator are three. The arbitrator must, in the first place, strictly comply with the provisions of the Arbitration Act, 1940. Secondly, if the arbitration agreement makes any special provisions as a procedural matter which are committed by law to be made, then those clauses of the arbitration agreement have also to be complied with. In this context, it may also be mentioned that where the arbitration agreement itself makes a reference to the rules of some Association of which the parties are members, say, a trade association or a chamber of commerce, then those rules are also to be complied with, because they constitute a part of the agreement. Thirdly and finally, on a matter on which the agreement is silent and on which the Arbitration Act also makes no provision, the arbitrator must still observe the principles of natural justice. The concept of natural justice does not possess any statutory definition; but broadly speaking, it may be stated that it comprises two main limbs. In the first place, the arbitrator must not be a person interested in the controversy to be adjudicated by him. Secondly, each party must be given a reasonable opportunity of hearing.

During the last few years, the question is being increasingly discussed as to how far the arbitrator is bound to give reasons for the award. As a matter of law, the arbitrator is not bound to give reasons. However, this is subject to two important qualifications. In the first place, where the arbitration is conducted under the rules of an association or a body and those rules themselves require the arbitrator to give reasons, then reasons must be given. Secondly, the arbitration agreement may itself prescribe the giving of reasons and it would seem that such a requirement is legally binding.

5.13. Hearing behind the back

An arbitrator stands in the position of a judge, though he is a private judge chosen by the parties. He cannot, therefore, take evidence behind

the back of one of the parties, unless the objection to such a procedure has been waived by the affected party. In a famous English case, *Drew v. Drew*, (1855) 2 Mseq. 1, the Lord Chancellor Lord Cranworth enunciated the principle in these lucid words: "The principles of universal justice require that the person who is to be prejudiced by the evidence ought to be present to hear it taken, to suggest cross-examination or himself cross- examine, and to be able to find evidence, if he can, that shall meet and answer it; in short, to deal with it as in the ordinary course of legal proceedings." It follows that if one of the parties to the arbitration proceedings tries to communicate to the arbitrator on a matter concerning the arbitration dispute, then the arbitrator should refuse to hear, read or be influenced by such communications. If by chance the party tries to send a written communication to the arbitrator, then the latter should take care to hand over to the other party copies of any written communciation so that there may be no misunderstanding or objection at a later stage.

5.14. Stages of procedure

The following are the main chronological stages of proceedings before the arbitrator to be followed after the preliminaries are over.

(1) Opening of the case by the claimant and (if there is a counter-claim) opening of the claimant's reply to the counter-claim.

(2) Examination of claimant's witnesses

(3) Cross-examination of the claimant's witnesses (after the examination of each witness is over) by the opposite party, followed by re-examination by the claimant to clarify ambiguities left by the cross-examination.

(4) Opening of the case by the opposite party (respondent).

(5) Examination of witnesses of the respondent.

(6) Cross-examination of the respondent's witnesses by the claimant, followed by re-examination by the respondent to clarify ambiguities.

(7) Address by the respondent to the arbitrator.

(8) Reply by the claimant.

5.15. Appearance by advocates

Parties are entitled to appear through lawyer at the hearing. A party who so desires may instead of engaging a lawyer, engage a friend or any person in whom he has confidence (with or without payment) for presenting his case after filing a proper power of attorney.

5.16. Consulting a lawyer

The arbitrator himself, if he is not a lawyer and if he wishes to seek legal opinion on any matter in issue, must take the consent of the parties before seeking legal advice. An award in which the arbitrator has taken legal advice without the parties' consent, is liable to be set aside on the ground of misconduct. This was laid down by the Privy Council in a well-known case, *Louis Dreyfus & Co.* v. *Arunachala Aiyer*, (1930) Law Reports 58 Ind. App. 381. This is for the reason that an arbitrator who is appointed to decide a dispute is expected to apply his own mind even on a question of law and cannot adopt, at his own, the decision of some legal adviser.

5.17. Technical matters

On the same principle, the arbitrator cannot consult an expert on a technical matter, without

the consent of the parties. Again, on the same principle, the arbitrator must decide on the evidence before him and not on the basis of information incidentally acquired by him outside the arbitration proceedings. *Owen* v. *Nicholl*, (1948) 1 All E.R. 707.

5.18. Costs

An arbitrator has power to determine the amount of costs incurred by the parties in the proceedings and to decide which party will bear the costs. However, this discretion is to be exercised in a judicial manner and not capriciously. If the agreement of arbitration or the rules of arbitration make a rule in this regard, it is for the arbitrator to exercise discretion. Usually, in courts, the successful party is entitled to recover his cost from the opposite party and it will be wise for the arbitrator to follow this usual practice.

5.19. Some models of arbitration clauses

Form 1

General form of arbitration clause

Any dispute or difference arising out of or in connection with this contract shall be determined by the arbitration of -

> a single arbitrator who, failing agreement between the parties, shall be appointed by the ....
>
> OR
>
> One arbitrator to be appointed by each party together, and if they disagree, of an umpire who, failing agreement between such arbitrators, shall be appointed by the .... on the application of either party.

Form 2

Chartered Institute of Arbitrators clause

Any dispute or difference of any kind whatsoever which arises or occurs between the parties in relation to any thing or matter arising under, out of, or in connexion with this agreement shall be referred to arbitration under the Arbitration Rules of the ....

Form 3

London Court of International Arbitration clause

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration, which Rules are deemed to be incorporated by reference into this clause.

CHAPTER SIX

ARBITRATION : AGREEMENTS

6.1. Advantages

There are several advantages, in certain instances, for the parties to a dispute to refer it to arbitration rather than to commence an action in the courts.

The principal advantages are:

(a) When the dispute concerns a technical matter such as a building contract, persons chosen to arbitrate generally possess the appropriate special qualifications.

(b) The process can be speedier than a court case.

(c) There can be a saving in costs.

(d) Unwanted publicity can be avoided.

(e) The convenience of the parties as to time and place has first consideration.

(f) The arbitrator can view the subject in dispute at any reasonable time.

However, where the substantial issue between the parties raises a question of law of general importance such as the interpretation of a commercial document in common use, it may be more prudent for the parties to commence an action in the courts, for the main advantage of arbitration over the normal process of law arises when the dispute involves principally differences of opinion on the issues of fact. *Fairclough, Dodd & Jones Ltd.* v. *J.H.Vantol Ltd.*, (1957) 1 W.L.R. 136, per Viscount Simonds and Lord Tucker; *Re Phoenix Timber Co. Ltd.'s*

Application, (1958) 2 Q.B. 1, per Lord Evershed, M.R.

6.2. Qualities of an arbitrator

The arbitrator should have special knowledge of the subject matter in dispute. He should be able to keep the atmosphere clear at the hearing and should be free from forensic eloquence and must be able to see that the evidence is given in the manner customary in the courts of law and equity. He should give his attention to the facts in the dispute placed before him, and his decision should be based on a practical, as well as an impartial, judgment. He should possess a first-class knowledge of civil procedure, and of the laws of evidence; a sound understanding of the law of contracts and torts, of equity, and, of course, the law of arbitrations itself, for the validity of awards is frequently disputed on the grounds that the procedure at the hearing was irregular and that arbitrators have acted beyond their jurisdiction.

The Arbitration Act regards an arbitration as a judicial inquiry conducted for special reasons before a private, rather than before an official, tribunal. The arbitrator's findings should be such as the court may deem fit to confirm, and in his conduct no laxity should be permitted. Expert witnesses must be checked in any desire to dominate justice or legal precedent by their own opinions.

6.3. Arbitration Act

The legislation now applicable to arbitrations consists of the Arbitration Act of 1979 (British statute). The Arbitration Act is comparatively a short Act. Further, many of its provisions may be excluded by agreement between the parties to an arbitration, for the parties may themselves determine what procedure is to be followed, what powers are to be vested in the arbitrator and what type of constitution the tribunal

itself is to have in the particular circumstances. What the Arbitration Act mainly does is to set out a code which governs these matters in the absence of agreement to the contrary between the parties.

6.4. Statutory arbitration

Arbitration may be consensual (i.e. founded on the agreement of the parties) or statutory (i.e. arising out of a statute which provides for disputes of a particular class to be determined by arbitration). Examples of statutory arbitrations are to be found in the special enactments.

The particular statute in question may expressly exclude the (Indian) Arbitration Act of 1940 or it may include special provisions as to the appointment of arbitrators and the conduct of the arbitration which are inconsistent with the provisions of the Act of 1940. On the other hand, it may expressly stipulate that certain provisions of the Act of 1940 are to apply.

6.5. Capacity of parties

Generally, a person who has a right of which he can dispose is competent to submit any questions which affect that right.

As in the general law of contract, there are certain exceptions to the rule that any person can make a binding arbitration agreement.

Trustees, executors and administrators may enter into agreements on behalf of a deceased person, or of a *cestui que trust*, as the case may be.

Agents may enter into arbitration agreements which bind their principals, but the question really turns on the scope of an agent's authority to bind his principal in each particular case. For example, in *The City of Calcutta*, (1898) 79 L.T. 517, there was doubt as to whether the master could bind the ship-owners to arbitration. In order to avoid

liability for breach of warranty of authority, an agent should ensure that he has the necessary authority to submit the dispute to arbitration. He should also take care to make the submission expressly as agent; otherwise he may be held to have bound himself personally.

In the case of a partnership, an agreement for arbitration signed by one partner will not be binding on the other partner or partners without their express consent, except in the case where in the carrying on of the business of the partnership, it is customary to refer matters to arbitration. However, the other partners may adopt an unauthorised submission by a co-partner; for example, in *Thomas v. Atherton*, (1878) 10 Ch.D. 185, co-partners were held to have ratified a partner's unauthorised submission of a dispute to arbitration (although, for another reason, the ultimate decision was in favour of the co-partners).

Where parties hold a joint interest, one cannot bind the other without express authority, but if the parties agree jointly and severally to refer a dispute and jointly and severally promise to perform the award, each is liable to perform the whole award and not only the part of the award affecting his own interests. Thus, in *Mansell v. Burredge and Roberts*, (1797) 7 Term Rep. 352, where two several tenants in a dispute with a succeeding tenant had jointly and severally promised to perform the award and the arbitrator had awarded that each of the two should pay a certain sum to the successor, the two tenants were held jointly liable for the sums payable by each.

6.6. Defination

An arbitration agreement is defined as "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not."

Thus, the first requisite of an arbitration agreement, if it is to come within the Act, is that it must be in writing.

An agreement by telex is an "agreement in writing". *Arab African Energy Corporation Ltd.* v. *Olieprodukten Nederland B.V.*, (1983) Com. L.R. 195.

6.7. Present and future differences

The statutory definition of "arbitration agreement" covers both an *ad hoc* submission (i.e. an actual submission of a particular dispute to a particular arbitrator) and an arbitration clause by which the parties to another, - the main, - contract agree that if disputes arise they will be referred to arbitration.

Because of the requirement for a "written agreement", the parties must be *ad idem* ("at one").

6.8. Scope of arbitration agreement

The question of whether a particular matter is within the scope of the arbitrator's jurisdiction depends on the interpretation of the words used by the parties in their arbitration agreement.

(a) The scope is wide where the words used are "all matters in difference" or "all matters in difference in a cause".

(b) In *Gunter Henck* v. *Andre & Cie. S.A.*, (1970) 1 Lloyd Rep. 235, where the words of an arbitration clause were "all disputes from time to time arising out of or under this contract", Mocatta J. said that the words "arising out of" clearly extended the meaning that would otherwise have been applied to the clause had it been limited to "all disputes arising under this contract".

(c) The House of Lords' decision in *Heyman* v. *Darwins Ltd.*, (1942) A.C. 356: (1942) 1 All E.R. 337 firmly settled the point that an arbitration clause in a contract may be wide enough to cover a dispute as to whether the contract itself has been repudiated or frustrated.

D. Ltd., manufacturers of steel in Sheffield, by a written contract, appointed H, to be their sole selling agent in certain territories. The contract contained an arbitration clause providing: "If any dispute shall arise between the parties hereto *in respect of this agreement* or any of the provisions herein contained or anything arising hereout, the same shall be referred for arbitration in accordance with the provisions of the Arbitration Act,1889 or any then subsisting statutory modification thereof."

H maintained that D. Ltd. had repudiated the contract and he brought an action of damages. D. Ltd. admitted the existence of the contract but denied that they had repudiated it, and they applied to have the action stayed in order that the matter might be dealt with under the arbiration clause.

It was held that the arbitration clause applied.

The language of the arbitration clause in the contract was described by Viscount Simon L.C. as being "as broad as can well be imagined." Questions as to whether the contract had been repudiated or frustrated were within such a clause. The Lord Chancellor also mentioned matters which the clause would not have covered. He said:

> "If the dispute is whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission.Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself also is void."

If the arbitration agreement is interpreted as a *separate contract* from the main contract, then he can even adjudicate on validity of the main

contract (Charlesworth, Reasonable Law (1984) 1985 Rep. p.695).

6.9. Mutuality

There are divergent views as to whether mutuality is an essential ingredient in arbitration. On the One hand, in *Baron* v. *Sunderland Corporation*, (1966) 2 Q.B. 86, a case arising out of a claim by a school teacher for additional salary under the Burnham scale, the Court of Appeal held that it was necessary in an arbitration clause for each party to agree to refer disputes to arbitration, and that as there was no agreement by the school teacher in the case in question, there was no mutuality and so the employers were not granted the stay which they sought. Davies, L.J. said: "It is necessary in an arbitration clause that each party shall agree to refer disputes to arbitration; and it is an essential ingredient of an arbitration clause that either party may, in the event of a dispute arising, refer it, in the provided manner, to arbitration. In other words, the clause must give bilateral rights of reference." In a learned analysis of the problem in *Union of India* v. *Bharat Engineering Corporation*, (1977 ILR (1972) 2 Vol. 57) the High Court of Delhi accepted the principle in *Baron's* case that an arbitration clause must be mutual, and decided that a unilateral arbitration clause giving the contractor an option to refer a dispute to arbitration was not an arbitration agreement; and it was only on the exercise of the option that an arbitration agreement arose for the first time. On the other hand, Russell on Arbitration (pages 38-46) finds deficiencies in *Baron's* case and does not accept the Delhi analysis. Russell's final submission is:

> "13. It is submitted that the *Union of India* clause is plainly an arbitration agreement, that it is valid that it is completely unilateral, and that the only mutuality it confers on the nonprivileged party is the inevitable one that once the privileged

"party has chosen to arbitrate the non-privileged party can and must *ipso facto* arbitrate also."

6.10. Certainty

An arbitration agreement must be capable of being given a sensible meaning. In *Lovelock Ltd.* v. *Exportles*, (1968) 1 Lloyd's Report 163, a contract included a clause referring "any dispute and/or claim" to arbitration in England and then a clause referring "any other dispute" to arbitration in Russia; the Court of Appeal held that the whole arbitration clause was void on account of ambiguity.

6.11. *Scott* v. *Avery* and *Atlantic Shipping* clauses

Despite the existence of a principle against ousting the jurisdiction of the courts, arbitration has been fostered by the courts as a result of their having sanctioned what have become known as "*Scott* v. *Avery*" clauses and "*Atlantic Shipping*" clauses in arbitration agreements.

The essence of a *Scott* v. *Avery* clause is that the making of an arbitration award is a condition precedent to the bringing of an action in the courts. It takes its name from the case *Scott* v. *Avery* (1856), in which the House of Lords decided that, though it is a principle of law that parties cannot by contract oust the jurisdiction of the courts, any person may covenant that no right of action shall accrue till a third person has decided on any difference that may arise between the two parties to the covenant. The case related to a marine insurance policy which provided that the insured was not entitled to "maintain any action at law or suit in equity on his policy" until the matter had been decided by arbitrators, and "then only for such sum as the arbitrators shall award", and obtaining the decision of the arbitrators was declared a

condition precedent to the maintaining of an action.

It was held that these conditions were lawful and that until an award had been made, no action could be maintained.

A *Scott* v. *Avery* clause, however, is not absolute in its effect, because the court, if it orders that an arbitration agreement is to cease to have effect, may further order that the *Scott* v. *Avery* clause is also to cease to have effect.

Atlantic Shipping clause

An *Atlantic Shipping* clause is to the effect that arbitration must be commenced within a certain time and that if it is not so commenced, the claim concerned is barred. The case from which it took its name was *Atlantic Shipping and Trading Co.* v. *Louis Dreyfus & Co.*, (1922) 2 A.C. 250, another decision of the House of Lords. A charter party provided : "Any claim must be made in writing and claimants' arbitrator appointed within three months of final discharge and where this provision is not complied with, the claim shall be deemed to be waived and absolutely barred."

It was held that the arbitration clause was not open to objection on the ground that it ousted the jurisdiction of the court. (However, as the claim was based on breach of the implied condition of seaworthiness, the shipowners were not entitled to the benefit of the term and so the claim was not barred by the arbitration clause).

Note-Such a clause is valid in India also: *Vulcan Insurance Co.* v. *Maharaj Singh* A.I.R. 1976 S.C. 287 *Ramlal Jagannath* v. *State of Punjab* A.I.R. 1966 Punj. 436 (F.B.)

6.12. Valuation and certification

The main difference between an arbitration and a valuation may be explained as follows : where a judicial inquiry is held on a dispute, and it is intended by the parties to it that the question in dispute is to be determined on the evidence of other parties, the inquiry is an arbitration; but where any questions of value are referred to a third party for his opinion solely on that point, and to which he applies his own skill and knowledge, the inquiry is a valuation. In other words, whereas an arbitration determines a dispute, a valuation is generally a means of preventing a dispute.

Certification frequently occurs in building contracts. There is often a provision in such a contract that work is to be done to the satisfaction of the architect who will issue a certificate entitling the contractor to receive payment from the building owner. The question can arise of whether the architect in issuing certificates is acting in the role of arbitrator or is merely an agent for the building owner with no authority to function independently of his principal.

6.13. Immunity of arbitration

The main importance of distinguishing between arbitration on the one hand and valuation or certification on the other hand lies in the question of immunity from being sued for negligence. The view which had for many years been regarded as settled law was that arbitrators could not be sued for negligence; they had a judicial function to perform and were therefore entitled to the same privilege of immunity from being sued as was unquestionably enjoyed by judges in the courts of law. Valuers and certifiers, on the other hand, had no such immunity. Decisions of the House of Lords in the 1970s may now be seen.

(1) *Sutcliffe* v. *Thackrah*, (1974) A.C. 727: (1974) 1 All.E.R. 859.

S employed T, an architect, to design a house for him. Subsequently S entered into a contract with builders to build the house and T was appointed architect. During the carrying out of the work, T issued interim certificates to the builders. Before the work was completed, S turned the builders off the site and engaged others to complete the work. The original builders later went into liquidation.

S brought an action against T for damages for negligence and breach of duty in supervising the building of the house and in certifying the work not done or improperly done by the builders. The official referee to whom this dispute was referred held that S had been justified in turning the builders off the site and that T had negligently over-certified sums due to them. He awarded damages to S.

The Court of Appeal reversed his decision on the ground that T was acting in an arbitral capacity and was therefore absolved from liability for negligence. S appealed to the House of Lords.

Held, allowing the appeal, that in issuing interim certificates an architect did not, apart from special agreement, act as an arbitrator between the parties, and that he was under a duty to act fairly in making his valuation and was liable to an action in negligence at the suit of the building owner (S). The damages were assessed at Pounds 2,000.

The test applied was whether the architect had been acting in a judicial capacity, and he was held not to have been acting in such a capacity.

