LECTURES ON CONSTITUTIONAL LAW AND LEGISLATIVE DRAFTING

VOLUME I

INSTITUTE OF
JUDICIAL TRAINING AND RESEARCH
UTTAR PRADESH

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PREFACE

Legislative drafting is a highly specialised job. The equipment necessary for its performance includes awareness of constitutional parameters set around the legislative activity, a clear grasp of the legislative intent, expertise in the use of philological tools for precise effects and in the rules evolved to interpret them, and eye of a sage to forecast the probable situations, amongst others. Even if the expertise is a notch below perfection it can cause unmitigated misery to the large affected population, who may have to run from court to court to get the mischief of the legislation spelled out.

And yet no law school imparts any training for the job.

In most of the States the judicial officers are required to perform this task in the legislative departments. The Institute therefore took upon itself the function of providing training in legislative drafting. The first such programme was conducted in the month of January-February, 1988. Though the primary strategy consisted of actual exercise in drafting and discussion, yet the Institute also had the privilege of having distinguished jurists and expert draftsmen addressing the participants.

This volume contains the lectures delivered in the programme.

The first part has the speeches delivered at the time of the inauguration of the programme.

The second part contains the lectures on the constitutional topics.

Part three is a collection of lectures on various aspects of legislative drafting.

It shall be an immensely useful resource book on the legislative drafting.

The effort of Sri Pratyush Kumar, Assistant Director in charge of publications, in bringing out the book is commendable.

Lucknow
December, 1989

J.K. Mathur
Director
Institute of Judicial
Training & Research, U.P.

CONTRIBUTORS

1. Agarwal B.D. -Former Judge, Allahabad High Court : Ex-Additional Legal Remembrancer-cum-Special Secretary, U.P. Government
2. Agarwal K.C. - Acting Chief Justice of Allahabad High Court
3. Babu Dr. Moti - District Judge (Retd.) : Ex-Additional Draftsman-cum-Member of the O.L.(L)C.
4. Bakshi P.M. - Member, Law Commission of India
5. Banerji Amitav - Chairman Central Administrative Tribunal : Former Chief Justice of Allahabad High Court
6. Bhansali S.R. - Law Secretary, Government of Rajasthan
7. Goyal K.N. - Lokayukta of U.P. : Former Judge, Allahabad High Court : Former Director of the Institute of Judicial Training and Research, U.P. : Ex-Legislative Secretary, U.P. Government : Former Member Law Commission of India
8. Kumar Virendra - Judge, Allahabad High Court
9. Mahajan R.K. - Law Secretary Government of Himachal Pradesh
10. Mehrotra V.K. - Judge, Himachal Pradesh High Court
11. Narang N.K. - Additional Legal Remembrancer-cum-Special Secretary, U.P. Government
12. Sastri R.V.S. Peri - Chief Election Commissioner of India : Ex-Legislative Secretary, Government of India
13. Shukla B.C. - Secretary, U.P. Legislative Assembly : Ex-Joint Secretary (Law)-cum-Joint Legal Remembrancer, U.P. Government
14. Singh G.B. - Former Judge, Allahabad High Court : Ex-Legislative Secretary, U.P. Government
15. Singh K.N. - Judge, Supreme Court of India
16. Srivastava A.K. - Additional Legal Remembrancer-cum-Special Secretary, U.P. Government
17. Srivastava U.C. - Senior Judge at Lucknow, Allahabad High Court

WELCOME SPEECH BY MR JUSTICE K.N. GOYAL (RETD.) HONY. DIRECTOR, IJTRUP, AT THE INAUGURAL FUNCTION ON JANUARY 2, 1988

My Lord the Chief Justice, other Hon'ble Judges, Mr Peri Sastri, and friends,

It is my proud privilege to welcome you to this inaugural function on behalf of the Institute of Judicial Training and Research, U.P. I am extremely grateful to the Hon'ble Chief Justice Mr Amitav Banerji for the trouble he has kindly taken to be here in our midst today. His blessings and patronage and the willing co-operation of other brother judges have always been available to this Institute for which we are very grateful.

On my own behalf and on behalf of the members of the faculty and the trainees I must express my deep gratitude to Mr R.V.S. Peri Sastri who has kindly consented to inaugurate this training course. My own happy association with Mr Peri Sastri goes back to over 20 years. Prior to his elevation to the present post he held the post of Secretary, Legislative Department in the Government of India for over 10 years with great distinction. He is recognised as the ace draftsman of our country and a constitutional expert. Indeed he has been associated with the drafting of most of the Constitution Amendment Bills, and also of numerous intricate Finance Bills, apart from other important legislative measures. Very often he has had to produce complicated drafts within a matter of hours and yet to the complete satisfaction of everybody.

It was in the fitness of things that he has risen to the post of Chief Election Commissioner. This post, because of the requirement of independence and impartiality of a high order expected from its holder, has been held in the past as well by men of law : Mr K.K. Sundaram, Mr S.P. Sen Verma, Dr. Nagendra Singh, the last of whom has risen to the post of President of the International Court of Justice. Mr Peri Sastri's association with this course will be a source of inspiration and encouragement to the trainees and to members of the faculty.

So far as I am aware this is the first course of its kind in our country. We will be having guest lectures by sitting and retired judges of the Supreme Court and our own and other High Courts on selected topics of Constitutional Law. There will also be lectures on construction of statutes and on principles of legislative drafting. Our special emphasis will be on practical exercises, and group discussions on drafts. The trainees will also be doing their home work and preparing drafts in syndicates of four or five officers each, and for that purpose and also for study in the library we will be leaving the entire post-lunch period free for them. The Law Secretary Sri S.N. Sahai and Dr. Moti Babu, who are both veterans in Legislative Drafting, and other senior officers of the Legislative Department of U.P. as well as other States

are giving us their fullest co-operation in this venture and we are particularly grateful to them. We will also be acquainting the trainees with the technique and problems of bilingual drafting.

As per the suggestion of the Hon'ble Chief Justice expressed on the last occasion we have also invited officers from other States for this training programme. I cordially welcome the trainees who have come here from Madhya Pradesh, Bihar, Himachal Pradesh and even as far as Assam, Mizoram, Manipur and Tripura and from Central Government. We hope they will enjoy their stay here besides profiting from the course. We are having a one-week recess in between for enabling them as well as our own officers to go round the State and get acquainted with its cultural heritage and its flora and fauna.

The task of the Legislative Draftsman in India is far more difficult than the task of his counterpart in Britain who is subject to an unwritten unitary Constitution. In our country the legislative power is distributed between the Union and the States, and the draftsman in a State has to be even more circumspect than the draftsman at the Centre, the Centre's powers being superior to those of the States and the Centre having residuary powers as well. Moreover the draftsmen here have to take into account Part III of the Constitution relating to fundamental rights and Part IV relating to directive principles of State policy besides other constitutional restrictions like those contained in Articles 265, 300A and 301 to 304.

The work of any legal adviser to the Government, the more so that of the legislative draftsman, is unenviable. A judge in a court is assisted by two opposing counsel who are expected to place before him all the statute law and case law bearing on the subject. The judge can then protect himself by recording in his judgment that no other point was urged or pressed before him. No such alibi is available to a legal officer sitting in the Secretariat. It is for him to find out all the relevant Acts, rules notifications, and also judicial rulings bearing on the matter before him. He does not always get sufficient assistance from the administrative department to which he is entitled. He often has to do the spade work which is properly the function of the initiating department. He must also anticipate future situations in which the law may come to operate. He has also to anticipate the possible loopholes that persons who find the law inconvenient will try to find out. He has also to safeguard against abuse of law by the minions of the State. He must also show an awareness of the social and economic issues, the difficulties of the common man, the requirements of the administration. He must have a lively social conscience. The law he makes must not only be reasonable, fair and just, but should also appear to be so. His language must be clear, simple, unambiguous. In spite of all precautions he often finds to his mortification that the intention behind the law is frustrated by some short-coming or inexactitude which has escaped his attention. He is often lampooned in courts, and his draft is ridiculed. A satire has thus said :

I'am the Parliamentary Draftsman.
I compose the country's laws,
And of half the litigation
I'm undoubtedly the cause.
I employ a kind of English
Which is hard to understand:
Though the purists do not like it,
All the lawyers think it's grand.

The criticism of the draftsman is sometimes uncharitable. The draftsman has to develop a thick skin in that regard. He can take some comfort in the fact that others far superior to him have also not been spared.

There have been great names in legislative drafting. Lord Thring, Lord Macaulay, Sir James Fitzjames Stephen, Sir Maurice Gwyer (who had drafted the Government of India Act 1935 before being sent out to India to head the Federal Court), Sir B.N. Rau, Dr. Ambedkar, who gave us the Constitution and also the Hindu Code.

We have started some research projects with the help of Sri P.M. Bakshi, retired Member-Secretary of the Law Commission of India and Dr. Moti Babu. We are thinking of involving younger judicial officers and junior advocates also in our research projects, but plans in that direction are yet to be worked out. We will also be having refresher courses for senior Munsif Magistrates and senior Civil Judges: the matter is under consideration of the Hon'ble High Court. As part of a continuing training programme we have also planned to send useful reading material from time to time to all the judicial officers of the State. We are also thinking of organising workshops on subjects like environment laws and consumer protection laws. It is also proposed to develop expertise in the use of computers in our court work. We have got two of our officers trained in computer programming. Much preparation, is however, still required before anything concrete can emerge.

I will not like to stand any longer between you and the principal guests.

I thank you again for gracing this occasion by your presence.

INAUGURAL SPEECH OF MR R.V.S. PERI SASTRI, CHIEF ELECTION COMMISSIONER ON JANUARY 2, 1988

Hon'ble Chief Justice, Hon'ble Senior Judge Sri U.C. Srivastavaji, my esteemed friend Hon'ble Mr Justice K.N.Goyal, my esteemed friend Mr S.N. Sahai:

I use the words "esteemed friends" because we have known them over a long period of time and we worked together.

Before I exercise the privilege of inaugurating this training course in drafting, it is my duty to do two things, to perform two duties. In the first place, I have to thank Hon'ble Mr Justice Goyal, the Director of the Institute, in all humility, and in the name of Almighty, for the honour which he has chosen to confer on me, in the second place, I have to discharge my duty, taking advantage of the audience present here, to the fellow members of the Legislative Drafting profession.

When I say that I have to perform my duty of thanking Hon'ble Mr Justice Goyal in all humility, there is a history behind it. As Justice Goyal mentioned to you, we have known each other for nearly two decades. But we came to know each other through a masterpiece in legislative drafting produced by Mr Goyal. A State Bill from Uttar Pradesh came to the Central Legislative Department for clearance for submission to the President for assent, I felt so impressed, in fact I should not say it in his presence, —it amply showed even at that time that he had all the qualities of a good draftsman which he has mentioned in the course of his address. I was so impressed that,- I was also a junior officer at that time,- I started making enquiries as to who the author of that bill was, and I approached one of my contemporaries in college, one Mr O.P. Rana, who was later on elevated to the bench here in Allahabad High Court just for a short while, and from him I discovered that it was Mr Goyal, and I seized the earliest opportunity to establish contact with him. From that time onwards we have been meeting, discussing, sharing our difficulties from time to time and it was my ambition to confer on him the privilege which he has conferred on me today. As Secretary, Legislative Department, I felt strongly the need for establishing a Legislative Drafting and Research Institute. I undertook a lot of preparatory work. In 1979, in collaboration with Commonwealth Fund for Technical Co-operation we organised a course in legislative drafting in New Delhi. Thereafter, I got in touch with the Law Secretaries of the different States and started a file by requesting one of the Law Secretaries to write to me. Otherwise nothing moves. So, the Gujarat Law Secretary, Mr. Sathwani wrote to me a letter suggesting that the question of setting up an institute should be taken up. I circulated that letter to the various State Law Secretaries and I am happy to say that all the State Governments concurred in the proposal. Thereafter,

I placed that proposal before the Law Ministers' Conference, got the approval of the Law Ministers and proceeded to take further action and even prepared a blue-print for the purpose. Well, I had to leave for taking up the present assignment. I could not complete the job. My successor, Mr. Ramiah has got the approval for the project now. So I wanted to have that Institute established and have it inaugurated by my esteemed friend, Mr Goyal; I couldn't do it, but he has done it. Therefore I say in all humility and remembering the Almighty,- why? The Almighty has taught me a lesson. I was going to think that I was able to do this particular thing. I have not done it. I have not been able to do it but I had the good intention, so He has prompted Mr Goyal to invite me, this is the thing.

Now my second duty naturally is to my colleagues in the profession, and this is such a golden opportunity. We have distinguished eminent judges, members of the public, distinguished lawyers and fellow members of the Legislative Drafting profession, trainees, and may be some legislators. I believe we have got here a select gathering, consisting of various groups of persons whom a draftsman has to satisfy simultaneously. You must have heard about "*Asthavarthanam, Satyavarthanam*". That is, eight persons will be engaging your attention but you must be alert, you must not be caught napping by anyone of those persons,- that is *Asthavarthanam*. Legislative drafting involves more or less a similar sort of exercise. I have first to please the officials who come to me with the proposal, understand what they want, convince them that what they want has been put in the draft. Next I have to please the ministers, next I will have to satisfy the legislators, next I will have to satisfy the judges and last, I must see that I have not caused any damage to the general public and that I have safeguarded the interest of the general public.

These different categories of persons have different types of background, different types of approach, and I have to satisfy each one of these categories and except at the initial stage of the officials, I have no voice to assert myself. That is the predicament of the draftsman. The Minister says, do it. You can't go beyond a point and argue with him. The legislator makes a comment; on that you must send a reply to the Minister, but if he does not use it you have to suffer for it. The judge makes a comment, the lawyer ridicules you in the course of the hearing, but you cannot come out and defend yourself. In other words, you walk behind the foot-lights. You have no effective voice at any one of these stages, but you are the cause of the half the nation's litigation, half the nation's ills, jingles like that. The draftsman is derided. There has been an occasion, I think that Lord Justice Scrutton who said that the draftsman should be made to pay the costs of the litigation. So this is one side of the picture.

The other side of the picture is : the draftsman has virtually a duty to build up the nation, a duty to see that the life of the nation is not in any way adversely affected by his draft, that is the responsibility at loggerheads. This is the dilemma in which the draftsman is in.

Now for discharging this responsibility,- as Justice Goyal has said, the Hon'ble Chief Justice has pointed out, as each one has pointed out, everyone knows that,- he has to possess a number of qualities. He must be an expert in English or Hindi or whatever is the language in which he is drafting. Adequate command over the language, adequate command over the law and,- as Mr Justice Goyal has said,- adequate command over the Constitutional Law in the context of the Indian drafting. He must be able to write correct English, precise,- as Hon'ble Chief Justice has said,- so many qualifications he has to fulfil. He must see that there is no litigation, he must see that there is no ambiguity and all these he has to do more or less as a command performance. This is the difficult position in which the draftsman is in. This is so not in India only, but all over the world it is the same. Ordinarily, the whole subject has been gone into, what is expected of a draftsman. There is the Renton Committee on the Preparation of Legislation. The drafting of legislation is an exacting occupation, an exacting occupation which demands a high degree of intellectual ability, a sound knowledge of the law and, as Mr Justice Goyal has said, not merely the law, Constitutional Law also, the ability to write good English and an unlimited capacity for hard work. The Committee itself says, if a person has all these attributes, why should he slog for a pittance in the Law Department of a State or at the Central Government and suffer all the indignities at the hands of so many categories of persons who if given a chance may not have done much better. This is the thing.

Now, I would only refer to you an article written by a very senior colleague (who is no more),- an able draftsman who served in the Legislative Department of the Government of India. He was a barrister, one of the best draftsmen anywhere in the world, and that article impressed Lord Chorley so much that he sought his permission and re-published it in the Modern Law Review. I had the good fortune of working with him, the late Mr S.K. Hiranandani. Now this is how he ends the last paragraph : "Legislative Drafting is a thankless task." Now sir, this gentleman was writing this article at the age of sixty; after serving in the Legislative Department and retiring, he was elevated to the position of a member of the Law Commission of India. "Legislative Drafting is a thankless task." In other words, it crystallises his whole life's experience. He served for nearly two-and-a-half decades as a Legislative Draftsman in the old Sind Government, before coming to India,- after partition. "Legislative Drafting is a thankless task. A draftsman rarely gets credit for a good draft. He is often blamed for a bad one and the reason perhaps is that a good draft never comes up before a court. A draftsman should be thick-skinned. He should always be unruffled. He should never get excited." Finally,- "If you have a choice to become a draftsman or take up any other job, take up that other job", this is what he asked. Well, personally, I don't subscribe to this philosophy because this is perhaps one of those few fields in which real achievement is possible. You may not get publicity.

But you can have full satisfaction and you can close your eyes when your end comes with a thought that you have done something substantially good for the country and for the posterity. That is the hope, and it is that hope, and it is that assurance, which sustains a good draftsman to carry on the work in spite of all the hardships, all the indignities.

Now all this is in the abstract,- what a draftsman should possess, what are his difficulties, etc. I now refer to a few illustrations. Well I may use the pronoun 'I,' but no draft is ever done by one person, it is always done by a team, so don't give me the credit. It is the team which did that work. I have been a part of that team, when I refer to myself in these illustrations. What is the contribution which the draftsman has made? What was his difficulty? What is the recognition which he has got for it? How many people know about it? Now take for example article 31-C of the Constitution. This was introduced by the Constitution 35th Amendment. When the first draft was prepared, the draft only provided for judicial review in the fully accepted sense of that expression. When this matter went up, well, we didn't have *Kesavanand Bharati's* case at that time. That was subsequent to that It provided for full judicial review, so that court could also satisfy itself whether as a matter of fact the legislation for which protection is to be given does really give effect to the policy underlying the relevant directive principles. The draftsman took all the precautions. Now when the provision went up there was a reaction from the higher circles : "No, we are amending the Constitution, therefore, any declaration made by the Legislature should be sufficient. This draft is not acceptable." Now, to draft a provision that any declaration made by the Legislature is binding, is purely a matter of simple English. But the draftsman had to suffer that indignity. A normal type of draftsman would have simply carried out the instruction and put a simple provision to the effect any law which contains a declaration that it is for the purpose of giving effect to the policy contained in such and such a directive principle shall not be called in question. It is simple English. There was no difficulty at all. The persons whom he had to contend with were established persons with acknowledged reputation in the field of law and with service in the field of judiciary. Now how can a good draftsman holding a junior position tell a person who had served as a judge of a High Court, who had been an Advocate General of a High Court, that a provision providing for a mere declaration would not be upheld, when there had been no judicial decision until subsequently. Now this is the dilemma in which you are placed and what was the time available. I can tell you : fifteen minutes! 15 minutes! Now imagine yourself in this position. But the draftsman concerned can have a sense of achievement because instead of questioning the honourable experts in the field of law, the draftsman concerned adopted a strategy. What was that strategy? "Sir, what you say is correct, there is no judicial decision so far." And as Mr Justice Vashishtha Bhargava, a former

draftsman had said, "I know the intention". In fact I am reminded of an old English decision where Lord Mansfield had admonished the counsel, "Do not try to interpret what it means, we know it better because we made it".[1] So that type of thing. Now it is a question of an official,- a draftsman,- an elderly person with long years of experience, so a strategy was adopted. This strategy was thought of within a very short time. "Sir, what you say may be true, but suppose the court strikes this down what will be the consequence? Well, this matter will reach the court may be after two years, three years, or five years, it won't come up before the court immediatley and within these two years, three years or five years, several States may have passed laws with this declaration, and suddenly you are confronted with the decision of the Supreme Court holding that this provision is bad. The consequence will be that hundreds of enactments passed by different Legislatures would become invalid overnight and these enactments would relate to the fields in which you are interested. The promotion of those principles to which you are committed if we use your language, would be frustrated. So, why not we adopt a compromise? We will put the judicial review provision as suggested by us and we will also put this thing. If this is struck down the other thing will remain, nobody can then say the laws have become invalid overnight. That can be tested, there would be time enough." Now it was through this course of persuasion that the draft given by the draftsman was allowed to be retained and I will show you, this is how it reads, (Article 31-C) 'Notwithstanding anything contained, etc., no law giving effect to the policy of the State towards securing, etc., shall be void on the ground that it is

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1. In this context the speech of Earl of Halsbury L.C. in *Hilder vs. Dester* (1902) A.C. 474 at 477 will be found interesting:- "My Lords, I have more than once had occasion to say that in construing a statute I believe the worst person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed. At the time he drafted the statute, at all events, he may have been under the impression that he had given full effect to what was intended, but he may be mistaken in construing it afterwards just because what was in his mind was what was intended, though, perhaps, it was not done. For that reason I abstain from giving any judgment in this case myself; but at the same time I desire to say, having read the judgments proposed to be delivered by my noble and learned friends, that I entirely concur with every word of them. I believe that the construction at which they have arrived was the intention of the statute. I do not say my intention, but the intention of the Legislature. I was largely responsible for the language in which the enactment is conveyed, and for that reason, and for, that reason only, I have not written a judgment myself, but I heartily concur in the judgment which my noble and learned friends have arrived at."

inconsistent with ... any of these rights," and then a semicolon, and then no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy." So what comes after the semicolon was added, what comes before the semicolon was the original draft. Through a method of compromise, though all under pressure and within a limited time of less than 15 minutes,- I can tell you,- this compromise was adopted. Now the draftsman was proved correct. This portion was struck down, it was restored subsequently, again it was struck down.

And the reason which we adopted at that time was not because of any decision available to us. The reasoning was very simple. If something is unreasonable, precedent or no precedent, irrespective of whether any specific provision in the Constitution is there or not, the court will find a way of striking it down. If, on the other hand, something is reasonable, even if there is a precedent standing against it, the court will find a way of upholding it. The entire Constitutional Law boils down simply to this. If you can show or demonstrate that it is reasonable, the court will of course always uphold it. Now if you try to camouflage or you put it in a naked way, you cannot cheat the court. It will find a way of reaching it out and strike it down. Maybe, prospective over-ruling, maybe some other device. And that is the real significance of the provision in the Constitution which says that the law laid down by the Supreme Court is binding. The ultimate authority rests in it and the court looks at the substance of the matter.

So, it is simple common sense approach which I have always followed, which I would command here to my fellow draftsmen. It must be reasonable; if you think it is reasonable, try to project that it is reasonable by some method. The court will help you. If, on the other hand, it is not reasonable, even if there is a decision of the Supreme Court supporting you, the Supreme Court will reverse its earlier decision, reach you and strike it down. To my mind, this provision appears to be un-reasonable because it was virtually nullifying the guaranteed fundamental rights. If you cannot by an ordinary law, by an ordinary parliamentary law, achieve that objective, you are trying to achieve that object by two steps,- nothing more and a mere declaration. Thus it was repulsive, not fitting in the scheme of the Constitution. The decision in *Kesavanand Bharathi's* case was arrived at after protracted hearings and after elaborate arguments. The draftsman anticipated the decision in *Kesavanand Bharathi's* case arrived at after elaborate arguments by well paid lawyers. This is the difference. Not only that. Subsequently the Law Commission also expressed the same view. After the bill was introduced, they submitted the report. When the matter came up in Parliament for discussion the passage of this amendment also became smooth. Because every minute of the Parliament's time costs something to the Nation. So, whenever anybody raised this objection, the Minister could reply "Oh, does not matter, the other provision is there, that will take care of it. We are aware of it".

So, the passage of the bill became smooth and lesser time was taken. Now all this result you have extracted from the draftsman within fifteen minutes and by making him work overtime. It is not known, and I want to submit to the Hon'ble Chief Justice, how things happen.

This is one illustration. Well what is my satisfaction, what is the draftsman's satisfaction? As I said, if I say "me" or "I", I don't say that I have done it. What is the draftsman's satisfaction? I have a tremendous satisfaction. Well, I have anticipated a decision of the Supreme Court. What more satisfaction can I have? Everything is counted in terms of money. I have saved something for the nation, so much more time would have been lost in Parliament. Yes, I have made a contribution in that field. This is one instance.

Now take another instance: the Constitution Forty-Second Amendment. I am confining myself to areas with which everyone is familiar. You know the circumstances in which that amendment was passed and the controversies at that time. The time factor in which it was done, it is all within public knowledge. So, you can easily visualise that time the draftsman would have got, but show me a drafting flaw in that. But whatever has come in the newspapers, I will say, is on the draftsman. Because you see, the draftsman is concerned with the technical part of it, not with the policy part of it. But even in that case, there was a sense of achievement for the draftsman, a sense of contribution. How, I will tell you, take the article relating to fundamental duties. This will also illustrate the broader side of the draftsman I want to illustrate. Take the article 51-A relating to fundamental duties. This was inserted by the Forty-Second Amendment. It is based upon a recommendation of the Swaran Singh Committee. If you look at the recommendations of the Swaran Singh Committee, you will find that they were based broadly on some foreign models on what type of duties should be included. I can tell you when this matter came up before the Cabinet I raised the issue. "Have we any freedom to make any suggestions or are we to give effect to it as it is?", and then the Prime Minister smiled and said that the draftsmen were free to offer suggestions. I said, "We should include something which is of relevance in our Indian context". I was only a Joint Secretary, but what I am saying is, a word of encouragement has come. Now that word of encouragement was enough for us to think about it and make a contribution and we will always feel happy about it. What is the contribution? You see, the clause relating to common brotherhood. "To promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities, to renounce practices derogatory to the dignity of women". Somebody said, you see, "Why should you put this?" I said, "It is a reality; face the reality, there is no question of running away from the reality. There are practices derogatory to the dignity of human beings and if you do not put it we are only shutting our eyes to the realities. It has to come". Approved. Approved! Yes, I have a sense of satisfaction. Not only that, the Prime Minister

herself became involved in the draft once this thing has come. You see, this is how a good draft comes. She herself has become involved. So, we first drafted this in the form of separate clauses. Her first observation was, "There should be something like "The Ten Commandments". Now, for the good draftsman who has to satisfy everybody, that is a word of encouragement. Now look at the number of clauses in that. We made it ten, (a) to (j). Then we have projected by implication, in this, so many things. It's Ten Commandments, the Christian concept. At least they are relevant for the modern theme. This concept of "common brotherhood",- that is the quintessence of Islam. Then, this "improvement of natural environment including forests, lakes, rivers, wild life", then "scientific tamper". You bring in the other religions, you see. You take for example, Vishnu Sahasranama,- names of the Lord,- *"Nadi Rupa Ganga,"* Vishnu is Ganga in the form of Nadi; Vishnu is all Rishis,- *Meru Himavatha Kailashadi"; "Prabutta Sailadi Dyanam."* That means, all mountains, whatever is good, whatever is excellent, whether in human beings, or in nature or in environment,- is Vishnu, God head. So, this is it. I won't stop with that. The draft,- she became so much involved that the final shape in which it has appeared can be regarded as very much her product. I can't divulge a secret beyond that, because I hold an office. So we left the draft, it was further touched up. So, here is a case and one of my illustrious predecessors to whom Justice Goyal made a reference, Sri S.P. Sen Verma, who was also a Chief Election Commissioner and Legislative Secretary, when he met me as an expert member, he complemented me for this. He said, "it is a poem in law"; so I said "the poetic content... is not mine, it goes to somebody else, the perfection is hers". Well, I prepared the ground work but it became perfect because so many persons became interested in that. At the most my contribution is that I have made them interested in it. But it is a permanent achievement. If the significance of the fundamental duties as enshrined in the Constitution is fully brought home, to our children, from the earlier stages,- well it may be difficult to change grown up persons,- life would be very much different. You see, each one of the duties, it is not merely a poem but is a philosophy. It is on the basis of this that you can make this nation prosper. My satisfaction,- that is, a draftsman's satisfaction,- is that he was behind it in a small way.

Now, similarly take article 39(f), this is not one of the proposals of the Swaran Singh Committee. Article 39(f) relates to children. You have got fundamental rights, but how can a child enforce a fundamental right. It simply is not possible and the directive principles as enshrined in the original Constitution so far as children was concerned was a negative one. What does it say? The second half of 39(f) was all that was there,- that is, "don't do this thing". It is, that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and childhood and youth are protected against exploitation". So the second half was there, the first half was not there. So, the draftsman had an opportunity,- why not take up from the Universal Children's Charter, make the directive principle a positive one instead of a negative one, so there

is more direction to it. Well, may be a duty is not enforceable, a directive principle is not enforceable, but it points the direction in which you have to conduct yourself,- points the direction in which the State has to act. It is not without significance, it is relevant to us,- as Hon'ble Chief Justice has mentioned,- from various other points of view. So there is a sense of achievement, there is a sense of feeling that silently you have also been allowed by the Almighty to be an instrument of doing something which may bring happiness to your fellow human beings. So whatever may be the travails of the draftsman, he has also this opportunity and it is very true that very few people get that type of opportunity to mould things in that direction This is the reward of it.

Now Hon'ble Chief Justice referred to ambiguity in drafting,- inconsistencies. He has referred to the Urban Land Ceiling Act. In the case of Urban Land Ceiling Act if you see the proceedings, you will find that the amendments were being moved virtually from minute to minute. This is no secret. Thus while clause 4 was being discussed amendments to clause 5 were being circulated; sometimes while clause 4 was being discussed amendments to clause 4 itself were being drafted and set for. This was the thing, and I remember vividly the speed. He was an extremely competent officer, he held the office of Secretary before me,- the officer who was dealing with it. At one stage,- of course he was a heart patient. At one stage he felt it so toilsome,- "go in, give a slip, make a draft, get it typed, then circulate it"; virtually, it was an amendment drafting factory. The ante-room to the Minister's room, was converted into an amendment manufacturing factory. So, he gave an S.O.S. that two or three persons should reach there for his rescue. So, that was the tempo with which that was done and thank God the Chief Justice could not find many things more.