The speeches in that case indicate that at the date of the case it was accepted as clear law "that persons who are appointed as arbitrators, or as it has been called quasi-arbitrators, to resolve a dispute which has arisen or which may arise cannot be sued for negligence." (per Viscount Dilhorne). It was because the architect had not been appointed as arbitrator to resolve disputes between the parties that he was held liable in damages. Lord Morris of Borth-y-Gest said: "The mere fact that an architect

must act fairly as between a building owner and a contractor does not of itself invoke that the architect is discharging arbitral functions."

No doubt was cast in this case on the traditional view that arbitrators enjoyed the same immunity from being sued for negligence as judges had; the question was whether that immunity extended to persons who were not arbitrators but were persons who as valuers or certifiers were in a somewhat similar position or appeared to be so. Lord Salmon said: "Since arbitrators are in much the same position as judges, in that they carry out more or less the same functions, the law has for generations recognised that public policy requires that they too shall be accorded the immunity to which I have referred. The question is - does this immunity extend beyond arbitrators properly so called, and if so, what are its limits?"

(2) *Arenson v. Arenson*, (1977) A.C. 405: (1975) 3 W.L.R. 815.

Archy Arenson was the controlling shareholder and chairman of a private company. He took his nephew, Ivor Arenson, into the business and Ivor was given a parcel of shares under an agreement that on termination of his employment he would sell his shares to his uncle at their fair value - defined as the value determined by the auditors of the company for the time being, "whose valuation acting as experts and not as arbitrators shall be final and binding on all parties."

In 1970, Ivor's employment terminated. The auditors valued the shares at Pounds 4916.13s.4d., and Ivor transferred them to his uncle at that price.

A few months later, the company offered its shares to the public, and that involved a report by the auditors. The report showed that the shares were worth Pound 29,500, i.e. six times their value as assessed for the transaction between Ivor and his uncle. Ivor brought an action against the auditors claiming damages for negligence.

The judge and the Court of Appeal held that since the auditors had been performing a function of an arbitral or quasi-judicial character, they were immune from any liability for negligence. Ivor appealed to the House of Lords.

Held, allowing the appeal, that Ivor's statement of claim did disclose a cause of action against the auditors; the immunity of judges and of arbitrators was exceptional and other persons (including in this case the auditors who had been appointed expressly to act "as experts and not as arbitrators") were subject to the general rule that negligence made them liable in damages.

Five Law Lords took part in the case, and although they reached a unanimous conclusion on the actual issue which it was necessary for them to decide, they expressed amongst them three divergent views on the general aspects of arbitral immunity. These three views were as follows:

(a) The first view, shared by Lord Simon of Glaisdale and Lord Wheatley, was very much in line with the attitude expressed and implied by the House in *Sutcliffe* v. *Thackrah*, (1974) A.C. 27. It may be thought of as the traditional view.

Lord Simon said:

> "............. the essential pre-requisite for (a valuer) to claim immunity as an arbitrator is that, by the time the matter is submitted to him for decision, there should be a formulated dispute between at least two parties which his decision is required to resolve. It is not enough that parties who may be affected by the decision have opposed interests - still less that the decision is on a matter which is not agreed between them."

Lord Wheatley listed the following as the indicia which serve as guidelines in deciding whether a valuer is constituted an arbitrator (or quasi-arbitrator) and clothed with immunity:

"(a) there is a dispute or a difference between the parties which has been formulated in some way or another; (b) the dispute or difference has been remitted by the parties to the person to resolve in such a manner that he is called upon to exercise a judicial function; (c) where appropriate, the parties must have been provided with an opportunity to present evidence and/or submissions in support of their respective claims in the dispute; and (d) the parties have agreed to accept his decision."

(b) Lord Kilbrandon's view was fundamentally at variance with the traditional view. He was of the opinion "that arbitrators at common law or under the Acts have no immunity"; only judges had immunity.

(c) The view of Lord Salmon and Lord Fraser of Tullybelton was midway between the extremes of (a) and (b). It was to the effect that it might be that a person, even if formally appointed as an arbitrator, ought not in all cases to be accorded immunity (e.g. if he were appointed arbitrator in a dispute between buyer and seller as to whether goods sold corresponded with sample or were of merchantable quality).

Lord Salmon said:

"An expert may be formally appointed as an arbitrator under the Arbitration Act, notwithstanding that he is required neither to hear nor read any submissions by the parties or any evidence and, in fact, has to rely on nothing but his examination of the goods and his own expertise. He, like the valuer in the present case, has a purely investigatory role; he is performing no function even remotely resembling the judicial function save that he finally decides a dispute or difference which has arisen between the parties....

I find it difficult to discern any sensible reason, on grounds of public policy or otherwise, why such an arbitrator with such a limited role, although formally appointed, should enjoy a judicial immunity which so called quasi-arbitrators in the position of the respondents certainly do not ....

The question as to whether there may be circumstances in which a person, even if he is formally appointed as an arbitrator, may not be accorded immunity does not, however, arise for decision in the present case, but it may have to be examined in the future".

Lord Fraser said:

"It may be ...... that a person, even if he is formally appointed as an arbitrator, ought not in all cases to be accorded immunity. But, as both parties accepted the immunity of arbitrators, we heard no argument on that matter and I express no opinion upon it."

The tentative conclusion which may be drawn from these two House of Lords cases is that there has been a move away from the traditional view that arbitrators necessarily enjoy the same immunity from being sued for negligence as judges do. It is clear that if the function is valuation or certification, there is no immunity. What is now open to argument is whether there are not at least some arbitrations also where there is no immunity.

6.14. Binding valuation

If parties have agreed that the valuation shall be "final, binding and conclusive", then a valuation giving reasons can be impugned in court proceedings, if it is clear that valuer proceeded on fundamentally erroneous basis. *Burgess v. Purchase & Sons (Farms) Ltd.*, (1983) 2 W.L.R. 361.

6.15. Enforcement

The necessity for the enforcement of an arbitration agreement generally arises when a party to it attempts to obstruct it. The remedy available to the other parties is then to request the arbitrator to proceed *ex parte*, and in the absence of the obstructing party.

Where one party to the agreement obstructs its enforcement, the other party may either (1) compel him to proceed to arbitration, or (2) prevent him from taking the dispute in the agreement to the court. The court will not interfere with the parties in a direct manner, e.g. it will not compel the obstructing party to go to arbitration, neither will it order specific performance of the agreement to arbitrate or award damages (as opposed to legal costs) against a party who issues a writ in a dispute covered by the arbitration agreement. The indirect remedies available to the court will depend on the circumstances of the particular agreement.

(a) Where the parties are in disagreement as to whether or not there is an effective arbitration agreement relating to the dispute, the court may give a declaratory judgment to the effect that the dispute is within the scope of the arbitration agreement and so cannot be litigated. This is of rare occurrence.

(b) The arbitrator may proceed ex parte in the absence of the obstructing party. This is an effective remedy when the arbitrator has been nominated and one of the parties does not appear. The arbitrator should give the absent party definite notice of his intention to proceed *ex parte*, so that party may have the opportunity of changing his mind.

(c) Where there is a reference to a sole arbitrator, who has not been nominated by the parties, either party can be granted a remedy by the Act. If the parties do not concur in the appointment of the arbitrator, any party may serve the other parties with a written notice to concur in appointing

the arbitrator, and if the appointment is not made within specified period after the service of the notice, the court may, on application by the party who gave the notice, appoint an arbitrator who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

In England, under section 10(2), added to the Act of 1950 by the Act of 1979, the court also has jurisdiction to appoint an arbitrator where the arbitration agreement provides for the appointment of the arbitrator to be made by a third party and that party refuses or fails to make the appointment within the time specified in the agreement or, if no time is specified, within a reasonable time. This additional provision closes the loophole which was evident in *National Enterprises* v. *Racal Communications*, (1975) Ch. 397.

6.16. Limitation

A person seeking to enforce a claim by means of arbitration proceedings may find that if he has delayed too long, his right to do so is barred by some limitation of time imposed by statute or by the arbitration agreement.

The submission of a claim to arbitration after it has become statute-barred does not prevent the statute from being pleaded at the hearing. *Re Astley and Tyldesley Coal Co.*, (1899) 68 L.J.Q.B. 252.

It is clear that if a statute (as opposed to an arbitration agreement) provides that a cause of action does not accrue until the award is made, the period of limiation runs from the date of the award. *Turner* v. *Midland Ry.*, (1911) 1 K.B. 832.

The Act and any other statutory limitation apply to arbitrations as they apply to actions in the High Court [Section 34(1)].

The period of limitation runs from the date

on which the cause of arbitration accrued, i.e. from the date when the claimant first acquired either a right of action or a right to require that an arbitration take place on the particular dispute. *Pegler* v. *Railway Executive*, (1948) A.C. 332. This applies even where the arbitration clause is in the "*Scott* v. *Avery*" form, i.e. even where there is a provision in the arbitration agreement that no cause of action is to accrue until the award is made, or, in other words, a provision that an award is to be a condition precedent to the bringing of any action in court; the cause of action is deemed to have accrued at the time when it would have accrued but for the "*Scott* v. *Avery*" term in the agreement. [Limitation Act, 1980, section 34(2)]. *Scott* v. *Avery*, (1856) 5 H.L. Cas. 811 is thus only partly effective.

6.17. Limitations imposed by the arbitration agreement

The parties may in their arbitration agreement stipulate that the arbitration must commence within some shorter period than that allowed by statute.

PART B

OTHER LECTURES

REASONABLENESS OF LAWS AND THE INDIAN CONSTITUTION

1. Introduction

Indian Constitution, while conferring legislative power on Parliament and State Legislatures, requires, in some of its provisions, that the law to be enacted by the appropriate legislature must be reasonable. In some cases this requirement is made explicit as in articles 19 and 304 (b). In other cases, the requirement of reasonableness, though not made explicit, follows implicitly from the wide and elastic provisions relating to certain fundamental rights, as interpreted judicially, as in the case of articles 14 and 21.

2. Subordinate legislation

The question of reasonableness can also be raised in the case of certain species of subordinate legislation (e.g. in the case of municipal bye laws). But the present study does not purport to deal with that aspect.

3. Equality before the law (article 14)

Article 14 of the Constitution provides as under:

> "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

According to judicial interpretation, this article does not take away from the State the power of classification for legitimate purposes, but permits reasonable classification. "Reasonable classification", in this context, means a classification which is based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained and the classification cannot be made arbitrarily and without any substantial basis.

Chiranjit Lal v. *Union of India*, (1950) S.C.R. 869; *State of Bombay* v. *Balsara*, (1950) S.C.R. 682, 708, 709; *Budhan* v. *State of Bihar*, (1955) 1 S.C.R. 1045. There is a presumption that the classification is valid. *U.P. Electric Co.* v. *State of U.P.*, A.I.R. 1971 S.C. 21, 24. But the presumption can be rebutted by showing that there is no nexus between the basis of the classification and the object of the Act under consideration. *Tulsipur Sugar Co.* v. *Govt. of U.P.*, A.I.R. 1987 S.C. 443. Article 14 applies to taxation laws also. *I.T.O.* v. *Lawrence*, A.I.R. 1968 S.C. 68; *State of Kerala* v. *Haji*, A.I.R. 1969 S.C. 378.

4. The six freedoms (article 19)

Article 19(1) guarantees to all citizens the right to the six freedoms enumerated in the article, namely, the right -

(a) to freedom of speech and expression;

(b) to assemble, peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India; and

(f) to practice any profession or to carry on any occupation, trade or business.

Under article 19(2) to article 19(6), each of these rights is subject to law made by the State for the enumerated purpose, and imposing reasonable restrictions on the right. The purposes so specified vary, depending on the right involved. But a requirement common to each right is that the restriction imposed by law, in order to be valid, must be reasonable.

The object of requirement of "reasonable

restriction" has been stated to be to strike a balance between the guaranteed freedom and the desirability of social control. *Pothumma* v. *State of Kerala*, A.I.R. 1978 S.C. 771.

5. The test of reasonableness under article 19: The two limbs

For the purposes of article 19, to satisfy the requirement of reasonableness, two tests have to be satisfied, one qualitative and the other quantitative. The qualitative test demands that the restriction must have a reasonable relation to the object sought to be achieved and must not go in excess thereof. The quantitative test demands that the restriction should not be in excess of the purpose for which law is permitted to be made. *Chintamanrao* v. *State of M.P.*, (1950) S.C.R. 759; *Pothumma* v. *State of Kerala*, A.I.R. 1978 S.C. 771.

6. Justiciability

It is elementary that a law violative of a constitutional fetter is void. This is re-affirmed by the article 13 of the Constitution. This is, of course, subject to the express provision in article 31C saving from judicial review under article 14 or 19 a law giving effect to article 39(b) or 39(c) of the Constitution. [The actual wording of article 31C is much wider but some parts of the article have been declared to be void in *Keshavananda* v. *State of Kerala*, A.I.R. 1973 S.C. 1461 and *Minerva Mills* v. *Union of India (II)*, A.I.R. 1986 S.C. 2030. The position stated above represents the gist of article 31C to the extent to which it survives after these two judgments of the Supreme Court].

7. Criteria of reasonableness under article 19

There is no general test of reasonableness for applying article 19. Courts will pay due regard to the following factors:-

(i) nature of the right alleged to have been infringed;

(ii) underlying purpose of the restriction imposed;

(iii) the extent and urgency of the evil sought to be remedied thereby;

(iv) disproportion of the imposition;

(v) prevailing conditions at the time.

State of Madras v. *V.G. Row*, (1952) S.C.R. 597, 607; *Harakchand* v. *Union of India*, A.I.R. 1970 S.C. 1453, 1463; *State of Maharashtra* v. *Himmatbhai*, A.I.R. 1970 S.C. 1157, 1163.

8. Article 19 and Directive Principles

(a) Restrictions imposed to carry out Directive Principles must be regarded as reasonable. *Lakshmi Khandsari* v. *State of U.P.*, A.I.R. 1981 S.C. 372.

(b) Restrictions running counter to Directive Principles are not reasonable. *Lakshmi Khandsari* v. *State of U.P.*, A.I.R. 1981 S.C. 372.

9. Substantive aspects of reasonableness (article 19)

Reasonableness for article 19 must be satisfied both in the substantive and in the procedural aspect. For example, the restriction must not be disproportionate to the evil sought to be remedied - say, by ordering total stoppage of a business which is not inherently dangerous or immoral. *Rashid Ahmed* v. *Municipal Board*, (1950) S.C.R. 566. It must not totally prohibit freedom of speech and expression (at least not in normal times). *Virendra* v. *State of Punjab*, A.I.R. 1957 S.C. 896, 899. It must not offend human dignity. *Malak* v. *State of U.P.*, A.I.R. 1981 S.C. 760, para 7, 9, 10. It must not bar access to hilly roads. *State of H.P.* v. *Umed*, (1986) 2 S.C.C.

68, para 11, 13. It must not compel a person to reside only at a particular place. *State of M.P.* v. *Bharat*, A.I.R. 1967 S.C. 1170, 1172. It must not compel a person to start a business. *Excel Wear* v. *Union of India*, A.I.R. 1981 S.C. 344, para 14.

10. Procedural aspects of reasonableness (article 19)

The illustrations given in the preceding paragraph relate to restrictions regarded as unreasonable from the substantive aspect. The procedural aspect is still more important. A few examples of laws or executive acts held void on this score are given below.

(i) A declaration under the Press and Registration of Books Act, 1867 cannot be cancelled without giving to the person affected an opportunity to show cause against the proposed action. *Gopal Das* v. *D.M.*, A.I.R. 1973 S.C. 213, 215.

(ii) A restriction imposing prohibition on judicial review totally when a question of freedom is involved is void. *Union of India* v. *Damani*, A.I.R. 1980 S.C. 1149.

(iii) Permanent restrictions on freedom of assembly imposed without procedural safeguards are void. *State of Bihar* v. *Misra*, (1970) 3 S.C.C. 337: A.I.R. 1971 S.C. 1667.

(iv) Similarly, the right of association cannot be curtailed without an opportunity of hearing. *Madhu Limay* v. *S.D.M.*, A.I.R. 1971 S.C. 2486.

(v) A person cannot be externed from a particular place without giving him a hearing. *Gurbachan* v. *State of Bombay*, (1952) S.C.R. 737.

(vi) A citizen cannot be required to leave India

on the subjective satisfaction of the executive and without an opportunity of showing cause. *Ebrahim* v. *State of Bombay*, (1954) S.C.R. 993.

11. Personal liberty (article 21)

Article 21 of the Constitution provides as under-

"21. No person shall be deprived of his life or personal liberty except according to procedure established by law.

The effect of the decision in *Maneka* v. *Union of India*, A.I.R. 1978 S.C. 597 is that it is not enough that the procedure laid down by law has been followed in the particular case. The procedure must be just, reasonable and fair. The right to life itself has been construed as widely as including a right to travel, right to live with dignity and decency and right to livelihood. *Sunil* v. *Delhi Admn.*, A.I.R. 1978 S.C. 1675 (decency); *Olga Tellis* v. *Bombay Corporation*, A.I.R. 1986 S.C. 180, para 8, 32 (livelihood); *State of Maharashtra* v. *Basantibai*, (1986) 2 S.C.C. 516; *Satwant* v. *Asst. Passport Officer*, A.I.R. 1967 S.C. 1836 (travel); *Govind* v. *State of M.P.*, A.I.R. 1975 S.C. 1378 (privacy).

The proposition that the procedure for deprivation of personal liberty must be fair, just and reasonable can be illustrated from some of the reported decisions.

(i) In a criminal case relating to an offence punishable with imprisonment, legal aid must be provided to a poor accused. *Hoskot* v. *State of Maharashtra*, A.I.R. 1978 S.C. 1548; *Suk* v. *Union Territory*, (1986) 2 S.C.C. 401; *Gopalanachari* v. *State of Kerala*, A.I.R. 1981 S.C. 67.

(ii) Undue delay in trial may vitiate the proceedings. *Hussainara* v. *State of Bihar*, A.I.R. 1979 S.C. 1360, 1369, 1377; *Kadra* v. *State of Bihar*, A.I.R. 1981 S.C. 939.

(iii) A convict must be supplied copy of the judgment in time to file an appeal. *Hoskot* v. *State of Maharashtra*, A.I.R. 1978 S.C. 1548.

(iv) Prisoners cannot be arbitrarily deprived of right to interview friends or lawyers. *Francis* v. *Union Territory of Delhi*, (1981) Cr.L.J. 306 (SC).

(v) A provision for minimum punishment for anti-social offences is valid. *Inderjeet* v. *State of U.P.*, A.I.R. 1979 S.C. 1867.

(vi) Prison rules can make a classification between ordinary and dangerous prisoners. *Charles Sobraj* v. *Superintendent*, A.I.R. 1978 S.C. 1514.

(vii) Death sentence executed by hanging by rope is valid. *Deena* v. *Union of India*, A.I.R. 1983 S.C. 1155. But public hanging is unconstitutional. *Attorney General* v. *Lachhma Devi*, A.I.R. 1986 S.C. 467.

12. Freedom of trade (article 304)

Finally, one may refer to provisions which relate to trade, commerce and intercourse within India. Article 301, which is intended to ensure the economic unity of India provides that subject to the other provisions of this Part (Part XIII), trade, commerce and intercourse throughout the territory of India shall be free. To this, a qualification is provided by article 304(b) which reads as under:-

> "304. Notwithstanding anything in article 301 or 303, the Legislature of a State may by law -
>
> ....
>
> (b) impose such reasonable restrictions on the freedom of trade, commerce or

intercourse with or within that State as may be required in the public interest.

Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President."

Thus, article 304(b) permits reasonable restrictions by the State Legislature (subject to Presidential sanction).

For the purpose of this article, the same criteria are generally applied for determining reasonableness as are applicable for article 19. *Tika Ramji* v. *State of U.P.*, (1956) S.C.R. 393; *Vrajlal* v. *State of M.P.*, A.I.R. 1970 S.C. 129; *Oudh Sugar Mills* v. *Union of India*, A.I.R. 1970 S.C. 1070. *Krishnan* v. *State of Rajasthan*, A.I.R. 1982 S.C. 29.

Because of the negative language of the provisions, the State bears the burden of showing that the restriction is reasonable and in the public interest. *Ramkrishna* v. *State of Bihar*, A.I.R. 1963 S.C. 1667, 1675, 1676.

13. Restrictions on trade: Illustrations (article 304)

Following illustrations drawn from reported decisions will elucidate operation of this article:

(i) A compensatory tax is valid: *Krishnan* v. *State of T.N.*, A.I.R. 1975 S.C. 583, para 29, but purely fiscal imposition or enhancement of tax is not. *Kalyani Stores* v. *State of Orissa*, A.I.R. 1966 S.C. 1686, 1691.

(ii) Sale of articles hazardous to health can be regulated, e.g. tobacco. *Abdul* v. *State of Kerala*, A.I.R. 1976 S.C. 182, para 19.

(iii) Intoxicants can be taxed. *Sat Pal* v. *Governor*, A.I.R. 1979 S.C. 1553.

(iv) Terminal tax can be levied. *Bhaskar* v. *Jharsuguda Municipality*, A.I.R. 1984 S.C. 583.

FREEDOM OF TRADE AND COMMERCE

CONSTITUTIONAL SCHEME

. The Indian Constitution contains three groups of provisions which are relevant from the practical point of view, when one is concerned with the constitutional validity of legislation relating to freedom of trade and commerce. In the first place, there is article 14 which provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Case law on this article on various matters of legislation, including taxing legislation, is legion. For the present purpose, one can only highlight the test usually adopted to determine whether a classification challenged as violating equality is permissible. It may be mentioned that article 14 combines (i) the English doctrine of rule of law; (ii) the equal protection clause of the Fourteenth Amendment to the American Constitution (Chief Justice Dass in *Basheshar Nath* v. *C.I.T.*, A.I.R. 1959 S.C. 149, 158); and (iii) the concept of equality before law as found in the Constitution of Ireland (*State of West Bengal* v. *Anwar Ali*, A.I.R. 1952 S.C. 75, 79). The tests usually adopted to determine the permissibility of classification are - (1) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (2) that the differentia must have a rational relation to the object sought to be achieved by statute in question (*Budhan Choudhry* v. *State of Bihar*, A.I.R. 1955 S.C. 191, 193).

The second important constitutional provision is that contained in article 19 guaranteeing the right to every citizen to carry on any trade, business or profession subject to reasonable restrictions which

may be imposed in the interest of the general public. Here, it is not merely the element of discrimination between one group and another which is material; the restriction imposed must be reasonable and in the interest of the general public. It is therefore permissible for the court to examine the quality as well as the quantity of the restriction. The test for determining reasonableness in this context was laid down by Chief Justice Shastri in *State of Madras v. V.G. Row*, A.I.R. 1952 S.C. 196, 200 and is in the following words:-

> "The nature of the right alleged to have been infringed, the underlying purposes of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict."

The main function of the court here is to strike a proper balance between individual liberties and social control. It may be mentioned that although, textually, article 19 is confined to citizens, this restriction is often circumvented by recognising judicially the right of shareholders to challenge the validity of legislation affecting the corporation [*R.C. Cooper* v. *Union of India*, A.I.R. 1970 S.C. 564, 585; *Press Trust of India* v. *Union of India*, A.I.R. 1974 S.C. 1044, 1050].

The third group of provisions in the Constitution (article 301 and the succeeding articles) represents a complicated scheme. A cryptic provision begins this group by enacting that subject to the other provisions of this Part of the Constitution, trade, commerce and intercourse throughout the territory of India shall be free. It is generally believed that this idea is derived from the Australian Constitution, section 92. Section 92 of the Australian Constitution (Commonwealth of Australia Act) reads: "On the imposition of uniform duties of custom, trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free". In the Indian Constitution, the

very next article - article 302 - authorises Parliament to impose by law restrictions on the above freedom "in the public interest". Generally, it is presumed that this embodies the law in the American Constitution, where Congress has power to regulate commerce with foreign nations and among the several States and with the Indian tribes (U.S. Constitution, article I, section 8, clause 3). Although article 302 mentions only Parliament, it is permissible to delegate the power to the executive [*Krishanlal Pravinkumar* v. *State of Rajasthan*, A.I.R. 1982 S.C. 29, 30,31]. On this power of Parliament to regulate trade etc., article 303(1) imposes a restriction prohibiting a law giving preference to one State over another or making any discrimination between one State and another, by virtue of any entry relating to trade and commerçe in the legislative Lists. But this restriction can be relaxed by Parliament by law under article 303 (2) for dealing with a situation arising from scarcity of goods in any part of India.

Coming more particularly to the power of States, to begin with, they must also comply with article 301. Further, article 303(1) applies to States also and prohibits the States from making any law preferring one State over another or discriminating between one State and another, by virtue of any entry relating to trade and commerce in the legislature Lists. Here, there is no relaxation of the limit imposed on legislative powers even for dealing with scarcity of goods. However, article 304(b) of the Constitution permits a State Legislature by law to impose "such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State, as may be required in the public interest, subject to the condition that the proposal for legislation must have been introduced with the previous sanction of the President." Existing laws are, by article 305, saved from articles 301 and 303 except where the President otherwise directs. The most important provision from the point of view of State Legislatures is article 304(b) [Article 304(a) is confined to taxation and permits a State Legislature to impose on goods imported from other States any tax to which similar goods manufactured or produced in the State

are subject, but without discriminating between goods imported from outside the State and goods manufactured within the State]. Article 301 is generally regarded as the source and the key provision, to which the remaining articles are in the nature of exceptions [*Atiabari State Tea Co.* v. *State of Assam*, A.I.R. 1961 S.C. 232, 249]. Finally, it may be mentioned that article 303 is partly inspired by section 297 of the Government of India Act, 1935 which prohibited the Provinces from restricting the entry into the Province or export from the Province of goods by virtue of any entry relating to trade and commerce and also prohibited the levy of any discriminatory tax on incoming goods from other Provinces.

APPENDIX

TRADE AND BUSINESS

Extract from articles 14, 19, 300A and 301 to 307 of the Constitution and the Seventh Schedule

Right to Equality

14. Equality before law:

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Right to Freedom

19. Protection of certain rights regarding freedom of speech, etc:

(1) All citizens shall have the right -

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India; and

(f) ....

(g) to practise any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (a) of clause (1)

shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, -

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controdlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

PART XII - CHAPTER IV - RIGHT TO PROPERTY

300A. Persons not to be deprived of property save by authority of law:

No person shall be deprived of his property save by authority of law.

PART XIII

TRADE, COMMERCE AND INTERCOURSE WITHIN THE TERRITORY OF INDIA

301. Freedom of trade, commerce and intercourse:

Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.

302. Power of Parliament to impose restrictions on trade, commerce and intercourse:

Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest.

303. Restrictions on the legislative powers of the Union and of the States with regard to trade and commerce:

(1) Notwithstanding anything in article 302, neither Parliament nor the Legislature of a State shall have power to make any law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule.

(2) Nothing in clause (1) shall prevent Parliament from making any law giving, or authorising the giving of, any preference or making, or authorising the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India.

304. Restrictions on trade, commerce and intercourse among States:

Notwithstanding anything in article 301 or article 303, the Legislature of a State may by law -

(a) impose on goods imported from other States or the Union Territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

(b) impose such reasonable restrictiors on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest:

Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.

305. Saving of existing laws and laws providing for State monopolies:

Nothing in articles 301 and 303 shall affect the provisions of any existing law except in so far as the President may by order otherwise direct; and nothing in article 301 shall affect the operation of any law made before the commencement of the Constitution (Fourth Amendment) Act, 1955, in so far as it relates to, or prevent Parliament or the Legislature of a State from making any law relating to, any such matter as is referred to in sub-clause (ii) of clause (6) of article 19.

306. **[Power of certain States in Part B of the First Schedule to impose restrictions on trade and commerce].** - Rep. by the Constitution (Seventh Amendment) Act, 1956, section 29 and Schedule.

307. Appointment of authority for carrying out the purposes of articles 301 to 304:

Parliament may by law appoint such authority as it considers appropriate for carrying out the purposes of articles 301, 302, 303 and 304, and confer on the authority so appointed such powers and such duties as it thinks necessary.

Seventh Schedule

List I - Union List

41. Trade and commerce with foreign countries; import and export across customs frontiers; definition of customs frontiers.

42. Inter-State trade and commerce.

List II - State List

26. Trade and commerce within the State, subject to the provisions of Entry 33 of List III.

27. Production, supply and distribution of goods, subject to the provisions of Entry 33 of List III.

52. Taxes on the entry of goods into a local area for consumption, use or sale therein.

56. Taxes on goods and passengers carried by road or on inland waterways.

57. Taxes on professions, trades, callings and employments.

List III - Concurrent List

33. Trade and commerce in, and the production, supply and distribution of -

    (a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;

    (b) foodstuffs, including edible oilseeds and oils;

    (c) cattle fodder, including oilcakes and other concentrates;

    (d) raw cotton whether ginned or unginned, and cotton seed; and

    (e) raw jute.

34. Price control.

STATUTE LAW AND SUBORDINATE LEGISLATION

In modern times, statute law has become the most important source of law and a person who newly enters the legal profession or judiciary may need guidance as to how to approach the subject. This guidance would embrace areas concerning the Constitution, the legal system, interpretation of statutes and subordinate legislation. Materials facilitating the study would not be found at one place, but would be scattered at diverse places. In the following few paragraphs, an attempt has been made to identify these sources and to say a few words about their significance and inter-relationship.

The framework

First, one can try to understand what is statute law. Statute law is the enacted law of the country or of the State. As is well known, under the Indian Constitution, a federal polity is envisaged, so that law-making takes place, both in Parliament and in the State Legislature. Of course, pre-Constitution laws enacted at the Centre or in the Provinces or in native States, if not repealed subsequently and if not inconsistent with the Constitution, also continue in force. Thus, the statute law operative in a particular area within a State would comprise not only post-Constitution enactments of Parliament/ State Legislatures, but also pre-Constitution enactments of Central Legislature and of the Legislature of the corresponding State or the corresponding native Indian State. In rare cases, certain British statutes, that is to say, statutes of the British Parliament, (mostly of the 18th and 19th centuries) are still regarded as applicable. A list of such British statutes was prepared by the Law Commission of India in its 5th Report (British Statutes applicable to India). A few of these statutes as enumerated in the Law Commission's Report of 1958 were repealed by Parliament by the British Statutes (Application to India) Repeal Act, 1960. The rest are still in force. In this sense, ascertaining the statute law in force in a particular area involves, besides an awareness of the legislative process and its product, a little bit of legal history.

Interpretation

Once the content of relevant statutory provisions on a matter in controversy before the court is ascertained and assuming that the provision has not been repealed by any later enactment, the next question that usually arises is that of *Interpretation*. Interpretation involves the process of spelling out the meaning of a word or words occurring in the statutory provision. For performing this task properly, the judge would like to remember (i) the legal sources for interpretation and (ii) the academic material needed to facilitate interpretation. As regards the legal sources, he must bear in mind the fact that there may be an interpretation clause in the General Clauses Act, 1897 or in the Indian Penal Code (as regards penal statutes) or in the statutory provision itself, in the form of a definition or interpretation clause. Besides this, there may be case law of the Supreme Court or of one's own High Court, interpreting a particular word as occurring in the disputed enactment or other analogous enactment. For tracing this case law, of course the best available commentary can be used as a preliminary step but, generally, once the case law is located from the commentary or the digest, it is advisable to consult the report of the case itself.

The sources of interpretation mentioned in the above paragraph are generally authoritative and binding. Besides them, there are books and other literature available to help in the interpretation process. These academic sources, though not authoritative, often shed light on matters on which authoritative material is scanty. Legal dictionaries are the most usual instance; for non-technical words which occasionally appear in a statute, consulting one of the Oxford English Dictionaries or the Webster or similar reputed dictionaries is a useful exercise. As regards the Oxford English Dictionaries, though they are available in various sizes, the Concise Oxford Dictionary is reasonably priced and can be useful. Amongst legal dictionaries, Jowitt and Stroud are excellent. Besides these two, the book entitled "Words and Phrases" often turns out to be helpful. Black's Law Dictionary is also very good, but it may not always be upto date.

A few words are needed about subordinate legislation or statutory instruments. These are rules, orders and similar other instruments made by authority under delegated power. For the intelligent citizen as well as for the lawyer, their practical importance is obvious. Some important legal principles of peculiar relevance to subordinate legislation may be mentioned.

A confusing picture

It is noticed that the numerous points that can arise, or have arisen, in this field create an apparently confusing picture. For facilitating a grasp of these points, one should classify them under convenient headings. Broadly speaking, the topics that need to be considered may relate to the validity of statutory instruments, their form, their enforcement, and their interpretation, as also their relationship to the general legal system. Some of these topics themselves have more than one aspect, thereby yielding a few sub-topics. For example, the validity of a statutory instrument could involve questions of constitutional validity, competence of the authority issuing the statutory instrument, substantive validity, formal validity, procedural validity and so on. Again, enforcement of statutory instruments which impose legal obligations on citizens or on the authorities would involve enforcement by suit, enforcement by penalties (where properly authorised) and so on [*B.K.Srinivasan* v. *State of Karnataka*, (1987) 2 S.C.J. 113 (SCJ dated 20 May, 1987].

The principal topics

The principal topics that arise for consideration are the following:-

1. Constitutional validity.

2. Competence of the authority.

3. Substantive validity - keeping within the limits of the parent Act.

4. Substantive validity - general or implied limitations.

5. Procedural validity (including publication).

6. Formal validity.

7. Commencement.

8. Enforcement.

9. Miscellaneous.

A few of these topics may be dealt with in some detail.

Constitutional validity

Where one is concerned with the constitutional validity of a statutory instrument, three requirements have to be satisfied:

(a) The parent Act must be constitutionally valid. In particular, it must not violate fundamental rights.

(b) The delegation clause in the parent Act must be valid, i.e. it should not suffer from the vice of "excessive delegation". Broadly speaking, the legislature may delegate, but not abdicate.

(c) The statutory instrument (made under the parent Act) should itself be constitutionally valid. It should not violate any fundamental right guaranteed by the Constitution. In particular, it must not be arbitrary or discriminatory thereby violating article 14 of the Constitution (equality before the law). It must not impose unreasonable restrictions on the freedom of speech, freedom of assembly, freedom of trade and so on.

Violation of a fundamental right by a subordinate legislation is illustrated by the well known judgment of the Supreme Court [*Air India* v. *Nargesh Mirza*, A.I.R. 1981 S.C. 1829] in which it was held that a regulation terminating the employment of female air hostesses on their first pregnancy would be void, as arbitrary and opposed to all civilised norms.

Recently, there have been a series of decisions holding that a service rule empowering the employer (in the public sector) to terminate the employment of an employee on 3 months' notice is arbitrary and the power cannot be exercised without giving the employee an opportunity of being heard [*Central Inland Water Transport Corp.* v. *Brojo Nath Ganguly*, (1986) 3 S.C.C. 156; *D.T.C. Mazdoor Congress* v. *Union of India*, (1986) 53 F.L.R. 158; *K.L. Seth* v. *Union of India* (1987) 9 Reports (Del.) 405, Issue No. 28]. In constrast, the validity of a regulation made under the Police Act [Paragraphs 173-174, Travancore-Cochin Police Manual contained under section 17, Kerala Police Act, 1961] prohibiting the wearing of beard by the police, has been upheld. Its validity was challenged by a Muslim police officer on the ground of violation of freedom of religion (article 25 of the Constitution). But the challenge was rejected by a Division Bench of the Kerala High Court [*Muhammed Kutty* v. *I.G.P.* (1987) 4 Reports (Ker.) 285, following *Mohammed Fasi* v. *S.P.* (1985) K.L.T. - 185 and agreeing with *E. Mokhthal Pasha* v. *B.H.E.L.*,*Lex et Juris*, Sept. 1986]. The High Court pointed out that the Police Drill Manual published by the Bureau of Police Research and Development, Government of India contained similar provisions. The restriction in question was held to be reasonable, having regard to the object to be achieved. The court also held that the wearing of a beard is not a fundamental tenet of Islam. It is "sunnath" (optional) and not "farz" (obligatory).

Substantive and procedural validity

A statutory instrument made under a particular Act must not travel beyond the scope of the Act. Also, in the absence of specific authority, a statutory instrument must not impose a financial burden, create an offence, operate retrospectively or exclude the

right of suit. There may be certain procedural requirements also, depending on the nature of the provision in the parent Act, such as consultation, pre-publication, prior approval of higher authority etc. Breach of these requirements generally renders the instrument void.

Pre-publication

In India, it is not obligatory to publish a draft of proposed statutory rules before making those rules. It is eminently desirable to adopt a general practice of pre-publication. At present, unless the parent Act itself provides for publication of rules made thereunder, it is not obligatory. As a result, there is a risk that the point of view of the citizen or of affected interests is not brought to the notice of the bureaucracy. The procedure needs reform in this regard. All important statutory instruments should be pre-published.

Committee on Subordinate Legislation

It should be mentioned at this stage that Parliamentary Committees on Subordinate Legislation in India and elsewhere are doing very useful work. They scrutinise each and every instrument with care and point out illegal, improper or unusual exercise of delegated legislative power. It is unfortunate that their valuable reports do not become known to citizens in general.

LEGAL CHALLENGES TO TAXATION

The taxing power of the Centre, the States and local authorities is bound to be exercised from time to time. The Constitution and the general principles of law lay down certain limits as to the *matters* on which, or the *manner* in which, the taxing power may be exercised. It is desirable to narrate briefly the legal limits of the power to tax, and the scope of legal challenges to its exercise.

Constitutional mandate

Article 265 of the Indian Constitution provides that no tax shall be levied or collected except by authority of law. This postulates three requirements.

(i) There must be a law authorising the tax.

(ii) It must be a valid law [*Poona Municipality* v. *Duttatraya*, A.I.R. 1965 S.C. 555; *Chholabhai* v. *Union of India*, A.I.R. 1952 Nag. 139, 144].

(iii) The levy or collection of the tax must be in conformity with the authority conferred by the law [*State of Mysore* v. *Cawasji*, (1970) 3 S.C.C. 710, 715].

It is well established that "law" does not include an executive order [*Bimal* v. *State of M.P.*, A.I.R. 1971 S.C. 517, 520]. In fact, the very object of provisions like article 265 is to guarantee that there shall be no taxation without representation. Hence, "law" means enacted law in this context [*Ram Krishna* v. *State of Bihar*, A.I.R. 1963 S.C. 166]. Limitations on the taxing power, as arising under the Constitution, can be classified into the following categories:-

(1) Limitations arising from fundamental rights (Part 3 of the Constitution).

(2) Limitations arising from constitutional provisions relating to freedom of trade, commerce or intercourse (articles 301 to 307, Part 13).

(3) Limitations relating to inter-Governmental immunities.

(4) Limitations relating to specific kinds of taxes.

Fundamental rights

Under category (1) above, one may note that a taxing law must not infringe fundamental rights, like any other law [*Ganga Sugar Corporation* v. *State of U.P.* A.I.R. 1980 S.C. 286, paragraphs 42-46]. Of particular relevance in this context are the following propositions.