Now I will come to another illustration that I will give you. This will show what are the difficulties of the draftsman, what he receives in return for that, what skill he has to possess. I am referring, deliberately, to a legislation which has been considered by the Supreme Court at full length. That is the legislation for taking over the management of Auroville. You will find the report in *S.P. Mittal* vs. *Union of India*, AIR 1983 SC 1. Now all that I want to say is, a preamble to nearly one-and-a-half pages was attached to that. Well the Law Commission had recommended that in statutes preambles should not be used. So this was not a mere preamble, it was a one-and-a-half page preamble, breaking all the conventions, breaking the recommendation of the Law Commission. Now the Supreme Court in that particular case refers to that preamble in a somewhat, not quite contemptous, but condescending manner. The judges say, "The long preamble reads thus". Now after quoting the preamble and after making a statement their Lordships immediately say, "The long preamble itself makes it clear". Now this is what it says. The long preamble says this". On page 11 of the judgment then after, the preamble is quoted. "The long preamble",- again the adjective is repeated,- "itself explains

what Auroville is, namely that it is a township". Now why was the long preamble put? You read that judgment. Every objection taken against the legislation, the validity of the legislation, was answered squarely and wholly by implication by one portion or the other of the preamble. In other words, the draftsman anticipated every conceivable objection to that legislation and given a lead to dispel doubts about it. That was why the long preamble was put. You can read it at leisure. So there was an objection on the ground that the law was violative of articles 25, 26,- religious denomination. So "No, this is only what we are taking over,- we are taking over the management of only a township, nothing to do with religion, that is for that purpose". There was an objection on the ground of legislative competence. So, this township concept which was again defined in Section 3 of the Act was only for projecting that, "No, no, we are not dealing with the society, we are dealing with a piece of property, and we have interest in that property as Centre, because Centre has invested money,- three crores it has given. Centre has interest from the International point of view because UNESCO has made contribution. It has got these special features, therefore it is a unique case, have not violative of article 14". So, the preamble was formulated after taking into account all possible objections to the validity of the legislation because we ourselves had doubts, and it was spelt out. In other words, the draftsman here did the job of the counsel and the counsel in this case argued (they were also paid fat fees) for a few days. The draftsman did the job of the counsel, made the task of the court easy, and the line of argument etc. has proceeded on the same lines,- and at the same time secured the objective which the Government had in view. So what is he getting in return? Two contemptuous references, "*the long* preamble, the *long* preamble." This is what happens, but the draftsman does not take it as a contemptuous reference at all. I can tell you honestly I was extremely proud and happy on that day when I saw this judgment. Because it is a question of the agency from whom a comment comes. When the agency is the Supreme Court, if the Supreme Court endures my draft, it's a matter of privilege. This, I think it was said of Jonathan Swift, "had Swift endured my list," he was a very difficult man to please. The Supreme Court has very exacting standards and I have passed the examination in the hands of the Supreme Court, so I don't look at it at all from that point of view. And I can definitely say,- so far as the judiciary is concerned they have shown us a lot of sympathy and I would only treat this as a mere description, that it comes to one-and-a-half pages. Nothing more than that. "Because the long preamble says,"--" itself says,"- that means, what he has put has been accepted by the court. I want to bring out that concept. But somebody else who reads may think otherwise,- may use it so. In fact somebody gave me a ring- "Have you seen that judgment? They have made a comment on it". When I saw the comment I said,"No, no, it is a compliment". It depends on the agency, if the highest court even nods, that is an honour for the draftsman But the draftsman did his homework, took so much trouble, and the draftsman is happy because, taking care of an institution which is

of national value, he put his heart and soul in it,- that is all. So, he has got a sense of satisfaction, in spite of the trouble he had to take. This is illustrative of where you have to take care of the constitutional provisions.

As my friend Mr Goyal has said, how difficult it is to take care. Of course, he was saying that the task of the State draftsman is more difficult with regard to the State List. But all of you know about Dhillon's case[1]. It is a simple formula : if it is not in the State List, it is with the Centre; if it is not in the Central List or the Concurrent List it is with the State. So it is a question of dichotomy, and for that purpose you have to really treat them as two lists only. The position is equally the same.

So, this is another type of illustration. I can go on multiplying illustrations like this. You can get a real sense of achievement, you can turn a disadvantage into an advantage. I can give you an instance : the Motor Vehicles Act. There are a number of amendments. They were interested in certain amendments, badly interested in it. The draftsman said, "Yes we will do it provided you will take care of this also. Because these amendments which you are proposing are not of much significance; if you want to do something come in this direction". That was how the provisions in the Motor Vehicles Act relating to Liability Without Fault,-hit and run cases, those were added. Now the draftsman whoever it is,- as I said it is a team, they are always happy about it because they know that they have been instrumental in providing help to one section of helpless persons. Because who is the victim of a hit and run accident? Normally, it is some pedestrian, foot pedestrian. I say foot pedestrian because if he walks, that means he doesn't have a vehicle, who gets up early in the morning or who has to return late in the night; he is generally the victim of hit-and-run case. If it is broad daylight, you can catch hold of the vehicle. So every such case is helped in that way.

Or, take again for example, the provisions relating to Criminal Laws Amendment on cruelty to married women. That also will illustrate how a draftsman can convert a situation to his advantage and make a contribution. We were confronted with the committee's report regarding the Dowry Prohibiton Act. Well, they knew, we knew, everyone knew, that it is next to impossible to achieve the objective of that law in the circumstances that we are. May be in the penal clauses you may keep any thing. So it struck us that the better course would be to attack the evil where it is manifestly revolting, and also simultaneously take some action for preventing this type of offences, particularly dowry deaths. How do you prevent a dowry death? You tackle the case before it reaches the stage of suicide or murder. Normally it is preceded by cruelty. So this concept was projected. But at the same time, if you see the "Statement of Objects and Reasons", we linked it up with the recommendation in the Dowry Prohibition Committee report and processed it. Now the draftsman has the full satisfaction that in this difficult area he has found a solution. And how was the

1. Union of India v. H.S. Dhillon, AIR 1972 SC 1061 (para 59).

solution arrived at? By reading some literature about wife-bashing cases in America. There, was an observation, there was a report, in fact there was an observation, "If you arrest the fellow and keep him overnight you would become chaser? That was the cue. Well you make this an offence, and if you march these guilty persons to the police station under this offence,- because it is a cognisable one,- that itself would strike terror and you are preventing it at the stage of cruelty and preventing it from reaching the stage of suicide or murder. So this was a device which was worked upon. Yes, the draftsman has made a contribution, he has full satisfaction, he is very happy about it.

So it has got its own rewards. But, as I said, at each case it is really a very exacting thing. Now various qualities are required. My friends have referred to them. This one thing I would like to add to that : that is, the draftsman requires two more qualities, two more attributes. One is what is known as legislative imagination and the other is a divine blessing. These two things are necessary for him to be successful. Legislative imagination is necessary for visualising everything, and the blessing is necessary so that his skill does not become what you call Karnavidya. When he knows it but in that pressure it does not strike him; that is how we look for remorse. Most of the mistakes which are pointed out can be corrected by the draftsman. In fact I would say that a good draftsman is one who when a mistake is pointed to him can readily accept it. That is, he knows what is drafting. It does not strike him at the moment As in the case of any other human being. So there you require a divine blessing. With these things he can have full sense of achievement.

Now the last thing as the Hon'ble Chief Justice has referred to is the use of Hindi and regional languages in the field of law and legislative drafting. Yes, we have to do it. We have to do it. Here, once again,I can say that the contribution was made again by a draftsman. You know about the controversy relating to the authorised text of the Constitution in Hindi. It was a draftsman with his legislative imagination and with his background of interpreting laws that found ultimately a solution for removing the obstacles. The solution was a simple one. The argument which was advanced was, "Look at the Constitution". The Constitution says, you should switch over to Hindi, at some stage, not necessarily today, after some years. Whenever that may be. But when you switch over to Hindi then all your Bills must be in Hindi. Now how can you amend a Constitution which is in English by a Bill in Hindi? Therefore an authorised text of the Constitution in Hindi is a constitutional necessity and there is no question of any doubt about it. Now this argument was accepted, but only a draftsman could have thought on those lines. The jurists who considered it never looked at it from that angle.

So, there are some areas where this type of experience will also help. Similarly, in gathering legislative intention the judges would also be benefited by a course in legislative drafting. Because how

the process works, and what is intended, and why this situation has arisen in this case, he can easily visualise, he has already visualised, he must have been under pressure, and so on and so forth.

So like this, you will have to take the totality. It is a rewarding experience, and the draftsman very much requires sympathy of everyone because of the extremely hard circumstances under which he works and so far as India is concerned I can definitely say that the judges have been more than kind to the draftsman. I have no doubt about it and we have also been getting, at least in the Centre, sufficient cooperation from other agencies who are involved in this also.

Well, I can go on talking like this because a life-time's experience cannot be condensed in an hour and fifteen minutes. Somewhere you have to stop, and I thank you once again for giving me this opportunity and I very happily invoke the blessings of the Lord for the success of this venture and of this Institute, and I would like to congratulate my friend Hon'ble Justice Goyal and the Chief Justice and the Senior Judge for the able guidance which they have been giving in developing this Institute, and I very happily inaugurate the Legislative Training Course.

PRESIDENTIAL SPEECH BY HON'BLE THE CHIEF JUSTICE MR JUSTICE AMITAV BANERJI AT THE INAUGURATION OF THE COURSE IN 'LEGISLATIVE DRAFTING' ON JANUARY 2, 1988

Hon'ble Umesh Chandra Srivastava, Senior Judge at Lucknow, Shri R.V.S. Peri Sastri, Chief Election Commissioner of India, Shri K.N. Goyal, Director of the Institute, brother Judges, Members of the Bar, Judges and Presiding Officers of the Subordinate Courts, Ladies and Gentlemen and the Trainees,

It is indeed a happy occasion that we have so many distinguished personalities present today at the commencement of this Course of training in 'Legislative Drafting' in this Institute as well as representatives from several State Governments. It is a very heartening feature that trainees come from far and wide for this Course. The State Governments are to be congratulated for sending them. This is encouraging for the Institute as well—and I have every reason to believe that the Institute has succeeded in establishing itself as one of the very desirable training centre in a branch which was till now bereft of any training. I have great pleasure in being present here today, in your midst. You have heard our Director of the Institute about our past history, brief and short it is, but full of achievements and aspirations. It gives me added pleasure to preside over this function, as the Chief Guest of this function is no other than an acknowledged master of Legislative Drafting, Shri R.V.S. Peri Sastri. His presence and his speech, will encourage you trainees to strive to achieve perfection in this branch of law. Those who have not been fortunate in doing so may look eagerly for the next course.

Gentlemen, 'Legislative Drafting' is no more an art, it is a science. The Drafter has to use the minimum number of words to achieve his object – the mandate of the government to draft a Bill for a particular object. The phrases he uses – the words he uses, all have a settled meaning; all developed over the years by a string of judicial decisions or having been defined in the Statute. Normally, he cannot use them for any other meaning . Further, the draft must be such that it is easily understood and brooks of no misunderstanding. Of course, when the bill becomes an Act of the Legislature, it is open to interpretation by Courts. The Court will also use the same yardstick to interpret it as ought to be used by the drafter. In other words both have the same approach, unless the sentences or phrases used introduce some other and contrary meaning. It is, therefore, apparent that the drafter must be very well acquainted with the law of interpretation of statutes and also very well acquainted with the grammar of the language used. In our country most of the laws drafted are in English and what we see in Hindi, is only a translation of the English text of the draft/Act. We are still following the pattern used by the Parliament in England. This is not because of any love for the English language, nor due to any slavish mentality, but because of compulsion – the compulsion of there being nothing better at the moment. The system is near perfect and is followed in innumerable countries. Even when we enact laws in Hindi or other regional languages, we follow the same principle as in English drafting.

It is true there are two serious complaints – one, the language used is much too cumbersome and secondly, the continued use of English even after 40 years of Independence. Both these complaints are genuine and need attention. We are no doubt good copyist but poor innovators. This role has to be reversed. We must become good innovators. We must introduce changes that takes care of both these complaints. It's time we innovated the direct use of language, i.e., easily understood and followed. The Hindi terms used at present in the enactments are as terse and complicated as the English for same and instead of simplifying the process of understanding brings in complications needing interpretation by Court. And that takes time. Time enough to frustrate the object of the Act. Even good laws, enacted for the good of the masses remain only on paper and await interpretation by the Courts. This could be averted if we changed the pattern of language used in the Statutes. But my esteemed friends in the drafting fraternity will of course say that it is not easy to do so. There cannot be a change overnight' they say, but I feel that time has come for a change. Will the Research wing of this Institute do some homework in this matter in the near future and give a lead to the country? It is time they galvanized their activity in this direction.

Well Gentlemen, legal drafting is not easy. You know that. Anyone who comes from the Law College and joins the profession of law, is called upon to read the Statute law and see if it is applicable to a particular case. Often he is called upon to draft a notice, or an agreement, or a Deed. If he had no knowledge of the branch of law it would be impossible for him to do so. It is, therefore, imperative for him to have a thorough knowledge of the principles of interpretation of the statutes. That is basic knowledge. That attained he can embark upon drafting legal deeds and papers. Although drafting of deeds, commercial agreements, treaties etc. are a subject by themselves and requires very specific knowledge yet the basic step is the interpretation of statutes. The rules of interpretation are well settled and are more or less on the same plane in most of the countries following the Parliamentary system of Government.

Legislative drafting is another branch of the same law, only it operates in a separate field and is highly specific. Drafting laws for the legislature is a science. It is no longer an art. Art allows a mind free play and free use of material and some of the finished product may be interpreted differently – with no apparent harm to anyone. But in science the end product is visible and must record the same reaction or interpretation in different minds. A piece of legislative draft should therefore convey to the reader the same meaning and purpose notwithstanding wherever he may be. In other words in science one does not have to roam about in wilderness to gather the meaning. It is there – it should be obvious to all. And that is what the test is in a sound piece of legislative draft. When the draft is approved by the legislature and receives the assent of the President or the Governor (as in India) it becomes an Act of the Parliament or the

State Legislature, as the case may be. That Act is liable to be called in question before an appropriate forum – in respect of its composition, interpretation and vires. It must stand the tests and the seal of the Court approving it is a matter of satisfaction to the drafter or the team of drafters. It is common knowledge that in drafting an enactment, a team of drafters work together to produce a comprehensive Bill for the consideration of the Legislature. It is necessary too, for it is too much for one person. In course of time the drafters specialize in specific branches too. That is, however, a different point. But the basic factor remains that one has to be perfect. Bacon in his Essays, OF STUDIES said "Reading maketh a Full Man; Conference a Ready Man; and Writing an Exact Man." How true? The drafter has to be an 'exact man', i.e., perfect in his approach and perfect in his finish of the draft. This comes by application, dedication and intelligent use of his knowledge and wisdom. It requires a brain mathematically inclined. More like solving an algebric equation. One mistake, even of a comma, or article, or a word may convey a different meaning, just as one error in Algebra, the end result is quite different. If this is borne in mind, one can become a good drafter of legal documents and even legislative Bills. I do not have to dilate on this aspect any more for you have here Shri Peri Sastri to tell you more about this.

In our country, we are governed by a system of parliamentary democracy. Parliament of India and the State Legislatures make laws for the governance of the country. These laws must pass the test of being *intra vires* if tested in a Court of law. Laws are enacted to regulate social behaviour and governmental activities. More and more laws are being made for social good to millions of people in this country. Newer enactments are being made in every State to give effect to the policies of the government. It is, therefore, imperative that the drafting is done carefully, competently and with expertise.

A statute is said to be the will of the legislature. The reason is obvious. The Legislature has put its seal of approval on the legislative draft. The drafter is thus put in a very responsible position – he has to use all his experience, knowledge, acumen and industry in making the draft. One can gain expertise by experience and hard work in the drafting department. When you are called upon to work in the drafting department you should not only be acquainted with the branch of law in which the draft is to be made but also with all rules of drafting – this course will help you in acquiring the elements of the principles and practice of drafting legislative proposals. The aim of this course is to prepare competent men to man the legislative drafting section in the Legal wing of the Government.

Gentlemen, you have one advantage here. Your Director was one of those men who was incharge of drafting numerous legislative proposals of this State. He knows the ins and outs of the business of drafting. He will guide your training in the next five weeks. You will also have the advantage of listening to some of our Honoured Judges of the Supreme Court and the High Court and distinguished members of the Bar. Make full use of them. Keep your notes and keep alert, for nothing is to be missed.

Some of you have come from other States. I am glad you have come. You are welcome to our State and you will realise that you have done well to join this Course and I am sure your talents and expertise in this branch will be fully utilised by your State Government.

Before I end this speech, I would like to call upon the course guides, the Director and all the trainees to devise some means to simplify the language used in the statute – ask yourself if the draft made by you is easily understood by a man of ordinary learning. Of course neither the illiterate nor the just literate would be able to follow anything of an enactment but at times even the educated and learned fail to make out a cohesive meaning, which at times is quite indistinct. One does not expect that every piece of controversy regarding interpretation is to be resolved by the Supreme Court. One matter comes to my mind and pertains to the Urban Land (Ceiling and Regulation) Act, 1976. When originally the Bill was introduced in the Lok Sabha it did not contain the provisions of section 4(9). On a criticism regarding the lacuna in the proposed Bill, raised by certain members of the Parliament, the Bill was amended and the provisions of sub-section (9), (10) and (11) were hastily added. On an apparent reading section 4(9) has the effect of taking away something which has been given in the earlier part of section 4. Section 4(9) begins with the words "Where a person holds vacant land and also holds any other land etc." This was interpretted by a Division Bench of Allahabad High Court in *L. J. Johnson* vs. *State of U.P.* (1978 A.W.C. 731) that it would apply where a person held two pieces of land. The words of section 4(9) quoted above would lead any person reading the provision that there should be two categories of land – one, a vacant land and the other with a building/dwelling unit. The State Government challenged this view in appeal to the Supreme Court. Their Lordships reversed the view taken by the High Court and held that it would apply even where the person held one piece of land. The drafting of section 4(9) was not free from ambiguity and that is why different interpretations of the provision had been made by the Courts. The controversy had been set at rest by the pronouncement of the Supreme Court. But it shows that hasty or ill-drafted legislation can lead not only to litigation on the question of interpretation, but also delay in the implementation of the provisions of the Statute.

Secondly, I feel that greater emphasis is to be laid on drafting laws in the language of the State. We have States on language basis now and it is desirable that local language should be used. But simple language is necessary as that the educated people, at least can make out without the aid of lawyers or courts, what the provision means.

A proper working knowledge of the Constitutional provisions is imperative. One must know the basic features of the Constitution, the directive principles of state policy as contained in Part IV of the Constitution with particular reference to the Articles 31-C, 14, 19 and 21 of the Constitution. One must also be aware of the limits of legislative jurisdiction particularly in context of Article 246 with the seventh schedule. It is also necessary to be aware of the provisions

of Articles 309, 310 and 311 of the Constitution as well as the exercise of executive power under Article 73 and 162. One must also be aware of limits of delegation of legislative powers, the legislative over-ruling of judicial decisions, retrospective application of Statute besides the concepts of promissory estoppel, placing of burden of proof on accused in socio-economic offences and the concept of repugnancy, pith and substance etc. The list is a long one no doubt but who is in touch with the constitutional provisions and the decisions thereon by the Supreme Court will not find any difficulty in appreciating the legal principles and in applying them. I am only pointing out this so that one may be aware of the vast scope in developing the law in this branch of study. It is in this field that instead of copying we may innovate and seek judicial sanction thereof. As I said earlier this Institute is also empowered to conduct research. This branch of law could afford many many good subjects for study and research.

Thirdly, the State should have a cell to compute the amount of cases the new enactment or amendment is going to generate. Often we find that courts, particularly the High Courts, are clogged with writ petitions on the introduction of a new legislation. For example the U.P. Consolidation of Holdings Act has virtually swamped the Court with innumerable writ petitions. This was never visualised with the result that we have now over ten thousand writ petitions in this branch pending and most of them require to be decided individually. This means that efforts for increasing the Judges' strength simultaneously was not thought of. It is essential that we think on these lines too. Whenever any provision is added or deleted, there is a note as to what would be the financial implication. Similarly, there should be an assessment of the possibility of cases coming up in courts.

Ladies and Gentlemen, I must stop now. I have taken much of your time and I must have taxed your patience as well. It is common for a speaker to lose count of time when he is speaking on a very interesting subject and to a distinguished gathering who are competent to appreciate what he is saying. Gentlemen, I thank you all for your presence and patience.

BASIC FEATURES OF THE CONSTITUTION

Mr Justice K.N. Singh

[Valedictory address at the conclusion of the course in Legislative Drafting, at the Institute of Judicial Training and Research, U.P., at Lucknow on February 6, 1988]

The Constitution of India is an elaborate document. It contains 395 Articles divided into twenty-two Parts and nine Schedules. No Constitution in the world is so comprehensive. It is a written and controlled Constitution. The Founding Fathers of the Constitution had rich experience of Indian polity, they had seen the emergence of freedom after protracted struggle, they had seen the deprivation of basic freedoms under the foreign rule, so they thoughtfully deliberated each and every aspect of political and socio-economic need before giving final shape to the Constitution. They cherished basic democratic values which they incorporated in the Constitution.

Though the Constituent Assembly was not directly elected its Members represented the people of India. The objectives before the Constituent Assembly were to constitute India into a sovereign, democratic republic, a welfare State and an egalitarian society, projecting the aims and aspirations of the people of India who had made extreme sacrifices for securing the country's freedom.

The Preamble to the Constitution begins with the words "We, the people of India having solemnly resolved to constitute India into a sovereign, socialist, secular, democratic republic and to secure to all its citizens, Justice : Social, Economic and Political; Liberty of thought, expression, belief, faith and worship, Equality of status and of opportunity, and to promote among them all Fraternity assuring the dignity of the individual and the unity and the integrity of the Nation". The Preamble incorporates the people's resolve to constitute India into a sovereign, socialist, secular democratic republic and to provide justice, liberty, equality and fraternity. Various provisions contained in the Constitution seek to achieve the objectives as contained in the Preamble.

Our Constitution is the supreme law of the land. The people of India will continue to be governed under the Constitution so long it is acceptable to them and its provisions promote their welfare and aspirations. Our Constitution is republican in character as the executive head of India is an elected person, and the republic is democratic. The institutions set up under the Constitution seek to give effect to the objectives set out therein in the governance of the country through democratic process and Rule of Law, maintaining and safeguarding the dignity of individual and his liberty, freedom of speech, profession, business and religion, and equality before law. These are some of the basic essentials of the Constitution.

Before we proceed to consider the basic features of the Constitution, it is necessary to briefly refer to the provisions contained in the Constitution. Part I of the Constitution having Articles 1 to 4 deal with the Union and its territory. Part II (Articles 5 to 11) which deals with citizenship confers power on the Parliament toregulate the citizenship by law. Articles 12 to 35 in Part III guarantee fundamental rights to a citizen, which include right to equality, right to freedom, right against exploitation, right to freedom of religion, cultural and educational rights and right to constitutional remedies for the enforcement of fundamental rights before the Supreme Court. Part IV contains the Directive Principles of State Policy. Articles 36 to 51, contained in the aforesaid Part, declare the objectives which the State is expected to achieve. The Founding Fathers of the Constitution considered these objectives necessary for securing a welfare State. Article 51A as contained in Part-IVA prescribes fundamental duties of the citizens. One of such duties is the duty to abide by the Constitution to respect ideals and institutions, to uphold and protect the sovereignty, unity and integrity of India. Part V of the Constitution deals with the election of the President, Vice-President, constitution of the Parliament. election of its Members, constitution of a Cabinet, legislative powers of the Parliament and constitution of the Union Judiciary. Part VI deals with the State and Part VIII deals with the Union Territories. Part XI regulates relations between the Union and the States. Part XII of the Constitution deals with Finance, Property, Contracts and suits. Part XIII provides for free trade, commerce and inter-course within the Territory of India. Part XIV provides for services under the Union and the States. Part XV provides for the constitution of Election Commission and the holding of the elections to the Parliament and the State Legislatures. Part XVI provides for special provisions relating to certain classes including reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislature and Public Services. Part XVIII contains emergency provisions conferring power on the President to proclaim emergency under certain specified circumstances. It further provides for the consequences which would follow on the declaration of emergency. Article 368 contained in Part XX confers powers on the Parliament to amend the Constitution. Part XXI deals with transitional provisions.

Part III of the Constitution guarantees Fundamental Rights of the citizens. Articles 14 to 16 guarantee equality before law and prohibit discrimination on grounds of religion, caste, creed, sex or place of birth and ensure equality of opportunity in matters of public employment. Article 19 protects citizens' right to freedom of speech and expression, to assemble peacefully, to form associations or unions, to move freely throughout the country, to reside in any part of India and to practise any trade, business or profession. However, the State is empowered to make laws imposing reasonable restrictions on the exercise of these rights. Articles 23 and 24 protect the citizens' right against exploitation, namely, forced labour, employment of children in the factories and traffic in human beings. Articles 25 to 28 guarantee right to freedom of religion. Every citizen is free to practise his

religion and to manage his religious affairs. Articles 29 and 30 protect the interests of minorities and further protect their right to establish and administer educational institutions. Article 31 as it initially existed protected the right to hold property which was subject to acquisition on payment of compensation on market value. Article 32 provides constitutional remedy for enforcement of Fundamental Rights by making petition before the Supreme Court. Article 13 which is contained in Part III of the Constitution places restrictions on the power of the Legislature to make any law taking away or abridging or modifying the Fundamental Rights conferred by Part III and it further provides that any law made in its contravention shall be void.

The fundamental rights are the foundation and core of the democratic way of life ushered in our country by the Constitution. They are regarded as a declaration of great majesty and importance, granting protection to the weak and oppressed and securing an abiding guarantee of justice. Founding Fathers not only declared the rights which are fundamental to a citizen but they also took care to provide a constitutional forum under Article 32 for the enforcement of those rights. While the fundamental freedoms guaranteed to the citizens are not absolute and the State has power to impose by law reasonable restrictions on the exercise of these freedoms, the courts have power to decide whether the restrictions imposed on the freedoms are reasonable and necessary in public interest. In this process whenever the courts have struck down laws relating to land reforms or for acquisition of property, the Parliament has been amending the Constitution under Article 368 to implement its policies. The validity of some of the amendments was challenged before the Supreme Court. Some of the amendments have been struck down while others have been upheld. In this process, a controversy and a long debate was raised before the Supreme Court and outside the court relating to the power of the Parliament to amend the Constitution and the extent to which this power could be exercised and also the courts' power to strike down the constitutional amendments. This led to the innovation of doctrine of "basic features"of the Constitution as declared by the Supreme Court in *Kesavananda Bharati's* case.[1] The Constitution does not declare any part to be the basic feature but in the thirteen Judges' Bench decision in *Kesavananda Bharati's* case the basic features of the Constitution were projected. In order to understand the basic structure of the Constitution as laid down by the Supreme Court, it would be necessary to have a short resume of historic decisions which led to the emergence of doctrine of "basic features".

The Constitution was promulgated on 26th January, 1950 and within one year of its promulgation first amendment of the Constitution was made which made certain changes in Fundamental Rights. The Patna High Court had struck down the Bihar Land Reforms Act, 1950 on the ground that it contravened Article 14 of the Constitution. The Parliament, thereupon, enacted the first Amendment Act, 1951 which

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1 1973(4) SCC 225

said that no law providing for acquisition of estate or any rights therein shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the Fundamental Rights. It further added Articles 31A and 31B and incorporated 13aggrerian laws in the Ninth Schedule making them immune from attack on the ground of Part III of the Constitution. The validity of the amendment was considered by the Supreme Court in *Sankari Prasad* vs. *Union of India.*[2] The Court held that the power to amend the Constitution including the Fundamental Rights was contained in Article 368 and the word 'law' in Article 13(2) did not include the amendment of the Constitution as the same was made in exercise of constituent and not legislative power. Thereafter, the Parliament made several amendments in the Constitution having regard to the social and economic needs of the society. The view taken in *Sankari Prasad's* case was approved by majority in *Sajjan Singh* vs. *State of Rajasthan*[3] upholding the Seventeenth Amendment of the Constitution. However, in *Golak Nath's* case[4] the Supreme Court by majority of six to five dissented from the earlier view in the aforesaid cases and held that the Parliament had no authority to take away or abridge any Fundamental Right by amending the Constitution. The majority held that the Constitution incorporated an implied limitation on the amending power of the Parliament and the Fundamental Rights were out of the reach of the Parliament. The Supreme Court again in *Bank Nationalisation case*[5] and *Privy Purse* case[6] struck down the constitutional amendments on the ground that the same violated Fundamental Rights. The Parliament thereupon enacted the Constitution 24th, 25th and 26th and 29th amendments and it amended Article 368 to nullify the effect of *Golak Nath's* case by providing expressly that Parliament had the power to amend any part of the Constitution including Fundamental Rights. Article 31-C was enacted saying that any law seeking to implement any of the Directive Principles mentioned in Article 39(b) and 39(c) shall not be questioned in court on the ground of contravention of any of the Fundamental Rights guaranteed by Article 14, 19 and 31. It further added a clause that any law containing the declaration that the law was enacted to implement any of the Directives could not be called in question in courts on the ground that it did not do so. By the Twenty-Ninth Amendment Act certain Acts of Kerala relating to land reforms were included in the Ninth Schedule. These amendments were challenged before the Supreme Court in *Kesavananda Bharati's* case. In fact in *Kesavanand Bharati's* case, in addition to the challenge to the Twenty-Ninth Amendment, the validity of the Twenty Fourth and Twenty-Fifth Amendments was also challenged. The petition was heard by a Bench consisting of all the Thirteen Judges of the Supreme Court. All the Judges held that Twenty-Fourth Amendment was valid and that Article 368 as amended by Twenty-Fourth Amendment conferred power on the Parliament to amend any or all the provisions of the Constitution including those relating to Fundamental Rights. But seven Judges held that the power to amend was subject to certain implied and

2 AIR 1951 SC 458 3 AIR 1965 SC 845 4 AIR 1967 SC 1643
5 AIR 1970 SC 564 6 AIR 1971 SC 530

inherent limitations and the Parliament could not so amend the provisions of the Constitution as to destroy the basic structure or frame-work of the Constitution. Differing opinions were expressed regarding the concept of "basic structure."

Before I refer to the concept of basic structure in detail, I consider it necessary to complete the historical survey. After the decision of *Kesavananda Bharati's* case Parliament enacted the Constitution Forty-Second Amendment Act, 1976 which enlarged the scope of Article 31-C by providing that any law seeking to implement any of the Directive Principles contained in Part IV of the Constitution shall not be called in question on the ground that the same was inconsistent with or abridged any of the rights conferred by Article 14, 19, and 31. It further added clauses (4) and (5) to Article 368, taking away the jurisdiction of courts to consider the validity of amendment of the Constitution, and making a declaration that there shall be no limitation whatsoever on the constitutent power of the Parliament to amend by way of addition, variation or repeal of the provisions of the Constitution. The validity of the Forty - Second Amendment was considered by the Supreme Court in *Minerva Mills* case.[7] The majority invalidated the changes made in Article 31-C holding that the Fundamental Rights are 'transcedental', inalienable' and 'primordial'. The majority held that any amendment in the Constitution which would destroy the guarantee given by part III would subvert the Constitution by destroying its basic structure although the amendment so made purported to achieve the goals set out in part IV, namely, the Directive Principles of State Policy. The Court further held that clauses (4) and (5) added to Article 368 guaranteeing immunity from judicial scrutiny to the amendments made in the Constitution, were contrary to the basic features of the Constitution. The Court held that judiciary was the interpreter of the Constitution and it was assigned the delicate task to decide and enforce the constitutional limitations. The Parliament could not take away power of judiciary in considering the validity of constitutional amendments. The decision in *Minerva Mills* case turned upon the applicability of the doctrine of basic features and the structure of the Constitution. Bhagwati, J., as he then was, expressed his opinion in the following categorical words :

> "It is a cardinal principle of our Constitution that no one howsoever highly placed and no authority howsoever lofty can claim to be the sole judge of its power under the Constitution or whether its action is within the confines of such power laid down by the Constitution. The judiciary is the interpreter of the Constitution and to the judiciary is assigned the delicate task to determine what is the power conferred on each branch of government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of rule of law..."

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7 1980 (3) SCC 625

Speaking further on the issue of the removal of limitation on the amending power of Parliament, Bhagwati, J. observed :

> "How can Parliament, which has only a limited power of amendment and which cannot alter the basic structure of the Constitution, expand its power of amendment so as to confer upon itself the power of repeal or abrogate the Constitution or to damage or destroy its basic structure or to convert it into an absolute and unlimited power ?"