(i) A taxing statute which violates equality by undue discrimination is void under article 14 [*Kunnothat* v. *State of Kerala*, A.I.R. 1961 S.C. 552; *State of Kerala* v. *Kutty*, A.I.R. 1969 S.C. 378; *Khandige* v. *Agricultural I.T.O.*, A.I.R. 1963 S.C. 591, 594; *N.M.C.S. Mills* v. *Municipal Corporation*, (1967) 2 S.C.R. 679, 693; *State of Kerala* v. A.I.R. 1969 S.C. 378].

(ii) A taxing statute which imposes an unreasonable restriction (or even a reasonable restriction but not for the specified purpose) on the six freedoms quaranteed by article 19 of the Constitution, would be void. These are the right -

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India: and

(g) to practise any profession or to carry on any occupation, trade or business.

It should be mentioned that fundamental rights may, in a conceivable case, be infringed by a taxing statute. Thus, a tax imposed upon the press, deliberately calculated to limit the circulation of information, would be unconstitutional [*Express Newspapers* v. *Union of India*, A.I.R. 1958 S.C. 578, 614], even though the press is subject to ordinary forms of taxation. Coercive sanctions for the realisation of a tax are valid [*Rahaman* v. *State of A.P.*, A.I.R. 1961 S.C. 1471]. The taxing law may even provide for cancellation of registration of a dealer for ensuring payment of tax [*Rahaman* v. *State of A.P.*, A.I.R. 1961 S.C. 1471]. However, it would seem that cancellation without opportunity of hearing would be unconstitutional [*Sukhanandan* v. *Union of India*, A.I.R. 1982 S.C. 902, para 23]. The reason is that a taxing law must also satisfy the test of reasonableness with reference to article 19 [*Balaji* v. *I.T.O.*, A.I.R. 1962 S.C. 123; *Jagannath* v. *Union of India*, A.I.R. 1962 S.C. 148; *Kunnathat* v. *State of Kerala* A.I.R. 1961 S.C. 552].

Taxes for religion

It remains to note that taxation for the purposes of religion is expressly prohibited. "No person shall be compelled to pay any taxes the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination" (article 27). This article preserves the secular character of the State [*Commissioner, H.R.K.* v. *Lakshmindra*, (1954) S.C.R. 1005]. Article 27 does not prohibit the levy of fees so long as there is no discrimination between one religion and another [*Moti Das* v. *Sahi*, A.I.R. 1959 S.C. 942, 950; *Bira Kishore* v. *State of Orissa*. A.I.R. 1964 S.C. 1501, 1510].

Freedom of trade

Under category (2) mentioned above come the rather complicated provisions in articles 301-307 of the Constitution (Freedom of trade, commerce and intercourse throughout India). Violation of these provisions is justiciable, though it is not a breach of fundamental rights [*Atiabari Tea Co.* v. *State of Assam*, A.I.R. 1961 S.C. 232, 247]. The interpretation of articles 301-307 in the context of taxing statutes cannot be said to have settled down. There is a string of decisions according to which "compensatory" taxes (taxes imposed for the use of facilities like maintenance of roads, bridges etc.) are permissible. [*Atiabari Tea Co.* v. *State of Assam*, A.I.R. 1961 S.C. 232, as explained in *Automobile Transport* v. *State of Rajasthan*, A.I.R. 1962 S.C. 1405, 1418; *Krishnan* v. *State of T.N.*, A.I.R. 1975 S.C. 583, 587]. It is also true that if a tax imposed by a State does not interfere with the freedom of trade and commerce, it is valid - e.g. Sales tax [*Hansraj* v. *State of Bihar*, (1971) 1 S.C.C. 59, 64; *Andhra Sugars* v. *State of A.P.*, (1968) 1 S.C.J. 694; *Venkataraman* v. *State of Madras*, (1969) 2 S.C.C. 299]. At the same time, taxes which have a direct and immediate impact by restricting trade or commerce may offend the provisions of article 301, which provides as under:-

> "Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free."

[*State of Kerala* v. *Abdul Khadir*, (1969) 2 S.C.C. 363]. It follows that a tax which is excessive and prohibitive, thus impeding free flow of trade and commerce, would be unconstitutional [*Kalyani Stores* v. *State*, (1966) 1 S.C.R. 865, 867, 874]. In any case, no State can levy a tax which is discriminatory between State and State. Article 304(a) provides that the Legislature of a State may by law impose, on goods imported from other States or the Union territories, any tax to which similar goods *manufactured or produced in that State are subject*, so, however, as not to discriminate between goods so imported and goods so

manufactured or produced. Thus, it would be a straightaway violation of this provision if a State, while taxing goods produced in another State, does not tax similar goods produced in the State [*State of Rajasthan* v. *Mangi Lal*, (1969) 2 S.C.C. 710]. If goods of the particular type are not at all produced within the State, and the State seeks to impose tax on goods (e.g. foreign liquor, brought from outside the State), the law would be definitely void [*Kalyani Stores* v. *State of Orissa*, A.I.R. 1966 S.C. 1686, 1691].

Notice may also be taken of article 304(b) of the Constitution, which has been held applicable in principle to taxing laws [*Khyberbari Tea Co.* v. *State of Assam*, A.I.R. 1964 S.C. 925, 937, 942]. Article 304(b) reads as under:-

> "Notwithstanding anything in article 301 or 303, the Legislature of a State may by law --
>
> ....
>
> (b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest:
>
> Provided that no Bill or amendment for the purpose of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President."

Here again, while compensatory taxes are regarded as reasonable [*Kalyani Stores* v. *State of Orissa*, A.I.R. 1966 S.C. 1686, 1691]and while retrospectivity itself is not unreasonable [*Ram Krishna* v. *State of Bihar*, A.I.R. 1963 S.C. 1667, 1675, 1676; *Abdul* v. *State of Kerala*, A.I.R. 1976 S.C. 182, para 19], it is important to point out that there is a possibility of judicial review even of a taxing statute [*Khyberbari Tea Co.* v. *State of Assam*, A.I.R. 1964 S.C. 925].

Inter-governmental immunities

With reference to category (3) above, it is proper to mention that a State legislature or any authority within the State cannot tax the property of the Union (article 285) and the Union cannot tax the property and income of a State (article 289).

Specific Taxes

Finally, as regards category (4) above, the Constitution imposes prohibitions or restrictions on imposition of certain taxes. These are contained in articles 276, 286 and 287 of the Constitution.

The nature of statute law

It is now acknowledged legal doctrine that new law, when *deliberately* brought into being, comes only from statute, that is to say, from open legislative operations. When the legislature decrees new law, we usually get new law. Subject to the glosses which courts are apt to be put upon a statute, the law, when expressed in statute, is what the legislature says it is. The common law (whether "found" or "made") is unwritten law announced by judges, and only when disputes are brought before them. A statute (in modern times) is law established by the vote of an assembly in response to political demand and then formally inscribed. A "statute" (as the etymology informs us) is a thing set up, constructed, made to stand. Statutes appear in specific written form, unlike the common law. Statutes have a certain textual rigidity. The common law has none. A rule based on common law is inevitably inter-twined with the factual situation in which the rule was evolved, and can therefore be moulded according to facts by the process of "distinguishing", explaining, modifying or even over-ruling past precedents. This is ordinarily not possible in statute law.

In this manner, statute law is a "superior" source of law, - superior, in the sense that statutes can override the common law or customary law, while common law or customary law cannot override statute law.

Genesis of interpretation

At the same time, one must note that statutes are not self-enforcing, if not obeyed. Someone must go to court and enforce them or rely on them. On this occasion, the court not only has to issue a judgment or an order; very often, it has also to determine what the legislation means. Individual action to enforce a statute results in "interpretation". It is left to the courts to tell us what the statute means, and to enforce the legislative declaration

as the judges understand. In this process is born the non-statutory law of interpretation. The law or statutory interpretation, then, is itself common law: it consists of principles evolved through the centuries in cases decided by the courts. It is true that some of the rules of interpretation are themselves given legislative shape in the Interpretation Act. But, by and large, they are judge-made.

The process of interpretation

In interpreting a statute, the court begins with the statute, but does not end there. The best of statutes do not apply with ease to every situation. The court must decide their meaning. Looking at the facts before it, the court listens to the words of the statute and strain itself to hear their meaning. There will usually be precedents to follow. If this particular statute has not already been construed, decisions on other similar statutes may offer precedents, or at least throw some light. Considering the object of the statute, and bearing in mind what is fair and beneficial in the particular case, the court announces that the legislature (i) intended this or that meaning, or (ii) must have intended this or that meaning. Once the decision is announced by one of the higher courts, it becomes a precedent, which itself will be followed, because of the doctrine of *stare decisis*. This itself leads to two consequences. In the first place, whenever the particular question comes up before the courts again, they will follow the earlier decision as precedent. Secondly, the fact that in the earlier precedent, the court adopted a particular approach to interpretation, itself gives birth to a rule of statutory interpretation. Henceforth, the same approach will be shown when a similar situation subsequently arises, even though, on that subsequent occasion, the statute to be interpreted may be on a different topic altogether and the word to be construed may also not be the same as on the previous occasion. It is in this manner that (uncodified) rules of interpretation are born. The *concrete situation* (or a number of concrete situations) exhibiting judicial approach to a *particular* statute is made use of as

a basis for formulating an abstract *rule* supposed to be applicable to *statutes* generally. Thus, the law of statutory interpretation is a body of general rules. But one should not forget that those rules were the result of the enforcement of particular statutes. Herein lies the strength as well as weakness of the uncodified law of interpretation. Its "rules" were themselves evolved in particular statutory situations. They are not inexorable commands.

Main topics

The field of statutory interpretation is a vast one. A convenient way of studying it would be to first devote attention to some of the general rules for determining legislative intent; secondly, to deal with the kinds of internal aids to be resorted to; thirdly, to discuss the external aids; and finally, to turn to some of the (so called) "presumptions".

Rules for determining legislative intent

Three main rules compete in regard to determining legislative intent -

(a) the literal rule,

(b) the golden rule,

(c) the mischief rule.

(a) The literal rule lays emphasis upon the *letter* or the text of the statutes. If the words of the statute are clear, the court must give effect to them. Lord Reid said: "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament meant, but the true meaning of what they said." : *Black Clawson* v. *Papierwerke*, (1975) 1 All E.R. 810 (H.L.).

Thus, if Parliament intended to enact one proposition but the words bear a different meaning, the courts must give effect to the contrary meaning.

One reason why this rule became operative was that the court does not, as a rule, refer to the debates or other external legislative materials : *Davis* v. *Johnson*, (1978) 1 All E.R. 1132 (H.L.).

(b) Where, however, the literal meaning gives rise to obscurity, courts may depart from it under the "golden rule". As Baron Parke (later Lord Wensleydale) said:

> "It is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used and to the grammatical construction unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, but no further." [*Becke* v. *Smith*, (1836) 150 E.R. 724].

It should be noted that the golden rule applies only if there is an ambiguity. Otherwise, the words have to be given their ordinary meaning [*Inland Revenue Commissioners* v. *Hinchy*, (1960) 1 All E.R. 505 (H.L.)].

(c) The "mischief" rule (*Heydon's case*, 1584) addresses itself to the following questions -

(i) What was the common law before the making of the Act?

(ii) What was the mischief and defect for which the common law did not provide?

(iii) What remedy Parliament has resolved and appointed "to cure the disease"?

(iv) The true reason of the remedy.

Servants, not masters

The above rules are not "rules" in the ordinary sense of having a binding force. "They are our servants, not our masters. They are aids to construction, presumptions or pointers." [*Maunsell* v. *Olins*, (1975) 1 All E.R. 16 (H.L.)].

Ambiguities

Ambiguities (and consequential need for interpretation) arise first, because of the inherent elasticity of most words; secondly, because the passage of time might have made the original words inappropriate; thirdly, because many words have an indeterminate connotation (e.g. : "merchantable quality" in the Sales of Goods Act); and finally, because of bad drafting.

Illustration

Wiltshire's case [*Wiltshire* v. *Barrett*, (1965) 2 All E.R. 271 (C.A.)] illustrates a case of bad drafting. Section 6, Road Traffic Act, 1960 (which made drinking and driving an offence) provided as under:

> "A police constable may arrest without warrant a person committing an offence under this section."

D was arrested under the above section but was released without being charged. D brought an action for damages for the tort of false imprisonment arguing that his release was proof that he had not been *committing* the offence. However, Lord Denning, M.R. read the word "apparently" into the section. "The constable is justified if the facts as they appeared to him at the time were such as to warrant him bringing the man before the court on the ground that he was unfit to drive through drink."

Internal aids

Internal aids in resolving ambiguities in statutes consist of the following:

(a) Long title.

(b) Preamble.

(c) Context in which the words appear.

(d) Rule of *ejusdem generis* [Where a statute uses specific words followed by general words, the general words (even if apparently unrestricted) will be interpreted as confined to objects or concepts of the same kind as the specific words][*Gregory* v. *Fearn*, (1953) 2 All E.R. 559].

(e) Rule of *expressio unius est exclusio alterius*

External aids

(a) Committee Reports

Report of a Committee which formed the basis of an Act may not be looked into for construing the Act. But it may be looked at for identifying the mischief which the Act was intended to remedy [*Black Clawson* v. *Papierwerke*,(1975)1 All E.R. 810 (H.L.) and *Davis* v. *Johnson*, (1978) 1 All E.R. 841 (C.A.)].

(b) Debates in Parliament

These cannot be looked at for construing the Act.

(c) International conventions or treaties

These can be looked at for construing the words of an Act implementing such convention or treaty [*R.* v. *Secretary of State for Home*

Department, Ex parte Bhajan Singh, (1975) 2 All E.R. 1081 (C.A.)]. The presumption is that "the Crown, in taking its part in legislation, would do nothing which was in conflict with the treaties."

(d) Statement of Objects and Reasons

Can be looked into, at least to identify the mischief intended to be remedied.

Presumptions

As a result of the mass of case law involving statutory interpretation, a number of "presumptions" have come to be recognised. These are tentative guidelines, and not absolute or binding rules. Text book writers on statutory interpretation have not tried to analyse their rationale or to classify them. It is, however, suggested that some of these presumptions are based on considerations of justice and avoidance of hardship - e.g. the presumption that *mens rea* should be read into a criminal statute (because, otherwise, the consequences would be unjust). Some of them are based on established drafting practice (e.g. the presumption that a consolidating statute does not alter the pre-existing law). A few of the presumptions can be traced to (supposed) doctrines of constitutional law or to the desire to honour international obligations. A few arise because of the realisation that the draftsman may be (i) usually precise but (ii) occasionally imprecise. The following are the principal presumptions:-

Presumptions based on justice

(a) An Act is not given retrespective effect, unless expressly provided. [*Carson* v. *Carson*, (1964) 1 WLR 511].

(b) Vested rights are not to be interfered with. "No man's contractual rights are to be taken away on an ambiguity in a statute, nor is an employer to be penalised on an ambiguity." [*Allen* v. *Thorn Electrical Industries*, (1967) 2 All E.R. 1137 (Lord Denning)].

(c) Intention is required for criminal liability [*Sweet* v. *Parsley*, (1969) 1 All E.R. 347 (A.C.)].

(d) A penal statute is to be strictly construed [*Zimmerman* v. *Grossman*, (1971) 1 All E.R. 363 (C.A.)].

Presumptions based on drafting practice

(e) An Act is not taken as repealed by implication, unless the provisions of the later Act are inconsistent with, or repugnant to an earlier one so that the two cannot stand together [*West Ham Church Wardens* v. *Fourth City Mutual Building*, (1892) 1 Q.B. 654].

(f) The same word has the same meaning [*Gartside* v. *I.R.E.*, (1968) 1 All E.R. 121 (H.L.).

(g) Consolidating Acts do not alter the law. "Draftsmen of such Acts re-phrase the original statutory provisions which are to be consolidated, but are well aware that it is their duty not to make any substantial alteration of the existing law and there is a very strong presumption that they have not done so." [*Maunsell* v. *Olins*, (1975) 1 All E.R. 16(H.L.)].

Presumptions based on honouring international obligations

(h) Parliament will not pass a statute infringing an international obligation [*R.* v. *Secretary of State for Home Department, Ex parte Bhajan Singh*, (1975) 2 All E.R. 1081(C.A.)].

Presumptions based on constitutional law

(i) The sovereign is not bound by a statute unless there is an express provision to

the contrary. [*Bank Voor Handel* v. *Administrator of Hungarian Property*, (1954) 1 All E.R. 969 (H.L.)]. (In India, this is becoming weak).

Presumptions linked with drafting precision/imprecision

(j) Rule of *ejusdem generis*: [*Gregory* v. *Fearn*, (1953) 2 All E.R. 559] : where a statute uses specific words followed by general words, the general words will be interpreted as being of the same kind as the specific words.

(k) *Expressio unius est exclusio alterius* : [R. v. *Palfrey*, (1970) 2 All E.R. 12 (C.A.) (Winn, LJ.)] : The specific mention of one (*unius*) excludes others (*alterius*). However, "the logic of the proposition and the force of the proposition depends entirely on establishing that there is only a choice between two named persons or objects; in such a case, it can be said that if one of the two available is chosen, that is an exclusion of the other. But save in that special case, the maxim has no effect in logic or in law".

GENERAL CLAUSES ACT

Interpretation Act

Statute law, which is one of the principal sources of law, starts gathering interpretation, no sooner a statute is passed. A word or expression used in a statute, when it comes up before the court,.has to be given some meaning and generally this is a part of the process of "interpretation". Of course, "interpretation" takes in many other things besides the mere assignment of meaning to words and expressions. In order that there may be a certain amount of uniformity in interpretation and in order to avoid controversies on matters which are likely to recur about statute law, every legal system, sooner or later, feels the need for an interpretation Act. That is precisely the role which the General Clauses Act, 1897 performs, even though its rather quaint title does not bring out its true purpose and character.

Objectives

Broadly speaking, the General Clauses Act performs the function of a legislative dictionary. An authoritative law for the interpretation of other laws is thus brought into existence. The Act as in force in India governs Central laws, there being similar laws in each State for the interpretation of State Acts.

The main objectives of the General Clauses Act can be enumerated as under:-

(i) to supply meanings of words and expressions frequently recurring in statute law;

(ii) to spell out the implications of certain legal concepts, thereby shortening the language of enactments;

(iii) to define the consequences of the enactment of a statute, in point of time;

(iv) to provide rules for dealing with the inter-relationship of two or more enactments, an object of the greatest importance when there is a plurality of enactments dealing with the same subject; and

(v) to lay down certain rules regarding the interpretation and application of statutory instruments.

How objects achieved

Thus, with reference to the first objective mentioned above, section 3 of the General Clauses Act gives more than forty definitions of words. This also achieves the second objective, because, when enacting each statutory provision in future, the legislature need not set out in detail the meaning of a word defined in the General Clauses Act. This enables statutory language to be shortened, because the General Clauses Act is always there at the background and is always speaking. Again, the implications of the particular statutory techniques or of the content of statute of various types can be provided by way of anticipation in the General Clauses Act. For example, it is provided that if time is referred to in a statute, then it is the Indian standard time. Similarly, questions too arise in practice as to when a particular Act comes into force. Obviously, there are a number of possible alternatives. A statute may come into force as soon as it is enacted or, in the alternative, it may be taken as operative when it is published, or its commencement may be postponed to a future notified date. Adopting the first alternative, the General Clauses Act, 1897 provides that on receiving the Presidential assent, an Act of Parliament comes into force, unless some other date is specifically provided in the particular statute.

Plurality of enactments

It has been mentioned above that the co-existence of more than one enactment can give rise to problems of their inter-relationship. Thus, if enactment A refers to enactment B, and enactment B itself is repealed by enactment C, how is enactment A to be construed in future, after the repeal? Will the reference in enactment A be construed as a reference to the new enactment C, or will it still continue as referring

to the old enactment?] Obviously the second alternative would lead to anomalies and inconveniences, because, after the repeal of enactment B, it would have lost all practical importance for other purposes and even its availability to the public would go on diminishing, in the course of time. Therefore, the legislature, adopting the first alternative, provides that in future, the reference will be construed as a reference to the new and substituted enactment. Here, we are concerned with *co-existence* at a particular *time*. *Succession* of enactments in point of time can also raise legal problems. If enactment A is repealed by enactment B, what would happen to action taken under enactment A, now repealed? [What would be the legal position regarding acts committed in contravention of enactment A?] What would be the situation regarding powers exercised, and proceedings pending, under the repealed enactment? All these questions possess deep practical importance, because the process of repeal (with or without re-enactment) goes on almost every day and some rules are obviously needed to anticipate and deal in advance with such problems. The most convenient place for making such provisions is the Interpretation Act, which would provide the needed uniformity and certainty. Section 6 of the General Clauses Act has dealt with the effect of repeal in all its dimensions and much serious inconvenience is avoided. Courts must now look to the text of section 6 and only to the text of section 6, when they are in search of the effect of repeal. Of course, provisions of the General Clauses Act (section 6 not excluded) would themselves require interpretation and one may not be able to get the full picture of the total law of statutory interpretation (even as derived from the General Clauses Act), unless one takes into account the case law on that Act. But the point to make is that once there is in existence a statutory provision for answering such questions, there is at least a nucleus to go by

Powers and functions

The majority of statutes vest powers and functions in various officers and authorities. Questions often arise as to the precise scope and impact of such powers.

For example, is a statutory power, once exercised, exhausted for all times to come? In the vast majority of cases, such a position would create immeasurable inconvenience. The law, therefore, through the General Clauses Act, provides that such powers may be exercised from time to time, as occasion demands. Of course, this provision, like most other provisions of the General Clauses Act, would not apply where the legislature has expressly or by implication shown a different intention. The utility of the General Clauses Act in the context of one species of power, namely, the power to appoint, is amply demonstrated by the provision conferring on the appointing authority the power of dismissal also. Of course, like all other laws, the General Clauses Act also, in so far as it makes such provisions affecting various rights, has to be applied in compliance with, and in conformity with, the principles of constitutional and administrative law.

Statutory instruments

As mentioned above, the Act also contains provisions relating to statutory instruments. Every year, a very large amount of law is made through subordinate legislation made under the authority of Acts of Parliament. These instruments share a dual character. On the one hand, they partake of the character of law, because they have the force of law. On the other hand, the manner of their making differs from the manner in which Acts of Parliament are passed. The process of initiation and reading of the Bills is totally absent in the case of statutory instruments. Some of the aspects of interpretation of statutory instruments have been dealt with in the Genezal Clauses Act. For example, care has been taken to provide that words and expressions defined in the parent Act have the same meaning when they are used again in the statutory instrument made under the parent Act. In the light of this provision, it becomes unnecessary to repeat the definitons given in the parent Act in the statutory instrument. It should be emphasised that under one parent Act, there can be any number of statutory instruments, such as rules, regulations, orders, notifications, schemes and bye-laws. Their

number can run into hundreds and it is obviously necessary that the meanings of words and expressions should not be left in doubt.

Constitution

Although, by the text of the Act, the General Clauses Act applies only to the enactments mentioned in each section, the Act has really an importance far transcending this limited scope. The Constitution expressly makes the General Clauses Act, 1897 applicable for the interpretation of the Constitution itself, in the same manner as the General Clauses Act was applicable for the interpretation of an Act of the Dominion of India. Of course, post-Constitution amendments or repeals of the General Clauses Act, 1897 would not automatically apply for the interpretation of the Constitution. One can even say that in the above position, the General Clauses Act, 1897 has come to acquire a sanctity of its own, which will last so long as the Constitution lasts.

Sources of interpretation law

The above exposition should not be taken as implying that the entire law of statutory interpretation is contained only in the General Clauses Act. Without going too much in detail, one can say that the law for the interpretation of a particular statute has to be gathered from the following sources:-

(a) the definition or interpretation clause, if any, given in the particular statute itself;

(b) the provisions of the General Clauses Act;

(c) such provisions in the Indian Penal Code, particularly Chapters 2, 3 and 4, which may be relevant to the particular statutory provision; and

(d) uncodified rules of interpretation.

Some comments are in order, regarding (c) and (d) above. The Indian Penal Code, while creating offences, also lays down certain general principles

of criminal liability or non-liability. It is the intention of the Code that these general principles would govern criminal liability on the matters provided in those provisions, not only where the liability arises under the Indian Penal Code, but also where the liability might otherwise arise under any other law. In fact, the Penal Code as coined two very useful expressions for describing those other laws. The other laws may be "local laws", being laws confined to particular localities or "special laws", being laws confined to particular subjects. For example, if an offence is committed in violation of a law relating to firearms by a child, then the question of exemption from liability would be determined by sections 82 and 83 of the Penal Code. Similarly, if a mentally abnormal person commits an offence against the Motor Vehicles Act, which again is a special law, then immunity from criminal liability under the special law would be regulated by section 84 of the Penal Code.

As regards the source of interpretation law mentioned at (d) above, it is pertinent to mention that many questions of interpretation and construction, not being dealt with in the other sources mentioned above, must be decided by the court when occasion arises. This is on the basic principle that the interpretation of legislation is a matter for the courts. Case law therefore may play a significant role. A much litigated statute often becomes an intricate network of statutory provisions and case law taken together. The decisions given by Judges on particular provisions are therefore of equal importance, because of the doctrine of precedent.

OBJECTIVE AND SUBJECTIVE LANGUAGE IN STATUTES

Statutes in modern times confer, on the executive, powers of various kinds. These powers are usually to be exercised if the specified circumstances exist and if the specified conditions are satisfied. In all such cases, the question may arise whether the statutory requirement as to circumstances or conditions is to be adjudged objectively, or whether it is enough if the competent authority takes the view that the requirements have been satisfied. In other words, two alternative constructions may be open, which are known as "objective" and "subjective" constructions, respectively.

Countries with and without judicial review

In a country not governed by a system of administrative law or constitutional law, judicial review of executive action not being permissible, the answer to the above question would depend almost exclusively on the language used in the statute. If the statutory language is clear enough one way or the other, then effect will be given to that language. If the language is not clear, the appropriate court will interpret the language. Thus, in such countries, the question will be only of statutory construction.

But in a country where judicial review is permissible, courts would not go merely by the language. They would also examine two other questions. The first question to be examined is, whether the purely subjective interpretation would be in conformity with constitutional norms. The second question to be examined is, whether the purely subjective interpretation, even if permissible from the constitutional angle, should still be avoided, having regard to the principles of administrative law.

Position in India

India belongs to the second category, because its Constitution confers fundamental rights and its courts possess the power of judicial review. Therefore, in India, when faced with a provision, in a statute, which confers powers on the executive in language capable of subjective or objective construction, courts have to undertake an examination of three issues.

First, whether, as a matter of interpretation, the language is to be regarded as subjective or objective. Secondly, whether, as a matter of constitutional law, the subjective or objective construction would stand scrutiny. Thirdly, whether the doctrines of administrative law have anything to say on the subject.

Subjective expressions and discretion

To begin with, all statutory discretion is subjective. As has been pointed out by an eminent writer, "There is a subjective element in all discretion." [Wade, Administrative Law (1982), page 394]. Coming to the judicial view, the earlier rulings seem to suggest that expressions like "is satisfied" do not permit the importation of an objective test. *Robinson* v. *Minister of Town and Country Planning*, (1947) King's Bench 702. But later rulings have rejected this purely literal approach. *Estate and Trust Agencies* v. *Singapore Improvement Trust*, (1937) A.C. 898 (PC). Courts now look into the question whether there was any material on which the "satisfaction" could have been arrived at. *R.* v. *Minister of Housing*, (1960) Weekly Law Reports 587.

Arbitrary exercise of power

In any case, every executive power must be exercised (i) in good faith, (ii) for the statutory purpose, and (iii) on relevant material.

Arbitrary and unreasonable exercise of statutory power would render the action void. In *Commissioner of Customs and Excise* v. *Cure & Deely Limited*, (1952) 1 Queen's Bench 340, the Commissioners had power to make regulations "for any matter for which provision appears to them to be necessary for the purpose of collecting purchase tax." A regulation made under this power provided that a proper return of purchase tax should be made, failing which, the Commissioners might themselves determine the tax due and the amount so determined shall be the proper tax payable. Mr. Justice Sachs held that the regulation was void, because it took power to determine the tax liability which was to be properly determined *according to the Act*, with a right of appeal to the court, and the regulation was made to take away the jurisdiction of the court. The power of delegated legislation had been exercised in an arbitrary and unreasonable manner. The fact that the rules were to be laid before the Parliament, made no difference.

Effect of judicial review (administrative law)

It follows from the above brief discussion that no statutory language will operate in a purely subjective manner. By judicial review, statutory language apparently giving unguided power to the executive will still be construed as leaving open judicial review on well recognised grounds. In the House of Lords case [*Secretary of State for Education and Science* v. *Tameside MBC*, (1977) AC 1014] Lord Wilberforce said: "Sections in this form may, no doubt, exclude juiicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then although the evaluation of those facts is for the Secretary of State alone, the court must enquire whether those facts exist and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts (and) whether the judgment has not been made upon other facts which ought not to have been taken into account."

If the executive authority exercises its power where there is no evidence to support its exercise, its action can be challenged, even if the wording used is "Where it appears to the Secretary of State". *Ashbridge Investment* v. *Minister of Housing*, (1965) 1 Weekly Law Reports 1320, 1326.

The constitutional aspect (fundamental rights)

The above aspects are of relevance in all countries which have a system of judicial review under administrative law. Besides this, in a country like India, where fundamental rights are laid down by the Constitution, if subjective language is employed in legislation which gives power to the executive to interfere with the fundamental rights, then it runs a risk of infringing the test of reasonableness. This test is explicitly laid down in article 19 of the Indian Constitution and is regarded as implicit in article 14 of the Constitution. Reasonableness has an aspect of substance as well as an aspect of procedure. A statute which does not lay down principles for guidance of the executive and leaves the power entirely to its satisfaction runs a high risk of violating article 19.

- *Mineral Development Company* v. *State of Bihar*, A.I.R. 1961 S.C. 468.

- *Hari Chand* v. *Mizo District Council*, A.I.R. 1967 S.C. 823, 833.

- *Dwarka Prasad* v. *State of U.P.* (1954) S.C.R. 803.

- *Banthia* v. *Union of India*, A.I.R. 1970 S.C. 1453.

Same approach is visible in case law under article 14, where absolute discretion is sought to be given to the executive by the statute.

- *Satwant* v. *A.P.O.*, A.I.R. 1967 S.C. 1836, 1845.

Conclusion

Thus, we come to the following conclusions in the Indian context:-

(1) Where there are constitutional implications, then the use of subjective language in a statutory provision giving power to the executive, should be avoided, because it may suffer from the vice or unreasonableness. This safeguard may have to be dispensed with in exceptional cases to deal with a very urgent situation.

(2) Where there are no constitutional implications, then subjective language can be employed in such statutory provisions. But one should remember that even then, judicial review under administrative law is open.

(3) In view of the wide scope given to article 14 of the Constitution, it is apprehended that there will not be many cases where constitutional implications would not arise, if the power is to be exercised subjectively.

UNCODIFIED LAW OF INDIA

The legal map of almost every country in the commonwealth represents at least three different areas, indicating the content of the law as derived from three different sources. These sources are the enacted law, the uncodified law resulting from precedents and customary law. Though every branch of law does not necessarily contain rules derived from all the three sources, the legal system as a whole cannot be properly understood without paying attention to the important function performed by the uncodified law. The manner in which, and the extent to which, uncodified law plays a part in a given legal system is a fairly vast topic. Moreover, it can be discussed from several angles. For example, from the point of view of jurisprudence, the process itself has a challenging interest. How does case law enter the stream of the law? What kinds of cases can be legitimately described as constituting sources of law? How does the legal system resolve or avoid conflicts or possible conflicts of views in the same court or in different courts? These are questions which pertain to the process of case law. Besides this, the *product*, that is to say, the large body of rules contributed by case law, is itself an equally challenging topic. The subsequent paragraphs attempt to highlight the important areas in which case law has a practical significance in the Indian legal system. The object is to draw attention to these areas, so that he who is in search of the precise legal doctrine on a particular topic may not miss the possibility that a rule on the subject might have been formulated in some judicial decision.

At the outset, one should note the legal authority in India which makes case law a source of legal rules. The Constitution is silent on the subject, excepting that it provides that the law declared by the Supreme Court shall be binding on all courts or authorities in India. How then does a court approach the subject when no law has been declared on the particular topic by the Supreme Court so far? This basic question is answered, at least for civil proceedings, by the enactment (usually, the enactment relating to civil

courts) which provides for the creation of civil courts. Such an enactment has to be traced in the provincial or State Acts as in force in different parts in India. The provision verbally differs from State to State but, broadly speaking, the Civil Courts Act provides that in so far as the law is not laid down in legislation, the civil court shall apply (in certain matters concerning family law) the personal law of the parties and as regards residuary matters, it shall seek guidance from justice, equity and good conscience. Our legal system has superimposed the proposition that once the High Court (or a court of corresponding status) lays down a rule of law under this rubric, it becomes a binding principle for the High Court and subordinate courts. Thus, the matter has two aspects. In a court lower than the High Court, if a question not covered by enacted law arises, the trial court will try to seek guidance from High Court precedents, if applicable. If there are no applicable High Court precedents, then the trial court will follow justice, equity and good conscience. The process is the same for the High Court acting in its appellate or revisional civil jurisdiction, but with the rider that what the High Court lays down on a matter not covered by authority, itself becomes authority for the future. It is therefore worth drawing attention to what Stephen, a very eminent jurist, stated. He pointed out that "every decision on a debated point adds a little to the law, by making that point certain for the future. Indeed, whichever way this case may be decided, it will settle the law upon the precise point involved, and it is this which gives to judicial decisions their great importance." [Coney, (1882) 8 Q.B.D. 534, 550, 551].

So far as criminal cases are concerned, the position is the same in substance. It is true that there is no specific and explicit statutory provision about the binding effect of precedents or about "justice, equity and good conscience", but the impact of case law as a source of legal doctrines is identical in criminal proceedings as in civil proceedings.

Bearing this process in mind, one can now come to the areas of the resultant product. It is commonly customary to divide the corpus of the law into "public"

and "private". Public law comprises those rules which regulate the relations between the States or other public authorities and the citizens, while private law covers areas wherein private relations are predominant. Generally, public law is taken as embracing public international law, constitutional law, administrative law and (according to some writers) criminal law and taxation law. In the sphere of public law, uncodified law plays a significant part because - to take up one by one the topics enumerated above - public international law is largely uncodified; constitutional law, even if there is a written Constitution, occasionally raises questions which can be answered only on the basis of uncodified principles; administrative law is very largely a judge-made law; criminal law, though it must begin as statutory law, does not end there because its abstract doctrines and penal provisions require further interpretation, giving rise to voluminous body of rules of uncodified law; and the same is true of taxation law.

In matters of private law, uncodified law plays a still more significant role. In India, large segments of family law are still uncodified. The Hindu joint family is one important example, as regards Hindus. As regards Muslims, the major portion of the rules must be derived from uncodified law. For Christians, marriage, divorce and conversion and succession are the subject matter of statutory provisions but the rest of the family law still depends on uncodified sources. Such a simple question as the question of the husband's duty to maintain his spouse or the father's duty to maintain his children, if the parties are Christians, must still be answered on the basis of uncodified law. Substantially the same is the position regarding Parsis. Persons who do not belong to any of these religions, such as Jews, are governed by uncodified law even as regards marriage and divorce.

Another segment of law in which uncodified rules play a prominent part is that of the law of torts. Indian courts largely follow the English common law on the subject and the number of enactments codifying or modifying the rules of common law, though apparently

large, leaves unaffected the vast scope for deriving the law from uncodified sources. For example, if A is injured by B by accident taking place in the home or a school or on the road otherwise than by a motor vehicle and A seeks damages from B, B's liability has to be determined only on the basis of uncodified rules. Even if A dies, and the Fatal Accidents Act, 1855 becomes applicable, the question whether B is liable or not can be answered only on the basis of common law. This part of the common law, in fact, specifically preserved by the Act which requires a "willful act, neglect or default" of the person sued. Even in the field of accidents caused by motor vehicles, the law of torts is not abrogated by the Motor Vehicles Act. No doubt, liability without fault has been introduced recently upto a certain amount by amending the Motor Vehicles Act; but this only modifies some of the common law requirements. It does not render obsolete all the common law learning as to cause of action in negligence. For example, generally B is liable to pay damages for an accident only if B (or his employee acting in the course of employment) caused the accident. Thus, issues relating to causation and vicarious liability, if they arise, can be resolved only with the help of uncodified law. Recently, in the *Sriram Fertilisers* case (A.I.R. 1987 S.C. 1086), liability for dangerous things has been sought to be expanded by describing it as absolute liability and by stating (directly or indirectly) that the exceptions to strict liability recognised in English law even for dangerous substances need not be recognised. This expansion of liability and abolition of defences otherwise available was itself achieved by a judicial decision so that the source of law is still the uncodified law, the only difference being that the actual content is no longer borrowed from England.

Another area of the law which is still governed largely by uncodified rules, is commercial law. It so happens that we have the Indian Contract Act, 1872 dealing with some aspects of the law of contracts. But the Act is not exhaustive; and, even in the narrow sphere of the doctrines of the law of contract, a pretty large bulk of the law has to be ascertained from the case law. The quantum of damages, issues

of frustration, assessment of claims on the basis of *quantum meruit* and questions of the legality of the agreement (particularly, those raising issues of public policy) can be settled only with the help of prolific case law. It is true that this case law is found resting on some provision or other of the Indian Contract Act. But that would be only a formal truth. The foundation itself is very thin, almost invisible. Much of the superstructure is the work of judicial craftsmanship; and one can see the skill and genius of the judge, where he has tried to build an edifice dealing with unexpected practical problems pertaining to contracts.

Speaking of contracts, one cannot overlook the realm of quasi contracts. A bunch of five or six sections in the Indian Contract Act does purport to deal with certain "relations resembling those created by contracts." And a somewhat larger bunch of sections appearing somewhat unexpectedly in the Indian Trusts Act, 1882 does purport to deal with what has come to be known as implied or constructive trusts. But these statutory provisions are only a pointer to the much more important doctrines of restitution, constructive trusts and other equitable doctrines. In fact, in dealing with questions of quasi contracts and equity, our courts very largely and profitably turn to English case law, not because we *must* follow English law, but because, if the situation has already arisen in England or elsewhere, and if judicial exposition or legal learning has been devoted to it, there is no reason why we should not benefit by it.

More than once, in the above exposition, a hint has been given that even where statutory provisions supply the nucleus, uncodified rules may gather around that nucleus and create a cluster. Adopting the language of geometry, if a statutory provision is the centre, case law creates around that centre a number of concentric circles, large as well as small. Their number could, in theory, be endless - as endless as the situations actually arising in life. What is equally important is that when a circle is created by interpretation of a central statutory provision, each point in the circumference of the circle can itself become the centre of still more circles. These expanding circles would naturally be intersecting with the first

circle based on the original statutory provision. When this process goes on for a pretty long time, the statutory provision remaines the source of law, only in a nominal sense. It is the original proginator of the concentric and intersecting circles but, in reality, the newly created circles may cover areas far removed from the central core of the statutory enactment. In form, then, the process is of statutory interpretation, but, in substance, the product is uncodified law.