The Constitution does not define or declare basic features or structure of the Constitution. The term "basic features" is synonymous to the terms "Essential Features", "Basic Elements", "Fundamental Principles" and "Basic Structure or Framework". All these expressions convey the same meaning which have been used by Supreme Court in *Kesavananda Bharati's* case while discussing the essential basic features of the Constitution. "basic features" or "structure of the Constitution" means the entire structure of the Constitution as a whole. It does not refer to one part or the other. It is difficult to ascertain the basic features of the Constitution from one part or the other; instead it is discernable from the entire provisions as a whole. A structural and functional analysis of the Constitution indicates the basic essential features. In *Kesavananda Bharati's* case, on a detailed analysis of the entire provisions of the Constitution, Sikri C.J. described the following as the "basic structure" of the Constitution :

1. Supremacy of the Constitution,
2. Republican and democratic form of the Government,
3. Secular character of the Constitution,
4. Separation of powers between the Legislature, the Executive and the Judiciary,
5. Federal character of the Constitution.

The structure as pointed out by the learned Chief Justice is built on the basic foundation, that is, the dignity and freedom of the individual which cannot be by any form of amendment destroyed.

Two other Judges, Shelat and Grover, JJ., while agreeing with the aforesaid illustrations regarding the concept of basic structure added the following two more features, namely,-

(1) the mandate to build a welfare State contained in Part IV of the Constitution;
(2) the unity and integrity of the nation.

Hegde and Mukerjee, JJ., illustrated the basic elements or fundamental principles of the Constitution, such as :

(i) sovereignty of India;
(ii) the democratic character of our polity;
(iii) the unity of the country;
(iv) the essential features of the individual freedoms secured to the citizens;
(v) the mandate to build a welfare State and egalitarian society.

Reddy, J. included the following in the list of basic features, viz -

(i) Sovereign Democratic Republic, (ii) Justice, Social and Economic,
(iii) Liberty of thought, expression, belief, faith and worship,
(iv) Equality of status and of opportunity. The learned Judge culled out these essential features from the Preamble to the Constitution.

Khanna, J. used the expression, "basic structure and frame work" of the Constitution. While agreeing with the illustrations given by Sikri, C.J. Shelat, Grover, Hegde, Mukerjee and Reddy, JJ. with regard to the basic features, he added further illustrations as the basic structure of the Constitution, viz -

(i) Democratic form of Government,
(ii) Lok Sabha and Rajya Sabha, and
(iii) the secular character.

The illustrations given by the learned Judges form the "basic features" and 'structure' of the Constitution and they have laid down that it is not open to the Parliament to destroy any of the "basic features" or 'structure' of the Constitution in exercise of its amending power. Parliament has, however, been conceded the power to amend the Constitution including the Fundamental Rights, with a rider that there is an implied limitation on the Parliament's power to amend the Constitution under Article 368, that is to say, while making amendments it cannot totally destroy the basic features of the Constitution. The learned Judges held that the Parliament in exercise of its ordinary legislative power cannot amend the Constitution to destroy Fundamental Rights, Parliamentary form of Government, Democratic process based on adult franchise etc. These basic features are ingrained in the Constitution. I think it necessary to refer to the provisions of the Constitution to ascertain the relevance of basic features.

The Preamble to the Constitution indicates the people's resolve to have a true and noble democracy for the welfare of the people by securing and protecting effectively a social order in which liberty of thought, expression, belief, faith and freedom of worship and equality of status and opportunity shall be secured to citizens. The solemn pledge given to the country finds expression in Part III of the Constitution in the shape of Fundamental Rights which among other things provide for equality before law, freedom of expression, freedom to carry on any profession, trade or business and freedom from arrest or detention except in accordance with law under Article 21 of the Constitution. These basic and natural rights of an individual are considered sacrosanct in a civilized society. The Founding Fathers took care to make it clear that there should be no totalitarian State in the country and for that purpose they designed democratic system having a Parliamentary form of Government elected on the basis of adult franchise (Articles 325 and 326). In our country, there are a large number of persons who follow different religions; The Founding Fathers gave freedom of religion and the State was ordained to follow a secular path.

The Constituent Assembly knew that Fundamental Rights were the basic human rights without which a free democracy was impossible,

so they declared Fundamental Rights in Part III which are in the nature of "Bill of Rights". Founding Fathers were conscious of the necessity of amending the Constitution in the years to come, yet they declared their faith in the supremacy of Fundamental Rights. In his speech Pt. Jawahar Lal Nehru, dispelled the fears raised by some Members of the Constituent Assembly on the question of amendment of these rights. Speaking of the Fundamental Rights he observed:

> "Fundamental Right should be looked upon, not from the point of view of any particular difficulty of the moment but as something that *you want to make* permanent in the Constitution."

Dr. S. Radhakrishnan the great philosopher speaking on the Resolution on Fundamental Rights in the Constituent Assembly observed :

> "There is also a reference to Fundamental Rights in this Resolution. It is a socio-economic revolution that we are attempting to bring about It is therefore necessary that we must remake the material conditions, but apart from remaking the material conditions we have to safeguard the liberty of the human spirit...We must safeguard the liberty of the human spirit against the encroachment of the State. While State regulation is necessary to improve economic conditions, it should not be done at the expense of the human spirit... This declaration which we make today is of the nature of a pledge to our own people and a pact with the civilized world."

Speaking in the same vein the main architect of the Constitution Dr. B.R.Ambedkar observed:

> "The declaration of the Rights of Man has become part and parcel of our mental make-up. These principles have become the silent immaculate premise of our out-look."

The Members of the Constituent Assembly from past experience were aware of the dangers of executive oppression and legislative interference with civil liberties under foreign rule and in order to protect the citizens from such dangers of tyrannical laws they made declaration of Fundamental Rights. Constituent Assembly debates show that no hon'ble member suggested that the Parliament in exercise of the amending power could abrogate fundamental rights. There was another essential common objective and purpose behind enacting Part III of the Constitution, namely, to grant protection and assurance to the minorities in order to maintain the integrity of the country.

The Fundamental Rights guaranteed by Part III of the Constitution are the basic human rights held by all Indians regardless of race, religion, social position or other factors. These rights are intended to be inviolable. In *West Virginia State Board of Education* vs. *Barnette*[8]

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8 (1942) 319 US 627: 87 L. ed. 1628.

Justice Jackson of U.S. Supreme Court summarized the philosophy underlying Fundamental Rights, while commenting on the American Bill of Rights, in the following words;

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the Vicissitudes of political controversy, to place them beyond (the) reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's rights to life, liberty, and property, to free speech, a free press, freedom of worship, and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

The basic features and structure of the Constitution as enumerated above have their own significance, and the view that Parliament's amending power does not permit abrogation of any part of such basic features is founded on the premise that Constitution has been given by, and the ultimate sovereignty resides in the people and it is they who can change the basic features of the Constitution. This may be by electing a Constituent Assembly for the purpose or by referendum. The Parliament which is created under the Constitution has limited power to amend the Constitution but if that power is to be considered absolute it will become open to it to amend the Constitution so as even to destroy its structure. Taking the absolute power to its logical end the members already elected to Parliament may amend the Constitution permitting them to continue in office for life and in the event of their death their heirs may be given right to succeed to them as members of Parliament. This would be contrary to the democratic system of our polity. Another possibility may be that the Parliament may amend the Constitution dispensing with Judiciary by providing that the judiciary shall not be competent to question validity of any law made by Legislature, or any order passed by the Executive or that there would be no courts. This would destroy the system of checks and balances contained in the Constitution. The courts are balance wheels of the Constitution and if that wheel is disturbed the constitutional scheme would collapse, and it would destroy the people's abiding faith in the Constitution which may bring chaos and disorder, people will take the law in their own hands to ventilate their grievances. Having regard to these considerations it is manifest that Founding Fathers never intended that Parliament should have absolute power to amend the Constitution, so as to destroy basic features of the Constitution.

The Constitution envisages a peaceful, socio-economic revolution to secure an egalitarian society having respect and regard to the individual's freedom and dignity. The Directive Principles contain the socio-economic philosophy of the Constitution, but these are not enforceable in a court of law while Fundamental Rights are enforceable. The Constitution has given primacy to Fundamental Rights. The Constitution contemplates social revolution to achieve the goals set out under Part IV of the Constitution through peaceful means without destroying the Fundamental Rights and other basic features of the

Constitution, which can be achieved without destroying the basic features. There is no inconsistency or collision between the Fundamental Rights and the Directive Principles.

There has been criticism of the 'basic features' theory evolved by the Supreme Court. Lawyers and jurists have pointed out that Article 368 does not contain any limitation on the Parliament's power to amend the Constitution, that the judiciary has placed an unjustified limitation on the Parliament's power to maintain *status quo*, that the judiciary has made itself the final arbiter and that its decisions are bound to affect adversely the socio-economic reforms in the country as a result of which development and progress of the country shall be retarted. It is said that the innovation of doctrine of basic structure or features of the Constitution is the out-come of a limited and narrow view of the history of the constitutional law, that seeks to make provisions in the Constitution eternal and valid for all times to come, forgetting the essential experience gained by mankind in regard to the working of a written constitution. They plead that sometimes unforeseen events over-take a nation and to meet that situation the Constitution may be required to be amended in respect of its essential elements. Human mind is not capable of foreseeing every possible change to take place in a country in a long period, during the life-time of a constitution. Change is the nature of life. History of natural science shows that ideas of men change with the changes in their socio-economic conditions. The Constitution should not be rigid and static, instead it should give way to the aspirations of the people. A Constitution which fails to be adaptive to the dictates of the people is doomed to failure, disrespect and damnation. They further advocate that the "basic features" doctrine would mean that the Constitution stands divided into two sets of provisions, one those which can be amended by Parliament by following the procedure under article 368, and second those which are essential and cannot be amended without destroying the core or essential features. They further assert that in the absence of any provision in the Constitution specifying its basic features, the final say rests with the Judges of the Supreme Court but not with the Parliament, according to the intention of the Constitution. And finally it is said that if an amendment to the Constitution is not permissible to bring about changes for the welfare and well-being of the society there is a great danger of the Constitution being over-taken by extra-constitutional methods for changing the "essential features" that may be regarded as stumbling block in the progress of the country.

Those who are opposed to the aforesaid views find no justification for taking the extreme view that judiciary has assumed the sovereign power or that it is a stumbling block in the progress of the country by evolving the doctrine of "basic features". It is not the Supreme Court which is to be blamed for the slow progress of the country. Many of the laws introducing social and economic reforms have been upheld by the courts, and yet the Government has failed to enforce the legislation vigorously as a result of which the socio-economic

reforms have not been implemented. The judiciary cannot be blamed for all these.

It would not be proper or desirable for me as a sitting Judge of the Supreme Court to express any positive opinion on these conflicting views.

The Constitutional Law as it stands today and the illustrations given by the learned Judges in *Kesavananda Bharati's* case and further in the decisions in *Indira Nehru Gandhi* vs. *Raj Narain*[9] and *Minerva Mills* case declare, define and specify the basic features of the Constitution. The argument that the basic features are uncertain and for that reason the scope of Parliament's power to amend the Constitution remains unspecified and uncertain is not correct. If and when any challenge is made to any amendment made in the Constitution it would be open to the Supreme Court to either affirm its views on the doctrine of basic features of the Constitution, or it may in its wisdom also take a contrary view having regard to the policy and purpose of the amendment. During the last thirty-eight years of working of the Constitution Parliament has amended the Constitution fifty-eight times. Many of these amendments were challenged before the Supreme Court but only a few of them have been struck down. There has been no serious confrontation between the Parliament and the Court, both have acted with restraint in the interest of the country. The judiciary's task is unpleasant; its decisions are sometimes unpleasant; but the people of the country have abiding faith in the independence and wisdom of the judiciary. The Parliament has shown sagacity in honouring the judicial verdicts. The constitutional scheme providing for maintaining checks and balances between the three organs of the State has functioned fairly without any break-down of the constitutional institutions. The Executive, the Legislature and the Judiciary have worked within the frame-work of the Constitution during the past thirty-eight years in spite of many stresses, pressures and pitfalls. The progress and development of the country during these years may not have been as fast as desired but nonetheless the country has progressed, despite the so-called judicial impediments.

I hope and trust that the people of India shall continue to have abiding faith in the Constitution and the institutions constituted by it and that they will strive to secure the welfare state and egalitarian society through democratic process in a peaceful manner. So long the three organs of the State function in coordination to secure the goals set out by the Constitution, and the people continue to have faith in the Constitution, there will be peace and order in the country.

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9 AIR 1975 SC 2299

BASIC FEATURES OF THE CONSTITUTION

Mr Justice K.C. Agarwal

For the philosophy underlying our Constitution we must look back into the historic Objectives Resolution moved by Pandit Nehru, which was adopted by the Constituent Assembly on January 22, 1947, and which inspired the shaping of the Constitution through all its subsequent stages. It reads thus:-

"This Constitutent Assembly declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance a Constitution:

(2) Wherein the territories that now comprise British India, the territories that now form the Indian States, and such other parts of India as are outside British India and the States as well as such other territories as are willing to be constituted into the Independent Sovereign India, shall be a Union of them all; and

(3) Wherein the said territories, whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the law of the Constitution, shall possess and retain the status of autonomous units, together with residuary powers, and exercise all powers and functions of Government and administration, save and except such powers and functions as are vested in or assigned to the Union, or as are inherent or implied in the Union or resulting therefrom; and

(4) Wherein all power and authority of the Sovereign Independent India, its constituent parts and organs of Governments are derived from the people; and

(5) Wherein shall be guaranteed and secured to all the people of India justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality; and

(6) Wherein adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes; and

(7) Wherein shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea, and air according to justice and the law of civilised nations; and

(8) The ancient land attains its rightful and honoured place in the world and make its full and willing contribution to the promotion of world peace and the welfare of mankind."

In the words of Pt Nehru the aforesaid Resolution was "something more than a Resolution. It is a declaration, a firm resolve, a pledge

and undertaking and for all of us a dedication." Mahatma Gandhi as early as in 1922 had demanded that India's political destiny should be determined by the Indians themselves. Pt. Nehru formulated his demand for a Constituent Assembly in 1938. The Resolution was :

> "This cannot be done by the wisest of lawyers sitting together in conclave; it cannot be done by small committees trying to balance interests and calling that Constitution-making; it can never be done under the shadow of an external authority. It can only be done effectively when the political and psychological conditions are present, and the urge and sanctions come from the masses."

It is, although, of interest to know as to how was the Constituent Assembly constituted and who were its members, but time at our disposal being short, I would not like to discuss the same here. The members of the Constituent Assembly approached the task of drafting of the Constitution in a practical rather than a theoretical way. They knew that the Constitution must help to bring about the reform, the rennaissance of Indian society, that it must embody the national goals and subserve their achievement, but they were politicians in the sense that they practised the art of the possible.

Members of the Constituent Assembly, although representing extremely diverse country, brought a spirit of unity, a national awareness. They also had this applied particularly to Nehru, Patel, Prasad, Azad, Pant, and several others, practical experience, personal popularity, intellectual ability and the political power to impress upon the Assembly the concept of the type of Constitution best able to bring about the new India. Granville Austin in his book on the Indian Constitution (1966 Edition) at page 21 has noted the respect which the leaders aforesaid commanded and which proved to be of immense help in drafting the same:

> "Nehru, Patel, Prasad, and Azad, in fact, constituted an oligarchy within the Assembly. Their honour was unquestioned, their wisdom hardly less so. In their god-like status they may have been feared; certainly they were loved. An Assembly member was not greatly exaggerating the esteem in which his colleagues held these men when he said that the government rested in the hands of those who (were) utterly incapable of doing any wrong to the people'. The oligarchy's influence was nearly irresistible, yet the Assembly decided issues democratically after genuine debate, for it was made up of strongminded men and the leaders themselves were peculiarly responsive."

There were many others who were involved in the framing of the Constitution but these names and their services to the country are unparalleled.

We must now try to understand what a constitution is. There are various types of constitutions which were born after the Second World War. Each one of them serves as symbol of the country's state-

hood and independence. These Constitutions can be grouped broadly into three categories: (1) the Western Democratic Libertarian, (2) the Socialistic Communist Constitution, and (3) others.

Again constitutions have been classified as written and unwritten, or unitary and federal or flexible and rigid, or democratic and totalitarian. United Kingdom has unitary constitution and a Parliament which is sovereign. It was once said that the sovereignty of the Parliament is so wide that it could do anything except make a man a woman or a woman a man. The history of the British people shows that they have been brought up on struggle and conflict against the King and of the Parliament, for the establishment of their rights, for freedom of speech and press, and for the establishment of an independent judiciary. They will never tolerate the use of parliamentary power to trample upon or transgress their cherished rights, though theoretically Parliament is omni-potent.

William Gladstone, the British statesman and Prime Minister once described the American Constitution as "the most wonderful work ever struck off at a given time by the brain and performance of men".

The next category of constitutions are those of Socialist-Communist States. These States have an aspiration to maximise economic welfare of all. They limit free economic enterprise and accumulation of private property.

Ours is a Constitution of unique type which secures to all of its citizens:

> "Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship;
>
> and to promote among them all;
>
> Fraternity assuring the dignity of the individual and the unity and integrity of the Nation."

The importance and utility of the Preamble has been pointed out in several decisions of our Supreme Court. For a proper appreciation of the aims and aspirations embodied in our Constitution, therefore, we must turn to the various expressions contained in the Preamble reproduced above. It is not possible to deal with all the aspects of the Preamble in this short lecture. However, I wish to note that guarantee of certain rights to each individual would be meaningless unless all avoidable inequalities are banished from the social structure and each individual is assured of equality of status and opportunity for the development of the best in him.

In the Directive Principles, however, one finds a clear statement of the social values. They aim at making the Indian masses free in the positive sense, free from passivity and inertia engendered by centuries of coercion by the society and by nature. At one time the view was that these principles are not justiciable. But there has of late been a change in approach to the interpretation of Directive Principles, the details of which need not be discussed here.

The question as to what are the basic principles of the Constitution came to be decided by the Supreme Court for the first time in *Kesavananda Bharati* v. *The State of Kerala* (1973 SC 1461). The Bench which decided this case consisted of thirteen Judges, and as many as 2158 paragraphs have been written. According to the majority view the basic features of the Constitution cannot be altered or amended. Other decisions relevant on the point are *Smt. Indira Gandhi* v. *Raj Narain* (AIR 1975 SC 2299); *Minerva Mills* v. *Union of India* (AIR 1980 SC 1789); *Sanjeev Coke Mfg. Co.* v. *M/s. Bharat Coking Coal Ltd.* (AIR 1983 SC 239: *Minerva Mills Ltd.* v. *Union of India* (AIR 1986 SC 2030). In *Golaknath* v. *State of Punjab* (AIR 1967 SC 1643), a majority of the Supreme Court Judges, including Chief Justice Subba Rao had held that the fundamental rights enshrined in Part III of the Constitution could not by virtue of Article 13(2) be taken away or abridged by an amendment under Article 368. The contention of the Government that the Parliament was supreme and could under Article 368 amend any part of the Constitution, abrogate or take away any of the fundamental rights was not accepted. What was, however, conceded by Government was that Parliament could not abrogate the entire Constitution and replace another one instead. Thereafter the Supreme Court decided two other cases, namely, *R.C. Cooper* v. *The Union of India*, (AIR 1970 SC 564) and the *Privy Purses case, Madhav Rao* v. *Union of India*, (AIR 1971 SC 530). In the latter decision the abolition of Privy Purses was set aside. These decisions led to the passing of Twenty-Fourth and Twenty-Fifth Amendments in the Constitution. By the former (i.e. 24th Amendment), *Golaknath's* case was sought to be overcome by enacting Article 13(2). By the latter (i.e. 25th Amendment), Article 31(2) was amended to provide that the acquisition of any one's property can be made on payment of an "amount"instead of "compensation".' This amendment also inserted Article 31C which had a wide sweep.

After these amendments *Keshavananda Bharati's* case came to be decided by the Supreme Court in 1973. The majority overruled *Golaknath's* case. It further held that Parliament, in the exercise of its amending power, cannot alter the basic structure or framework of the Constitution. In other words Article 368 could not be pressed into service to destroy the basic structure of the Constitution.

When this controversy was going on, the Allahabad High Court allowed an election petition against Smt. Indira Gandhi on June 12, 1975, and held her guilty of corrupt practices. The Parliament amended the Representation of the People Act removing the corrupt practice of which the Prime Minister was held guilty. In the appeal before the Supreme Court, the reference of which has been given above, the question was whether clauses (4) and (5) of Article 329A of the Constitution were unconstitutional being against the basic structure. The Supreme Court held that there could be no legislative validation of an election which is judicially declared invalid as it would be an encroachment on the judicial power.

Kesavananda Bharati's case, thus made the destruction of the basic structure of the Constitution impermissible. Again the controversy about the power of amendment was considered by the Supreme Court in *Minarva Mills Ltd.* v. *Union of India*, (AIR 1980 SC 1789). The majority consisting of Chandrachud, C.J. Gupta, Untwalia and Kailasam, JJ. held that section 55 of the 42nd Amendment Act, which added clauses (4) and (5) to Article 368 confers on Parliament a vast and undefined power to amend the Constitution so as to distort it out of recognition. Since the Constitution conferred only a limited amending power on Parliament, as held in *Kesavananda Bharati's* case, Parliament could not under the exercise of that limited power, enlarge that very power into an absolute power. Hence, section 55 of the Amendment Act was held to be beyond the amending power of Parliament. Correctness of the aforesaid *Minerva Mills Ltd.* case was doubted by another bench of the Supreme Court in *Sanjeev Coke Mfg. Co.* v. *Bharat Cooking Coal Ltd.* (AIR 1983 SC 239).

There has been a criticism of the 'basic features' theory by some jurists and public men on the ground that Article 368 of the Constitution does not contain any limitation on the Parliament's power to amend the Constitution. According to their views the judiciary has placed an unjustified limitation on the Parliament's power and thereby it has shown itself in favour of *status quo*. In support of this view it pointed out that no such limitation can be placed on the right of a future Parliament elected under the Constitution. If exigencies require, the argument runs, the Parliament can amend any of the part of the Constitution.

N.A. Palkhivala in his book 'We the People' at pages 212 and 213 has observed;

"The basic structure of the Constitution is of marble. Article 31C, as amended by S.4 of the Forty-Second Amendment Act, sought to substitute a framework of red bricks. The Supreme Court's judgment has cried a halt to the process of administering euthanasia to freedom."

"The bogey of a conflict between fundamental righs and directive principles is wholly misconceived. While Part IV (directive principles) contains the directory ends of the State, Part III (fundamental rights) indicates the permissible means of giving effect to those ends."

"There can be no conflict between the directory ends and the permissible means. The only conflict is between the Constitution and those who refuse to accept the discipline of the Constitution. The real question is not of social interest versus the individual's but whether in the name of social interest the basic human freedoms can be trampled under foot."

Any discussion about the scope of Article 368 would be incomplete without making a reference to the speech of Dr. B.R. Ambedkar while moving the motion in the Constituent Assembly for consideration of the draft Constitution in justification of the restrictions placed (namely,

requirement of special majority, etc., on future Parliaments' power of amendment.

"The Constituent Assembly in making a Constitution has no partisan motive. Beyond securing a good and workable Constitution it has no axe to grind. In considering the articles of the Constitution it has no eye on getting through a particular measure. The future Parliament if it met as a Constituent Assembly, its members will be acting as partisans seeking to carry amendments to the Constitution to facilitate the passing of party measures which they have failed to get through Parliament by reason of some article of the Constitution which has acted as an obstacle in their way. Parliament will have an axe to grind while the Constituent Assembly has none".

One may or may not agree with the 'basic features' theory. But, for so long as the Supreme Court does not change its view, the decisions, referred to above, would be binding.

RELIGIOUS AND MINORITY RIGHTS UNDER PART III OF THE CONSTITUTION AND THE VALIDITY OF THE LEGISLATION ON THEIR TOUCHSTONE

Mr Justice U.C. Srivastava

The problem of minorities is a world-wide problem. It plagued the country before independence. Even now the said problem has not yet finished and in India all types of divisive forces still continue to raise their head. The basis of two nations theory was one of the principal causes of bifurcation of this country. The Britishers' rule came to an end in the year 1947 but they left the country partitioning on religious grounds. The partition took place on the basis of majority of the followers of a particular religion in contiguous area in the western and eastern parts of the country and a theocratic state of Pakistan came into existence. In the remaining country known as India that is Bharat, on the other hand, a number of religious and linguistic groups continued to reside : Hindus, Muslims, Christians, Sikhs, Parsis etc. A number of languages are spoken in the country and the Constitution included eighteen such languages in the 8th Schedule. Most of them were included in the said Schedule even prior to the States' reorganisation, when linguistic States were carved out. Even thereafter the problem of linguistic minorities continued to stand, sometimes in an aggravated form, and occasions have come in the past when the linguistic problem raised its dirty head.

The founding fathers gave a Constitution for the country. Although in the Constitution as adopted by the country the word "secular" nowhere found place, various provisions of the Constitution such as Articles 15 to 17 and Articles 25 to 30 did indicate that it was a secular State. This was made explicit by the 42nd Amendment Act, 1976 by which in the Preamble of the Constitution the word 'secular' and the words Unity and Integrity of India were added. The Preamble specifically provides that "We the people of India ... to constitute India into a Sovereign Socialist Secular Democratic Republic ... unity, integrity of the nation". The preamble thus gives out the solemn resolution of the people of India which includes people of all religions, castes, creeds and beliefs to constitute the country as a Secular Socialistic Democratic Republic. One of its objects is to secure the 'Unity and Integrity of the nation'. The Constitution thus itself gives out that India is one nation. The nation is one though people of various religions and faiths are its people and their various languages are its languages. The words "We the people" are very significant. The Constitution is by and for the people of India. The Constituent Assembly was set up in view of Cabinet Mission Plan which also suggested that an Advisory Committee on the rights of the citizens, minorities, tribals and for excluded areas be set up. Thus the Cabinet Mission Plan itself separately categorised citizens as minorities, tribals and the excluded areas and the Advisory Committee was constituted which submitted its report prior to the framing of the Constitution. The framers of the Constitution protected the rights of various minorities throughout the country.

The word 'secular has not been defined in the Constitution of India anywhere. But it can have no restricted meaning in this country in view of the various provisions of the Constitution of India. In a secular State, as far as religion is concerned, the State is of no consequence. It rules out any discrimination on the ground of religion. I mean members of all religions, whether numerically more or less, get the same treatment in the matter of regulations or restrictions by the State, and the balance of State is not to tilt either in favour or against any section, group or individual on the basis of religion. In *Ahmedabad St. Xavier's College Society* vs. *State of Gujarat* (AIR 1974 S.C. 1389) it was held :-

"There is no mysticism in the secular character of the State. Secularism is neither anti-God nor pro-God. It treats alike the devout, the agnostic and atheist. It eliminates God from the matters of the State and ensures that no one shall be discriminated against on the ground of religion."

India gained independence and the immediate price it paid, the loss it suffered, was known to the Constitution makers and in view of the fact they wanted it to be secular State it was considered necessary to give a feeling of confidence to members of minority communities and to ensure that they will get equal rights and have religious freedom, of course without encroaching upon the religious freedom and freedom of belief of others in any manner.

Articles 25 to 28 of the Constitution of India preserve and protect the freedom of all religions existing in the country. Article 25 to 28 read as under :-

Article 25 : Freedom of conscience and free profession, practice and propagation of religion :-

(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law -

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Article 26 : Freedom to manage religious affairs :-

Subject to public order, morality and health, every religious denomination or any section thereof shall have the right -

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law".

Article 27 : Freedom as to payment of taxes for promotion of any particular religion :-

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 28 : "Freedom as .....institutions : -

(1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing to clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto."

A reading of these articles would indicate that freedom of religious activities has been conferred by the Constitution of India, but all these rights are subject to public order, morality and health and to other provisions of Part III of the Constitution of India, i.e., the Fundamental Rights under the Constitution. The powers for imposing restrictions and regulations by law have been conferred upon the State in various matters. These Articles do not use the word 'minority', but the word 'religious denomination' has been used. The word 'religion' has not been defined in the Constitution of India. In *Ratl Lal* vs. *State of Bombay* (AIR 1954 S.C. 388) it was observed :-

"A religion is not necessarily theistic; there are well known religions in India like Buddhism and Jainism, which do not believe in the existence of God or of any intelligent first cause. A religion has its basis in a system of beliefs and doctrines which are regarded by those who profess that religion to be conducive to their spiritual well being; it is not correct to say that matters of religion are nothing but matters of religious faith and religious belief. A religion is not merely an opinion, doctrine or belief. It has its outward expression in acts as well."

The word 'religious denomination' would mean a religious sect or body designated by distinct name. Several religions founded by

those who were born in the old religion are all part of a big entity known as Hindu religion. Coming to the ancient or the old religion as it was in Vedic and Pauranic times we find that the people then too had different objects of worship, which gradually gave rise to various sects and breakaway groups by way of rebellion or otherwise. Various other religions later came into existence like Islam and Christianity. In *Commissioner H.R.E.* vs. *Lakshmindra Tirtha Swamier* (AIR 1954 S.C. 282) it was observed :-

> "The word 'religious denomination' has not been defined in the Constitution of India. According to Oxford dictionary it would mean collection of individuals classed together under the same name, a religious sect or body having common faith and organisation and designated by a distinctive name."

This test has been followed in *S.P. Mittal* vs. *Union of India* [(1983) 1SCR 729]wherein it was observed :-

> "The words 'religious denomination' must therefore satisfy three conditions, viz. (1) it must be a collection of individuals who have a system of beliefs or doctrines which they regard as conducive to their spiritual well being, that is, a common faith; (2) common organisation; and (3) designation by a distinctive name."

We may first take up the 'Hindu religion'. Hindus constitute the majority in this country. The word 'Hindu' has not been defined and it can safely be said that there is no religion which is known as Hindu religion like Islam or Christianity. When from western part of the country attacks were made then those who were residing on the other side of the Sindhu river were named by the attackers as "Hindus", and the country was given the name of "Hindustan." This would include the entire Hindu religion as it existed then, which includes Jainism and Buddhism, or the religion observed or practised in excluded areas or those who were designated as tribes or aboriginals by the British rulers for their own reasons. The Hindu religion in this wider sense includes Jainism, Buddhism, Arya Samaj, Brohma Samaj, Prarthana Samaj, Lingayats, Sikhism, Radhaswami. Hindu law as it was applicable prior to the coming into force of the Constitution of India is applicable to all such religious denominations under various statutes like the Hindu Succession Act, the Hindu Marriage Act, the Hindu Minority and Adoption Act.

Article 25 guarantees the freedom of conscience and free profession, practice and propagation of religion, but this freedom is subject to public order, morality and health, and the State can restrict and regulate this freedom for this purpose and the State can also frame any law or restrict economic, financial political or other secular activity which may be associated with a religious practice. It can also make laws providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. This would show that the Constitution has conferred powers upon the State to interfere in the matters of Hindu religion which

is over and above the restrictions or regulations which can be imposed by law on the followers of all religions. Article 25 also confers the right to propagate one's religion. Propagation of religion will not include conversion, as right to convert others is not a fundamental right as has been observed in *Rev. Stainislaus* vs. *State* of M.P. (AIR 1977 SC 908). It was observed that what is freedom for one is freedom for others in equal measure. It was held :-

> "The word 'propagation' has no doubt been used in Article 25(1), but what the Article grants is not the right to convert another person to one's own religion, but to transmit or spread one's own religion or an exposition of its tenets. It has to be remembered that Article 25(1) guarantees "freedom of conscience" to every citizen, and not merely to the followers of one particular religion, and that, in turn, postulates that there is no fundamental right to convert any person to one's own religion, because if a person purposely undertakes the conversion of another person to his religion, as distinct from attempt to transmit or spread the tenets of his religion, that would impinge on the "freedom of conscience" "guaranteed to all the citizens of the country alike."

In the said case reliance was placed on *Rati Lal* vs. *State of Bombay* (supra) wherein it was observed :-

> "Thus subject to restrictions which this Article imposes, every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others."

Obviously thus the propagation of religion if it is not to violate any constitutional provision or the rights guaranteed under it would stand for propagation among the followers of the same faith. But any propagation among the followers of any other religion attracting or alluring them towards their religion, may be because of poverty, ignorance, illiteracy or frustration, could also amount to impingement on those other's free conscience and would amount to conversion.

Article 26 confers the freedom to manage religious affairs subject to public order, morality and health, and every religious denomination or any section thereof has the right to establish and maintain institutions for religious and charitable purposes and to manage its affairs in matters of religion and to own and acquire movable and immovable property and to administer such property in accordance with law.

The words 'manage its own affairs in the matter of religion' are important. The State has full right to decide as to what rights and ceremonies are necessary to be observed in a particular religion in which no interference by an outside agency can be made. This freedom of course can be curtailed to the extent permitted in Articles 25 and 26 of the Constitution. Similarly the right to own and acquire property

is also not absolute and is subject to restrictions and regulations which may be made by the State. Obviously it is subject to the State power to acquire property for public purpose under any law. But so far as minority institutions are concerned, the right to market value of property acquired has been conferred upon them by Article 30. The State can place reasonable restrictions and make regulations in the matters of transfer of property of such religious denominations.

The right to compensation that may be claimed by a religious denomination is different from its right to manage its affairs in the matter of religion. A religious denomination has the right to administer its property but the same can be done only in accordance with law, and the law will encroach upon this fundamental right only when it is necessary or when it is in conflict with other rights. A law which takes away the right of administration from the hands of a religious denomination and vests it in another authority is violative of rights guaranteed under Article 26(d) of the Constitution. But if the Collector of the district or any other officer who may not be the follower of the religion concerned or member of that denomination is made a member of the board of management the same will not violate Article 26(d) as the presence of the Collector in the Board's meeting only helps the proper administration of the temple property. (See *Govindlalji Maharaj* vs. *State of Rajasthan*, AIR 1963 SC 1638, para 60).

Article 27 prohibits the specific appropriation of the proceeds of any tax in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. The same is in conformity with the Preamble of the Constitution which provides it to be a secular State. So is the case with Article 28 of the Constitution of India. Article 28 provides that no religious instruction shall be provided in any educational institution wholly maintained out of State funds, but this provision will not apply to an educaitonal institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution. Article 28(3) further provides that no person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

Articles 27 and 28 as they read indicate that they exist for strengthening the secular foundation of the Constitution.

Articles 29 and 30 of the Constitution of India have guaranteed cultural and educational rights of the minorities. These articles read as under :-

Article 29 : Protection of interests of minorities

(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

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

Article 30 : "Right of minorities to establish and administer educational institutions :-

(1) All minorities, based on religion, or language, shall have the right to establish and administer educational institutions of their choice.

(1-A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority whether based on religion or language".

Articles 29 and 30 confer five distinct rights :-

(i) Right of any section of citizens to conserve its own language, script or culture [Art. 29(1)].

(ii) Right of a citizen not to be denied admission into any State-maintained or State-aided educational institution on ground only of religion, race, caste or language [Art. 29(2)].

(iii) Right of all religious or linguistic minorities to establish and administer educational institutions of their choice [Art. 30(1)].

(iv) Right of an educational institution not to be discriminated against in the matter of State aid on the ground that it is under management of a minority.

(v) In the event of compulsory acquisition of any property of an educational institution established and administered by a minority based on religion, or language, the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause [Art. 30(1A)].

Article 30 does not use the word 'citizen' but it does not confer any right on foreigners, not residents of India, to claim a right to set up educational institutions of their choice. Persons setting up educational institutions must be resident of India and they must form a well-defined religious or liguistic minority in this country. To incorporate in the interpretation of Article 30, in respect of an institution established

by a minority, the condition that it must in addition be proved to have been established by persons who would, if the institution had been set up after the Constitution, have claimed Indian citizenship, is to whittle down the protection of Article 30 in a manner not warranted by the provisions of the Constitution.

Article 30 indicates that the choice is not limited to Indians to conserve language, script or culture, but a minority community can effectively conserve its language, script or culture by and through educational institutions of its choice.

Articles 29 and 30 create separate rights and it is possible that they may overlap in a given case.

The word 'minority' has not been defined in the Constitution of India though it may be said that a 'minority' can exist only if there is a majority. In *Kerala Education Bill's Case** the Supreme Court observed that minority is a term which is not defined in the Constitution but it must be held that a minority community means a community which is numerically less than 50 percent; but then the question is not fully answered, for part of the question has yet to be answered, namely, 50 per cent of what? Is it 50 per cent of the entire population of India or 50 per cent of the population of a State forming a part of the Union? No final opinion was expressed in the said case. But in *D.A.V. College, Jullundur* v. *State of Punjab*;** it was observed that minority should be determined in relation to a particular impugned legislation. It was held that in State of Punjab, Arya Samaj will be a minority community. Thus the view appears to be that the determination of this question is to be based on the area of operation of the particular piece of legislation.

The concept of minority in the context of the Constitution of India is of variable character and has a diversified character in accordance with the population of its country and the States. After partition of the country on religious grounds a separate State was carved out on the eastern and western sides of the country on the basis of followers of Islam being in majority in these areas called Pakistan, and the remaining part is known as 'India that is, Bharat'. In India in some of the States members of the Hindu community are thus claiming the privileges and benefits of being members of minority community. In Jammu and Kashmir Muslims are in majority, while in Nagaland, Meghalaya and Mizoram the Christians are in majority and in rest of the Bharat, Hindus are in majority.

Hindus, Muslims, Christians or persons of any religious community are the sons of the soil and the question still remains whether the use of the word 'minority' in the Constitution of India will not create a feeling of separation and seggregation amongst members of various communities following different religions, and faiths and be a permanent hurdle in the way of national integration.

Article 29(1) of the Constitution of India confers on all sections of persons, may be in majority or minority, the rights mentioned in

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* AIR 1958 SC 956

** (1971) 2SCC 269

the said Article. Even though the marginal note of it uses the word minority, but obviously the language, as it is, does not restrict it to minorities. So far as clause (1) is concerned, the only condition is that the section of the citizens must have a distinct language, script or culture of its own. It is not necessary that they may constitute a religious linguistic minority as required by Article 30(1) of the Constitution of India. The word used in this Article is "conserve" which is wider than the word "preserve". In *Jagdev Singh Sidhanti* v. *Pratap Singh Daulata* (AIR 1965 SC 183) the Supreme Court observed that "the right to conserve the language of the citizens includes the right to agitate for the protection of the language."

It is to be noted that apart from the right to conserve language and script, the right to conserve culture has also been given. Undoubtedly the word 'culture' is a word of wide import, but the Constitution has nowhere mentioned the word 'culture'. Those who reside in excluded areas or those who keep themselves away from modern civilization may be seen to have a separate culture, religion or language from other sections of the society, but the impact of western culture has affected them too. Islamic culture has undoubtedly affected the culture of this country and those who came from outside became the sons of the soil and they have adopted the culture of this country as a part of their culture, and the culture of the countrymen is now a composite culture. The object of our Constitution is to bring about unity and integrity of India. The fundamental duties mentioned in Article 51-A of the Constitution of India, though not enforceable through court of law, have inter alia cast on every citizen a duty to value and preserve the rich heritage of our composite culture. This shows that our Parliament was fully conscious of the fact that India has got a rich heritage of composite culture and it is the duty of every citizen to preserve the same.

Discrimination against any citizen on the ground of religion in the matter of admission to any educational institution is prohibited by Article 29(2) of the Constitution and if admission is refused on this ground and not on any other ground, obviously it would be violative of the fundamental right guaranteed under Article 29(2) of the Constitution. The use of the word 'only' before the word "religion, caste or language" is significant. The use of the word 'any of them' gives further emphasis that none of the factors mentioned in the Article can be made the sole basis of discrimination in the matter of reservation of seats in the educational institutions.

In the case of *State of Bombay* v. *Bombay Education Society* (AIR 1954 SC 561) the Bombay Government issued a direction that subject to certain exceptions no State-aided Primary or Secondary School should admit students to a class where English was the medium. The Supreme Court while rejecting the plea that the object of the impugned order was to promote Indian languages held that the order in effect involved infringement of Fundamental Right under Article 29(2) of the Constitution in the matter of admission on the ground of language. It was observed that the citizens of the very section whose language, script

or culture is sought to be conserved by the Institution, or citizens belonging to the very minority group which has established and has administered the institution, do not need any protection against themselves and, therefore, Article 29(2) is not designed for the protection of this section or this minority. Nor do we see any reason to limit Article 29(2) to citizens belonging to minority groups other than the section or minority referred to in Article 29(1) or Article 30(1). For the citizens who do not belong to any minority group may quite conceivably need this protection which they have got as the citizens of such other minority group.

In AIR 1958 SC 956 the Supreme Court observed that the real import of Article 29(2) and Article 30(1) of the Constitution seems to be that they clearly contemplate a minority institution with a sprinkling of outsiders admitted to it, and even if non-members of the community are admitted to the institution, it will continue to be a minority institution.

The educational rights of the minorities and of institutions run by them are enshrined in Article 30 of the Constitution of India, which rights are not available to nor can be claimed by the majority. The policy laid down in Article 29(1) of the Constitution of India viz., right of minorities to conserve their language and culture which obviously includes the right to preserve and develop the same is carried further by Article 30 of the Constitution of India. But the considerations on on which Article 29(1) confers the right not only upon a minority as understood in its technical sense, but also upon sections of the citizens which may technically be majority, do not apply to Article 30 under which the beneficiaries are only minorities, either religious or linguistic. There is yet another distinction between these two Articles. Article 29(1) confers right in respect of three subjects viz., language, script and culture, while Article 30(1) deals only with the right to establish and administer educational institutions. Article 30(1) thus guarantees no right to religious minorities who have no distinct language and culture.

There have recently been quite a large number of cases on Article 30 of the Constitution of India decided by the Supreme Court in which the scope of Article 30 has been defined and effect of earlier decisions has been diluted to some extent. The benefit of Article 30 is available and can be claimed only by the institutions which have been established and are administered by the members of a minority community who have got a right to establish educational institutions of their choice. These words indicate that the extent of the right is to be determined, not with reference to any concept of State necessity and general societal interest but with reference to the educational institutions themselves, that is, with reference to the goal of making the minority institutions "effective vehicles of education for the minority community or other persons who resort to them". The words 'established' and 'administered' in Article 30 show that the same are to be read conjunctively if the institution has not been established by members of the minority community, the benefits of Article 30 may not be available

to such institutions even though they are being administered by a particular religious community. The word 'administered' has been used in this context and consists of the following things, as has been held in *Azeez Basha's case* (AIR 1968 SC 662)

(a) The choice of its Managing or Governing body.

(b) the choice of its teachers,

(c) not to compel or to refuse admission in the institution,

(d) the use of its properties and assets for the benefit of the institution,

(e) to select its own medium of instruction.

After this decision amendments were made in the Aligarh Muslim University Act and it was held that in order to claim the benefit of Article 30 of the Constitution the institutions must be established by members of the religious community and be also administered by them. Moreover, the benefit of Article 30 is available only, to the educational institutions which are genuinely of the minorities. In the case of *A.P. Christians Medical Educational Society v. Government of Andhra Pradesh*[(1986) 2 SCC 667]it has been held that :-

> "The object of Article 30(1) is not to allow bogies to be raised by pretenders but to give the minorities 'a sense of security and a feeling of confidence' not merely by guaranteeing the right to profess, practise and propagate religion to religious minorities and the right to conserve their language, script and culture to linguistic minorities, but also to enable all minorities, religious or linguistic, to establish and administer educational institutions of their choice. What is imperative is that there must exist some real positive index to enable the institution to be identified as an educational institution of the minorities. The Government, the University and ultimately the court have the undoubted right to pierce the 'minority veil' and to go behind the claim that the institution is a minority institution and to investigate and satisfy itself whether the claim is well founded or not."

But the rights of the minority institutions in the above matters are not absolute but are subject to the State's power to impose certain regulations and restrictions.

In the case of *Christian Medical College Hospital Employees Union and another v. Christian Medical College Vellore Association and others* [(1987) 4 SCC 691] it was observed that "the right under Article 30(1) is subject to the regulatory power of the State. Article 30(1) is not a charter for maladministration. Social welfare legislation and similar regulatory measures, though they have some effect on the right under Article 30(1), do not constitute an abridgment of such right. Court has to strike a balance between the constitutional obligation to protect what was secured to the minorities under Article 30(1) and the social necessity to protect the members of the staff".

In the said case the Court held that the benefit of sections 9-A, 10, 11-A, 12 and 33 of the Industrial Disputes Act is also available to the members of the staff of institutions run by minority communities like Christian Medical College and Hospital at Vellore inasmuch as the provisions of the Act are regulatory in nature and do not abridge the right under Article 30(1) of the minority institutions.

In *Frank Anthony's* case (AIR 1987 SC 311) certain observations were made regarding the powers of the State to regulate the working of the minority institutions in certain matters. The Supreme Court after taking into consideration certain observations made in the earlier decisions, which were explained and enunciated to some extent, observed as under :-

> "The maintenance of educational standards and excellence of of the educational institutions would depend directly on the excellence of the teaching staff, and in turn, that would depend on the quality and the contentment of the teachers. Conditions of service pertaining to minimum qualifications of teachers, their salaries, allowances and other conditions of service which ensure security, contentment and decent living standards to teachers and which will consequently enable them to render better service to the institution and the pupils cannot be said to be violative of Article 30(1). The management of a minority educational institution cannot be permitted more than any other private employee. Oppression or exploitation of the teaching staff of an educational institution is bound to lead, inevitably, to discontent and deterioration of the standard of instruction imparted in the institution, affecting adversely the object of making the institution an effective vehicle of education for the minority community or other persons who resort to it. The management of a minority institution cannot complain of invasion of the fundamental right to administer the institution when it denies the members of its staff the opportunity to achieve the very object of Article 30(1) which is to make the institution an effective vehicle of education."

The minority institutions who claim the benefit of Article 30(1) cannot also deny admission to the students not belonging to the minority community who, as has been noticed, cannot be compelled to take any particular religious instructions. Undoubtedly Article 30 has conferred certain fundamental rights on the minority communities, but the question will still remain whether overstretching them would be conducive towards safeguarding the unity and integrity of India which is one nation. So long as the 'minority' character of a community in emphasised it will make its members over-conscious of their separate identity, and it may not help the process of their assimilation into the main-stream of the country. It is however a matter which is for Parliament to consider.

Another right which is secured to the minority institutions is that the State will grant aid to them, which will not be denied on the ground that it is under the management of a minority community,

maybe a religious or linguistic minority. Aid can be denied on any other ground, but not on the ground of religion and language.

Similarly if there is compulsory acquisition of property of any minority institution, it will be the duty of the State that the amount of compensation which is fixed would not be such which may restrict and abrogate their rights, meaning thereby that other constitutional provisions in the matter of amount of compensation will not be applicable to minority institutions.

Thus while the institutions run by a majority community will have no fundamental right to compensation in case of compulsory acquisition of the property, the educational institutions belonging to a minority community will have the fundamental right to compensation which they can enforce through court of law and its quantum cannot be illusory. The property of a minority educational institution thus stands on better footing than the property of other institutions run by a majority community. How far the existence of this provision will make members of the minority community free from a feeling of separation and seggregation is yet to be seen.

So far as linguistic minorities are concerned, it is to be noticed that the benefit of the protection can be claimed by a linguistic minority in a State although it forms linguistic majority in an adjoining area (as in the case of dispute between Maharashtra, and Karnataka), and if this thing is claimed in the entire country, the question will arise whether it will be conducive for the integrity and unity of the country.

FREEDOM OF TRADE AND COMMERCE; CONSTITUTIONAL SCHEME

P.M. Bakshi

Article 14

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 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, 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.* AIR 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).

Article 19

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 reasonsble 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 restrictions. 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.

Article 301 etc

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 State, 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 Pravin Kumar* 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 commerce 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 legislative 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 article 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 Tea Co.v. State of Assam*, AIR 1961 SC 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.

CONCEPTS OF 'REPUGNANCY', 'PITH AND SUBSTANCE' AND 'INCIDENTAL ENCROACHMENT' WITH REFERENCE TO DISTRIBUTION OF LEGISLATIVE POWERS : ARTICLES 246 AND 254 OF THE CONSTITUTION

Mr Justice B.D. Agarwal

Our Constitution is federal in character though the extent of federalism is largely watered down because of the peculiar conditions of the country. This has been described as cooperative federalism. In a federal constitution there has to be distribution of legislative powers between the centre and the states. The Constituent Assembly had before it three models namely the Constitution of Canada, Australia and the Government of India Act, 1935. The 1935 Act drawn by the British Parliament had itself in its background the constitution of the two other countries. Our Founding Fathers after long deliberation took decision to adopt as model the Government of India Act, 1935, keeping in view the distinct advantages.

One such benefit is that the three legislative lists were superbly drawn in the 1935 Act.The overlapping was minimal possible and there had been judicial decisions of the Privy Council and the Federal Court resolving some of the differences. That Act took care to ensure that the subjects of legislation mentioned in each List is mutually exclusive as far as possible. Secondly, entries relating to taxation were separated from entries relating to general subjects of legislative power. Significantly, the Concurrent List contains no tax, but provides only for fees. The three Lists of 1935 Act have been bodily lifted to the Constitution with some verbal changes only.

Under the scheme of the Constitution, Clause (3) of Article 246 confers exclusive power in the State Legislature to enact law in respect of matters enumerated in the State List. This is List II. It, however, is subject to Clauses (1) and (2). It follows that if the subject also falls in Union List (List I), you have to take it as excluded from List II. In case the matter falls in List III which is the Concurrent List it should be considered as taken out of List I. In that event, the Parliament and the State Legislature both have competence to legislate. This in brief is the broad scheme of Article 246. Residuary subject, if any, though the chances are rare, falls under the Union List (Entry 97).

Despite the great dexterity and the ingenuity exercised in drawing the three lists, overlapping on occasions or to some extent is inevitable. Legislation though at its face appearing to deal with a subject in one list may touch also on a subject in another List. If the Courts were to go by superficial appearance only, several Acts might come to be declared *ultra vires* the legislative competence. This certainly could not be the intention of the Constitution makers. You may on occasions have a feeling that a subject falls in part within two Lists or you may think that the subject is primarily within one List, but it also touches another List. Occasion may also arise for you to consider

at times whether the scope or content of an entry covers the subject matter of the legislation which it is proposed to draft. How to resolve the situations as these ?

Certain basic principles must need be borne in mind in this connection :-

(1) Entries incorporated in the Lists are not powers of legislation. Instead these are fields of legislation. The entries are merely legislative heads. These are only enabling in character (see *Prem Chand Jain etc.* v. *R.K. Chhabra* (1984) 2 SCC 302. *Harak Chand* AIR 1970 SC 1453; *State of Bihar* v. Kameshwar AIR 1952 SC 252).

(2) Entries in each of the Lists have to be given very liberal and wide interpretation. They must not be construed narrowly or pedantically. There should be no attempt to whittle down their scope. [*S.P. Mittal* v. *Union of India* (1983) 1 SCC 51.] It must be remembered that the subjects dealt with in the three Lists are not always set out with scientific definition. The construction put on them must be large and liberal.

(3) The resultant effect of these accepted principles is that the general words used in the entries extend to all ancillary, subsidiary or incidental matters. It is immaterial that the entries do not spell out or refer to these other things. They go with the baggage. It could neither be possible nor expedient to make a mention thereof. All that is to be considered implicit.

Thus :

(a) There may be legislation giving retrospective effect. Depending upon legislature's policy,a legislation may not only be prospective, but also retrospective. Except in the case of creating criminal offence due to Article 20(1), a piece of legislation may be made effective from a post date, regard being had of course to the restraint of Article 14.

(b) Validation enactment may also be framed. If a legislation or executive order has been struck down by Court, it is open to rectify that shortcoming and validate the past effect of the legislation. This no doubt is subject to the competence of the legislature otherwise. All that is regarded incidental to legislative entries.

(c) Provision may be made for punishment of breach of any statutory provision or to prevent evasion thereof. That would as well be ancillary. The words "with respect to" are interpreted to include the same.

Those of you interested may profitably refer to *United Provinces* v. *Mt. Atiqa Begum & Others* (AIR 1941 Federal Court 16; "Land" under Entry 21 of Provincial List was held to cover also legislation providing for regularisation of remissions.). See also *R.S. Joshi* v. *Ajit Mills Pvt. Ltd.* (1977) 4 SCC 98 -

Legislative entry is of sales tax vide Entry 54/64 State List. It was held these covered also legislation providing for appropriation by State Government of tax illegally collected by dealers.

With a view to resolve the tangle created by overlapping - real or fanciful – the concept evolved is of 'pith and substance'. The Privy Council evolved this in interpreting the provisions of the Canadian Constitution. In India this was first applied by the Federal Court in the *Central Provinces Case* (AIR 1939 F.C.I.). In that case, the Court reconciled the entry relating to Excise in the Central List and Tax on Sales of Goods in the Provincial List of the Government of India Act, 1935. It was held that excise came in respect of the manufacture of goods whereas sales tax is tax imposed in respect of the sale of goods.

What does the notion of pith and substance denote? It suggests that whenever the question arises whether a legislation falls within an entry in one List or the other, you try to ascertain the real nature and character of such legislation. Consider it as a whole. See the legislative policy, the statement of objects and reasons, the design and purport as disclosed by its language and take into account the effect it would have in its actual operation. Go deep into it; delve into these details and thus come into grip with the predominant theme of the legislation. This will give you a clear idea as to which list primarily covers the statute.

It will often be that entries in one List cover an Act in part and to some extent the provisions appear to be covered by another List. There comes the principle of incidental encroachment. Any such trespass has to be ignored. The standard again is not whether trespass is more or less but whether in pith and substance, the Act falls within one List or the other *(Prafulla Kumar Mukherjee* v. *Bank of Commerce, Khulna.*AIR 1947 PC 60). "If a statute is found in substance to relate to a topic within the competence of the legislature, it should be held to be *intra vires*, even though it might incidentally trench on topics not within the legislative competence". (*A.S. Krishna and others* v. *State of Madras* : AIR 1957 SC 297.)

Some illustrations may serve further to clarify the position :-

1. AIR 1941 PC 47 *(Subrahmanyan Chettiar* v. *Muttuswami Goundan)* - Madras Agriculturists Relief Act, 1938.
2. AIR 1941 PC 16 *United Provinces* v. *Mt. Atiqa Begum)* - Regularisation of Remissions Act, 1938.
3. AIR 1947 PC 60 : *(Prafulla Kumar Mukherjee* v. *Bank of Commerce)* - Bengal Money Lenders Act, 1940.
4. AIR 1950 FC 59 : *(Lakhi Narayan Das* v. *Province of Bihar)* - Bihar Maintenance of Public Order Act, 1949.
5. AIR 1957 SC 297 : *(A.S. Krishna* v. *Madras State)* - Madras Prohibition Act, 1937.

If the encroachment is minimal and does not affect the dominant part of some other entry, which is not within the competence of the State Legislature, the Act may be upheld as constitutionally valid. It was held in *Indian Tobacco Co. Ltd.* v. *State of Karnataka* (1985) Suppl, SCC 476 that the State had no jurisdiction to levy market fee in respect of tobacco because that directly collides with the Tobacco Board Act, 1975 framed by Parliament, covered by List I.

Refer also the *Ishwari Khetan Sugar Mills Case* (1980) 4 SCC 136 where referring to *Kannan Divan Hills Produce Co. Ltd.* (1972) 2 SCC 218 held 'effect is not the same thing as the subject matter.'

Also State of *Karnataka* v. *Ranganath Reddy* (1977) 4 SCC 471- Incidental trespass would not invalidate the Law (Entries 42/35 of List III).

Coming to the concept of 'repugnance' now, we turn to Article 254 of the Constitution. Clause (1) lays down the general rule. If there is repugnance between law made by Parliament before or after the Constitution and the law of State legislature on a subject in the Concurrent List, the Central Act prevails to the extent of the repugnancy. To this general rule, Clause (2) contains an exception. In case there is assent obtained of the President, the State Legislation would prevail if it is repugnant to Central Legislation and is on a subject of the Concurrent List. There is, however, a proviso to Clause (2) which qualifies the same. Despite President's assent being given, it remains open to Parliament, to enact on the subject and it may repeal the State law expressly or even by implication. Then in that event, the State Act would cease to prevail.

In this connection, two things must be kept in view :-

(1) The Subject matter of legislation both of Parliament and the State legislature is of *Concurrent List;*

(2) The State Law becomes inoperative under Clause (1) to the *extent of repugnancy* alone, and not beyond.

Article 254 (1) has no application to cases of repugnance due to overlapping found between List II on the one hand and List I/III on the other. If such overlapping exists in any particular case, the State law will be *ultra vires* for want of legislative competence.

To ascertain repugnancy the following principles were affirmed by the Supreme Court in *Deep Chand etc.* v. *State of U.P.*, AIR 1959 SC 648 :-

(1) Whether there is direct conflict between the two provisions;

(2) Whether Parliament intended to lay down an exhaustive code in respect of the subject matter replacing the State Act;

(3) Whether the law made by the Parliament and the law of the State Legislature occupy the same field.

Similar test was laid down in AIR 1954 SC 752 (*Zaverbhai* v. *State of Bombay*). The case of *Tika Ramji* v. *U.P.* (AIR 1956 SC 676 accepts these tests as useful guides.

In short, the question of repugnancy under Article 254(1) arises only in case both the Legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List and there is direct conflict between the two laws. (See *Hoechst P. Ltd.* v. *Bihar*; AIR 1983 SC 1019 – Held provision for surcharge on price of drugs under Entry 54 of List II - not to be passed on to consumers not repugnant to control on price of drugs by Central Government under E.C., Act covered by Entry 33 List III).

ORDINANCE MAKING POWER

Mr N.K. Narang

Articles 123 and 213 of the Constitution empower the President and the Governor respectively to issue Ordinances. The purpose of these Articles is to provide a machinery for legislation during the period the Parliament or as the case may be, the State Legislature is not in session. The Ordinance making power of the Governor is similar to that of the President except that Article 213 provides for certain additional limitations in the exercise of the power by the Governor.

Almost similar provisions were there in the Government of India Act, 1915 (Section 72) and the Government of India Act, 1935 (Sections 42 and 88). Before examining the nature or scope of Ordinance making power of the President or the Governor, it may be useful to read Article 213 which is the only Article in Chapter IV of Part VI of the Constitution and begins with the heading 'Legislative Powers of the Governor'. Article 213 is as follows :-

Power of Governor to promulgate Ordinances during recess of Legislature.

"213.(1) If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require :

Provided that the Governor shall not, without instructions from the President, promulgate any such Ordinance if :

(a) a Bill containing the same provisions would under this Constitution have required the previous sanction of the President for the introduction thereof into the Legislature; or

(b) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President; or

(c) an Act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President.

(2) An ordinance promulgated under this article shall have the same force and effect as an Act of the Legislature of the State assented to by the Governor, but every such Ordinance —

(a) shall be laid before the Legislative Assembly of the State, or where there is a Legislative Council in the State, before both the Houses, and shall cease to operate at the expiration of

six weeks from the reassembly of the Legislature, or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council; and

(b) may be withdrawn at any time by the Governor.

Explanation :-

Where the House of the Legislature of a State having a Legislative Council are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

(3) If and so far as an Ordinance under this article makes any provision which would not be valid if enacted in an Act of the Legislature of the State assented to by the Governor, it shall be void :

Provided that, for the purposes of the provisions of this Constitution relating to the effect of an Act of the Legislature of a State which is repugnant to an Act of Parliament or an existing law with respect to a matter enumerated in the Concurrent List, an Ordinance promulgated under this article in pursuance of instructions from the President shall be deemed to be an Act of the Legislature of the State which has been reserved for the consideration of the President and assented to by him."

Nature of the Power

Whether Executive or Legislative ?

It has been settled by a number of decisions of the Supreme Court that the power to issue ordinances under Article 123 or Article 213 is Legislative. See R.K. Garg vs. Union of India (The Bearer Bonds Case) AIR 1981 S.C. 2138, *A.K. Roy* vs. *Union of India* AIR 1982 S.C. 710, *K. Nagraj & others* vs. *State of Andhra Pradesh* and another (1985) 1 S.C.C. 523, *T. Venkata Reddy* vs. *State of Andhra Pradesh* AIR 1985 S.C. 724, *D.C. Wadhwa* vs. *State of Bihar* AIR 1987 SC 579 and M/s *Utkal Contractors and Joinery (P) Ltd. & Others* vs. *State of Orissa* AIR 1987 S.C. 2310.

It is pointed out that the heading of Chapter IV of Part VI in which Article 213 occurs itself proclaims that power to issue ordinance is legislative power of the Governor. Article 367 which relates to interpretation of the Constitution also provides by clause (2) that —

"Any reference in this Constitution to Acts or laws of or made by Parliament or to Acts or Laws of or made by Legislature of State shall be construed as including reference to an Ordinance made by the President or an Ordinance made by the Governor."

Then, Article 213(2) itself says that an Ordinance promulgated under this Article shall have the same force and effect as an Act of Legislature assented to by the Governor.

Thus, it is firmly established that issuing of an Ordinance under Article 213 is legislative and not executive act of the Governor. It therefore follows that subject to the conditions mentioned in the Article itself and other provisions of the Constitution, the power of the Governor to legislate is co-extensive with the power of State Legislature.

We may now examine the circumstances in which an Ordinance may be promulgated, the period for which it may remain in force and the constitutional requirements for the promulgation thereof.

A perusal of Article 213 will show that an Ordinance can be promulgated when both the Houses of the Legislature are not in session and the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action. We may examine it as follows;

When both the Houses are not in session

1. Meaning of -

   (a) both the Houses.
   (b) in session.

2. Ordinance promulgated when both the Houses are in session i.e. before order of Prorogation is made and notified will be void.

   Bidya v. *Province of Bihar* AIR 1950 (Patna) 19

Satisfaction of Governor

(a) Satisfaction not the personal satisfaction of the President or the Governor - who acts on the aid and advice of the Council of Ministers.

R.C. Cooper v. *Union of India AIR 1970 S.C. 564 Shamsher Singh* v. *State of Punjab AIR 1974 S.C. Page 2192.*

(b) is the satisfaction justiciable ?

Since the word 'satisfied' denotes 'subjective satisfaction,' the Courts could not question the bonafides of such satisfaction. This was the view on cases under section 42 of the Government of India Act, 1935 and also in cases under the Constitution of India.

Lakhi Narain Das v. *Province of Bihar AIR 1950 F.C. 59.*
King Emperor v. *Banwari Lal (1945) 72 I.A. 57 (P.C.)*
S.K.G. Sugar Mills v. *State of Bihar AIR 1974 S.C. 1533.*

In *R.C. Cooper* v. *Union of India AIR 1970 SC 564* (The Bank Nationalisation Case), the minority view suggested that since the 'satisfaction' was a condition precedent for the exercise of power, it was open to an aggrieved person to challenge the exercise of the power in a given case on the ground that no such genuine satisfaction could be entertained in facts and circumstances of the case; or in other words the action of the President or Governor was malafide.