JUDICIAL DISCRETION

In any legal system, a certain element of discretion would have been left with the judge. Although this is a proposition well understood by lawyers, their ideas about the precise extent of the discretion are somewhat obscure. Here, an attempt will be made to demarcate the areas of judicial discretion and to indicate, in broad terms, some salient features of the manner in which the discretion adds to the richness and variety of the law and its administration.

It is commonly assumed that the judge decides questions of fact on the evidence before him and applies the law; and that this is a task which can be performed according to some well set principles. But really speaking, this is only an incomplete statement of the position. While determining facts, the judge has, in that process, to interpret and apply rules contained in the law of evidence, as well as to bring to bear upon the task judgment and wisdom in certain matters. In this sense, the first sphere of discretion is concerned with the determination of facts. When one comes to questions of law, the freedom left to the judge may relate to the application of the law, its interpretation or occasionally even its formulation. Besides facts and law, there is the discretion vested in the judge in the matter of granting relief. For example, even in a civil case, the judge may have to choose between specific performance and damages, or he may have to determine the rate of interest to be awarded for the future in a money decree, or to decide the quantum of compensation in tort or damages for breach of contract or an equitable obligation. Thus, the spheres of discretion are concerned with facts, law and relief (particularly, sentence).

First, in the sphere of facts, the judge does not determine facts as a scientist would do. The scientist has freedom to collect whatever data he can collect, a freedom which the judge does not have. The judge must follow the law of evidence.

Nevertheless, in applying and interpreting the rules of that very law, there is scope for different approaches. In the scheme of the Indian Evidence Act, evidence can be given of facts in issue and relevant facts. What is relevant is enumerated in sections 6 to 55 of the Act but, in essence, the really important relevant facts can be gathered from a study of sections 5 to 16, because the rest of the sections deal mostly with secondary or incidental matters. Now, the relevance of fact B to fact A depends upon the assessment of a certain relationships between the two facts, such as cause and effect, motive and act and so on. These have ultimately to be determined by each presiding officer according to his own intellect and experience.

Apart from relevance of facts, there are situations in which the judge has to decide whether certain evidence should be admitted or not. For example, when State privilege is claimed, it is for the judge to decide whether the matter is so important for public interest that the privilege must outweigh the demands of justice. Similarly, in determining the voluntariness or otherwise of confessions, a host of facts have to be taken into account and obviously it is unlikely that two judicial officers will take the same view as to whether a confession is voluntary or not. There is even a more visible instance of discretion being left to the judge when one comes to cross-examination as to character. At least in theory, the law confers upon the judge the function of deciding whether a particular question which is supposed to be put by the counsel in cross-examination, only to test the credibility of the witness, should be allowed or not. The concept of "proportionality" is laid down in the law for this purpose.

In the Indian legal system, in general, the fact that certain evidence has been procured illegally does not make it inadmissible. But it is possible that certain provisions of the Constitution, particularly article 21 (which prohibits deprivation of life or personal liberty except according to procedure established by law) may come to be so interpreted as to vest the court with a discretion to exclude evidence illegally obtained. It may be

mentioned that in the United States, the courts habitually exclude evidence obtained in violation of constitutional rights. This has come to be known as the "fruit of the poisonous tree" doctrine, though its precise dimensions vary from judge to judge and fluctuate from time to time.

In regard to questions of law, judicial discretion is more manifest. First, one must point out that the judge applies the law to the facts of the case. Legal mandates, even in a statute, have to speak in general terms deciding whether the concrete case at hand falls within those general terms, necessarily involves exercise of the moral and mental faculty of the judge. For example, one of the states of mind requisite for elevating the offence of culpable homicide into the offence of murder is the intention to cause death, while another state of mind sufficient for such elevation is the intention to cause a bodily injury (a subjective element) and the requirement that the injury must be sufficient to cause death (an objective element). Now, while intent of the quality mentioned above is a legal requirement which is reasonably intelligible, the question whether that requirement is satisfied in a particular case must be decided by the judge only. The legislature cannot decide all concrete cases and where the legislature is silent, the judge must speak. This category of discretion, namely, discretion in applying the law, is more vividly illustrated when one comes to concepts of law which are uncodified. For example, take negligence, in the law of torts. There is no statutory definition of negligence for the purpose and even if there were one, the problem mentioned in the next sentence could still arise. In applying such abstract concepts of undefined dimensions, the problem is to decide whether the general, takes in the particular case. Although, in theory, the legislature has made the law or an uncodified doctrine has given the law, yet, in practice, much will depend on the view taken by the judge.

Apart from applying the law to the facts, there is the aspect of interpretation. Words, as well as general concepts of law, even if codified, can be given meaning and must be given meaning, in each

case. This is particularly so in the case of statutory words or mandates. How this aspect is of practical importance can be illustrated from a Scottish case. [*Khaliq* v. *H.M. Advocate*, (1984) Scottish Law Times 137]. The accused in that case had sold "glue sniffing kits" to children. Both the trial judge (Lord Avonside) and the High Court of Justiciary (in appeal) held, that the act of the accused could constitute the crime of wilful and reckless administration of dangerous substance to another, causing injury or death. An argument had been advanced on behalf of the accused that the accused had not "administered" the solvents, but had merely supplied the solvents. The argument was rejected by both the courts. The accused had known that the glue would be abused by the children. Indeed, by supplying containers and other ancillaries, the accused had intended that it should be so abused. The fact that the children voluntarily inhaled the solvent did not constitute a "new intervening act" (*novus actus interveniens*) so as to break the chain of causation between the supply of the glue and the injurious consequences which the children were likely to suffer from sniffing it. The supply of the glue-sniffing kits was the cause of the abuse of the solvent, and not merely the occasion for its abuse.

Apart from applying the law and its interpretation, there is the question of judicial formulation of new rules of law. Since legislation cannot cover every inch of the field that may come up from time to time before the courts, some authority has to function for determining the rule of law to be applied. This is popularly known as judicial law-making and its impact and intensity are matters which the layman is not ordinarily able to comprehend. The matter arises in this manner. A controversy involving litigation relates to a particular topic. Either there is no statute on the subject, or, if there is a statute, it is silent on the particular point at issue. The judge must decide. At that stage, he has a discretion to decide one way or the other, unless the matter has been decided by the High Court of his own State or by the Supreme Court. If the judge who decides the matter is a High Court or Supreme Court Judge, then his decision, rendered in the

exercise of judicial discretion, itself becomes a binding rule of law for the subordinate judiciary, because of the doctrine of precedent. The extent to which the law is made in this manner may differ from one subject to another; but the theoretical possibility that the law will be so made, is undisputed. It is well recognised now, that legislation cannot be exhaustive. Some discretion must therefore be left to the judges to enable them to deal with the new developments or the unexpected case. "It is impossible to cover all contingencies; it is foolish and dangerous to try to do so; foolish because it involves under-estimating the range and complexity of possible contingencies; dangerous, because in the architectural analogy, the codifier is both the architect and the builder of the structure; it is left to those who have to live with it to furnish, to decorate and, where necessary, to make alterations and additions." [*William Twining, Karl Llewellyn and the Realist Movement* [1973], page 309].

Finally, one can come to the discretion in regard to relief. The subject has qualitative as well as quantitative aspects. Qualitatively, the criminal law, in many cases, leaves a choice to the convicting court between imprisonment and fine. In capital offences, it leaves the choice between death and imprisonment for life. Quantitatively, our statutory criminal law does not, in general, lay down a minimum punishment but lays down the maximum term of imprisonment or the maximum amount of fine. In theory, then, the judge has the discretion to award the maximum or anything less than the maximum, which can be even one day's imprisonment or one rupee fine. It is true that the recent tendency in enacting penal statutes is to prescribe a minimum punishment. This minimum punishment is usually (but not invariably) relaxable by the court, for special reasons. Where such a relaxation is permissible, the scope for judicial discretion is obvious. It is only in the last two decades or so that the importance of the process of sentencing has come to be realised. In exercising the power of sentencing, and in choosing the appropriate sentence or its quantum, the judge is performing a task essentially different from determining the question of guilt or innocence on the facts or

the question whether the law applies to the facts or the question how the law is to be interpreted. Here, he is in the realm, not of determining culpability in the abstract legal sense, but of determining the degree of culpability. In the process of so determining the degrees of culpability, while making a choice about sentence, the judge will be unconsciously going through a whole gamut of questions. What are the criteria of seriousness? How far are the consequences of the act relevant? What effect is to be given to planning, deliberation, impetuousness, provocation, alcohol and temptation? What is the relationship, *inter se* between the various modes of sentencing? How can equality of sentencing and equality of impact be achieved between the rich and the poor, the advantaged and the disadvantaged, the married and the single?

Some restrictions or limitations do exist on judicial discretion in criminal law. In India, the judges cannot create new offences; this is prohibited by the Constitution. Can they create new defences to criminal liability? Probably not, in the Indian legal system. Elsewhere, the suggestion has been made that they should have this power. For example, it has been asked why judges should not be able to develop a defence of euthanasia of newly born babies with Down's Syndrome. [*Glanville Williams, "Down's Syndrome and the Duty to Preserve Life" (1981) 131 New Law Journal 1020*].

The thrust of the above discussion is that in determining questions of individual justice, judges must, from time to time, revert to the principles and try to elucidate them as occasion demands. At the present day, it is idle to debate whether the courts make law. In fact, about a hundred years ago, Stephen, the greatest jurist in the field of criminal law, pointed out that "every decision on a debated point adds a little to the law, by making that point certain for the future. Indeed, whichever way this case may be decided, it will settle the law upon the precise point involved, and it is this which gives to judicial decisions their great importance." [*Coney, (1882) 8 Q.B.D. 534, 550, 551*].

CONTEMPT OF COURT

Sources of the law

The law relating to contempt of court in India is derived from two sources. In the first place, the Constitution, in Articles 129 and 215, vests the Supreme Court and the High Courts with the power to punish a person for contempt of the respective court. Secondly, the Contempt of Courts Act, 1971 punishes contempt of court as defined in that Act. The constitutional jurisdiction is not subject to any statutory limit and is expressly saved by the Act of 1971. The statutory jurisdiction flows from the Act of 1971, which has been enacted by Parliament under the Constitution, Seventh Schedule, Concurrent List, Entry 14 and Union List, Entry 77.

History

Before independence, there was in force the Contempt of Courts Act, 1926 which, after independence, was revised and re-enacted in 1952 [S. Natarajan, A History of the Press in India (1960), pages 14-20]. Because of certain complaints received against the Act of 1952, and also in view of the constitutional guarantee of freedom of speech under article 19(1)(a), it was considered necessary to re-examine the law [For a History of the Act of 1971, see 73 Calcutta Weekly Notes 21 (Journal)]. A Committee with the late Shri H. N. Sanyal (the then Additional Solicitor General) was appointed to review the law [Lok Sabha Debates (1968), vol. 41, col. 987]. The Act of 1971 is largely based on the report of that Committee (1963). Incidentally, it may be mentioned that Article 19(2) of the Constitution expressly saves from attack a law made by the competent legislature which imposes reasonable restrictions on the freedom of speech and expression in the interests, *inter alia*, of prevention of contempt of court [*See State* v. *Brahma Prakash*, A.I.R. 1950 All. 56; *State* v. *Editors etc. of Matrubhumi*, A.I.R. 1955 Orissa 36, 41. See 10 C.A.D. 394 to 401].

Rationale

The rationale of the law of contempt was lucidly described by the Supreme Court [E.M.S. *Namboodripad* v. *T.N. Nambiar*, A.I.R. 1970 S.C. 2015, 2018, para. 6.] in the following words:

> "The law of contempt stems from the right of the courts to punish, by imprisonment or fines, persons guilty of words or acts which either obstruct or tend to obstruct the administration of justice. This right is exercised in India by all courts when contempt is committed *in facie curiae* (in the face of the court), and by the superior courts on their own behalf or on behalf of courts subordinate to them even if committed outside the courts. Formerly, it was regarded as inherent in the powers of a Court of Record, and now, by the Constitution of India, it is a part of the powers of the Supreme Court and the High Courts. There are many kinds of contempts. The chief forms of contempt are - insult to judges, attacks upon them, comment on pending proceedings with a tendency to prejudicing fair trial, obstruction to officers of courts, witnesses or the parties, abusing the process of the courts, breach of duty by officers connected with the court and scandalising the judges or the courts. The last form occurs, generally speaking, when the conduct of a person tends to bring the authority and administration of the law into disrespect or disregard. In this conduct are included all acts which offend its dignity, affront its majesty or challenge its authority. Such contempt may be committed in respect of a single Judge or a single court, but may in certain circumstances, be committed

"in respect of the whole of the judiciary or judicial system."

Object

As to the object of the law, one may take up a fairly recent case [*National Textile Workers' Union* v. *P.R. Ramakrishnan*, A.I.R. 1983 S.C. 759] in which the person charged with contempt made serious allegations against Judges of the Madras High Court. The comment in question attributed improper motives to the judges. The Supreme Court held that the allegations were not justified. It pointed out that the parties to a case have as much a right to redress at the hands of the court, uninfluenced by external pressure, as the press has the right to publish its comments. The Supreme Court emphasised that the object of the law of contempt was not so much to protect individual judges, as to protect the institutions of the judiciary, so that these institutions may be able to discharge their duties prescribed by the Constitution and the law.

Protection of the judiciary

In an earlier case, [*In re S. Mulgaokar*, A.I.R. 1978 S.C. 727] the court stressed the need to maintain a harmony between two competing constitutional values - the right to criticise freely (a right vested in all citizens under Article 19) and the need for a fearless judiciary and fearless judicial process (a value that must be protected in the interest of the public). The court made a distinction between honest criticism of the judiciary - from which the judiciary cannot be immune - and criticism based on obvious distortion of facts or gross mis-statement in a manner which seemed designed to lower and destroy public confidence in the judiciary.

Press Commision

The matter was considered by the Second Press Commission in 1982, [Second Press Commission, Report (1982), page 19] which made the following observations

on the subject:

> "The Press does have the right, which is also its professional function, to criticise and advocate. The whole gamut of public affairs, including the administration of justice, is the domain for fearless and critical comment. But the public function which belongs to the Press makes it an obligation of honour to exercise this function only with the fullest sense of responsibility. Without such a lively sense of responsibility, a free Press might readily become a powerful instrument of injustice. The competing claims of the court to maintain its authority and of the freedom of the press to comment on matters of public interest must be reconciled. Without a free press, there can be no free society. Freedom of the press, however, is not an end in itself, but a means to an end of a free society. The independence of the judiciary is no less a means to the end of a free society and, in fact, the proper functioning of an independent judiciary puts the freedom of the press in its proper perspective. A free press is not to be preferred to an independent judiciary, nor an independent judiciary to a free press either. No judge fit to be one is likely to be influenced consciously except by what he sees and hears in court and by what is judicially appropriate for the deliberation. However, judges are human. There is the powerful pull of the unconscious. Since judges, however stalwart, are human, the delicate task of administering justice ought not to be made unduly difficult by irresponsible publication."

Civil contempt

Civil contempt comprises two species: disobedience to an order of a court and breach of an undertaking given to the court. In both the cases, it must be wilful. Where there is ignorance of the order of a court or a misapprehension of the correct position leading to unintentional breach, it would not be wilful. An "undertaking" is a promise given to the court by a party to a proceeding, not to do a particular thing. When the court accepts the undertaking, its order amounts to an injunction [*Gurumurthy* v. *Perumal*, A.I.R. 1936 Mad. 651, 652 (Varadachariar, J.)].

Criminal contempt

Under the Contempt of Courts Act, [Section 2(a), (b) and (c), Contempt of Courts Act, 1971.], "contempt" means civil contempt or criminal contempt. "Civil contempt" as already stated means wilful disobedience to any judgment or order of a court or wilful breach of an undertaking given by a person to a court. "Criminal contempt" means the publication of any matter, or the doing of any other_ act whatsoever, which --

(i) scandalises or lowers the authority of any court; or

(ii) prejudices or interferes with the due course of any judicial proceeding; or

(iii) interferes with, or obstructs, the administration of justice in any other manner.

Thus, criminal contempt of court comprises three species of conduct.

(1) Scandalising the judge

Under the first species of criminal contempt mentioned above, it is an offence to scandalise a judge or a court. One cannot publish any matter which creates an apprehension that the judge would not be

fair or able. One cannot impute improper motives to a judge. To say that the courts do not act on considerations of justice but are influenced by the lure of wealth and wine, is also criminal contempt, because it scandalises the judiciary [*Tyagi* v. *Gupta*, (1974) Cr.L.J. 428, para. 4 (All.)]. To express an opinion that one judge "toes the line" of another is a contempt, because it scandalises the judge [*Daphtary* v. *Gupta*, A.I.R. 1971 S.C. 1132].

Scandalising the court is, in substance, an attack on individual judges or on the court as a whole, with or without reference to particular cases, causing unwarranted and defamatory allegations on the character and ability of the judges. The conduct is punished as tending to create distrust in the popular mind and as impairing confidence of the people in the judiciary [*State of M.P.* v. *Revashankar*, A.I.R. 1959 S.C. 102, 104, 106, paragraphs 3, 7].

(2) <u>Prejudicing fair trial</u>

Criminal contempt under the second category (prejudicing fair trial) may take a variety of forms. For example, it is contempt (a) to deter a person from coming forward as a witness in court, or (b) to cause the parties to discontinue the proceedings by offering a threat, or (c) to publish an abuse against a party so as to compel him to discontinue the suit, or (d) to discuss the merits of a case pending in court.

Trial by newspaper

In the United States, the topic of "trial by newspaper" has been much discussed in the context of contempt caused by prejudicing fair trial. This matter has recently come up before the English courts also. No newspaper has a right to assume the role of an investigator and to suggest that the accused person against whom a proceeding is pending was, or was not, guilty of the offence charged. It is also contempt of court to discuss the merits of a pending civil case. Publication of the photograph of a person

when a question of identity may arise at the trial, is a contempt of court. It is also a contempt to misrepresent the evidence given in a pending case, if it may prejudice the mind of the public before the case is decided [*R.* v. *Evening Standard*, (1954) 1 All E.R. 1026, 1029]. The reasons why "trial by newspaper" is not allowed are manifold:

(i) it may influence the minds of those who may later become important witnesses;

(ii) it may compel the parties to discontinue the litigation;

(iii) it may prejudice the public as a whole, by evoking adverse reactions, and thereby impair the public confidence in the administration of justice;

(iv) it may inhibit other potential litigants from resorting to the courts of law.

The press has no special privilege [*Arnold* v. *K.E.*, (1914) 41 I.A. 149 (PC)].

An English case (trial by newspaper)

Contempt of this type is illustrated by the English case (1983) relating to Michael Fagan who was alleged to have intruded into the bedroom of the Queen [James Watson and Anne Hill, Dictionary of Mass Communications and Media Studies (1984), page 50]. Contempt charges were levelled against a few newspapers who had published certain particulars about the accused while the trial was impending. One of the newspapers, the *Sunday Times*, was fined. In the case of the other newspaper, the *Daily Star*, no punishment was awarded because it was found that publication of the matter in question was not deliberate but was due to the failure of the internal checks existing in the mechanism of the newspaper establishment.

Similarly, it is contempt to paint the accused

as a bad character or to publish his criminal antecedents [R. v. *Thomson Newspapers*, (1968) 1 All E.R. 208] or to publish a confession made out of court, while criminal proceedings are pending.

Communication with the judge

Sending a communication to a judge during the pendency of litigation to influence the decision of the judge in a pending case by commenting on the merits of the case, or by offering a threat to compel him to alter the opinion, is contempt of court. Of course, it is not contempt of court to express an opinion fairly on the merits of a case *after* it has been heard and finally decided [Section 5, Contempt of Courts Act, 1971].