By the Constitution 38th Amendment Act, 1975 clause (4) was inserted in Article 123 as well as in Article 213 providing specifically that the satisfaction of the President or Governor that circumstances exist which render it necessary to take immediate action "shall not be questioned in any Court on any ground". By the 44th Amendment 1978, these clauses were omitted. The question is what is the effect of the amendment. Whether the Governor's satisfaction can be challenged on the ground that the conditions to the exercise of power did not exist or the exercise of power is malafide. In *A.K. Roy* v. *Union of India, (1982) 1 S.C.C. 270*, the Supreme Court held that because of the amendment made by Constitution 44th Amendment Act judicial review of President's satisfaction was not totally excluded. It also held that the satisfaction of the preconditions of Article 123 cannot be regarded as a purely political question and kept beyond judicial review (As held in *State of Rajasthan* vs. *Union of India AIR 1977 S.C.* 1361). However, the Court refused to enter into the question as the Ordinance had been passed into an Act and also on the ground that pleadings were insufficient to raise a plea of malafide.

However, in subsequent cases *K. Nagraj and Others* vs. *State of Andhra Pradesh* AIR 1985 S.C. 551 and *T. Venkata Reddy etc.* vs. *State of Andhra Pradesh AIR 1985 S.C. 724*, the Supreme Court has categorically held that the President's or the Governor's satisfaction is not justiciable. In a very recent case, in *Re Nagendra Sharma* v. *The Regional Manager, U.P. State Road Transport Corporation, Ghaziabad and Others* (1988) 14 ALR 65 (HC) the Allahabad High Court has reiterated the view that satisfaction of Governor is not justiciable. In *D.C. Wadhwa* vs. *State of Bihar* AIR 1987 S.C. 579, also it has been held that the satisfaction of the Governor is not justiciable. In that case the Bihar Government re-promulgated several Ordinances again and again without getting them replaced by Acts of Legislature. The Supreme Court held that it was a fraud on the Constitution and such promulgation was beyond the legislative competence of the Governor. It invalidated the Bihar Intermediate Education Ordinance, 1985. Nevertheless it was categorically held that the satisfaction of Governor was not justiciable. Even otherwise also, it is clear that prior to the 38th Amendment when the words "shall not be questioned in any Court on any ground" were not there in Article 213, the consistent view of the Supreme Court was that the satisfaction of the Governor was not justiciable (see K.G. Sugar Mills case). As such the deletion of these words by the 44th Amendment does not make any difference. If the Ordinance is also Legislation, then it is settled that a law cannot be declared invalid on grounds of 'malafides'. While an executive or judicial act may be declared invalid on the ground of 'malafides', a legislative action is only subject to constitutional limitations. Motive is irrelevant to judge the vires of an Act or Ordinance. Thus the plea of colourable legislation or malafide legislation only means want of legislative competence and not the motive for the legislation. The motive of the legislation cannot be inquired into by courts. (See *R.S. Joshi* v. *Ajit Mills* AIR 1977 S.C. 2279). It may be useful to reproduce the following observations in *T. Venkata Reddy* v. *State of Andhra Pradesh* AIR 1985 S.C. 724-

"It is a settled rule of constitutional law that the question whether a statute is constitutional or not is always a question of power of the legislature concerned, dependent upon the subject matter of the statute, the manner in which it is accomplished and the mode of enacting it. While the courts can declare a statute unconstitutional when it transgresses constitutional limits, they are precluded from inquiring into the propriety of the exercise of the legislative power. It has to be assumed that the legislative discretion is properly exercised. The motives of the legislature in passing a statute is beyond the scrutiny of courts. Nor can the courts examine whether the legislature had applied its mind to the provisions of a statute before passing it. The propriety, expediency and necessity of a legislative act are for the determination of the legislative authority and are not for determination by the courts. An ordinance passed either under Article 123 or under Article 213 of the Constitution stands on the same footing. When the Constitution says that the ordinance making power is legislative power and an ordinance shall have the same force as an Act, an ordinance should be clothed with all the attributes of an Act of legislature carrying with it all its incidents, immunities and limitations under the Constitution. It cannot be treated as an executive action or an administrative decision."

In *K. Nagraj* vs. *State of Andhra Pradesh* AIR 1985 S.C. 551 also, the Supreme Court observed as under —

"It is impossible to accept the submission that the Ordinance can be invalidated on the ground of non-application of mind. The power to issue an Ordinance is not an executive power but is power of the executive to legislate. The power of the Governor to promulgate an Ordinance is contained in Article 213 which occurs in Chapter IV of Part VI of the Constitution. The heading of that Chapter is "Legislative power of the Governor." This power is plenary within its field like the power of the State Legislature to pass laws and there are no limitations upon that power except those to which the legislative power of the State Legislature is subject. Therefore, though an ordinance can be invalidated for contravention of the constitutional limitations which exist upon the power of the State Legislature to pass laws it cannot be declared invalid for the reason of non-application of mind, any more than any other law can be. An executive act is liable to be struck down on the ground of non-application of mind. Not the act of a Legislature."

Duration of the Ordinance

Article 213(2) provides that an Ordinance shall cease to operate at the expiration of six weeks from the reassembly of Legislature or earlier if before the expiration of that period, a resolution disapproving it, is passed by the Legislature. Thus, if it is not withdrawn by the Governor earlier or a resolution disapproving it is not passed by the Legislature earlier, the Ordinance will automatically come to

an end on the expiry of six weeks of the summoning of the Legislature. Under Article 174 of the Constitution, six months shall not intervene between the last sitting of the Legislature in one session and the date appointed for its first sitting in the next session. At best therefore the summoning of a House can be postponed fot six months. Adding the period of six weeks from the summoning of the House, the maximum period during which an Ordinance can remain in force is 7-1/2 months.

Laying before the House

Article 213(2) provides that an ordinance must be laid before the State Legislature when it reassembles. There are provisions in the Rules of the State Legislature for laying the Ordinance alongwith reasons which necessitated it promulgation before the House. For example, rule 120 of the Rules of Procedure and Conduct of Business of the Uttar Pradesh Legislative Assembly provides that whenever an Ordinance is promulgated, a statement explaining the circumstances which necessitated immediate legislation by Ordinance shall be laid on the table of the House together with a copy of the Ordinance at the commencement of the session or the sitting, as the case may be. Provision regarding laying has however been held to be directory and if the Ordinance is not laid before the House, it does not affect its validity.

Constitutional requirements for promulgation of Ordiance

I have already said that the scope of Ordinance making power of the Governor is co-extensive with the legislative power of the State Legislature. The combined effect of the provisos to the clauses (1) and (3) of Article 213 is as follows :-

First of all the State Legislature must have legislative competence. As already explained the State Legislature can make laws in respect of the matters specified in list II (State List) and List III (Concurrent List) (Subject to certain conditions). So first of all the Governor can promulgate Ordinance only in respect of matters on which the State Legislature can make laws. You all know that in certain cases a Bill cannot be introduced in the State Legislature without the previous sanction of the President e.g. Article 304(b). The Governor is required to reserve a Bill for the consideration of the President e.g., Article 200. In certain matters an Act is invalid unless the Bill after having been passed by both the Houses has received the assent of the President (e.g. Article 254(2). In all such cases Ordinance cannot be promulgated without the previous instructions of the President. Thus as regards a Bill, in certain cases, previous sanction for introduction is necessary and in certain cases it is reserved for the consideration and assent of the President but for promulgation of an Ordinance, previous instructions in all such cases are necessary. While doing practical exercises in Legislation and constitutional examination of Bills etc., we have discussed at length the distribution of legislative powers, the principle of interpretation of the entries in the three lists of the Seventh Schedule including the pith and substance

rule, the limitation subject to which laws may be made by the Parliament and the State Legislature, the circumstances in which a State Law may be said to be repugnant to a Law made by the Parliament attracting Article 254(2) and the making of delegated legislation etc. You are quite familiar with this and it is not necessary to repeat it except some points. However you have to bear in mind that subject to the limitations stated an Ordinance can make provisions in the manner and to the same extent as an Act of Legislature. Thus an Ordinance may amend or repeal not only another Ordinance but a law passed by the Legislature itself subject to the limitation regarding its duration. An Ordinance can be given retrospective effect. It can validate a law or override judicial decisions. (See *Tirath Ram Rajindra Nath* v. *State of U.P.* (1973) 3 SCC 585 and *Utkal Contractors and Joinery (Private) Ltd. & Others* vs. *State of Orissa* AIR 1987 Supreme Court 1454 & 2310. Thus an Ordinance can provide for delegated legislation. Though the duration of an Ordinance is limited, the Ordinance can make provisions which can last even after the expiry of the Ordinace e.g., an Ordinance can create an office which will last even after the expiry of the Ordinance or abolish an office (See *State of Orissa* vs. *Bhupendra Kumar* AIR 1962 S.C. 945 and K. Nagraj vs. State of A.P. (1985) 1 S.C.C. 523. Thus what can be achieved by an Act of Legislature can be achieved by an Ordinance. In short when the promulgation of an Ordinance is challenged, the Court has to determine whether the State Legislature had competence to make the impugned law.

General Clauses Act

Section 30 of the General Clauses Act, 1897 provides that except in certain cases the word 'Act' includes an 'Ordinance'. Similarly Section 30 of the Uttar Pradesh General Clauses Act, 1904 provided that the provisions of the Act shall apply to Ordinances. Thus in the constructions of Ordinances, the General Clauses Act applies subject to exceptions contained therein.

INTRODUCTORY TALK ON LEGISLATIVE DRAFTING

Mr Justice K.N. Goyal

The first thing that a legislative draftsman must find out when he is asked to prepare a draft legislation on any particular subject is whether the concerned legislature will have the legislative competency. If he is working for the Central Government, he has to find out whether the subject matter of the proposal falls within the Union or the Concurrent List. On the other hand if he is working in the State Government, he has to find out whether the subject matter relates to State or the Concurrent List. Articles 245 to 253 of the Constitution and the Seventh Schedule to the Constitution which sets out the three lists namely the Union List, the State List and the Concurrent List, must be carefully studied for the purpose.

If you are working for a State Government and the matter falls in the Concurrent List, you have to further investigate whether the subject matter of the proposal is covered by any Central law. In that event, you have to take care of the provisions of Article 254 as well.

The next step is to see whether the proposal will be consistent with the provisions of fundamental rights guaranteed by Part III of the Constitution. For, as laid down in Article 13, Cl.(2), the 'State', which as defined in Article 12 includes any Legislature, shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

Clause (3), Sub-Clause (a) of Article 13 defines 'law', for the purpose of this Article, as including any ordinance order, bye-law, rule, regulation or notification, having the force of law.

You have also to study carefully Parts IV and IV-A of the Constitution. Part IV sets out the directive principles of state policy. Although Article 37 says that the provisions contained in this part shall not be enforceable by any court, it has also been laid down that the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply the principles in making laws. You cannot, therefore afford to ignore Part IV relating to directive principles of state policy while examining a legislative proposal. It is also necessary to keep Part IV in mind for the purposes of Article 31-C, which overrides Article 13 to the extent that no law giving effect to the policy of the State towards securing all or any of the directive principles shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Article 14 or Article 19. Not only this, the courts take the directive principles into consideration while interpreting the laws. The draftsman must always try to anticipate how the law prepared by him is going to be interpreted by the Courts. From this angle as well, a study of the directive principles is necessary.

Part IV-A sets out the fundamental duties of citizens. These should also be taken into consideration while making laws.

Every legislative proposal must be looked at critically from the point of view of public interest. You put yourself in the position of the person who is going to be affected by it. The proposal should be reasonable and should also look to be reasonable. For in the words of Lord Thring, the father of modern legislative drafting "Bills are made to pass as razors are made to sell". A Bill must look reasonable to the legislator who has to take into account the reaction of his constituency.

Another thing to be seen before you set out to prepare a draft is whether there is already a law dealing with the given subject-matter. You have to study the present law, which means not merely statute law but also case law and personal law, customs and usages having the force of law. You must know how the proposal when implemented is going to change the present law.

An examination of the present state of law is helpful also for the purpose of finding out whether there is at all any need for a new law for carrying out the object in view. In case what the Government wants to do is permissible without much difficulty under the present law itself you can advise the Government accordingly and suggest that the proposal may be dropped as redundant.

Another thing to be seen is whether what is desired to be done needs any statutory backing at all. In other words, whether the same thing cannot be done in exercise of the executive power of the Government under Article 73, in the case of the Central Government, or Article 162, in the case of the State Government. In one case the State Government of Punjab decided to undertake publication of text books. The private publishers challenged this decision of the Government on the ground that there was no law which empowers the Government to publish text books. The Supreme Court held that no law is needed for the purpose. Like everyone else, the Government can also publish text books. What was significant was that there was no law or anything in the Constitution which prohibited the Government from publishing text books. Nor did the publication of text books by Government infringe any fundamental rights or legal rights of any citizen. Of course if the Government were to decide to create a State monopoly in the trade of publication of text books, then a law would be needed. For while publication could be done in exercise of the executive power of the State, the exclusion of private citizens from competing with the State in that field would be an encroachment on the fundamental rights of the citizen to carry on trade and business guaranteed by Article 19 of the Constitution. This right can be curtailed only to the extent required by the public interest and only through law made by legislature and not by an executive fiat.

Again take the instance of a Government building. The Government wants to exclude any person from visiting that building unless he holds a pass issued by its officials. The Government being the owner

of the building has a right to exclude anyone from entering that building. Hence no law is needed for that purpose. However, if that building is, say, a court building, then the Government cannot issue an administrative order restricting such entry. The courts are open to all. Of course the presiding officer or the Chief Justice or the District Judge, as the case may be, may regulate the entry of persons inside a court room in certain conditions, for instance, to cope up with a law and order problem or because the proceedings in a particular case have been decided to be held in camera or because the public curiosity in the hearing of a particular case is so widespread that the court room cannot accommodate all persons who wish to attend the hearings. But the Government cannot pass any order in that matter unless there is some law conferring power on the Government to do so.

Again no law is needed for Government to empower its officers to allot Government accommodation and to determine the entitlement for such accommodation. Even an executive order will do. However, if persons to whom the accommodation is so allotted are sought to be ejected otherwise than through a suit in a court of law, then statutory backing for such action would be necessary.

In view of what I have said above it is most useful to increase your familiarity with the statute book. A legislative draftsman does not have enough work with him round the year. Legislative activity goes on in spurts off and on. Sometimes there is a heavy work load, but quite often there is a lot of time on your hands. What you are going to do with the time so available will determine how far you are going to be a successful draftsman. This should be utilised in studying the statute book, both the Central laws as well as the laws of your own State. The more you know of the existing statutes the quicker you will be in examining fresh legislative proposals.

Of course as I pointed out earlier, you should be familiar not only with the statute book but also with the uncodified laws namely, common law, personal laws, the law of torts, and customs and usages having the force of law.

You have also to be familiar with the principles of jurisprudence. Whenever you frame any law you have to take into account the jurisprudential concepts which the words you use connote.

Take for instance the words "possession", "occupation", "custody", "use". While a layman can use the words virtually as interchangeable synonyms,-sometimes one word and sometimes another,-for the same meaning. A journalist can also do so. Even established national dailies do not make any distinction between these words. But jurisprudentially they have different meanings, and you have to be clear in your mind what meaning you want to convey and then you have to use the appropriate word.

A writer or journalist often employs the technique of what is called "elegant variation". When he wants to say that a thing is ugly, he cannot go on using that word 'ugly' again and again. Such repetition

would itself look ugly. He would, therefore, use 'ugly' in one place and words conveying the same meaning such as 'unpleasing', 'repulsive; 'unpromising', 'uncouth', and so on at other places. There is a well known dictionary called Roget's Thesaurus which gives many synonyms for the same word. Every good author makes full use of it for purposes of elegant variation in his writing. A legislative draftsman cannot, however, afford to indulge in this stylish usage. He has to stick throughout the text to one word for one meaning. If he uses different words, the courts will presume that a different meaning is intended.

Case law also you must master because you should know how the courts have in the past interpreted the words which you are going to use when they were used in other statutes in the past.

You also have to know the provisions of the General Clauses Act. If you are working under the Central Government, you should know the General Clauses Act, 1897 almost by heart. If you are working under the State Government, you should know the provisions of your State General Clauses Act. You need not memorise the exact words of each section or clause of the Act, but you must have a broad idea of what the various sections provide and what words are defined in those Acts and what is the general purport of each definition. Of course when you actually use that word you will have the Act open before you and refresh your memory about the contents of the definition of the word concerned or about the text of other relevant provisions. You need not define a word in your draft if the word has already been defined in the General Clauses Act, unless of course you want to give that particular word a meaning different from that given in the General Clauses Act. Again as regards provisions relating to computation of time or period, or powers of statutory functionaries and so on, you need not make any specific provision in your draft, unless you want to depart from the provision as given in the General Clauses Act.

For instance Section 16 of the General Clauses Act lays down that the power to appoint includes the power to suspend or dismiss. Supposing you are preparing a draft in which the power of appointment has been conferred on some functionary. If you want to give him the power to suspend and dismiss as well, you need not make any specific provision in that regard, for the General Clauses Act already does it for you. If, however, you want to give the power of suspension or dismissal to an authority lower than the appointing authority, you must make a specific provision to that effect. So too even if you want to confer authority of dismissal on a functionary higher than the appointing authority. Again the word "act" is defined in the General Clauses Act as including an omission. If, however, you want that the use of the word "act" in your draft should not include an omission, you will have to make specific provision indicating so. Likewise, words signifying the masculine gender are deemed to include the faminine gender and a singular is deemed to include a plural. You do not have to clarify in your draft that it is so, this having already been taken

care of in the General Clauses Act. But, if you want a provision to apply only to men and not to women, then you should make it clear in your draft. Or if you want a provision to apply only to a singular number then also it should be made express.

The draftsman must cultivate the habit of keeping copies of the General Clauses Act, the Constitution, and a dictionary always by his side and of consulting them again and again,- indeed, several times in a day, whenever he stands in the slightest doubt about the provision or about the meaning or spelling of any word. Cultivating the dictionary habit is most useful in legislative drafting.

The General Clauses Act gives only some of the principles of interpretation of statutes. There are numerous other rules which are not embodied in any statute but have been formulated through judicial decisions. You are expected to be familiar with those rules of statutory construction as well. For, as I mentioned earlier, you have to anticipate while preparing a draft as to how the courts are likely to interpret the law when enacted on the basis of your draft. There are several standard books on the subject. Among foreign books, those by Maxwell, Crawford, Sutherland and Craies are most authoritative and among Indian books you can consult the well-known books by G.P. Singh, Jagdish Swarup, Sarathe and Bindra. I have also summarised the principles of interpretation of statutes on the basis of Supreme Court decisions at pages 9 to 33 of my commentary on the Administrative Tribunals Act recently published.

There are also several dictionaries of words and phrases which have either been defined in statutes or which have been interpreted by courts. One is Venkataramaiya's Legal Lexicon. There are several volumes of an English book called Stroud's Judicial Dictionary. There is a whole set of American volumes called "Words and Phrases". There are several other books of this kind which are available in our library also. It is always useful to have a look at the earlier interpretation of the words proposed to be used so that you may be sure that the word you are using would convey the meaning intended.

The definitions given in Sections 6 to 52A of the Indian Penal Code of various expressions are also useful, particularly while drafting laws containing penal provisions. Such laws are special or local laws within the meaning of Sections 41 and 42 of the Indian Penal Code and of the Code of Criminal Procedure. Sections 4 and 5 of the Code of Criminal Procedure should also be borne in mind in this context as also Part II of the First Schedule to that Code (Classification of Offences against Laws other than the I.P.C.). You have to be clear in your mind while making any penal provision as to whether you want the offence to be bailable or non-bailable, cognizable or non-cognizable. If you are going to make a departure from the general provision contained in the said Schedule, you have to make it specific.

To keep abreast of the case law it is necessary to read the current law reports. Whenever, in any judgement, any old ruling is referred

to, it is useful to have a look at that old ruling also. Whenever a word or phrase or clause is interpreted in a ruling, the interpretation should be noted in a digest to be maintained by you. Particular attention should be paid to the difficulty experienced by the judges in interpretation of a clause or section due to the use of a certain ambiguous word or phrase. We will be circulating for your information some of the rulings of the Supreme Court in which such difficulties have been discussed. But the collection being supplied to you will not suffice unless you keep on reading new rulings and note similar points from other rulings in your digest, from time to time.

It is also of great use to go through the statutes passed in other States. A journal named the Current Indian Statutes gives statutes and notifications, both Central and of various States. Do not skip over the statutes and notifications of States other than your own. The legislative entries contained in the State List, and the Concurrent List form the basis of legislation in all the States. The problems giving rise to a legislative proposal in your State may normally be expected to have at one time or another arisen in some other State also.

When you study statutes of your own State or the laws of other States, it is well to try to visualise the legislative entries to which that legislation could be related. One statute does not always relate to one entry. Different parts of it could be referred to distinct legislative entries.

For instance, take the Essential Commodities Act. The main entry attracted would be entry number 33 of the Concurrent List which relates to trade and commerce in the products of controlled industries, food-stuffs etc. Entry 34 which relates to price control would also be attracted. To the extent that any contracts relating to essential commodities have to conform to the provisions of the new law entry number 7 of the Concurrent List may also be attracted. As licence fees may also be imposed on dealers, entry number 47 would be attracted, besides entry number 46 related to jurisdiction and power of courts. Entries relating to offences against laws with respect to matters contained in a List are also often attracted. This will be a good mental exercise. It will train you in examining the legislative competency for any proposal that may come up before you.

Another advantage of looking at the statutes of other States is that you will be able to make use of the language of those enactments for your own drafts when similar problems arise before you. You will be able to see how a particular situation was met by the draftsman in another State or at the Centre. I do not suggest that you must copy the provision as drafted or as prevalent in another State verbatim. There is, however, nothing to be ashamed of in a legislative draftsman copying from other enactments. The draftsman is not a literary writer, and he will not be accused of plagiarism if he copies from another enactment. There is no copyright in the language or style of enactments. Indeed it may sometimes be dangerous to try to change the language merely for the sake of appearing to be original. One advantage of

copying from an existing statute is that if any case law has grown on the terms of that statute you have the initial advantage of knowing how the courts have interpreted or reacted to that provision. If any flaws have been found therein, you can take care of the same while preparing your own draft. You can also take care, in your draft, of any constitutional infirmity pointed out in any judicial decision with respect to that other enactment.

One thing that must always be remembered is that an enactment is a formal document. The word "enactment" which I am using, is defined in the General Clauses Act. The expression is used not only for referring to an entire Act or Ordinance but also to any clause or section thereof. So, when you draft any clause for a Bill, Ordinance or rule, etc. you have to ensure that the language used is formal. Considerable laxity in the use of language is accepted in the case of journalists. But a legislative draftsman cannot take these liberties with grammar, or with words or spellings which a journalist may with impunity. For instance, the word, "colour" is spelt by Americans as "color". Again Americans use the word "gas" for "petrol". They spell "cheque" as "check". As we, in India, have been nurtured in English language and spellings as adopted in England, we have to stick to the same for legislative drafting even though more and more journalists are now adopting Americanism, even in our country.

If you want to make any provision in respect of petrol or other petroleum products, it is useful to consult the Petroleum Act which should guide you, if you want to make any provision in respect of liquor or other intoxicant you better refer to the local excise law.

Judgments of courts are also formal documents. But of late, there is a tendency amongst judges of resorting to literary flourishes which may not always accord with the traditional rules of grammar. For instance, Lord Denning, who is rightly regarded as the best writer of English language among judges in modern time and is well-known for simplicity and readability both in respect of his judgments and also extra-judicial writings, can make sentences with telling effect even without the use of a verb. His language is nonetheless correct despite the occasional omission of a verb. But you cannot take that liberty in legislative drafting which is even more formal than the judgment of a court. In India, Mr Justice Krishna Iyer started a new trend altogether. He even invents new words by converting nouns into verbs or adjectives, and adjectives into nouns and so on. Mr Iyer is a most learned judge and is highly respected for his learning and also for his passion for social and economic justice. But it has become a fashion to imitate his language and style and many judges not so learned, only make themselves ridiculous by trying to copy his style. Even Justice Krishna Iyer has been roundly criticised for use of incomprehensible language by Seervai in his work on the Constitutional Law of India. While you should try to emulate Mr Krishna Iyer's learning and passion for justice, I would advise you, both as judicial officers and as legislative draftsmen, to avoid the style and mannerisms of his judgments, and speeches.

The fact that a legislative draft is a formal document also leads to the corollary that you cannot use slang even or colloquialism, though a word which is essentially a slang may have crept into writings in the press or even in political speeches. If you consult any standard dictionary you will find that words which are treated as slang are specially indicated. For instance Mr. Krishna Iyer often speaks of "docket management" when referring to the problem of tackling judicial arrears. In a legislative draft you will not speak of "docket" but of "pending cases."

You cannot also use abbreviations in a legislative draft. For instance the word "etc." is not to be used in your drafts. The abbreviation "&" is also not to be used in such a draft. You must always use the full word "and". Whenever you are inclined to use the word "etc." you should try to visualise what other things or persons or matters you want to cover by the use of that abbreviation. If those things or persons or matters can be specified, it is bettter to mention them specifically and add them in your draft. If what you want to add is a very wide category of persons, things or matters, then you have to use words indicating that other persons or things or matters of the same class are also covered. For instance, in most provisions conferring power on the Government to make rules under an Act, there is always a residuary sub-clause showing that rules may also provide for "any other matter which is required to be or may be prescribed". While using the words "any other" to cover residuary matters, persons or things, you have also to remember the principle of interpretation which goes by the name of *ejusdem generis*. In some enactments where a penal clause is inserted, the various types of contraventions of the provisions of that Act or any rule or order made thereunder are specified, and thereafter a residuary clause thereafter is added reading "contravenes any other provisions of this Act, or rule or order made thereunder." This is done in order to ensure that nothing is left out from being made punishable. Similarly in a clause requiring the maintenance of record of proceedings of any kind the statute may provide that the minutes of that proceeding shall include various specified particulars, and thereafter a final residual clause may be added to cover "any other particulars that may be prescribed." What I want to emphasise is that the word "etc." is totally out of order in a legislative draft even though one may use it in a judgment or other writings. You have to write the full name of the State such as Uttar Pradesh and not U.P. and Chief Justice instead of C.J. Even recognised abbreviations like B.A. and "M.A." are not to be used in a legislative draft. Instead words like a "degree in Arts" or "master's degree in Arts"are to be used instead. Likewise oblique sign is not to be used in a legislative draft, though we may do it in a G.O. for example in a G.O. you may say "D.J./A.D.J." but in a legislative draft you have to say "a District Judge or an Additional District Judge."

There have always been complaints about complexity of statutes. Superior courts have also often complained about the involved language used in a statute. As far back as in the sixteenth century, King Edward

VI had observed that he would wish that "superfluous and ludicrous statutes were brought in one sum together and made more plain and short, to the extent that men might better understand them". It is, therefore, necessary to use as simple language as possible. Sentences should be short. If an idea cannot be compressed in a short sentence, it should be split up into shorter ones and couched in simpler language. As observed by Lord Denning, "Simplicity and clarity of language are essential. Ambiguity should be avoided." Above all it should be readable but mere simplicity of style or readibility is not end in itself. It is even more necessary that the law should be effective. It has been rightly observed that good men need no laws to keep them on the right path. It is for controlling bad men that laws are made. Innocent men should also be protected against the possibility of abuse of the law on the part of unscrupulous functionaries. The law should therefore be so made that an unscrupulous person inclined to break the law may not find loopholes in it and an innocent person is not unnecessarily harassed by it. It was thus, that Thomas Jefferson had pointed out that the aim should be "simplicity of style so far as was safe." The rider "so far as was safe", is most important. In many cases, simplicity is not possible because the subject matter is complex. Hence while striving for simplicity, you should not make a fetish of it. Criticism there will always be even in respect of good drafts made by experienced and learned draftsman. Legislative draftsmen had often been the butt of ridicule. An example is the following sarcastic verse :

I'm the Parliamentary Draftsman,
I compose the country's laws,
And of half the litigation
I'm undoubtedly the cause.
I employ a kind of English
Which is hard to understand:
Though the purists do not like it,
All the lawyers think it's grand.

There is much truth in this criticism because ambiguities in statutes often cause much litigation. Very often however, the criticism of statutes is ill-informed or uncharitable and you should not lose heart on account of it.

As mentioned earlier, "law" includes not only an Act or Ordinance but also a rule, bye-law, notification or order having the force of law. In the U.P. General Clauses Act, the expression "statutory instrument" has been defined to include rules, notifications, etc. which have the force of law.

The drafting of enactments differs in one respect from drafting of the statutory instruments. While an enactment has to be prepared by the legislative draftsman on his own from a scratch, he generally gets a draft of the statutory instrument from the administrative department concerned and he is then asked to revise and vet it. The word "vetting" connotes examining it and revising it in order to ensure that it is

in proper legal shape. In many matters, however, the Law Department itself may be the administrative department. For instance, the Judicial Department may be required to make rules under the Family Courts Act or under the Legal Services Authorities Act or rules for registration of Hindu Marriages. In such cases, the original draft has also to be prepared by an officer of the Law Department who often combines in himself the capacity of a Legislative Draftsman and an adviser in the Law (Legal Affairs) or Judicial Department.

Another difference in regard to drafting of statutory instruments is that while it is not required to mention the relevant legislative entries of the Seventh Schedule of the Constitution in a Bill or an Ordinance, it is necessary to specify the source of authority while issuing a statutory instrument. Whether it is a rule or a notification or statutory order, it should indicate, on the face of it, under what provision the same is being issued.

Another thing to be noted in this connection is that the power to issue a notification or other statutory order is normally conditioned on the existence of either some objective facts or on the formation of subjective satisfaction of the issuing authority with regard to a state of affairs or the need to pass such an order for meeting a certain situation or a certain apprehension. These are called "conditions precedent", which are necessary for the exercise of the power. The notification should always show the existence of such conditions precedent. While specifying the conditions precedent, it should first be understood as to whether the conditions are of an objective nature or are subjective. Suitable language should accordingly be adopted. For instance, if the power to issue a notification can be exercised on the happening of something or on the existence of a certain state of affairs, then the notification should recite something like "whereas such and such thing has happened or exists, now therefore in exercise of the power conferred by such and such provision the Governor (or other authority as the case may be) is pleased to order or direct", etc. If, on the other hand, the conditions precedent are subjective in nature, then the notification will use some such phraseology as "Whereas the State Government (or other authority) is satisfied (or is of opinion) that it is necessary (or expedient) that such and such order should be made, and therefore in exercise of the powers conferred by such and such provision, the Governor (or other authority) is pleased to direct" etc.

Article 77 in the case of the Central Government and Article 166 in the case of the State Government, and the Rules of Business and the Allocation of Business Rules made under these articles, are also to be kept in mind while vetting statutory instruments.

A basic thing to remember about enactments and statutory instruments is that a stream cannot rise higher than the source. The Legislature makes a law in exercise of the power conferred on it by the Constitution. It is a limited power. Hence the Legislature cannot do what the Constitution does not empower it to do. Likewise, a rule making authority cannot go beyond the terms of the delegation of

powers given to it by the Act or Ordinance under which the rules are to be made. Just as an enactment cannot go beyond what the Constitution permits to be done, so also a rule or a notification has to conform to the provisions of the Act under which it is issued. A notification may be made either under an Act or under a rule. It all depends on where and how the power to issue notifications or to make statutory orders is conferred.

When you are posted in the Legislative Department, you are normally first given the work of vetting of statutory instrument. This work is considered to be relatively easier but it is by no means less important. Actually it is the statutory instrument which more directly impinge on the people concerned. This is why they are more likely to be challenged in courts than an enactment. They are generally more vulnerable too. For instance, if a notification under section 4 or under Section 6 of the Land Acquisition Act is quashed on account of some flaw, the Government or other public authority may be put to loss of crores of rupees. One has, therefore, to be very careful about the vetting of statutory instruments. The only reason why this work is considered easier is that the drafting of notifications is simpler than the drafting of an enactment, and moreover its initial draft is generally available to the draftsman from the administrative department and he has only to work on it for making it flawless. He does not have to draft from a scratch, which of course is more difficult. But the relative simplicity of this vetting work should not, I may emphasise again, delude you into thinking that it is any less important or that you need not devote the same care or attention to it as to a Bill or an Ordinance.

Accordingly, in our training programme we will start with drafting of statutory instruments, first with the vetting of notifications which are relatively simple and then take up vetting of rules and then, we will gradually go on to drafting of Bills and Ordinances.

We are today giving you some drafts on which you have to work according to the instructions which Sri Ashok Kumar Srivastava will shortly give you. Sri Srivastava is a senior Joint Secretary in the Legislative Department of U.P. and is a very experienced and competent draftsman. You will be working in syndicates of four trainees each. Each trainee shall first work on his own, then compare notes with other members of the syndicate and then the syndicate will finalise the draft collectively. The draft will, then be presented by one member of the syndicate to the faculty members. The faculty members will then discuss those drafts, and they will point out flaws and invite reactions from you on the points raised. All the trainees can comment on the drafts of all the syndicates, not only on the drafts of their own group. The faculty will also give model drafts. You are not bound to accept a model draft as a perfect draft. A perfect legislative draft is yet to be invented. Every draft is capable of improvement. You should, therefore, critically examine the faculty draft as well and then offer your comments. Those comments will be discussed. This will be a careful exercise for you and also for the members of the faculty.

We have already given you several brochures in which various matters of detail relating to legislative drafting are explained and discussed. The quicker you go through these brochures the better it will be for you. You should not wait till the conclusion of the training for going through them. It will be advisable to finish reading the brochures on legislative drafting during the course of the first week itself.

That is more than enough for an introductory lecture. I hope you will make good use of the training and the facilities available here. You need not hesitate in bringing to our notice any difficulties you experience either with regard to your hostel conditions or with regard to the training programme.

THE REQUIREMENT OF REASONABLENESS FOR LEGISLATION

Mr Justice V.K. Mehrotra

In a country like India with a written Constitution one has to look to the provisions of the Constitution for determining the ambit of legislative power and the restrictions under which it can be exercised. The scope of both is to be determined with reference to the constitutional provisions governing the sphere of legislation. More so in a federal set up where exercise of legislative power is distributed between the federal and the State Legislatures.

Part XI of the Constitution which deals with the relations between the Union and the States provides for legislative relations in Chapter I. Articles 245 to 255, which together constitute this Chapter, deal with the distribution of the legislative power. It is not necessary for us to go into the entire gamut of the legislative powers for the subject of today's talk which touches only one of the aspects of exercise of this power, namely, the reasonableness of the laws. However, a look at the broad features of the legislative power as envisaged in the Constitution, is worthwhile.

Territorially, Parliament may make laws for the entire territory of India or a part thereof while the State Legislature can do so for the entire or any part of the territory of the State. The VII Schedule to the Constitution, which consists of three Lists, enumerates the matters in respect to which the Parliament or the State Legislature has exclusive power to make laws as also those in respect of which they have concurrent powers. In respect of a matter which is not enumerated either in the State List or the Concurrent List, the Parliament has exclusive power to make laws. This is provided in Article 248 of the Constitution and is also reiterated in Entry 97 of the Union List (List I of Schedule VII). The Constitution also contemplates the primacy of the Parliament in matters regarding which States have concurrent power with it to frame laws. This is exemplified by the provisions contained in Articles 251 and 254 which deal with a situation in which there is inconsistency between the laws made by Parliament and by a State Legislature. Article 250 provides for framing of laws by the Parliament even in respect of matters enumerated in the State List when there is a proclamation of emergency in operation.

The power which the Constitution gives to the Parliament or the Legislature of a State is subject to the provisions of the Constitution. This is expressly mentioned in Article 245. Obviously, therefore, the law enacted by them are subject to those provisions of the Constitution which envisage reasonableness. This brings us immediately to those Articles which provide for reasonableness. The first of these is *Article 14* which says that "the State shall not deny any person equality before the law or the equal protection of the laws within the territory of India." Specific facets of non-discrimination are provided for in *Articles*

15 and 16. The right of a citizen to certain freedoms is guaranteed under *Article 19(1)* subject to reasonable restrictions under sub-Article (6) and *Article 21* says that "no person shall be deprived of his life or personal liberty except according to procedure established by law."

Articles 14, 19 and 21 jointly aim at reasonableness and fairness. Their scope was considered by the Supreme Court at some length in *Maneka Gandhi* vs. *Union of India* (AIR 1978 S.C. 597). The Supreme Court went into the matter a little further two years later in *Bachan Singh* vs. *State of Punjab* (AIR 1980 SC 898).

The first of these cases related to the rights of a citizen of this country in the event of impounding of her passport. The second decision was in regard to the imposition of death penalty upon a person convicted of an offence of murder.

The basic principles which emerge from the discussion made by the Supreme Court in the aforesaid cases are as follows :

(a) Natural justice is a humanising principle intended to invest law with fairness and to secure justice.

(b) Fairness excludes arbitrariness. Non-arbitrariness is the equivalent of right, just and fair.

(c) The principle of reasonableness is an essential element of equality or non-arbitrariness.

(d) Not only an administrative action but also legislative action must pass the test of reasonableness or non-arbitrariness and must not impinge upon a fundamental right guaranteed under Article 19 except to the extent of reasonable restriction envisaged by Article 19(6). It should conform to the provisions of natural justice in the sense that the procedural law enacted by the legislative authority should be fair to the person whose rights are affected by it.

(e) Natural justice is fair-play in action which requires that an opportunity should be given to the person affected.

The task of those upon whom rests the obligation to frame laws, therefore, is to strike a balance between the paramount power of the State to frame laws and the rights of the persons affected by them. The life of a citizen is touched by the laws framed by the legislatures, or those enacted by way of subordinate legislation, almost in every aspect. That makes the task of legislative drafting of great importance. Those concerned with the legislative drafting have to keep in mind the impact which a particular law will have upon the individuals constituting the society and also the fact that the provision of law is reasonable from the point of view of those individuals as well. This adds to their responsibility in a substantial measure.

The doctrine that law should be reasonable in the sense that it should not be arbitrary is applicable both to substantive and procedural laws. In other words, a particular provision of law should not only

be non-arbitraty but should also envisage a fair opportunity for a person, likely to be affected adversely by it, to put forward his own view point before the authority about it. If the statute does not provide for such an opportunity, it can be provided to him on principles of natural justice and this is the essence of fair play. The law should operate equally against all persons who are similarly situate. There should be no discrimination between them. The protection of equal treatment is available to all persons whether natural or artificial. It is to be ensured both in respect of the privileges conferred by a statute, for example, the grant of licence for entering into a business or issuance of quotas or entering into contract relating to Government business etc. as well as the liabilities imposed by the provision like punishment for an offence or liability for payment of a tax or fee imposed. This injunction is, however, subject to reasonable classification which permits the law maker to frame a law which may not be of universal application but may deal equally with persons of a well defined class. The basic thing to remember is that the principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position because the varying needs of different classes of persons sometimes requires separate treatment. If the law maker takes care to reasonably classify persons for legislative purpose and the law deals equally with all the persons belonging to a well defined class, it cannot be characterised as transgressing the rule of equal protection on the ground that it does not apply to other persons.

The basis for classification has to be reasonable. It should be founded upon some intelligible differentia which distinguishes persons or thing that are kept together from those left out of the group and the differentia should have a rational relation to the object which is sought to be achieved by the statute.

In legislative drafting one has to bear in mind that the legal provision does not result in discrimination between citizens on the ground of religion, caste, sex and place of birth or residence. Of course, Articles 15 and 16 permit the making of special provisions for women and children or for persons belonging to any socially and educationally backward classes of citizens or for scheduled castes or scheduled tribes or in regard to residents within a particular State or Union Territory for purposes of employment.

Any statute which impinges upon the right of a citizen of this country in respect of

(a) freedom of speech and expression ; or

(b) to assemble peacefully and without arm; or

(c) to form associations or unions; or

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

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

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

shall be violative of Article 19 of the Constitution.

The law maker should be cognizant about it. Restrictions upon these rights can be imposed in the interest of sovereignity and integrity of India or public order or morality or in the interest of the general public. While drafting a provision of law, one has to keep in mind that the restrictive provision therein should fall within the ambit of these permissible exceptions. The rights which are conferred by Article 19 are civil rights and are in the nature of what are known as natural or common law rights. They are distinct from rights which are created by a statute itself which can be exercised subject to the conditions imposed by the statute and can be taken away by the statute. Instances of this category of rights can be found in the right of a lawyer to practice before a Court or Tribunal or the right of a person to hold a public office or the right to vote or stand as a candidate for election to a Legislature or a municipal body. However, even where a right is conferred by a statute, its curtailment should be preceded by an opportunity to the person sought to be deprived of it of having his say. This is to be ensured on the principle of fair-play. While drafting a provision this must not be lost sight of.

Reasonableness in the matter of procedure is akin to a provision for adequate opportunity of having their say to the persons likely to be affected by the exercise of a statutory power. Where an administrative authority is empowered to affect the right and is permitted to give a decision without giving an opportunity to the party affected to be heard, that would be unreasonable except where there is an emergency or any extraordinary circumstance requiring such action. If a provision which authorises levy of tax enables an assessment without notice or hearing to the assessee or without providing for any machinery or procedure for making the assessment it would be unreasonable. It might result in an arbitrary assessment. Absence of opportunity to the person likely to be affected by the assessment may be a reason for its annulment on the ground that there is violation of the principles of natural justice. Care should, therefore, normally be taken of making adequate provisions in this respect.

In cases of personal liberty which includes all the varieties of rights which go to make up a man's personal liberty other than those which are included in the various clauses of Article 19 the right can only be taken away by a procedure established by law which means law made by the Parliament or State Legislature. Even these laws have to be fair and reasonable and not arbitrary. The procedure which is found to be arbitrary, oppressive or fanciful, though enacted by a competent Legislature will not be a procedure established by law.

As illustrations of general principles noticed earlier, it is worthwhile looking at some specific instances.

Substantive Laws :

(a) Levy of tax on an import which is confiscatory is arbitrary.

(b) In cases of ordinary trade or calling (as distinct from dangerous or noxious trades) a restriction having practical effect of total stoppage is unreasonable.

(c) Total prohibition upon freedom of speech and expression is invalid.

(d) Deprivation of even subsistence allowance during suspension pending enquiry is unreasonable.

(e) Refusing even bare necessities of life, like clothing, shelter, nutrition, interview with family members etc. to a prisoner is invalid.

(f) Keeping an undertrial in prison for a period exceeding maximum possible term of imprisonment upon his conviction.

(g) Impounding of citizen's passport for indefinite period of time.

(h) Prescribing a punishment which is too cruel or torturesome in the present day social background.

(i) Enacting penal law which is so vague and uncertain that it does not give any notice to the accused as to what act or conduct would constitute an offence.

(j) A law imposing vicarious criminal liability.

Procedural Laws:

(i) Providing for trial by procedure different from the normal procedure and leaving it to the sweetwill of the authority to choose the procedure without giving any guideline for such choice.

(ii) A provision authorising grant of exemption from tax to any person or 'any land or class of lands' in absolute discretion of the authority without any guidelines.

(iii) Conferment of discretion on minor officials to apply a provision one way or the other without any guidance in the matter of its exercise, e.g., in cases of grant of quota, permit or licences or loans etc.

(iv) Determination of any right of a person without provision for opportunity to him to have his say e.g. change in his date of superannuation from the one accepted earlier in records; holding him ineligible for confirmation in a post due to incapacity acquired after appointment, refusing to grant him a licence or renew it on the ground of some disqualification said to have been incurred after the earlier grant etc.

(v) Assessing a person to tax without provision for assessment which gives him an opportunity of hearing.

(vi) Refusing or impounding a passport without opportunity to the person affected of placing his version.

(vii) Restriction on the enjoyment of proprietory rights of a person on pure subjective satisfaction of the authority.

(viii) A law making an administrative decision affecting a person's fundamental rights, 'final and conclusive' and barring approach to courts by such person.

The instances can be multiplied. It is not necessary to do so because, in essence, as far as the legislative drafting is concerned, within the ambit of the legislative policy, the draft should ensure fair play and absence of arbitrariness.

TAX AND FEE

Mr Justice Virendra Kumar

Obviously, tax and fee are essentially words of economics, and to be more particular, belong to the sphere of finance. But they have acquired no less importance in law. These words have acquired wider implications and dimensions, apart from great significance with steady widening of sphere of functions, powers and responsibilities of the State. The word 'State' here includes the three main organs viz. law-making, administrative and judicial machinery.

TAX AND FEE

A tax is in the nature of a compulsory exaction of money by a public authority for public purposes. It is a payment which is enforced by law. The other characteristic of a tax is, that the imposition is made for public purpose to meet the general expenses of the State without reference to any special advantage to be conferred upon the payers of the tax.

Thus although a tax may be levied upon particular classes of persons or particular kinds of property or things, it is imposed not to confer any special benefit upon individual persons and the collections are all merged in the general revenue of the State to be applied for general public purposes. Tax is a common burden and the only return which the tax-payer gets is participation in the common benefits of the State.

Fees are also payments primarily in public interest and are also enforced by law. But they are for some special service rendered or some special work done for the benefit of those from whom the payments (in the form of fee) are demanded. Thus in fees there is always an element of 'quid pro quo' which is absent in a tax. In order that the collection made by the Government can rank as fees, there must be correlation between the levy imposed and the expenses incurred by the State for the purpose of rendering such services.

Thus two distinguishing elements are essential in order that a payment may be regarded as a fee. In the first place, it must be levied in consideration of certain services which the individuals accepted either willingly or unwillingly. However, too much stress should not be laid on the presence or absence of what has been called the 'coercive' element.

It is not correct to say that as distinguished from taxation which is compulsory payment, the payment of fees is always voluntary, it being a matter of choice with individuals either to accept the service or not for which fees are to be paid (*Shyam Lal* v. *Municipal Board, Ferozabad*, A.I.R. 1956 All. 185). In the second place, the amount collected as fees is to be ear-marked to meet the expenses of rendering these services and is not to go to the general revenue of the State to be spent for general public purposes. But this feature subsists in a modified form in view of certain subsequent pronouncements of our Courts.

The payment into a separate fund which does not merge in the consolidated fund of the State is at best only an indication that the levy is intended by the legislature as a fee for services rendered, but it is not a conclusive test. Equally so payment into a separate fund would not by itself remove a levy outside the pale of controversy whether the levy is in fact a fee. What is important in determining as to whether a particular levy is a tax or fee is the fact whether the primary motive of the levy is regulation in public interest or whether it is to impose a burden irrespective of the benefit accruing to the class of persons affected thereby (*Rameshwar v. U.P. Government* A.I.R. 1966 All. 436 at 437).

Further unless the fee levied is correlated to or is proportionate, more or less, to the costs of the special service rendered, its validity cannot be supported. This proposition is now well-established by a number of decisions of the Supreme Court as well as of other High Courts-(one of them being Muthuswamy v. Kadayanallur Panchayat, A.I.R. 1965 Mad. 289 at 290).

In *Commissioner Hindu Religious Endowments v. Shri Lakshmindera Thirtha Swamiar of Sri Shirur Mutt.* AIR 1954 SC 282 the following propositions were laid down :-

The reference in Art. 366 (28) to an 'impost' suggested that fees were included in taxation. However, for several purposes, the Constitution maintained a distinction between a tax and a fee. The definition of a money bill in Art. 110(1) included a tax, but expressly excluded fees. Art. 277 referred to taxes and fees *separately*, and entries 96, 66 and 47 of Lists I, II and III referred to fees in respect of matters in each List. Therefore, while generically a fee was a tax, it has been differentiated for legislative purposes in our Constitution. The definition of a tax given by Latham C.J. namely, "A tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not a payment for services rendered", brought out the essential characteristics of a tax as distinguished from other forms of imposition which in a general sense are included in a tax. The second characteristic is that it is a public impost without any reference to services rendered, which is expressed by saying that a tax is imposed for the purpose of general revenue, and its object is not to confer any special benefit upon any particular individual and consequently there is no element of *quid pro quo* between the taxpayer and the public authority. A fee is generally defined to be a charge for a special service rendered to individuals by some governmental agency and is supposed to be based on the expenses incurred in rendering the service, though in many cases, the costs are arbitrarily assessed. Ordinarily, fees are uniform and no account is taken of the varying abilities of different recipients to pay. A fee is not a voluntary payment because a careful examination shows that there is an element of compulsion in all fees. No doubt licence fees are charged from those who want a licence, but a person who wants to pursue an activity which requires a licence must pay the licence

A fee involves a *quid pro quo*

fee whether he wants to pay it or not. Public interest is of the basis of all impositions, but in a fee it is some special benefit which the individual receives. Since a fee is a sort of return for services rendered, it is essential that the provision for the levy of a fee should be correlated to the expenses incurred in rendering the services. If the money paid is set apart and is not merged in the public revenue for the benefit of the general public, it would be accounted as a fee, and not as a tax.

Under the Constitution of India in the three lists, namely Union list, State list, and Concurrent list the powers are vested in the Union and States. The subjects in relation to which tax/fee etc. can be imposed by the respective Legislatures of the Union or State have been specified in the respective lists. There have been used words such as toll, duty under the same lists. Let us understand these connotations as well. Neither the Union Government nor the State Government can encroach the field exclusively reserved for the other for imposing tax, fee, duty on the subjects of its exclusive jurisdiction. So far as subjects of the Concurrent list are concerned, the law dealing with tax/fee/duty laid down by Union is to prevail over the State law in so far as the law framed by the latter is repugnant to the law framed by the former.

So let us also now take up a few other words of broadly speaking the same class or sphere. These words are also of common use in the field of law and there should be correct understanding of their meanings and implications without confusing them interse or with the words, tax and fee.

TOLL

Wharton's Law Lexicon defined 'toll' as a tribute or custom paid for passage. In the Stroud's Judicial Dictionary, III Edition 'toll' has been defined as a sum of money which is taken in respect of some benefit, the benefit being the temporary use of land. High Court interpreted the word 'toll' in the same sense. In this connection reference can be made to the case of *Mst. Bayabi* v. *District Council Nagpur* (I.L.R. 1937 Nag. 246). It may include all payments made by persons who go to the market either to sell or to purchase any commodity or any animals or any other thing which by custom is exposed for sale in the market (*Sitaram* v. *Janpada Sabha*, A.I.R. 1952 Nag. 401 at 404).

Usually the consideration is some amenity, service, benefit or advantage which the person entitled to the toll undertakes to provide for the public in general or the persons liable to pay the toll. Sometimes the consideration may be taced to ownership or *jus domini*. Permission by the owner of the land for the use of his land for any purpose may, therefore be sufficient consideration if the persons charging the toll is the owner. If the benefit or advantage which is the consideration is made available, it is not necessary for incurring the liability to pay the toll that the benefit or advantage should actually be utilized.

Tolls are of many kinds and can be levied for various purposes. Besides tolls relating to passage over land or water some of the other recognized tolls are market toll, fair toll, canal toll and so on.

Though 'toll' is a tax levied for the use of land or passage, it cannot be imposed under the Municipalities Act, 1916 (Section 128) on vehicles going out of the limits of the Municipal Board *(Raghbir Singh v. Municipal Board of Hardwar* A.I.R. 1956 All 324 at 326.)

LEVY

The expression 'levy' is a common expression in taxing statutes. It has various shades of fiscal meaning depending upon the different contexts in which it is used. In Webster's Dictionary it has been stated that it means "to assess for the purpose of collecting money also to enforce an execution of certain sum". Levy sometimes signifies the process of assessment or determination of a tax and sometimes the realisation or collection. A taxing authority may levy a tax on capital value and direct that the assessment be made in accordance with the rules laid down by the Legislature in regard to the assessment of a rate. In this connection Bombay Municipal Borough Act, 1925 may be referred.

Section 70 of the Indian Penal Code, 1860 says that the State may levy fine within six years from the date of the sentence. To levy is to realise or to collect. It is clear that what is meant is that within six years the State must commence proceedings for realisation not complete it. It may not complete the realisation proceedings in six years. What is contemplated is that the State shall commence recovery proceedings. Once such steps are taken, the plea of limitation is out of bounds for the sentence.

CESS

"Cess" is defined in Murray's Oxford Dictionary means a tax levied for specific object. In the case of *Daulat Ram v. Lahore Municipality*, A.I.R. 1941 Lah. 48 at 42 it was held that it is not possible to distinguish 'tax' from 'cess' or 'duty'.

The word 'cess' has a definite legal connotation indicating tax allocated to a particular thing not necessarily forming part of the general fund. Instances may be found such as Cotton Cess Act 1923: Indian Lac Cess Act, 1930: Agricultural Produce Cess Act, 1940; Coffee Market Expansion Act, 1942; Salt Cess Act 1953; Tea Cess Act, 1903. All these enactments authorise levy of cess. According to its import the word 'cess' is only tax and not a mere 'fee'. It is not necessary for the purpose of cess there should be *quid pro quo* between the service actually rendered and the amount of tax levied, as it is not a fee but a tax.

DUTY

The word 'duty' is "a payment to the public revenue" upon import, exp[illegible]rt, manufacture or sale of certain commodities. The word 'duty'

connotes obligation. It is a payment due and enforced by law and made to the public revenue. For the payments under the heads of Customs Excise, Stamp etc. the word 'duty' is used. There has been levied death duty under the Income Tax Act.

OCTROI

It is a tax levied on certain articles on their admission into a town. Toll bearer must have been seen at the entry point of a town or city or district at which the payment called as octroi is charged for commodities.

VALIDITY OF CURBS ON PERSONAL LIBERTY (OTHERWISE THAN THROUGH CRIMINAL PROCESS) IN THE INTERESTS OF PUBLIC SECURITY : LEGISLATION FOR CONTROL OF GOONDAS, GANGSTERS, TERRORISTS

Mr Justice B.D. Agarwal

Constituent Assembly debated at length over the issue whether in addition to the ordinary criminal process the Constitution needs have provision for preventive detention. Freedom had dawned after long and protracted struggle. Most of the members had undergone terrible hardships of incarceration and otherwise under the imperial regime. The hesitation to make provision for preventive detention in times of peace was natural . That could indeed appear repugnant. But the Founding Fathers could certainly not be oblivious to the prevailing conditions around. In the after-math of partition of the country there had been tremendous upheavals and mass killings in the wake of unprecedented communal riots. Those statesmen could as well foresee the dangers of critical situations arising in the future keeping in view the vast diversities in the country and the sinister influence of anti-social elements operating in league with foreign powers. The consensus, therefore, was in favour of preventive detention being as well provided.

The legislative power in this behalf is conferred under Entry 9 of List I (the Union List) and Entry 3 of List III (Concurrent List) read with Article 246 of the Constitution. Article 22 contains essential safeguards both substantive and procedural in character. It is noteworthy that the power is exercisable only for specified purposes all of which are centered in larger public interest. Parliament accordingly enacted the Preventive Detention Act, 1950.

Validity of this Act came under challenge soon after the enforcement of the Constitution in the case of *A.K. Gopalan* AIR 1950 SC 27. The Supreme Court by majority upheld the vires of the Act. I will not like to dilate before you the ratio of that historic decision because there has been judicial controversy over the same in later years. For your purposes it may not be necessary to travel into these intricacies. Those of you interested in serious study on the subject may read the brilliant analysis of *Seervai* in Constitutional Law (Vol. I) Chapter XI.

The question arose whether 'personal liberty' within the meaning of Article 21 includes within its purview the freedoms incorporated in Article 19 (1). Article 21 reads :-

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

Article 19(1), as you know, enumerates the six freedoms. What is the meaning and content of the words 'personal liberty'? A view advanced was that the freedoms referred to in Article 19(1) are carved

out of personal liberty. Upon this premise it was sought to be founded that if an enactment meets the requirements of Article 21, it need not stand the test of reasonableness under Article 19. This view was discarded by the majority in the *Bank Nationalisation* case AIR 1970 SC 564 and also in *Shambhu Nath Sarkar* (1973) 1 SCC 856; *Khudiram Das* (1975) 2 SCC 81; *Hardhan Saha* (1975) 3 SCC 198; *Maneka Gandhi* AIR 1978 SC 597. It was held that the law of preventive detention has to meet the test of Article 21 and also of reasonableness under Article 19. The view is that the Articles are not mutually exclusive. Articles 21, 19, 22, 14 play together. Article 21 is both substantive and procedural. Article 22 is not the complete code with respect to the law for preventive detention.

You will like to know whether the law of preventive detention meets the requirements of reasonableness under Article 19. The Supreme Court considered this question directly in *Hardhan Saha (supra)*. In that case the vires of the MISA, 1971 was under challenge. Ray, C.J. speaking for the Constitution Bench observed in the first place that when a person is detained, there should be no question of his being able also to enjoy the freedoms conferred by Article 19(1). Alternatively, however, he proceeded on 'assumption' that the test of reasonableness has also to be satisfied. The provisions of the MISA were analysed. There was provision for the grounds and the material being disclosed to the detenu except where public interest otherwise justified. He was given the right to represent both to the State Government and the Advisory Board. The Board was judicially constituted. It was pointed that natural justice flows from procedural reasonableness contemplated in Article 19, and this was fulfilled in relation to the application of that Act. MISA was, therefore, upheld as valid.

This decision was affirmed by the Supreme Court in *A.K. Ray v. Union of India* (1982) 1 SCC 271. In that case the vires challenged was of the *National Security Act*, 1980. It was held that this Act is in pari materia with the MISA and is not violative of Articles 14, 19, 21 and 22.

In between 1975-82, there was the important decision in *Maneka Gandhi v. Union of India* (1978) 1 SCC 248. that elaborates the content of Article 21 and its relationship vis-a-vis Articles 19 and 14. The view expressed by Bhagwati, J in that case concurring this aspect was :

(1) The expression 'personal liberty' in Article 21 has to be given natural meaning and, therefore, the attributes referred to in Article 19(1) cannot be excluded;

(2) For purposes of Article 21 there is to be law made by Legislature laying down the procedure;

(3) The procedure cannot be arbitrary, unfair or unreasonable. It must be right, just and fair. This would be in conformity with Articles 19 and 14. There has to be reflected fairness in action even where the sphere is administrative and not quasi-judicial.

In short, therefore, it follows that in the public interest there can be curbs imposed by law on the personal liberty of anti-social elements but there must be fairness and reasonableness within the meaning of Articles 14, 19 and 21. Preventive detention is sustained upon the satisfaction of this test. It is now well settled that the rights in Part III are not mutually exclusive. A law of preventive detention under Article 22 must also satisfy Articles 14, 19 and 21. It is equally settled that a law of preventive detention cannot be held unconstitutional for the reason that it violates Articles 14, 19, 21 and 22. The National Security Act which is in *pari materia* with MISA is not unconstitutional on the ground that *by its very nature* it generally violates Articles 14, 19, 21 and 22. It must need be emphasised that the history of personal liberty is largely the history of insistence on observance of the procedural safeguards. These must, therefore, be strictly observed *vide Mohinuddin @ Moin Master* v. *D.M. Beed etc. (1987)* 4 SCC 58 at p. 66.

Question has also arisen at times with respect to right of privacy. Claim was laid to this as a fundamental right. In *Kharak Singh* v. *State of U.P.* (AIR 1963 SC 1295) challenge was made to regulation 236 of the U.P. Police Regulations. The majority was of the opinion that clause (b) of regulation 236 which authorised domiciliary visits at night was alone void keeping in view the concept of personal liberty under Article 21 of the Constitution. The question came up again in *Gobind* v. *State of M.P.* (1975) 2 SCC 148 in relation to similar provisions contained in the M.P. Police Regulations. The Supreme Court in that case made a discussion on the right of privacy but left open the question whether this is a fundamental right granted as such in our Constitution. Mathew J speaking for the Court concluded :-

> "The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute."

The provisions were read down in the light of this conclusion. It was observed :-

(1) Surveillance by domiciliary visits would not always be unreasonable restrictions upon the right of privacy;

(2) The right of privacy even if fundamental must be subject to restriction on the basis of compelling public interest.

(3) The right to privacy of movement too cannot be absolute; a law imposing reasonable restriction upon it for compelling interest of State must be upheld as valid;

The procedure laid down in the impugned regulation is reasonable. Only persons who are suspected to be habitual criminals will be subjec-

ted to domiciliary visits. Surveillance is also confined to limited class of citizens who are determined to lead a criminal life or whose antecedents would reasonably lead to the conclusion that they would lead such a life. Mere conviction in criminal cases would not warrant the invocation of these regulations. Crime in this context is confined to such as involves public peace or security only and if they are dangerous security risks. Domiciliary visits and picketing by the police should be reduced, it was held, to the "clearest cases of danger to community security and not routine follow up at the end of a conviction or release from prison or at the whim of a police officer."

Preventive detention and the police regulations discussed above are preventive in nature. The U.P. Control of Goondas Act which provides for externment of goondas after due notice and opportunity to show cause being given is also of that nature. Action taken under this Act is upheld provided the procedural safeguards have been carefully observed. Of late it is realized that these measures are not adequate. A new class of criminals has raised its head which poses grave danger to the society. Gangsterism aims at creating special organisations and groups to commit murder, use violence and take people for a ransom or other demands often involving torture, black-marketing etc. It may also mean the destruction of buildings, ransacking and similar acts in a cruel manner to terrorise the people. Government have felt the impelling necessity to legislate with a view especially to curb gangsterism and what goes by the name of terrorism. The measures would need be *punitive* and not mere preventive. The procedure evolved needs be special and far more rigorous than that provided under the ordinary criminal law of the State. The U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 is illustrative on the point.

Validity of this Act was challenged before the High Court in a large number of petitions. The matter has been dealt with by a Full Bench in *Ashok Kumar Dixit* v. *State of U.P.* reported in AIR 1987 All. 235. The validity was upheld. The power of the State Legislature to enact the measure was found covered under Entry 1 of List II; Entry 1 of List III and also Entry 65 of List II. 'Public Order' and 'Criminal Law' are wide enough in their ambit to cover measures as these. The authority has to be satisfied that there is a reasonable and proximate connection between the occurrence and the activity of the person sought to be apprehended and that such activities were to achieve undue temporal, physical, economic or other advantage. It is not necessary that there be overt or positive act of the person intended to be apprehended at the place. It is enough to prove active complicity which has a bearing on the crime.