Academic writings

Writing academically about a question of law does not amount to contempt of court, merely because the question discussed is at issue in some court. It will be extraordinary if academic writings on different questions of law regarding which several cases would be pending in different courts are considered as amounting to contempt. While considering such questions, freedom of speech must be kept in view [*V.V. Hanumantha* v. *K. R. Pattabiraman*, A.I.R. 1975 Ker. 30, 31].

There was a case relating to an article on the law of curfew published in the daily *Deccan Chronicle*. At the time the article was published, a writ petition regarding a curfew imposed by the Sub-Divisional Magistrate was pending in the High Court. It was held that the article did not cause any real danger of prejudice and no contempt had therefore been committed.

(3) <u>Contempt by interference and obstruction</u>

Interference with the administration of justice or obstructing it in any other manner is the third and last category of contempt. Such contempts are not ordinarily committed by newspapers. In any case,

this category presents no special complication.

Breach of undertaking regarding confidential documents

It would be pertinent to refer to an English case relating to breach of undertaking. In that case [*Harman v. Home Office*, (1982) 2 W.L.R. 338 (H.L.) (See Public Law, 1982)], confidential policy documents were disclosed on "discovery" to H, a solicitor, in the course of proceedings against the Home Office. H undertook not to use them otherwise than for the purposes of the proceedings. The documents were read aloud in open court. H allowed a newspaper reporter to inspect these documents for the purposes of writing an article critical of Home Office policy.

The Home Office complained that this amounted to breach of the undertaking and was a contempt of court. The House of Lords (by a bare majority) dismissed the appeal of the journalist and held that the disclosure of the documents to a reporter was a breach of an undertaking, implied by law, not to use documents disclosed on discovery for purposes collateral or ulterior to the conduct of the action in question. The undertaking did not terminate, once the documents were read out in court or admitted in evidence. Although anyone present in court was free to report whatever was read aloud, it was a civil contempt to allow a reporter to inspect or use the documents. The various views expressed in the House of Lords may be referred to. Lord Diplock observed that the principle that civil actions must be heard in open court is not intended to satisfy public curiosity or to facilitate public discussion of matters of public interest. A judge should be chary of allowing documents to be read aloud, when they are voluminous. Lord Keith of Kinkel observed that the implied obligation not to make improper use of discovered documents is independent of any obligation relating to confidentiality. Lord Roskill held that the undertaking implied on discovery protects litigants against wider publicity than is necessary for the proper conduct of the trial. Lord Scarman and Simon of Glassdale (dissenting) held it cannot be desirable

that public discussion of matters of public interest is to be discouraged or obstructed by refusing to allow a litigant or his advisers to use the documents in public discussion, once they have become public knowledge.

Defences : ignorance of pendency of proceedings

In certain situations, an act which may otherwise amount to contempt of court is not punishable. The Contempt of Courts Act, 1971 now provides that a person shall not be guilty of contempt on the ground that the matter published by him interferes with the course of justice in any pending proceeding, if, at the time of publication in a newspaper, he had no reasonable ground for believing that the proceeding was pending [Section 5, Contempt of Courts Act, 1971]. This exemption is, however, available only if the newspaper has been published in accordance with the Press and Registration of Books Act, 1867. But no discussion is allowed on a case known to be pending [*Haji Rashid Mohammed* v. *Ramanujam*, A.I.R. 1986 Mad. 119, 125].

Reporting of judicial proceedings

Publication of reports of judicial proceedings by a newspaper also requires discussion in this context. It has two legal aspects. On the one hand, publication of a fair and accurate report of the proceedings is lawful under the Contempt of Courts Act [Section 3, Contempt of Courts Act, 1971] and is a defence to a prosecution for contempt [Section 4, op. cit. This is subject to section 7]. A person cannot be guilty of defamation for publishing a fair and accurate report of a judicial proceeding or any stage thereof, if the reporting is not prohibited by specific law or by an order of the court [Section 499, Fourth Exception, Indian Penal Code]. On the other hand, however, if publication has been prohibited by the court or is forbidden by any enactment, then such publication amounts to contempt [Contempt of Courts Act, 1971, sections 4 and 7].

Fair comment on a court judgment as a defence

Connected with judicial proceedings is the question of comments on the judgments of courts. A person cannot be guilty of contempt of court for publishing any fair comment on the merits of any case which has been "heard and finally decided" [Sections 5, 6 and 7(1)(a), Contempt of Courts Act, 1971. See *Rama Dayal* v. *State of U.P.*, A.I.R. 1978 S.C. 921]. Thus, it is not contempt to comment on the correctness of a judgment on a point of law or fact, or on a question of sentence. But the comment must be fair. A critic cannot impute improper motive, or incompetence, or want of integrity to a judge. Nor can he allege that the judge had acted arbitrarily [*State of M.P.* v. *Revashankar*, A.I.R. 1959 S.C. 102; *Perspective Publications* v. *State of Maharashtra*, A.I.R. 1971 S.C. 221].

Further, this defence is available only if the case has been "heard and finally decided". The exact meaning of this requirement is somewhat illdefined. If one is to take into account the explanation given elsewhere in the Act as to when a judicial proceeding is said to be "pending", it would appear that before criticising a judgment, one must wait until the period of limitation for filing an appeal against the judgment has expired. And, if an appeal or revision has been already filed, one must wait until the appeal is heard and decided [Section 3, Explanation (a), Contempt of Courts Act, 1971]. In practice, no one waits for expiry of the limitation period.

Contempt against a judge

Next is the protection given in respect of a complaint made by a person against the presiding officer of a court to its superior court [Section 6, Contempt of Courts Act, 1971].

Truth not a defence

The Contempt of Courts Act saves a few other

defences [Section 8, Contempt of Courts Act, 1971]. But the truth of the allegation charged as contempt is not, in itself, a valid defence to a prosecution for contempt [*Courts* v. *Bansilal*, A.I.R. 1979 N.U.C. 96 (P&H)].

Punishment

Contempt of court under the Act of 1971 is punishable with simple imprisonment upto six months or fine upto two thousand rupees, or both. The trial is held before the High Court [Sections 10 and 12, Contempt of Courts Act, 1971]. If the accused makes an apology *bona fide* to the satisfaction of the court, he may be discharged without punishment, or, if punishment has already been awarded against him, it may be remitted.

Apology

Where a contempt has been committed and an apology is tendered, it is for the Supreme Court or the High Court (as the case may be) to decide whether the apology should be accepted. Generally an apology, to be acceptable, should be sincere and unqualified and tendered without undue delay [*L.D. Jaikwal* v. *State of U.P.*, A.I.R. 1984 S.C. 1374. (Apology cannot always discharge a contempt)]. A Supreme Court case may be cited in this context. A senior advocate, appearing for his client before a Special Judge, had made a written application to the Special Judge couched in scurrilous language, making the imputation that the judge was a "corrupt judge" and adding that he was "contaminating the seat of justice". A threat was also held out that a complaint was being lodged to the higher authorities that he (the Judge) was corrupt and did not deserve to be retained in service. This was done after the Advocate's client had been found to be guilty of corruption charge and sentenced to 4 years' rigorous imprisonment by the Judge. The High Court of the concerned State found the appellant Advocate guilty of having committed criminal contempt under section 2(c)(i) of the Contempt of Courts Act,

1971, after affording him full opportunity of hearing and imposed a sentence of simple imprisonment for one week and a fine of Rs. 500/- (in default to undergo a further term of simple imprisonment for one week). The Supreme Court declined to interfere or to set aside the sentence merely because the appellant advocate tendered a formal apology which, in any case, did not wipe out the mischief [*L.D. Jaikwal* v. *State of U.P.*, A.I.R. 1984 S.C. 1374].

LAW OF TORTS : RECENT DEVELOPMENTS

Recent developments in the law of torts have been noticeable, both in point of quantity and in point of quality. Quantitatively, tort litigation in India is now increasing. It is true that much of it is not labelled under the head of "tort", and it may also be true that controversies which ultimately manage to reach the High Courts are still small in number. Nevertheless, one should not forget that citizens' awareness of the possibility of getting monetary redress from a wrong doer is gradually increasing; and this points to the practical possibility that the law of torts should no longer be regarded as confined to the realm of theory. In the following few paragraphs, attention is proposed to be drawn to some of the important developments.

A little bit of history is very relevant. Torts as a separate branch of law came to be recognised only in the second half of the 19th century. The first American Treatise on Torts (Hillard) appeared in 1859. Addison's work on the subject was published in England in 1860. At that time, while reviewing an abridgement of Addison for use in the Harvard Law School, Holmes said: "We are inclined to think that torts is not a proper subject for a law book". [*G. E. White, Tort Law in America: An Intellectual History [Oxford University Press, 1980] reviewed by Norman Marsh in [1981 April] Vol. 30, I.C.L.Q. pages 486 to 488*]. The situation now is quite different. Cases in the law of torts have become staple diet for lawyers and academics. Though starting as a technical branch of law - technical, because originally much depended on the choice of remedy - this field is now attracting the interest of non-legal disciplines. Thus, economists are interested in the law of torts where it deals with compensation for accidents. Those interested in loss prevention are involved in its study, because of the extensive and intensive pre-occupation of torts with safety regulations and their breach. Men and women concerned with the media have always found it necessary to cultivate some acquaintance with the

law of defamation and the supposed tort of privacy. Organisations interested in the family as an institution are concerned with causes of action as between the spouses. Men of business and of the learned professions are very much concerned with the nascent civil wrong of breach of secrecy which, though having its genesis in doctrines of equity, might also have some flavour of the law of torts. Of late, environmental disasters which, unfortunately, seem to be episodes of frequency, have unavoidably resulted in focussing attention upon some topics of tort law, such as, liability for nuisance, liability for dangerous activities, representative actions and so on. In this manner, the subject has crossed the boundaries of its own narrow discipline and attracted the eyes of many others. It is no longer true to say that an ordinary judicial officer sitting in a remote corner of the country will never come up to have an encounter with the law of torts.

Juristically, the law of torts is non-statutory law. Developing as it did entirely on case law, it is largely the result of judicial law-making. It presents (or should present) rules which are sufficiently flexible to allow for the particular circumstances and yet so rigid that lawyers may predict what the decision may be, and men may guide their own conduct by that prediction. Thus, its rules have a certain amount of elasticity.

Coming to some of the concrete topics, one should draw attention, at the outset, to the tort of negligence. Commonly, it is described as the breach of duty to take care, in circumstances where such a duty is recognised by law, causing damage to body, mind or property. For a long time, liability did not come to be attributed unless the wrong doer had acted intentionally or had shown lack of reasonable care. But the Industrial Revolution (and certain other events) brought in their wake the doctrine of "strict liability", according to which a person may become liable for the wrongful consequences of an unintended act, and the liability would be irrespective of negligence, though it would be subject to certain exceptions. Those exceptions themselves would become

irrelevant if one votes for the theory of "absolute liability" - which is supposed to have been adopted in India by the Supreme Court in its judgment in *M.C. Mehta v. Shri Ram Fertilisers*.

The above paragraph was concerned with the conversion of negligence into still higher *degrees* of liability. But even negligence itself, in the traditional sense, is now coming up before the courts in India. There have been legal proceedings claiming damages against negligent doctors, negligent para-medical staff, negligent engineers, and persons similarly placed. More than one case has been reported on compensation recovered for the negligent placing of electric cables, resulting in death or personal injury. Mention was made above of strict liability and this has now been introduced in India to a limited extent for accidents caused by motor vehicles. The key provision is section 92A of the Motor Vehicles Act, 1939. This represents what is commonly known as the "no fault" system of compensation for personal injury incurred in traffic accidents. Since compensation is the undisputed aim of the law of torts, this scheme aims at the more efficient and just distribution of loss.

It may also be pertinent to mention that certain parts of tort law have been invaded by statute, such as Workmen's Compensation Act, the Motor Vehicles Act (already mentioned) and so on. Besides this, there is a tendency to create special tribunals, away from the courts, for dealing with injuries caused by special categories of accidents. The legislation soon to be enacted regarding claims against railways for railways accidents is the latest example.

Apart from negligence, the law of defamation is now gaining attention. As literacy increases, the circulation of newspapers and periodicals will go up in number. Along with this, there is the increased political and social tempo in the country. All these developments create more possibilities of reputation being harmed in some form or other. For this reason, there seems to be an increasing interest in defamation as a tort.

Attention should also be drawn to the important question of governmental liability in tort. Broadly speaking, one can say that while the judges still pay homage to the doctrine that the State in not liable for torts committed by its employees in the exercise of sovereign functions, the distinction between sovereign and non-sovereign functions is losing its importance in practice because Indian courts now treat many activities of the Government as non-sovereign.

SCIENTIFIC AND MEDICAL EVIDENCE

The literature of crime is replete with exciting, even dramatic, illustrations of scientific detection of crime. Lay persons do not yet realise the fantastic variety of techniques of science, employed in crime detection, as well as the vast range of questions that come up for solution by scientists. Did the victim die of poisoning? Are the blood stains on clothes those of the offender, rather than of the victim? What was the kind of gun used for firing a shot and what were the distance and direction from which the bullet was fired? These are some of the questions that arise where murder is suspected. If the offence suspected is rape, some of the scientific questions that may arise relate to samples of hair, samples of clothing and various body substances and fluids. If, it is a case of typewritten forgery, the expert has to determine the question whether the forged document was typed on the typewriter seized from the accused.

Detective in fiction and in real life

Scientific detection of crime is a comparatively modern development. The actual word "detective" was coined by Charles Dickens. In his novel *Bleak House*, Tulkinghorn introduced Inspector Bucket as "a detective officer". That was in 1852. The first great "detective", Poe's Dupin, had been in existence more than ten years, by that time. Poe's invention of a detective who solves his cases by reasoning (in the year 1840) was a precognition of the future. In real life, two decades were to pass before the first "real detective" case in British criminal history was reported. That was the "mystery of Road Hill House". This began on 30 June, 1860, when the nurse-maid in an upper class English family discovered that four year old boy Francis Kant was missing from his cot. Later, the body of the boy was found stuffed down a lavatory in the garden, the throat cut from ear to ear. Inspector Whicher from Scotland Yard decided,

after investigation, that the likeliest candidate for the murder was the daughter of the house, Constance. She was 16 years old and a step-sister of the boy. She had been deeply jealous of her step-brother. One year ago, she had completely uncovered the child in his cot, to give him pneumonia. An important evidence against Constance was her bloodstained nightdress, which had somehow disappeared. Later, she confessed to the murder of her step-brother and was convicted. She spent next 30 years in prison. It is reported that she lived to be a hundred and died, in 1944, in Sydney, after having led a blameless life, as a 'nurse' for more than half a century. Inspector Whicher inspired Wilkie Collins, the English novelist, to create Sergeant Cuff, the detective hero of the novel *Moonstone*.

Criminals, and their traces

The principle behind all scientific detection is a relatively simple one. 'Every contact leave a trace', that is to say, a criminal always leaves something at the scene of his crime and, conversely, he takes something away with him. Thus, a murderer may leave a body and take away a splash of the victim's blood. A person who has committed rape may carry off hair on his clothing. Post-mortem examination of the body of the victim of an offence, is centuries old. The Roman Antistius is said to have performed a rudimentary examination of the corpse of Julius Caesar. He noted 23 stab wounds, and announced that only one wound (through the heart) had been fatal. The honour of being the first true forensic pathologist is attributed to the Greeco-Roman physician Galen (130-200 A.D.), who performed a number of autopsies. Incidentally, he quotes a curious case handled by a fellow doctor, who saved a woman from punishment for adultery. The woman bore a child who looked so unlike her husband, that her husband pressed charges of adultery against her. The doctor was called in. He examined the woman's bedroom and pronounced that the child took his appearance from a statue, that stood by the mother's bed in the bedroom. The doctor said that the woman had looked on the statue too frequently during her pregnancy and this had affected the features of her unborn baby.

Forensic medicine throughout the world

In the Western world, Vesalius (1543) is regarded as the pioneer of anatomy and dissection, as applied in the service of detection of crime. But it must be mentioned that in 1248, an enormous book appeared in China (*Hsi Yuan Lu*) which narrated several methods of examining victims of homicide and assault, with a view to bringing charges against criminals. Incidentally, the author of the above work suggests that blood circulates in the body - a theory which predates, by centuries, the famous discovery of Harvey. In the West, certain disciples of Vesalius (from Paris, Palermo and Rome) in the 16th century, made a particular study of the vital organs of victims of crime. They were followed by Morgagni, usually known as the father of modern pathology. Morgagni instituted a system of carefully describing the results of post-mortem examination. Those were also days of infanticide practised on a large scale in Europe. This kindled particular interest as to the methods of determining whether a child had been born alive. In 1663, the Danish Surgeon Thomas Bartholinus devised one of the first scientific tests in legal medicine. He announced that the only method of determining whether a child had or had not been born alive, was to examine the lungs of the child for air. If the child had breathed, then it had been born alive and the corpse must be treated with suspicion.

The University of Leipzig in Germany was the first University to begin a systematic course in forensic medicine (1642). The Universities of Paraque and Vienna followed suit, though they combined the subject of forensic medicine with public hygiene. The Code Napoleon (1808) threw open the procedures of European courts for public examination. The work of the medical examiner came to be recognised. In Britain, legal medicine was first taught at the Edinburg University (1801), which still leads in the teaching of the subject. The lectures were started by Andrew Duncan, whose son (also named Andrew) became Edinburg's first Professor of Forensic Medicine.

Forensic science is not always exact. In Europe, the holder of the chair of forensic medicine at Lyons

University, Professor Lacassaque, coined a phrase which is still taught in forensic science establishments. "One must know how to doubt".

The case of Helen Priestley

It is not all medicine or surgery. The last century saw the development of the science of finger prints, as also the scientific examination of hair, fluff - even of household refuse. How useful such examination can become is illustrated by an incident in 1934. In Aberdeen (Scotland), a murder mystery which hit the headlines was solved by the examination of hair. An eight year old girl named Helen Priestley, was murdered and her dead body traced near the water closet on the ground floor of the tenements where she had been living with her parents. The body was lying in a sack, fully clothed, except for knickers and beret. Rigor mortis had set in. There was blood on her thighs and the private parts were seriously injured. It was suspected that the girl had been subjected to rape followed by murder. The police began questioning all the men in the eight flats which made up the apartments, but no clues could be found. An examination of Helen's stomach revealed her last meal of meat and potatoes, taken at half past twelve, and the digestive changes showed that death had taken place, not later than two o'clock in the afternoon. This changed the entire course of investigation. At two in the afternoon, the male inhabitants of the apartments were all out at work. An examination of the girl's organ showed that the injuries had been caused by a sharp stick of some kind. So, it was not a case of rape, but someone had tried to make it look like rape. The police now started suspecting females. The neighbour of the girl was the Donald family, with whom the girl's family had very bitter relationship for years. Further inquiries by the police revealed that about 2 p.m. a child's scream had been heard from Donald's house. Mr. Donald himself was out at work at that time, but Mrs. Donald had remained in her cell. A famous forensic scientist, Sir Sydney Smith, was then called in for help. He concentrated on two lines of investigation:

1. Were there any items on the girl's body, which could be linked with the Donald household?

2. Were there clues in the Donald household, which had so far been overlooked and, which could be linked with the girl's body?

Sir Sydney Smith examined, with minute care, the sack containing the girl's body. The sack was used for shipping foodgrains. Five similar sacks were found in the flat of Mr. Donald and all of them had holes in one corner, as had the "murder" sack. Inside the murder sack, there were hairs. This discovery was crucial, because they were *not hairs of the murdered child*. They had a remarkable irregularity of colour and had many defined twists caused by careless artificial waving. Sir Sydney decided to get the hairs found in the sack compared with Mrs. Donald's. This had to be done tactfully as she would not herself give samples. It was achieved by obtaining Mrs. Donald's hair from a brush supplied to her while she was in prison after her arrest. It was found that Mrs. Donald s hair had exactly similar characteristics and a similar waving distortion. Further, the fluff found in the sack contained fibres of two hundred different varieties - all tallying with samples taken from the Donald's household.