You may like to take a special note that in the given circumstances such as in dealing with gangsterism or terrorism the law may in departure from ordinary criminal process sanction :-

(1) Special rules of evidence raising presumption against the accused upon certain basic facts being established;

(2) provision for trial by special courts other than ordinary criminal courts;

(3) provision for trial *in camera*;

(4) provision for keeping the address and identity of witnesses secret in certian circumstnaces;

(5) distinct provision in the matter of grant of bail.

In framing legislation on the subject you must, however, bear in mind the well settled proposition that upon the validity being challenged, the burden will lie upon the accused to establish the violation of Article 14, but in so far as Articles 19 and 21 are concerned, the burden would lie upon the State (*Deena* v. *Union of India* (1983) 4 SCC 645. 'Reason' is the touchstone of all State actions –including legislative. The Constitution proceeds upon the principle of balancing various interests. If the larger social good so demands, the law does permit curbs being imposed upon liberty of the individuals.

LEGAL CHALLENGES TO TAXATION

P.M. Bakshi

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. *Dattaraya*, A.I.R. 1965 S.C. 555; *Chhotabhai* v. *Union of India*, AIR 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. *Rai Ram Krishna* v. *State of Bihar*, A.I.R. 1963 SC 1667 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. *K.T. Moopil Nair* v. *State of Kerala*, A.I.R. 1961 S.C.

552; *State of Kerala* v. *Hazi K. Kutty*, AIR 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 SCR 679, 693.*

(ii) A taxing statute which imposes an unreasonable restriction (or even a reasonable restriction but not for the specified purpose) on the six freedoms guaranteed 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

(f) to practice 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 Newspaper 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. *Rahman* 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., *Rahman* 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. *Sukhnandan* 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*, AIR 1962 SC 148; *K.T. Moopil Nair* v. *State of Kerala*, AIR 1961 SC 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.E.* 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. *S.P. Sahi*, AIR, 1959 SC 942, 950; *Bira Kishore Deb* 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*, AIR 1962 SC 1406, 1418; *G.K. 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 Kadir*, (1969) 2. SCC 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*, A.I.R. 1966 S.C. 1686. 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 to, 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 this 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*, AIR 1966 SC 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 the 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 (*Rai Ram Krishna* v. *State of Bihar*, A.I.R. 1963 S.C. 1667, 1675, 1676; *Abdul Kadir* 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 article 276, 286 and 287 of the Constitution.

OBJECTIVE AND SUBJECTIVE LANGUAGE IN STATUTES

P.M. Bakshi

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" construction 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. Minsiter 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 judicial 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 these 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 of 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. 1960 S.C. 468.
- *Hari Chand* v. *Mizo District Council*, A.I.R. 1967 S.C. 829. 833.
- *Dwarka Prasad* v. *State of U.P.* (1954) S.C.R. 803.
- *Harak Chand* 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 of 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.

INTERPRETATION OF STATUTES

P.M. Bakshi

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 "overruling" 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 of 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."[1]

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1. *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.[1]

(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 :[2]

> "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."

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.[3]

(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."[4]

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.

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1 *Davis* v. *Johnson*, (1978) 1 All E.R. 1132 (H.L.).
2 *Becke* v. *Smith*, (1836) 150 E.R. 724.
3 *Inland Revenue Commissioners* v. *Hinchy*, (1960) 1 All E.R. 505 (H.L.).
4 *Maunsell* v. *Olins*, (1975) 1 All E.R. 16 (H.L.).

Illustration

Wiltshire's case[1] 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].[2]
(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.[3-4]

(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.[5] The presumption is that "the Crown, in taking its part in legislation, would do nothing which was in conflict with the treaties."

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1 *Wiltshire* v. *Barrett*, (1965) 2 All E.R. 271 (C.A.).
2 *Gregory* v. *Fearn*. (1953) 2 All E.R. 559.
3 *Black Clawson* v. *Papierwerke*, (1975) 1 All E.R. 810.
4 *Davis* v. *Johnson*, (1978) 1 All E.R. 841 (C.A.)
5 *R.* v. *Secretary of State for Home Department, Ex-part Bhajan Singh*, (1975) 2 All E.R. 1081 (C.A.).

(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 retrospective effect, unless expressly provided.[1]

(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."[2]

(c) Intention is required for criminal liability.[3]

(d) A penal statute is to be strictly construed.[4]

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.[5]

(f) The same word has the same meaning. [6]

(g) Consolidating Acts do not alter the law. "Draftsmen of such Acts re-phrase the original statutory provisions which are to be consoli-

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1 *Carson* v. *Carson, (1964) 1 WLRSII*
2 *Allen* v. *Thorn Electrical Industries*, (1967) 2 All E.R. 1137 (Lord Denning).
3 *Sweet* v. *Parsley*,(1969) 1 All E.R. 347 (A.C.).
4 *Zimmerman* v. *Grossman*, (1971) 1 All E.R. 363 (C.A.)
5 *West Ham Church Wardens* v. *Fourth City Mutual Building*, (1892) 1 Q.B. 654.
6 *Gartside* v. *I.R.E.*,(1968) 1 All E.R. 121 (H.L.).

dated, 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."[1]

Presumptions based on honouring international obligations

(h) Parliament will not pass a statute infringing an international obligation.[2]

Presumptions based on constitutional law

(i) The soverign is not bound by a statute unless there is an express provision to the contrary.[3] (In India, this is becoming weak).

Presumptions linked with drafting precision/imprecision

(j) Rule of *ejusdem generis*[4]: 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.*[5]

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."

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1 *Maunsell* v. *Olins*, (1975) 1 All E.R. 16 (H.L.).
2 *R.* v. *Secretary of State for Home Department, Ex parte* Bhajan Singh, (1975) 2 All E.R. 1081 (C.A.).
3 *Bank Voor Handel* v. *Administrator of Hungarian Property* (1954) 1 All E.R. 969 (H.L.).
4 *Gregory* v. *Fearn*, (1953) 2 All E.R. 559.
5 *R.* v. *Palfrey*, (1970) 2 All E.R. 12 (C.A.)(Winn. L.J.).

GENERAL CLAUSES ACT, 1987

P.M. Bakshi

Introduction

The General Clauses Act is the most important enactment from the draftsman's point of view. Next to a pocket edition of the Constitution, a copy of its bare text would be an indispensable equipment for the draftsman of legislation. Of course, it has to be supplemented by the definitions and interpretation provisions contained in the particular Act under consideration.

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.

Objects how 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 alter-

natives. 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 interpreted 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 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 *coexistence* 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, that 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 General 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 definitions 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 its own interpretation.

LEGISLATIVE PROCEDURE RELATING TO BILLS

B.C. Shukla

The legislative procedure in India is based on constitutional provisions, the Rules of Procedure relating to the House concerned and the parliamentary conventions. These together constitute the structural framework for the legislative process.

The Union Parliament and the State Legislature exercise their legislative powers in accordance with the Seventh Schedule to the Constitution. List I of this Schedule enumerates the Central subjects whereas List II thereof enumerates the subjects of which State Legislature alone can make laws. List III contains the concurrent topics on which both can make laws with the condition that in the case of a conflict, it is the Central law which shall prevail over the other.

Legislation is one of the primary functions of the parliamentary institutions. It is, therefore, quite interesting to know as to how these institutions proceed to discuss and pass a Bill before it becomes an Act. Every Bill, whether it is official or non-official, has to pass through three different stages, viz. Introduction, Consideration and Passage. We may also divide the stages into the First Reading, Second Reading and Third Reading of the Bill. Before we discuss the different stages of the Bill, it is better to keep the following points in view :-

(1) In U.P. the Bills are prepared and printed by Legislative Department of the State Government.

(2) About 600 copies of the printed Bill in Hindi language are supplied to the Assembly Secretariat (there being about 425 members) 2 days before the date on which the Bill is sought to be introduced.

(3) Each copy of the printed Bill is accompanied by the following documents :-

  (a) Statement of Objects and Reasons (S.O.R.)
  (b) Financial Memorandum, if the Bill involves expenditure from the Consolidated Fund.
  (c) Memo of delegated legislation involved in the Bill.
  (d) In case of amending Bills, extract of those provisions of the original Act which are sought to be amended.
  (e) In case of replacing Bills, the details of modifications, if any, made in the Bill as compared to the Ordinance.
  (f) Recommendation of the Governor under article 207(1) or 207(3) of the Constitution, if so required.

(4) Alongwith the copies of the Bill, a written request from or on behalf of the concerned Minister is also sent to the Assembly Secretariat to the effect that the said Minister would like to introduce the Bill on the date specified therein.

(5) On receipt of the copies of the Bill, the Assembly Secretariat scrutinises it, and if the provisions of the Constitution and the Rules of Procedure are found to have been complied with, the motion for leave to introduce the Bill is included in the Agenda and the copies of the Bill are circulated to the Members through their Pigeon-Holes.

(6) The Agenda, in so far as it relates to the introduction of the Bill, contains entries on the following lines :-

(क) शिक्षा मंत्री, उत्तर प्रदेश राज्य विश्वविद्यालय (संशोधन) विधेयक, १९८८ को पुरस्थापित करने हेतु सदन की अनुज्ञा मांगेंगे।

(ख) शिक्षा मंत्री, उत्तर प्रदेश राज्य विश्वविद्यालय (संशोधन) विधेयक, १९८८ को पुरस्थापित करेंगे।

(7) In Parliament and in some of the States, the Bills are also numbered such as Bill No. 1 of 1988, Bill No. 2 of 1988 and so on. (These serial numbers of Bills would differ from the serial numbers of the resulting Acts). In U.P., this system has not yet been introduced.

Introduction of Bills

(1) No Bill can be introduced in the Assembly or the Council unless the member-in-charge of the Bill seeks the leave of the House to introduce the Bill and such leave has actually been granted.

(2) According to Rule 123 of the Rules of Procedure of U.P. Assembly, the motion for leave to introduce a Bill cannot be moved unless copies of the Bill have been circulated to members at least one day before. Thus the Railways (Amendment) Bill, 1984 could not be introduced in Lok Sabha on 24.4.86 because copies of the Bill were not circulated well in advance. But there are instances when the Speaker has permitted the introduction of the Bill on the same day when it was sought to be introduced. Thus on July 21, 1987, the Bill relating to enhancement of salary and allowances payable to the legislators was allowed to be introduced although copies of the Bill were distributed moments before its introduction.

(3) Normally, no speech or discussion is allowed at the introduction stage of the Bill, but if the motion for leave to introduce the Bill is opposed, the following courses are adopted :-

(a) If the motion is opposed on the ground that the Bill sought to be introduced is beyond the legislative competence of the State Legislature, the Speaker may permit full-fledged discussion before he puts the motion to vote.

(b) If the motion is oppposed on any other ground, the Speaker may hear the member concerned and without further debate, put the motion to vote.

(4) The Speaker does not, as a matter of constitutional propriety, decide the objection regarding validity of a Bill. But if the members feel, they are free to refuse the leave regarding introduction of the Bill.

(5) Certain interesting developments took place on March 22, 1984 when Dr. Ammar Rizvi, Minister for Parliamentary Affairs sought the leave of the House to introduce the U.P. Official Languages (Amendment) Bill, 1984. The Bill, which sought to replace an Ordinance promulgated earlier, declared Urdu as second official language. Most of the opposition members assailed the validity of the Bill on the ground of legislative competence. They also maintained that since a writ petition challenging the validity of the connected Ordinance was pending before the High Court, the matter was sub-judice, and the Bill under reference could not be introduced. A piquant situation arose when one of the members of the Council of Ministers supported the opposition and opposed the introduction of the Bill. The Speaker held that the introduction of the Bill could not be objected to, but it shall not be taken up for consideration till the writ petition pending before the High Court was finally decided.

(6) When a Bill has been introduced, its copy is published in the Gazette for information to the public. Copies of the Bill are also sent to the Governor of the State and President of India for information.

Motion for Consideration of Bills (First Reading)

After a Bill has been introduced, the member-in-charge of the Bill may make a motion that the Bill be taken into consideration. A motion for consideration of the Bill cannot, however, be made unless copies of the Bill have been supplied to the members at least 3 days before. The Speaker has, however, the power to allow such a motion to be moved even before the expiry of three day 's period.

When the motion for consideration of the Bill has been made, the Bill is open for discussion. At this stage, the general principles of the Bill, as distinguished from clause-wise consideration, are discussed by the House.

After general discussion on the principles of the Bill, the motion that "the Bill be taken into consideration" shall be put to vote.

Clause-wise consideration of the Bill (Second Reading)

When the motion for consideration of the Bill has been passed, the Speaker is empowered by Rule 136 to submit the Bill or any part thereof to the House clause by clause.

At this stage, the notice of amendment to any particular clause or clauses of the Bill is taken up. The Speaker is entitled to take up only those notices of amendment which have been received from the members 36 hours before the day on which the Bill is taken up for consideration.

Admissibility of amendments depends upon the following conditions :-

(a) The amendments should be within the scope of the Bill. If the amending Bill seeks to amend sections 3, 5 and 7 of the principal Act, any amendment relating to section 4 or 6 of the Act shall normally held to be beyond the scope of the Bill.

(b) The proposed amendment should be intellegible and should not be frivolous or meaningless.

(c) If the amendment is of such a nature that the previous sanction of the President or the recommendations of the Governor is necessary, a copy of such sanction or recommendation shall also be filed along with the notice of amendment.

Each clause of the Bill would then be voted and adopted by the House with or without amendment. The Preamble and the Title of the Bill shall be voted and approved at the end.

When a Bill is of a controversial nature, the number of amendments moved in respect of various clauses may be quite large. In the Mansoon Session of 1981, the Essential Commodities Maintenance Bill was passed by Lok Sabha. More than 500 amendments were moved by the members, and after a marathon sitting upto 4 AM, the Bill was passed. Lobby divisions were also demanded 31 times.

Passage of the Bill (Third Reading)

When the motion that the Bill be taken into consideration has been carried, and no amendment is made to the Bill, the member-in-charge of the Bill may at once move that the Bill be passed.

But if the House had agreed to accept any amendment to the Bill, any member may object to the motion of passage being moved on the same day.

When the motion that "the Bill be passed" is moved, the scope of discussion on the Bill is very limited. The Bill is deemed to have been passed when the aforesaid motion has been approved by the House.

Instances are not wanting when the House was in disorder and yet the Bill was declared to have been passed. The certificate of the Speaker that the Bill has been passed is final and it cannot be called in question by law courts, vide article 212 of the Constitution.

Procedure regarding Private Members' Bill

A Private Members' Bill is a Bill sought to be introduced by any member other than a Minister. Such a Bill normally suffers from disadvantages; firstly because it is generally not well drafted and secondly, because it does not have the support of the majority. However, the Assembly Secretariat helps the members in drafting their private Bills.

According to the Rules of Procedure, a period of three hours (from 2 PM to 5 PM) on every alternate Friday is fixed for Private Members' Bills.

About 15 days before the date fixed for Private Member's Bills, ballotting is arranged for selecting 5 such Bills by means of lottery. The selected Bills are printed in the Agenda in order of priority accorded in the lottery. Copies of such Bills are sent -

(a) to the Administrative Department of the Government to enable them to decide whether or not the Bill should be opposed in the House;

(b) to the Law Department with a view to obtaining previous sanction of the President or recommendation of the Governor, if so required.

On the date fixed for the disposal of Private Member's Bill, the motions regarding introduction, consideration and passage of the Bills selected by lottery are printed in the Agenda. Private Members' Bills are seldom passed and either they are rejected at the stage of introduction or they are negatived at the stage of consideration. Instances are not wanting when the member himself withdraws the Bill after the concerned Minister has explained the Government stand on the Bill.

If the Private Member's Bill involves expenditure from the Consolidated Fund of the State, and the Bill requires Governor's recommendation under article 207 of the Constitution, such recommendations are usually not available and the Bill is unable to see the light of the day.

The fate of some of the Private Member's Bills is discussed below :-

(1) The Code of Criminal Procedure (U.P. Amendment) Bill, 1985 was introduced by Sri Brahma Dutt Dwivedi Advocate M.L.A. (Farrukhabad), on 3.9.85. The Bill sought to restore section 438 dealing with Anticipatory Bail which had been deleted earlier by U.P. Amendment. The motion for consideration of the Bill was rejected by the House on 4.9.86.

(2) U.P. Educational Tribunal Bill, 1985, was introduced on 3.9.85 by Sri Shatrudra Prakash M.L.A. Varanasi. The Bill sought to establish an Educational Tribunal for the removal of grievances of the teachers of universities and degree colleges. Since the Bill involved expenditure from the State Exchequer, the recommendation of the Governor under article 207(3) was not received and hence the Bill had to be dropped.

(3) U.P. Regulation of Reservations in Public Services Bill, 1985 was introduced on 3.9.87, by Sri Ravindra Nath Tewari Advocate, MLA (Faizabad). The Bill sought to provide that reservation in public services shall be regulated according to economic conditions of the people and not on the ground of caste. After a good deal of discusssion on the motion for consideration

the Hon'ble Member sought to withdraw the Bill and it was dropped accordingly.

(4) U.P. Zamindari Abolition and Land Reforms (Amendment) Bill, 1985 was introduced by Sri Fajlul Bari MLA (Gonda). It sought to provide that the inheritance of agricultural land in the State shall be governed by the personal law of the tenure-holder and not in accordance with sections 171 to 174 of the Zamindari Abolition Act. The bill is still pending.

Though it is true that Private Member's Bills have little chance of success in the House, nevertheless, they do serve the purpose of building up public opinion. It may be interesting to note that from 1952 to 1986, as many as 14 Bills introduced by private members in the Parliament have become law.

Special Procedure for Money Bills

Articles 198 and 199 of the Constitution prescribe certain special provisions regarding Money Bills. They are enumerated as under : -

(a) A Money Bill shall not be introduced in the Legislative Council.

(b) A Money Bill duly passed by the Assembly shall be transmitted to the Council for its recommendations.

(c) The Council must return the Money Bill to the Assembly with its recommendations within a period of 14 days.

(d) After the receipt of the Money Bill from the Council, the Assembly is free to accept or reject the recommendations of the Council.

(e) If the Assembly does not accept the recommendations of the Council, the Bill shall be deemed to have been passed in the form in which it was originally passed by the Assembly.

(f) If the Council does not return the Bill to the Assembly within the period of 14 days, it shall be deemed to have been passed in the form passed by the Assembly.

(g) The period of 14 days is to be counted from the date on which the Bill is received in the Council Secretariat, and not from the date on which its copy is laid on the table of the Legislative Council.

What is a Money Bill

The expression 'Money Bill' has been defined in article 199 of the Constitution. According to this definition, if a Bill contains 'only' provisions dealing with all or any of the matters specified in the said article, it shall be deemed to be a Money Bill. If any question arises whether a particular Bill is or is not a Money Bill, the decision of the Speaker is final.

Under article 199(4), the Speaker is required to record a certificate that the Bill under reference is a Money Bill. It has, however, been held in *State of Punjab* v. *Satyapal Dang* (AIR 1969 SC 903) that this provision is directory and even the Deputy Speaker can certify a Money Bill.

Procedure in Legislative Council

Where a Bill is passed by the Assembly, three parchment copies thereof duly endorsed by the Speaker are transmitted to the Council Secretariat where it is laid on the Table of the House for information to the members. There is thus no need to move for the introduction of such a Bill in the Council. On a day agreed upon by the House, the motion for consideration of the Bill is moved by the Minsiter-incharge of the Bill. After discussion, the Bill may be passed by the Council, with or without amendment. If the Council has approved of the Bill without any amendment, the Bill goes back to the Assembly and thereupon, it is submitted to the Governor for assent. But if the Council rejects the Bill or makes any amendment in the Bill, the procedure prescribed in Article 197 has to be followed.

According to article 197, if the Bill transmitted to the Council is rejected by it, or no action is taken by the Council within a period of three months, or the Bill is passed by the Council with amendments to which the Assembly does not agree, the Bill may again be passed by the Assembly and transmitted to the Council for a second time. In any such eventuality, if the Bill is rejected by the Council, or if no action is taken by the Council within a period of one month, or if the Bill is passed by the Council with amendments to which the Assembly does not agree, the Bill will be deemed to have been approved by both the Houses in the form in which it was passed by the Assembly for the second time.

After a Bill has been passed by both Houses or is deemed to have been passed by both the Houses, the same is sent to the Governor for his assent, through the Law (Legislative) Department.

Assent to the Bill

Where a Bill has been presented to the Governor for his assent under article 200, the Governor has to adopt one of the three courses :-

(a) He can give his assent to the Bill.
(b) He can withhold his assent, or
(c) He can reserve the Bill for the consideration of the President.

In the matter of choosing one of the three courses specified above, the Governor is normally guided by the advice of the Law Secretary to the Government.

I shall cite two instances which would throw light on the Governor's power of assent to the Bills.

(i) In 1973, the U.P. Legislature passed the Zamindari Abolition and Land Reforms (Amendment) Bill which sought to extend

the Zamindari Abolition Act to certain areas which had come to U.P. by the change of course of River Jamuna after 1949. The Bill was reserved for the consideration of President. While the Bill was still pending with the President, dispute between U.P. and Haryana regarding boundary arose. The result was that the President returned the Bill without assent and with certain message. The Bill was again laid on the table of the Assembly in 1978 and subsequently, it was withdrawn by the Government.

(ii) The second instance relates the controversial Post Office (Amendment) Bill, 1986, which is still lying with the President for his assent. This shows that there is no time limit during which the President or Governor must accord his assent.

Once the Governor or the President gives his assent, the three parchment copies are sent to the Law Department which transmits one copy of the Bill to the Assembly and the other copy to the Council. The third copy is retained by Legislative Department, and is kept in its Statute Book. The Legislative Department allots serial number to the Act and the same is notified in the Gazette.

Withdrawal of the Bill

The last aspect of the Legislative Bills is their withdrawal. At any time after the introduction of a Bill, the member-in-charge of the Bill may seek the leave of the House for its withdrawal. If the Government considers that the amendments sought to be made by the Bill are no longer necessary or that a new and more comprehensive Bill should be introduced, they may withdraw the earlier Bill with the permission of the House. The only condition is that the Bill must be pending before the House where the motion for withdrawal is intended to be moved.

But the parliamentary procedure is never at home in the company of absolutes. The controversial Press Bill of Bihar was passed by both the Houses of Bihar Legislature and was pending with the President for his assent. In view of hostile public reaction to it. Dr. Jagannath Misra, the then Chief Minister of Bihar decided to withdraw the Bill and for that he adopted a novel procedure. He got a resolution regarding withdrawal of the Bill passed by both the Houses of the Legislature and informed the President accordingly. The resultant effect was that the Bill stood withdrawn.

Before I close, I may recall the practice adopted by British M.Ps. In Britain, the House of Commons meets from 2.30 in the afternoon. Before the start of the session, the M.Ps. assemble at 2.25 p.m. daily and offer prayers to God that He should give them necessary courage and wisdom so that they should enact good laws for the benefit of the people of Great Britain.

INCORPORATING AND REFERENTIAL LEGISLATION[1]

S.R. Bhansali

Before entering into the depths of the 'Incorporating and Referential Legislation' we would perhaps have to understand the term 'legislation' itself. I shall, therefore, like to define legislation first and define it as meaning "that act of the State by which it communicates its policy decisions having legal consequences to members of society" and since there is hardly any aspect of the conduct of the society, individual or collective, which is not regulated by legislation, the preparation, enactment, interpretation and implementation of legislation are matters of prime importance not only for those, who are to be affected by the legislation but also for those who are professionally involved in these matters.

2. The conception, formulation, enactment, interpretation and implementation of legislation are inter-related activities. We are, however, concerned here only with that part of legislation which is confined to the preparation of draft legislation and accordingly I shall confine myself to as to how a draft is to be prepared and what are the matters which a legal draftsman should keep in view before he embarks upon the task of preparing a draft legislation.

3. In order to avoid ambiguity in what is communicated to the society for the purpose of regulating its conduct, the legislature tries to state its intention in a phraseology and pattern which has already been set by some earlier enactment, especially where such a phraseology and pattern is found to have withstood the test of judicial scrutiny. Whether, however, the Legislature states its intention in such phraseology and pattern or in a fully new phraseology and pattern, it has to be very careful about the accuracy and precision of what is stated because in the absence thereof the society will get confused about what it is being directed to do or abstain from doing.

4. It would have been better if the Legislature could make a legislation self-contained on every point within its scope. Since, however, in the present day world, faced as it is with a new law every other day, the Legislature sometimes does not make a legislation self-contained and instead makes use of some earlier enactment by referring thereto and thereby determines the role which the former enactment is sought to play for the purposes of the latter enactment. So, when, in a legislation, we say something by referring to some other legislation, such legislation is known as a referential legislation and when by

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1 See also Sec. 8 of the General Clauses Act, 1897 and also of the U.P. General Clauses Act, 1904 : For its application to statutory instruments see *National Sewing Thread Co. v. James Chadwick & Bros Ltd.*, AIR 1953 SC 357.

referring to such other legislation we seek to incorporate in the new legislation the provisions of such other legislation, such new legislation is known as incorporating legislation.[2]

5. The provisions in a statute, incorporating another statute, are generally of three kinds:-

(i) Provisions incorporating definitions from other Acts;
(ii) Provisions incorporating procedural sections from other Acts; and
(iii) Provisions incorporating substantive sections from other Acts.

6. The provisions which we borrow either for defining a particular expression or defining all such expressions not expressly defined in the statute in question the formula generally employed is-"X shall have the same meaning as in the-Act" or "all words and expressions used and not defined in this Act but defined in the...Act shall have the meanings respectively assigned to them in that Act".

7. A typical example of this category is available in sub-section (16) of section 2 of the Rajasthan Panchayat Samitis and Zila Parishads Act, 1959, which provides that "words and expressions" used but not defined in that Act shall have the meanings assigned to them in the law for the time being in force relating to Panchayats, Municipalities

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2 **NOTE :** Where a subsequent Act incorporates provisions of a previous Act then the borrowed provisions become an integral and independent part of the subsequent Act and are totally unaffected by any repeal or amendment in the previous Act. This principle, however, will not apply in the following cases :-

(a) Where the subsequent Act and the previous Act are supplemental to each other;

(b) Where the two Acts are in *pari materia*;

(c) Where the amendment in the previous Act, if not imported into the subsequent Act also, would render the subsequent Act wholly unworkable and ineffectual; and

(d) where the amendment of the previous Act, either expressly or by necessary intendment, applies the said provisions to the subsequent Act : See : *State of M.P. v. M.V. Narasimhan*, (1975) 2 SCC 377; see also *Bolani Ores Ltd. v. State of Orissa*, (1974) 2 SCC 777; *Collector of Customs, Madras v. Nathella Sampathu Chetty*, (1962) 3 SCR 786 : AIR 1962 SC 316; *New Central Jute Mills v. Asstt. Collector of Central Excise*, (1970) 2 SCC 820; *Ram Sarup v. Munshi*, AIR 1963 SC 553; *Agarwal Trdg. Corpn. v. Collector*, (1972) 1 SCC 553, *Shama Rao v. D.M.*: AIR 1952 SC 324; *Ram Narain v. Simla Banking & Industrial Co.*, AIR 1956 SC 614.

and District Boards. Similarly, in clause (vii) of sub-section (1) of section 3 of the Rajasthan Land Revenue Act, 1956, it has been provided, "words and expressions defined in the Rajasthan Tenancy Act, 1955 shall, wherever used herein, be construed to have the meanings assigned to them by the said Act." An example of incorporating provisions relating to definitions and expressions borrowed from a Central law is found in section 2(19) of the Rajasthan Public Trusts Act, 1959 which says, "words and expressions used but not defined in this Act and defined in the Indian Trusts Act, 1882 have the meanings respectively assigned to them in that Act." Another such example is found in clause (a) of section 2 of the Estate Duty (Distribution) Act, 1962 wherein it has been said that by "estate duty" was meant the estate duty levied under the Estate Duty Act, 1953 in respect of property other than agricultural land; and still another in the Central Sales Tax Act, 1956 which, in its section 14, says that by "rayon or artificial silk fabrics", by "sugar", by "tobacco" and by "woollen fabrics" were meant their identical expressions as defined in the Central Excises and Salt Act, 1944.

8. The formula used for the second category, where procedural sections of an earlier Act are borrowed in a new legislation contains provisions to the effect that"....Act shall apply to proceedings under this Act." A sample of this category is illustrated here:

"The Rajasthan Zamindari and Biswedari Abolition Act, 1959, section 32:

> **Powers and procedure of officers.**-(1)Any officer or authority holding an inquiry or hearing an appeal or application for review under this Act shall have the powers of a civil court under the Code of Civil Procedure, 1908 (Central Act 5 of 1908) relating to-
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> (a) proof of facts by affidavits,
>
> (b) enforcing attendance of any person and his examination on oath,
>
> (c) production of documents, and
>
> (d) issuing of commissions,
>
> and every such officer or authority shall be deemed to be a civil court within the meaning of sections 480 and 482 of the Code of Criminal Procedure, 1898 (Central Act 5 of 1898).
>
> (2) Save as otherwise provided in this Act or the rules made thereunder every officer or authority acting under this Act shall have and exercise the same powers and shall follow the same procedure as are had and exercisable by, and is laid down for, a revenue court under the Rajasthan Tenancy Act, 1955 (Rajasthan Act 3 of 1955) while trying a suit under that Act."

9. In November, 1987, we enacted a special law in Rajasthan to provide for the more effective prevention of sati and its glorification and

for matters connected therewith or incidental thereto. This law titled as the Rajasthan Sati (Prevention) Act, 1987 contained a provision that a special court shall, for the purposes of trial of any offence, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session, so far as may be in accordance with the procedure prescribed in the Code of Criminal Procedure, 1973 for trial before a Court of Session. Thereafter a Central law was enacted on the same subject and the Commission of Sati (Prevention) Act, 1987 contains the same provision with regard to procedure and powers of Special Courts. Here also the provisions of Criminal Procedure Code were incorporated.

10. The third category purports to borrow the substantive provisions which is at times called 'substantive incorporation' and covers a wide variety of expressions such as - "This Act shall form part of -"The....Act shall have effect", "The...Act shall apply', "The notification shall be deemed to have been made under this Act", "The provisions of this Act shall be in addition to .... Act". For instance, section 484 of Criminal Procedure Code, 1973, among other things, provides that all notifications published, proclamations issued, powers conferred, forms prescribed, local jurisdiction defined, sentences passed and orders, rules and appointments, not being appointments as Special Magistrates, made under the old Code and which are in force immediately before the commencement of this Code, shall be deemed, respectively, to have been published, issued, conferred, prescribed, defined, passed or made under the corresponding provisions of this Code. In Section 4, Transfer of Property Act, 1882, it has been provided, "the chapters and sections of this Act which relate to contract shall be taken as part of the Indian Contract Act, 1872". Section 2 of the Banking Regulation Act, 1949 provides, "The provisions of this Act shall be in addition to, and not, save as hereinafter expressly provided, in derogation of the Companies Act, 1956, and any other law for the time being in force."

11. Sometimes a statute may declare that its provisions will override any particular or all other laws in force. An example of such a provision can be traced in section 92 of the Jaipur Development Authority Act, 1982, wherein the provision states that this Act shall have effect notwithstanding anything inconsistent therewith in any other law for the time being in force. Similarly such enactments use a formula "The provisions of this Act shall be in addition to and not in derogation of those of ... Act".