Scientific evidence thus established Mrs. Donald's association with the crime. Further confirmation was obtained by another type of scientific evidence. Bloodstains found on various items on the flat of Donald were examined. They were all of the O group, which was the child's group. It was *not* the group of Mrs. Donald. After a trial of five days, Mrs. Jennie Donald was convicted of the murder of Helen Priestley. She was sentenced to death, but the Crown commuted the sentence to life imprisonment.

Blood stains

In the above episode, hair played an important part, alongwith other scientific evidence. Equally exciting is the study of blood examination. It is possible to say that a particular blood-stain did not come from a given source. This position became

crucial in a case which occurred in Britain in the early seventies. A man was alleged to have raped a girl. When the man was arrested, there were bloodstains on the lining of his mackintosh. The man denied having assaulted the girl and claimed that the blood on the rain coat was his own. A forensic scientist examined the blood stains on the mackintosh and found them to be of a female. The man was convicted of rape In most cases, it is possible to detect the "sex" of a blood stain, as the white corpuscles of females show minute drumstick-shaped marks when examined microscopically, which are absent from the blood of males.

Criminals try to remove blood stains, but they do not always succeed. In one case, blood was detected, 60 days after the crime, in shoes that had been washed and then regularly worn. Since Cain slew Abel, split blood has borne mute testimony in crimes of violence. It was in 1900 that Landsteiner, the Viennese doctor, discovered the various groups of blood and won the Nobel Prize. Since then, serology has made immense strides. Serological examination now yields answers to the following questions:-

(1) Is the substance detected blood or is it any other material?

(2) Is it human blood?

(3) What is the group of the blood?

(4) What is the organ from which the blood came?

Conclusion

Scientists at Aldermaston in England can now detect tiny traces of substances, such as LSD in samples of urine. There is being devised a system which can detect whether an individual has recently fired a gun or caused a bomb explosion. This is by examining the traces of nitrates on his hands. There can be no doubt that science is increasingly entering the domain of law. Of course, the decision is still of the judge, and not of the scientific expert. Guilt

must be proved. It is not always possible to link the available vestiges of crime to the author of the crime. But the methods of research into facts, as available and actually employed in modern times, show that we have travelled far beyond the magical notions of primitive times, or the era of ordeals by fire, ordeals by water and ordeals by poison.

Criminalistics

The facets of scientific aids to crime detection, mentioned above, show the practical importance of the emerging science of criminalistics. The methods and techniques of investigation vary; and so do the materials upon which the methods are employed. The materials can consist of the following:-

(a) traces, markings and strains;

(b) firearms and ammunition;

(c) explosives and fires;

(d) documents, currency notes and works of art (particularly when there is an allegation of forgery);

(e) substances derived from human body superficially, or impressions taken from the human body;

(f) substances derived internally from the human body (for example, body fluids); and

(g) non-human objects (dust, fluff, food, poison, soil, water and other substances).

But the apparent diversity of the material to be studied hides a profound unity. This has been pointed out by an eminent scientist (Ceccardi, Professor of Forensic Medicine at the Paris University). The single objective of the forensic scientist is the search for "material evidence" - often called "real evidence".

The legal significance of scientific evidence

Of course, the evidence collected or analysed by the scientific method has to be absorbed into the stream of testimony in court. This has to be done through the oral evidence of witnesses or (in exceptional cases) through reports of scientific experts taken on the file. The evidence and reports of an expert consist of (i) facts observed by the expert, and (ii) opinions formed by him. Opinions on matters of science, art, finger impressions etc. are admissible under section 45 of the Indian Evidence Act. But the value of the opinion of an expert depends upon the qualifications and experience of the particular expert, the material collected by him, the methods employed by him, and the reasoning by which he has sought to support his opinion.

The approach

The general method of scientific search and proof through material evidence is based on two principles - (i) resemblance, and (ii) probability. The object of resemblance is to establish identity. The object of probability is to establish certainty. Resemblance is qualitative. As the same cause produces similar effect, resemblance tries to reason backwards from effects to causes. For example, similarity of markings on two or more bullets gives rise to the inference that the bullets were from the same barrel. Probability is quantitative and depends on statistics.

Methods

The methods used by the scientist are (i) optical, (ii) biological, (iii) chemical, and (iv) electronic.

(i) Optical methods include photography, microscopic examination and spectrometry (measurement of radiation).

(ii) Biological methods include cytology (study of cells), immunology (study of blood etc.), enzymology

and microbiology (particularly, study of fungus and bacteria).

(iii) Chemical methods include microscopic chemistry and spot reactions.

(iv) Electronics are the latest to develop and are particularly useful in legal proceedings relating to computers.

CROSS-EXAMINATION

Cross-examination is a topic on which there is not much of law, but which is practically the most important part of the criminal trial. Throughout the centuries, it has been invested with a certain amount of romance and glory and learned books have been written, mostly about some brilliant cross-examinaters in history such as Edward, Marshall Hall, Jowitt and many others. At the same time, the lay citizen who has to face it as a witness has found it to be a terrible experience, often a humiliation and, in all cases, an unpleasant episode. A great master of logic and philosophy, Bishop Whately, made the following adverse comment:-

> "I think that the kind of skill by which the cross-examiner succeeds in alarming, misleading, or bewildering an honest witness may be characterised as the most, or one of the most, base and depraved of all possible employments of intellectual power."

To some extent, the unpleasantness of this experience lies in the roles of the respective participants in the process. To the witness, it appears that he should tell the truth as he knows it to be. But to the cross-examiner, it is the cause of his client which is dear, and, to advance and promote that cause, namely, the success of his client, he must do all that he can. In the zeal for achieving that objective, counsel often forget some of the decencies of behaviour which a citizen will expect him to observe, and the impression gathers that the courtroom is one place where these decencies could be thrown overboard.

So far as the law goes, there is no much of it on the subject of cross-examination. The right to cross-examine a witness arises both from the Evidence Act and from the Codes of Procedure. In the Evidence Act, the definition of "examination of witnesses"

makes it clear that a witness is first examined in chief by a party calling him, then cross-examined by the opposite party and then (with the permission of the court) re-examined by the party calling him. This, of course, is only a bare statement of the position. The real distinction between examination-in-chief and cross-examination lies in the kind of questions that are permissible only in cross-examination. In the scheme of the Evidence Act, as indeed, in the scheme of the laws of most countries, two kinds of questions are peculiar to cross-examination, because they can be asked only in cross-examination, as a rule. First, there is the important proposition of law that leading questions can be asked only in cross-examination. Secondly, there is the proposition that in cross-examination, questions can be put to shake the credibility and impeach the character of the witness, which cannot be put in examination-in-chief. The second proposition opens up a very vast area for the range of cross examination and it is in this sphere that there is a possibility of abuse. It should be noted that an attack on the character of a witness under examination is not confined to an attack on truthfulness or integrity or honesty, but may extend to any facet of the witness's character. As will be shown later, the width of latitude allowed to the cross-examiner has been the cause of serious discontent amongst the lay public, and many law reformers have set to themselves the task of limiting this latitude, so as to prevent undue harassment to witnesses. It has been said of a famous English advocate, Sir Patrick Hastings, that while he was the finest cross-examiner in England in the present century, yet, all too often, he was guilty of ruthless and gross discourtesy. Because of his eminence as counsel, his methods often went unrebuked. An instance of his method is available in the cross-examination that took place in the libel suit brought by Harold Laski against the *Newark Advertiser* and Parlby. Laski was Professor of Political Science at London University and was also Chairman of the National Executive Committee of the Labour Party. In 1945 June, at the height of the General Election, he had addressed a crowd of over 500 persons from the back of a lorry in the marketplace of Newark in Nottinghamshire, in

support of the local Labour candidate. After his speech, a journalist asked Laski why Laski had openly advocated revolution by violence on two occasions. The paper *Newark Advertisers*, edited by Parlby, reported Laski's reply as stating: "We shall have to use violence even if it means revolution". Laski maintained that he had not spoken of violence, but only of revolution by consent. He sued the newspaper and its editor for libel. The defence took the plea that the report was a fair and an accurate one of the proceedings of a public meeting and the defence was accepted by the jury at a trial presided over by Lord Goddard, then Lord Chief Justice of England. For the defendants, Sir Patrick Hastings K.C. appeared. One of the witnesses of Laski was Air Vice Marshall Sir Hugh Vivian De Crespigny who was the Labour candidate and was present in that role in the meeting addressed by Laski. The following is the whole of his cross-examination by Hastings:-

"*HASTINGS*: Do you recognise this expression: 'It did not lie in the mouth of any member of the Tory party, who helped to organise mutiny in the British Army over Home Rule in 1914, to discuss the question of violence'? Do you remember anything like that being said by anyone?

SIR HUGH: No, I do not. That does not mean to say that it was not said.

HASTINGS: Many things may have been said that you did not hear?

SIR HUGH: Sir Patrick....

L.C.J.: Will you try and answer the question. Yes or No. We really must try and get on with this case.

SIR HUGH: There was nothing vital that I would not have heard.

HASTINGS: If you did not hear it, how do you know whether it was vital or not?

SIR HUGH: I must ask your permission to elucidate this so as not to give the wrong impression.....

HASTINGS: No, thank you (sitting down).

SLADE: I have no questions in re-examination."

In contrast, of course, there have been counsel who do not wish to overstep the limits of decency. Thus, it is stated that Marshall Hall, defending a prisoner accused of murder (Robert Wood), refused to embarrass a young prostitute (who gave evidence against the accused) by asking her about her life. Instead he obtained the evidence which was needed for the purpose by questioning the police officer about her.

These aspects naturally raise the question about the limits of cross-examination. The Evidence Act, while permitting the cross-examiner to put questions to shake the credibility of the witness, does give certain rules on the subject. It makes a distinction between questions which are relevant as connected with the matters in issue and questions which are admissible only for impeaching the credibility of the witness. The Act expects that the second type of questions shall not be asked by counsel without proper instructions. It also provides that if such questions are improperly asked, the matter may be reported to the proper authority for disciplinary action. Though this rule is not observed in practice, it is worth remembering the rule, because experience shows that if the presiding judge insists on enforcement of the rule, counsel will not pursue the matter further. Besides this, section 152 of the Evidence Act concentrates on the form of putting a question. It provides that the court shall forbid any question which appears to it to be intended to insult or annoy or which, though proper in itself, appears to the court needlessly offensive in form.

The question often arises as to contradicting a witness who, in cross-examination about character, rufuses to admit a fact alleged to have a bearing

on his credibility. It may be recalled that section 146 of the Evidence Act provides that when a witness is cross-examined, he may, in addition to the questions otherwise permissible, be asked any questions (1) to test his veracity, or (2) to discover who he is and what is his position in life, and (3) to shake his credit, by injuring his character, although the answer to such questions might tend, directly or indirectly, to criminate the witness or might expose or tend directly or indirectly to expose him to a penalty or forfeiture. At the same time, section 153 of the Act provides that when a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but if he answers falsely, he may afterwards be charged with giving false evidence. The position can be illustrated by taking the case of a woman who alleges that she has been raped. As the law in India stands at present, she can be put questions about her previous sexual intimacy [i] with the accused (to show likelihood of consent) or (ii) with third persons (to impeach her character). But if she denies any acts of sexual intimacy voluntarily indulged in by her with other men, the cross-examiner is "bound by her answer" and cannot call evidence to substantiate the suggestions made to her [Du Cann, *The Art of the Advocate* (Penguin Books 1986 Reprint), page 100]. The reason of the rule is that questions asked with the sole object of shaking the credit of the witness bring in their trail many matters, relevant or irrelevant, including matters foreign to the inquiry. Allowing the parties to adduce evidence to contradict such matters which are foreign to the issues in the inquiry may draw away the parties from the real controversy [I.L.R. 6 Bom. 93; A.I.R. 1928 P.C. 54].

This naturally leads to the important question as to the admissibility of character evidence in court. In civil cases, the character of a person may become relevant if it affects the amount of damages which he ought to receive (Section 55, Evidence Act). Thus, in civil actions for damages for defamation, the bad character of the plaintiff will mitigate the quantum

of damages, even if he has succeeded on the point of actionability of the libel. In actions for breach of promise of marriage, evidence of character of the plaintiff would be of the highest importance by virtue of this provision. Incidentally, it may be mentioned that contrary to the misconception which prevails amongst many lawyers, a suit for damages for breach of promise of marriage is permissible in India even though this action has been abolished in England by statute [*Prema* v. *Mustak Ahmed*, A.I.R. 1987 Guj. 106, 112 (May); *Maung Sain Qui* v. *Maung Sain Qui*, A.I.R.1916 Lower Burma 45].

In criminal prosecution, the general rule is that the good character of the accused is always admissible but evidence of his bad character can be given only if the defence has first adduced evidence about good character, so that evidence of bad character is needed to rebut the defence evidence. However, in some exceptional cases, evidence of the bad character of the accused may be given substantively - for example, when the bad character itself is a fact in issue (as in cases relating to taking of bond for peace or good behaviour) or such evidence may be needed to help the court in determining the proper sentence or the advisability or otherwise of release of the accused (if convicted) on probation or after due admonition.

There is considerable popular dissatisfaction as to the limits of cross-examination in rape cases. By virtue of the general rule that questions may be put to any witness about her character so as to impeach her credibility, it follows that a woman can be put questions in cross-examination about her prior sexual intimacy. The most important witness in a rape case is the complainant herself. Broadly speaking, evidence about her prior sexual intimacy with the accused himself on prior occasions is sought to be adduced to show that in the instant case also the act was committed with her consent. On the other hand, questions about her prior intimacy with other persons have a different aim. The objective here is to impeach the credit of the witness. Since questions as to character under this head are not (by the text of

the statute) limited to attacks on truthfulness in the narrow sense, this leaves open a wide scope for ransacking the entire past life and character of the complainant in a rape case. The matter can be remedied only by legislation. Incidentally, it may be mentioned that such an amendment was recommended by the Law Commission in one of its Reports, though it has not yet been found possible by the Government to implement this particular recommendation. A reform of the law on the above lines has been implemented in many Western countries, including England. Of course, this is not to say that reforming statutes themselves are perfectly drafted. In England, questions about her sexual history with third persons can, under the amended law, be put only with the permission of the trial judge. Even this reform has not worked satisfactorily. But in any case, the matter is worth attention.

Of course, so far as questions about the actual incident of rape and the victim's behaviour as indicating consent are concerned, these questions would be directly relevant to the issues. However unpleasant the experience may be, this is unavoidable. It is often stated that whether the trial for rape ends in conviction or acquittal of the accused, the "judgment of the public" on the victim will always go on. In this sense, the trial is not really of the accused, but of the victim herself. This will be the position, even if the courts (as they have done recently in India) adopt a liberal attitude about the need of corroboration of the victim of the rape. Also, it is often overlooked that violence is not the essence of rape and so far as the victim is concerned, violence or no violence, the fear, the distress and the trauma of rape or attempted rape may be as grave in non-violent rape as in violent rape. Of course, the infliction of bodily injuries on the victim or subjecting the victim to prolonged terror ought to be a ground for aggravated punishment.

PROBATION OF OFFENDERS ACT

The statute

One of the little known enactments on the Indian statute book is the Probation of Offenders Act, 1958. Before 1958, the release of offenders on probation used to be dealt with, either under section 562 of the Code of Criminal Procedure, 1898 (then in force) or under Probation Acts enacted in some of the provinces/states. On the enactment of the Probation of Offenders Act, 1958, and on the commencement of that Act in a particular State, the State Act would cease to be in force. So far as section 562 of the Code of 1898 is concerned, it is now replaced by the Code of 1973 but its applicability is in very limited areas (for probation).

Some misconceptions

Some misconceptions exist as to probation. Probation is always preceded by conviction, but is not accompanied automatically by sentence. The "probation" is a probation of good conduct; and the release is in substitution for sentence. In some cases under the Act, the release can be ordered on admonition. The Act has been described rightly as a reformative measure. However, this does not mean that there is no conviction and it does not mean that there is any undue leniency towards the offender. A finding of guilt is the first pre-requisite of release on conviction, both under section 3 and under section 4 of the Act, and this is clear from the words "when any person is found guilty....." which occur in both the sections, in the very beginning. Another misconception that prevails is regarding age. Here, one should make a distinction between one group of sections (sections 3 and 4) and another group of sections (section 6). Many Magistrates have the impression that where the offender is not a young person, release on probation is not appropriate. This impression would be dispelled if one bears in mind the distinction in the above mentioned groups of

sections. Admonition or probation is permissible for a person of any age, if the offence is one covered by section 3 or section 4. In the case of persons under 21 years of age, probation becomes mandatory under section 6, if the offence is punishable with imprisonment, but not with imprisonment for life. For such an offence, section 6 makes it mandatory that the convicting court shall not sentence him to imprisonment unless the court is satisfied that having regard to the circumstances of the case, including the nature of the 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 reasons. Further, if the offender is not to be released on probation in such a case, the court must call for a report from the probation officer and consider the report as well as any other information available to the court relating to the character and physical and mental condition of the offender. Thus, for a young person convicted of an offence punishable with imprisonment, but not with life imprisonment, the law prima facie makes probation *mandatory*. For other offenders, the law does not make it mandatory, but, nevertheless, it is the duty of the court to have regard to sections 3 and 4 even where it convicts an offender above 21 years of age.

Offences covered

The power under sections 3 and 4 is limited to certain offences. Broadly speaking, the court has power under section 3 to release on admonition for offences punishable with imprisonment for not more that two years or fine or both if there is no previous conviction. The power is also available under section 3 for offences under sections 379, 380, 381, 404 and 420 of the Indian Penal Code. In the case of offences not punishable with death or imprisonment for life, the convicting court may, having regard to the circumstances of the case, including the nature of the offence and the character of the offender, release the offender on probation. Before doing so, the court has to take into account the report of the probation officer. Probation order under section 4 may be

accompanied by a supervision order, itself accompanied by certain conditions to be included in a bond.

Conditions to be included in a bond

The contemplation of the law is that if the offender fails to observe the conditions of the bond, the court may sentence him for the original offence or where the failure is for the first time, then impose a penalty not exceeding fifty rupees. The bond under section 4 can be supported by surety, if the court so orders and can be forfeited for breach of conditions by the offender. The conditions of the bond can be varied by the court under section 8 after giving the offender and the surety or sureties an opportunity of being heard. If the conduct of the offender has been very good and the probation officer applies for the discharge of the bond, the court has power to discharge the bond accordingly, before its expiry.

Dismissal

One of the provisions which has caused some trouble is section 12, which may be quoted:-

> "12. *Removal of disqualification attaching to conviction.* - Notwithstanding anything contained in any other law, a person found guilty of an offence and dealt with under the provisions of section 3 or section 4 shall not suffer disqualification, if any, attaching to a conviction of an offence under such law:
>
> Provided that nothing in this section shall apply to a person who, after his release under section 4, is subsequently sentenced for the original offence."

A controversy exists as to whether a person released on probation can be treated like any other person (convicted and sentenced) in regard to dismissal from Government service. The controversy hinges on the important words "attaching to a conviction". The argument is often made, that since dismissal is not automatic, the case is not covered by section 12 and the dismissing authority, in its discretion, may still take into account the conviction, notwithstanding release on probation. This controversy can be resolved only by an amendment of the law.

Minimum punishment

More important is the controversy about offences carrying a minimum punishment. Decisions on this point have not been very consistent and an amendment of the law is needed.