12. Examples of the Central Acts containing provisions of incorporation etc. of other Acts can be traced in the following:-

1. The Displaced Persons (Debts Adjustment) Act, 1951.
2. The Vishva Bharati Act, 1951.
3. The Drugs and Magic Remedies,(O.A.)Act, 1954.
4. Prevention of Food Adulteration Act, 1954.
5. Ancient Monuments etc. Act, 1958.
6. The Army Act and Air Force Act,1950

7. The Central Sales Tax Act, 1956.
8. The State Financial Corporations Act, 1951.
9. The Estate Duty (Distribution) Act, 1962.
10. The Apprentices Act, 1961.
11. Coal Bearing Areas (Acquisition and Development) Act, 1957.
12. The Banking Regulation Act, 1949.
13. Transfer of Property Act, 1882.

13. The technique of legislation by reference is used to describe and bind two laws. By this technique provisions of one are incorporated in the other. The simple way of referential legislation is to extend the scope of an existing law to make it applicable to the new legislation. If there are some peculiar situations in the new legislation, reference is limited to certain specified things. This technique involves expansion of the existing law; but in doing so the earlier legislation is bound with the new legislation. The provisions of the earlier legislation are used in the new legislation by deeming them, as part of the new legislation. For instance, the meaning and definition of "dangerous drug" in section 2(1)(h) of the Rajasthan Children Act, 1970, refers to the Dangerous Drugs Act, 1930 for the purpose of its meaning. By this the earlier provisions of an Act have been used by reference to obviate repetition. In clause (p) of sub-section (1) and sub-section (2) of section 2 of this very Act, certain words and expressions not defined in the Act, itself, have been used by reference to the Probation of Offenders Act, 1958 (Central Act 20 of 1958) and the Code of Criminal Procedure, 1898.

14. In other words, these techniques comprise legislation of a nature which adopts or incorporates in a statute provision of an existing statute not by re-enacting those provisions but by referring to them. The examples, illustrations and samples I have enumerated earlier are a few specimens of this method of legislation.

15. This method of legislation is useful and necessary as it avoids needless repetition, saves the time of legislature, dimnishes political difficulties by diminishing the area and scope of debate in the legislature and serves the factor of uniformity in law by reference to those laws which have stood the test of time through judicial scrutiny.

16. Though in the new Acts, a reference to an old law is advantageous to the draftsman, because he saves time and labour in again drafting those provisions which have stood the test of time, but there are many disadvantages too. The legislation by reference is criticised for its incomprehensibility. In such legislations the reader is forced to refer to earlier legislations which requires professional skill and labour. An Act should be self-contained as far as possible and one should not be directed to refer to another statute which causes inconvenience to referer. Legislation by reference is a dangerous technique as the Act referred to may not fit in the scheme of Act referring it. It is just possible that the provisions may be inappropriate, inapplicable and may not be exhaustive. As such a draftsman should be very careful in employing the method of legislation by reference. Only

such of the provisions should be referred which are applicable and they must be specifically referred to because a general or vague reference may not serve the purpose. Legislation by reference may sometimes create problem when the referred Act is either repealed or amended in such a way that the provisions of the referring Act get omitted. In such a case the inconvenience of amending the law again and again may arise. Legislation by reference pre-supposes the existence of up-to-date amended codes with classified titles. Although this technique is useful for the draftsman who possesses all the relevant statutes with the existing examples yet it may create difficulties for the citizen. So the critics of this system stress that an Act should be self-contained so far as possible.

17. In general terms, it may be said that there are valid reasons to use the technique of legislation by reference as it is necessary looking to the limited time available with the legislature for discussing and passing the laws. This method has a practical utility but while adopting this technique the draftsman, in my opinion, should try to avoid unnecessary difficulties that may arise in the construction and interpretation of the laws enacted. In a fast changing society like ours legislation has to keep pace with the time and laws have to be enacted according to the needs of the society. These circumstances warrant a draftsman to rely upon the method of incorporating and referential legislation to deliver the goods in time with accuracy and precision by avoiding unnecessary repetition. However, whenever sufficient time is available the other possible methods should also be kept in view. The laws which have wider application should be self-contained generally, so that ordinary citizen who is expected to know the law may understand it as it is without peeping into another Act. In a welfare State like ours this need is all the more imperative.

18. As already discussed above, legislation by reference has come to stay, because without it the Legislature will not be in a position to keep pace with the times in the present day complex world. Moreover, when the present day society has opted for interdependence in other spheres of life, it cannot reasonably refuse to cooperate with the technique of legislation by reference and by incorporation involving its dependence on other laws. In such circumstances, all that a draftsman can be expected is that he uses this method of legislation with due care and responsibility.

19. Furthermore, with the change of times and speed with which the society is progressing the draftsman is also asked to prepare an Act or a legislation with the same speed and in order to keep pace with the time, the draftsman has also to draw the words, phrases and other matters from other legislations, which had been framed earlier. To quote a few examples, I have been working as Law Secretary for about three and a half years and there have been times when I have been asked to prepare a particular legislation within 48 hours or 24 hours. Even at the risk of the repetition, I would mention that Rajasthan Sati (Prevention) Ordinance, 1987 was prepared within 24 hours and

since it was a completely new law to be enacted by the State Government we had nothing to fall back upon and every thing was freshly thought of and incorporated in words. The draftsman can take his own time to prepare a particular legislation but in that Ordinance even if there would have been a delay of few hours, there may have been innumerable casualties and it may have resulted in a greater catastrophe. It was therefore that the Ordinance had to be prepared at a great speed. The said Ordinance has stood the test of the courts, except section 19 of the Ordinance/ Act, which actually covered the old temples. I want only to emphasize here that time has no relevance with the drafting of legislation but actually proper thoughts and proper recording of words must be adhered to so that it does not lead to any confusion or it does not result in any further complication of matters.

20. In Rajasthan the work of drafting is mainly being done by one of our Deputy Secretary and Joint Legal Remembrancer and in last three and half years, since I have been there in the Department, we have framed as many as 95 Acts and 59 Ordinances. None of them have been declared as *ultra vires* or has been struck down. The job of drafting is time-consuming and it is, therefore, expected that the Government should also give enough time to the draftsman to draft a particular legislation,because before putting it in actual words, he has to read too many other Acts and Rules and then frame it. However, as and when required the draftsman should be readily available to draft a law at a great speed, may it be a super-sonic speed.

21. In the end, I would like to express my thanks to the organisers of this programme for the honour they have extended to me for delivering a lecture on this important technique of legislation, which may be put to use by you as and when occasion is afforded for preparing the draft legislation.

PROMISSORY ESTOPPEL IN THE CONTEXT OF LEGISLATIVE ENACTMENTS AND NOTIFICATIONS

R.K. Mahajan

Concept of promissory estoppel is nothing than based upon principle of equity, good conscience and justice. It is a safeguard against the exercise of arbitrary powers on the part of executive or unreasonable use of discretion. So ultimately the principle is that promisor must act fairly when promisee has changed his position on the representation of promisor. The concept has gone so far that the Government and its officials are not immune from the application of this doctrine when they act within their powers. Recently on account of State activity in carrying out the directive principles or socio-economic objects as laid down in the Constitution of India, it is expanding its activities in so many fields to achieve that end. There is industrial activity all over India and State offers exemption of taxes or gives incentives to the persons so that they can start the industry. I would cite judicial precedents to show to what extent promissory estoppel is applicable to the legislative enactments and notifications.

2. In India State is at par with ordinary citizen in the matter of suing the person or being sued for wrongful acts of its servants. The State can also file suit under Article 300 of the Constitution of India against the ordinary citizen. So it does not lie in the mouth of State to say that the estoppel should be pleaded in every field barring few exceptions. I would like to quote Lord Denning's observations made in "The Discipline of Law" regarding the principle of estoppel :-

> 'My word is my bond', irrespective of whether there is consideration to support it. Once a man gives a promise or assurance to his neighbour on which the neighbour relies - he should not be allowed to go back on it. In stating the principle, and its extensions, the lawyers use the archaic word 'estoppel'. I would prefer to put it in language which the ordinary man understands :
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> It is a principle of justice and of equity. It comes to this : When a man, by his words or conduct, has led another to believe that he may safely act on the faith of them - and the other does act on them - he will not be allowed to go back on what he has said or done when it would be unjust or inequitable for them to do so."

3. In his "The Discipline of Law", in the Introduction to (Part V) The *High Trees Case*, Lord Denning observed :

> "In the 19th century the law of England was dominated by the difference between Law and Equity. Law had its own strict rules. Equity was, or should have been, more flexible. It was the means by which the needs of the people could be met. As Sir Henry Maine said in his Ancient Law (Page 24) :

'Social necessities and social opinion are always more or less in advance of law. We may come indefinitely near to the closing of the gap between them, but it has a perpetual tendency to re-open. The greater or less happiness of a people depends on the degree of promptitude with which the gap is narrowed."

So ultimately the concept has been to give justice on the basis of equity.

4. Now coming over to its applicability in different fields. This principle was also enunciated by Calcutta High Court in *Ganges Mfg. Co. v. Sourujmull*, ILR (1880) 5 Cal 669 in 1880 and thereafter by the Supreme Court in 1951 in case *Collector of Bombay v. Municipal Corporation of the City of Bombay*, AIR 1951 SC 469 and onwards till today the doctrine has been applied in various cases and fields, especially in the field of public law. It was observed that holding of the promise by the Government was binding on the Government and that a court of equity must prevent the perpetration of a legal fraud. There is another famous Supreme Court case known as *Union of India v. Anglo Afghan Agencies*, AIR 1968 SC 718, which recognized the principle of estoppel and held that whether the agreement is executive or administrative in character, the Court had the power, in appropriate cases, to compel the performance of the obligation imposed by the scheme upon the authorities. This case involved the consideration of an export promotion scheme under which on exporting goods to Afghanistan of the f.o.b. value of Rs. 5,03,471.73 p. the respondent became entitled to get an import entitlement certificate equal to 100 per cent of the f.o.b. value of their export, unless the appropriate authority reduced the quota on the ground that the value of the goods had been over-invoiced. No opportunity was given to the respondents to meet the allegations that the goods were over-invoiced. Hon'ble Justice Shah by applying the principle against the Government exploded the doctrine of executive necessity as a defence. He observed :-

"Under our jurisprudence the Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the judge of its own obligation to the citizen on an *ex parte* appraisement of the circumstances in which the obligation has arisen."

5. So this principle is based on rule of law enshrined under Article 14 of the Indian Constitution and the executive cannot take away the rights of the people on its whim and will. So, reasonableness has to be shown in every act of the Government.

6. In *Tapti Oil Industries v. State of Maharashtra* AIR 1984 Bombay 161, the State Government was compelled to provide incentives to an indus-

trial concern and fulfil its promise. In *Kothari Oil Products Co., Rajkot v. Govt. of Gujarat*, AIR 1982 Gujarat 107, the Government was compelled to fulfil the promise of granting sales tax free loan for five years to a firm. Similarly this doctrine has been repeated in case *Union of India v. Godfrey Philips India Ltd.* (1985) 4 SCC Page 369 and *Express Newspapers Pvt. Ltd. v. Union of India* (1986) 1 SCC 133. In the first case the question was about the charging of excise duty on secondary or final packing. The Central Board of Excise and Customs, as a result of representations by cigarette manufacturers to exempt them from charging excise duty on secondary packing, replied that no tax would be charged on secondary packing, but subsequently on November 2, 1982, on reconsideration, the secondary packing was sought to be charged to excise. The Court applied the principle of promissory estoppel and was of the view that the representation was within the competence of the Government and Board. Assessee had acted upon such representation and the Government and Board were bound by the promissory estoppel to grant exemption under its powers. So in other words the assessee was not liable to pay excise duty for the period 24.5.76 to 1.11.82. This judgment shows that the principle of equity was applied and it was also observed that *Jit Ram Shiv Kumar v. State of Haryana*, (1981) 1 SCC 11, does not overrule the *Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P.* (1979) 2 SCC 409. It was a decision by a Bench of equal number of Judges. It was again repeated in this case that the doctrine of promissory estoppel is not limited in its application to its being a weapon of defence but it can also found a cause of action. This doctrine is applicable against the Government in the exercise of its governmental, public or executive functions and the doctrine of executive necessity or freedom of future executive action cannot be invoked to defeat the applicability of this doctrine.

7. In the Express case (supra) Hon'ble Supreme Court estopped the Governor of Delhi from acting arbitrarily and ruled that the successor Government was clearly bound by the decision taken by the Minister particularly when it had been acted upon. It was observed :-

> "In my considered opinion the Express Newspapers Pvt. Ltd. having acted upon the grant of permission by Sikander Bakht, the then Minister for Works & Housing and constructed the new Express Building with an increased FAR of 260 and a double basement in conformity with the permission granted by the lessor i.e. the Union of India, Ministry of Works & Housing with the concurrence of the Vice-Chairman, Delhi Development Authority on the amalgamation of Plots Nos. 9 and 10, as ordered by Vice-Chairman by his Order dated October 21, 1978 as on "special appeal" as envisaged in the Master Plan having been directed, the lessor is clearly precluded from contending that the order of the Minister was illegal, improper or invalid, by application of the doctrine of promissory estoppel."

8. In *Century Spinning and Manufacturing Co. Ltd.* v. *The Ulhasnagar Municipal Council* (AIR 1971 SC 1021), the State of Maharashtra on the representation made by certain manufacturers proclaimed the exclusion of the industrial area from the Municipal jurisdiction. The Municipality made representation to the State requesting that the proclamation exempting the factories in the industrial area from payment of octroi from the date of levy be withdrawn. The State acceded to the request of the Municipality. The appellants expanded their activities relying on the Municipality's assurance. The Maharashtra Municipalities Act was enacted and the Municipality took over the administration. Thereafter, the Municipality sought to levy octroi duty on the appellant amounting to Rs. 15 lacs per annum. The High Court dismissed the writ petition. The matter went to Supreme Court. The Hon'ble Supreme Court observed while remanding the case that the law is not powerless to raise in appropriate cases an equity against the authorities to compel performance by them of the obligation arising out of the representation.

9. *In Jit Ram Shiv Kumar and others* v. *The State of Haryana* (AIR 1980 SC 1285) the Municipal Committee of Bahadurgarh established Mandi Fateh, with a view to improve trade in the area. The Municipal Committee decided that the purchasers of the plots for sale in the Mandi would not be required to pay octroi duty on their goods imported within the said Mandi. This was decided so by the resolutions of the Municipal Committee and the Mandi was to remain immune from payment of octroi duty for all times to come. Later on it was decided to impose octroi. This decision was annulled by the Punjab Government under section 236 of the Punjab Municipal Act. Later on when this area became part and parcel of Haryana, this octroi duty was imposed. Jit Ram and others challenged this imposition. The following principles were decided by the Supreme Court (as per head note) :

"(1) that the action taken by the State Government was strictly in conformity with the powers conferred on it under section 70(2)(c) of the Act. It exempted the petitioners from payment of octroi duty for a particular period and ultimately withdrew the exemption. The action of the Government could not be questioned as it was in exercise of its statutory functions. The plea of estoppel was not available against the State in the exercise of its legislative or statutory functions. The Government had powers to direct the Municipality to collect octroi if the Municipality failed to take action by itself under Sec. 62A (3). Thus, the plea of estoppel was not available against the Government for questioning the validity of the Government order. AIR 1970 Punj. 462 (FB). Affirmed (Para 5)

(2) that the Municipal Committee had no authority to exempt the Fateh Market from the levy of octroi duty. When the Municipal Committee passed a resolution or issued a notification that no octroi duty would be levied, it was ultra vires of the powers of the Municipal Committee. When a public authority acted beyond the scope of its authority the plea of estoppel

was not available to prevent the authority from acting according to law. It was in public interest that no such plea should be allowed. (Para 6)

(3) that the principle of estoppel was not available against the Government in exercise of legislative, sovereign or executive power. AIR 1976 SC 2237, AIR 1973 SC 2641 and AIR 1973 SC 2734, Foll. Case law discussed. (Para 12)

There can be no promissory estoppel against the exercise of legislative power of the State. So also the doctrine cannot be invoked for preventing the Government from acting in discharge of its duty under the law. The Government would not be bound by the act of its officers and agents who act beyond the scope of their authority and a person dealing with the agent of the Government must be held to have notice of the limitations of his authority. The Court can enforce compliance by a public authority of the obligation laid on him if he arbitrarily or on his mere whim ignores the promises made by him on behalf of the Government. It would be open to the authority to plead and prove that there were special considerations which necessitated his not being able to comply with his obligations in public interest. Scope of plea of doctrine of promissory estoppel explained. Case law discussed. Observations in AIR 1979 SC 621, Dissented from (Paras 50, 39)

(4) that so far as the recommendation of the Municipal Committee to the Government to levy octroi duty was concerned, though it was contrary to the representation it made to the buyers of the sites in the Mandi, the Municipality was not estopped as the representation made by it was beyond the scope of its authority. The levy of tax being for a public purpose i.e. for augmenting the revenues of the Municipality the plea of estoppel was not available. The order of the Government directing the levy of octroi in pursuance of the resolution of the Municipality could not also be challenged as it was in the exercise of its statutory duty. AIR 1976 SC 2237 Foll., case law discussed. AIR 1970 Punj. & Har. 462 (FB). Affirmed. (Para 53)

10. Now there are more limitations regarding the applicability of the doctrine of estoppel. It cannot be ignored. These are as under:-

"Limitations of the doctrine, however, cannot be overlooked. the doctrine obviously (1) cannot apply against Acts of the State legislature[1] and (2) to Acts of Parliament because they are no representations ;[2] (3) no one can be compelled to act against

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1 *N. Ramanatha Pillai* v. *State of Kerala*, (1973) 2 SCC 650; *Union of India* v. *Godfrey Philips India Ltd.*, (1985) 4 SCC 369.

2 *Godfrey Philips, supra; Jasjeet Films Pvt. Ltd.* v. *DDA*, AIR 1980 Del. 83.

the statute.[3] The government or public authority cannot be compelled to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the government or of the public authority to make.[4] (4) Even where the liability or obligation is imposed by statute[5] or (5) where there is statutory prohibition[6] where there is no representation or promise made out by government the principle does not apply.[7] (7) In public law the most obvious limitation on the doctrine is that it cannot be invoked so as to give an overriding power which it does not possess. That is, no estoppel can legitimise action which is ultra vires.[8] (8) The doctrine does not operate at the level of government policy; however it operates against public authority in minor matter of formality where no question of *ultra vires* arises.[9] Similarly, the advice given by a negligent officer cannot change the legal position and hence the doctrine has no application.[10] (10) Lastly, where there is fraud or collusion,[11] (11) where the public interest suffers[12] and where (12) it would be inequitable to endorse the doctrine[13], it will not be applied."

11. There is another leading case of J & K High Court viz., *Malhotra & Sons* v. *Union of India*, AIR 1976 J & K 41. In that case the plaintiffs were exporters of walnuts. The Union of India formulated a scheme for providing incentives to registered exporters of walnuts to augment the foreign exchange earnings. The plaintiffs qualified for and received several sums by way of cash assistance and therefore had reasonable basis to conclude that the scheme would be continued for the entire period mentioned when the scheme was first declared. However, the scheme was withdrawn when it was found that due to world-wide shortage of edible nuts, the international price of walnuts had escalated considerably and there was no longer any likelihood of the Indian

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3 *Kedar Lal Verma* v. *Secretary, Board of High School and Intermediate Education*, AIR 1980 All 32.
4 (1985) 4 SCC 369, *supra*.
5 (1979) SCC 409, *supra*; *Kedar Lal*, *supra*; *CIT* v. *B.N. Bhattacharjee*, (1979) 4 SCC 121.
6 (1985) 4 SCC 369, *supra*.
7 *Jatinder Kumar* v. *State of Punjab*, (1985) 1 SCC 122; *Excise Commr.* v. *Ram Kumar* (1976) 3 SCC 540.
8 *Express Newspapers Pvt. Ltd.* v. *Union of India* (1986) 1 SCC 133.
9 *Ibid.*
10 *Assistant Custodian, Evacuee Property* v. *B.K. Agarwala*, (1975) 1 SCC 21; (1985) 4 SCC 369, *supra*.
11 *D.R. Kohli* v. *Atul Products Ltd.*, (1985) 2 SCC 77; *Haripada Das* v. *Utkal University*, AIR 1978 Ori 68; *Satish Kumar Rao* v. *Gorakhpur University*, AIR 1981 All 377.
12 (1979) 2 SCC 409 *supra*; *Kedarlal*, *supra*; *CIT* v. *B.N. Bhattacharjee*, *supra*; (1981) 1 SCC 11, *supra*.
13 (1979) 2 SCC 409, *supra*.

exporters suffering a loss. The plaintiffs claimed that the Union could not unilaterally withdraw the scheme when they had acted on it to their detriment. Interestingly enough Anand, J. relied upon *Turner Morisson & Co.* v. *Hungerford Investment Trust Ltd.*[*1] which he thought was an authority for changing existing legal relations between two parties without consideration. Once the representee has taken the representer at his word and acted on it, "the party who gave the assurance or promise cannot afterwards be allowed to revert to the previous legal relationship, as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced."

12. In our own State of Himachal Pradesh and similarly in other States to encourage the development activities in the industrial field, numerous concessions are available to the entrepreneurs in the matter of exemption from the payment of sales tax, concessions under the Income tax laws, investment laws and so on. There is tax holiday in new industries. Concessions are also given for industries to be set up in the rural areas. So notifications are issued while publishing the industrial policy. I would like to pose a query that would it not be unreasonable, unjust and inequitable to back out from the incentives especially when the entrepreneurs have spent lacs of rupees. I would like to quote another example. A notification is issued by the government that in case of establishing a new distillery in the private sector, the entrepreneurs shall be given concessions in the matter of excise tax and relying upon this concession, the industry is established. In my view the government would be bound to respect the promise unless the assurance given in the notification was a trap engineered by the entrepreneurs. So promissory estoppel is nothing but to control the arbitrary exercise of administrative discretion and ultimately it is based on principles of natural justice. The State is either to defend the case or to institute a case as litigation arises from so manifold activities. It may prejudice citizens' right if the doctrine of estoppel is not made applicable and the entire concept of rule of law would be put into jeopardy. So it is bound by ultimately by consideration of honesty and good faith.

13. The write-up would not be complete if I do not quote a famous case known as the High Trees Case : *Central London Property Trust Ltd.* v. *High Trees House Ltd.* (1947) K.B. 130. The facts were quite simple. During the war, many people left London owing to the bombing. Flats were empty. In one block, where the flats were let on 99 years lease at £ 2500 a year, the landlord had agreed to reduce it by half and to accept £ 1250 a year. When the bombing was over and the tenants came back, the landlord sought to recover the full £ 2500 a year. Lord Denning held that he could not recover it for the time when the flats were empty and equity was also not tenable as representation was made that the payment would be charged at the reduced rate, though it was of future fact. Under Section 63 of the Indian Contract

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*1 (1972) 1 SCC 857 : (1972) 3 SCR 711

Act promissor can accept the less amount in the discharge of debt. In Indian Law under Section 10 of the Indian Contract Act consideration is an essential part of the contract but the Courts are more lenient to equitable aspect.

14. In *Motilal Padampat Sugar Mills* v. *State of U.P.*, AIR 1979 SC 621. The Uttar Pradesh Government announced its policy that anyone, who set up an industry in the State would get three years tax holiday from the date when the industry commences operation. The Chief Secretary also confirmed as revealed from the correspondence. Later on notification was issued granting partial concession. The plea of equitable estoppel as well as waiver was taken and the High Court dismissed the petition on the ground of waiver. The matter went to Supreme Court. The Supreme Court dismissed it on the point of waiver. Hon'ble Justice Bhagwati after reviewing case Law of England and the United States held that the State was bound by promissory estoppel. It was observed that :-

> "We do not see any valid reason why promissory estoppel should not be allowed to found a cause of action where, in order to satisfy the equity, it is necessary to do so."

15. I would like to observe further that the promissory estoppel which is based now on equity has invaded administrative action. Prof. H.R.W. Wade in Administrative Law (fifth edition), page 329 and 330 has pointed out that the doctrine of estoppel could not be allowed to impede the proper exercise of public and statutory function by the State and different authorities. In public law the most obvious limitation on the doctrine of estoppel is that it cannot be invoked so as to give an authority, power which in law it does not possess. In other words no estoppel can be legitimate against its *ultra vires*. Normally the courts do not prevent and are very careful to do so from the impeding exercise of discretion in the public interest but I would like to emphasis, at the risk of repetition, that in our Constitution State and citizen in the matter of contracts and assurances have been placed on equal footing with exceptions already pointed out.

AN INTRODUCTION TO GENERAL CLAUSES ACT

A.K. Srivastava

For a person who is interested in the science of legislative drafting and who wishes to undertake the task of drafting laws it is imperative that apart from having a good knowledge of the Constitution he should have a good knowledge of the Interpretation Act, i.e., the General Clauses Act. There may be a curiosity as to why it is called General Clauses Act? Since its provisions are applicable to enactments in general and also because it does not lay down any substantive rule of law its short title is kept as the General Clauses Act. It contains definitions of words generally used in enactments and certain principles of interpretation generally required to be made part of an enactment. Since the General Clauses Act applies on all enactments it is a must for a legislative draftsman to know its provisions thoroughly.

Another question arises as to why at all there should be General Clauses Act ? The answer is simple. An Act should not only be valid but it should be well written and short. The very object of this Act is to shorten the language of the statutory enactments and to provide for uniformity of expression in cases where there is identity of subject-matter. The very purpose of such Act is to avoid superfluity of language in enactments wherever it is possible to do so and to place in one single statute provisions as regards interpretation of words and legal principles which would otherwise have to be specified separately in different Acts. Moreover, the General Clauses Act is of general assistance in easing the interpretative complexities and in avoiding a linguistic game at least in relation to the words defined and the principles of interpretation propounded therein.

Whatever the General Clauses Act says, whether as regards the meaning of words or as regards legal principles, has to be read into every enactment to which it applies unless that enactment contains anything repugnant to its provisions. As such in an enactment it is permissible to keep different meanings of words and different principles of interpretation but so long as it does not have different meanings of words and different principles of interpretation the meanings and interpretations contained in the General Clauses Act; shall apply.

The Central General Clauses Act, 1897 applies on central enactments and the State General Clauses Act applies on the respective State enactments. Almost every State has enacted its General Clauses Act. It is, therefore, to be borne in mind that while a central legislation is to be drafted or a central Act is to be interpreted the Central General Clauses Act, 1897 has to be looked into and while a state legislation is to be drafted or a state enactment is to be interpreted the respective State General Clauses Act has to be looked into.

The General Clauses Act, 1897 applies on the Constitution of India also. Article 367 of the Constitution provides that unless the context otherwise requires, the General Clauses Act, 1897 shall, subject to any adaptations and modifications that may be made therein under Article 372, apply for the interpretation of the Constitution as it applies for the interpretation of an Act of legislature. For illustration proviso to Article 309 confers powers on the President of India or the Governor of State to make rules. There is nothing in that proviso under which the President or the Governor may amend, vary, add to or rescind those rules but in exercise of the powers under section 21 of the General Clauses Act, 1897 read with Article 367 of the Constitution the President or the Governor may do so.

Keeping the Central General Clauses Act, 1897 as a model almost each State enacted its General Clauses Act. As such the provisions in all the General Clauses Acts are almost similar. On going through their contents it would be found that the scheme of the Acts is as follows :-

1. The opening part of the Act is devoted to general definition of words, terms or expressions which are commonly used in legal phraseology of enactments such as "affidavit", "document", "enactment", "oath", "central Act", "good faith", "year", "financial year", "local authority" or expressions referring to "writing" etc. Some of the definitionsare inclusive and some are exhaustive.

2. The second part pertains to general rules of construction such as -

(i) coming into operation of enactments;

(ii) effect of repeal of an enactment;

(iii) effect of revival of repealed enactment;

(iv) construction of references to repealed enactments;

(v) commencement and termination of time where the word "from" and "to" are used :

(vi) computation of time where under an enactment any act or proceeding is allowed to be done or taken on a certain day or within a prescribed period and that day or the last day of the prescribed period is a holiday;

(vii) measurement of distances- whether straight or otherwise;

(viii) gender - whether masculine includes feminine;

(ix) singular and plural - whether singular includes plural and plural includes singular.

3. The third part relates to construction of powers vested in and exercisable by various functionaries such as -

(i) powers conferred are to be exercisable from time to time;

(ii) powers to appoint to include power to appoint ex-officio;

(iii) power to appoint to include power to suspend or dismiss;

(iv) effect of substitution of statutory functionaries.

4. The fourth part pertains to certain provisions relating to notifications, orders, rules, bye-laws etc. made under the enactments such as -

(i) expressions used in the notifications, orders, rules etc., shall unless there is anything repugnant in the subject or context have the same respective meanings as are in the enactment conferring powers to issue such notifications, rules etc;

(ii) power to issue notifications, rules etc. to include power to add to, amend, vary or rescind notifications, rules etc;

(iii) power to make rules or bye-laws under an enactment or to establish a Court or Office or to appoint officers etc. thereunder between the passing of the enactment and its enforcement;

(iv) previous publication of rules or bye-laws;

(v) continuation of appointments, notifications, orders, schemes, rules, bye-laws etc. so far as they are not inconsistent with the provisions re-enacted.

5. The fifth part pertains to certain miscellaneous matters like -

(i) application of the provisions of section 63 to 70 of the Indian Penal Code and the provisions of Criminal Procedure Code in relation to the levy of fines to all fines imposed under any other enactment, Regulation, Rule or Bye-law unless the Act, Regulation Rule or Bye-law contains express provisions to the contrary;

(ii) if an act constitute an offence under two or more enactments then the offender is to be punished under one of enactments only;

(iii) meaning of service by post;

हिन्दी में विधि प्रारूपण - समस्याएं और निदान

- न्यायमूर्ति श्री पंचा लाल सिंह

विधायी प्रारूपण (LegislativeDrafting) अत्यधिक दुष्कर तथा उच्च स्तरीय कौशल का कार्य है। प्रारूपकार (Draftsman) के मस्तिष्क में जो विचार होता है उसे मूर्त रूप देने हेतु ऐसे शब्दों में व्यक्त करना होता है जिनका पाठक वही अर्थ निकाले जिसमें उनका उपयोग किया गया है। साहित्यिक रचना के लिए साहित्यकार शब्दों के प्रयोग में जितना स्वतंत्र है उतना विधिक प्रारूपकार नहीं होता। विधि प्रारूपण में जिन सुगठित वाक्यों, संतुलित वाक्यांशों तथा निश्चित अर्थबोधक शब्दों का प्रयोग होता है उनका अपना अलग महत्व है। साहित्यिक एवं विधिक रचनाओं के नियम एक निश्चित बिन्दु पर अलग हो जाते हैं।

प्रारूपकार के लिए शब्दों का विशेष महत्व है। वह न केवल उपयुक्त शब्दों का चयन करता है, वरन् आवश्यकता पड़ने पर उन्हें गढ़ता है, संवारता है, उनका परीक्षण एवं परिष्कार करता है। उसे इस बात का सदैव ध्यान रखना पड़ता है कि वह जिन शब्दों का प्रयोग कर रहा है उनसे अर्थ के स्थान पर अनर्थ होने की संभावना तो नहीं है। प्रारूपकार द्वारा प्रयुक्त शब्दों का व्याख्यात्मक विश्लेषण न्यायालयों द्वारा होता है और वे ही उन शब्दों का अर्थ विनिश्चित करके यह निर्धारित करते हैं कि वास्तव में उपयुक्त शब्दों का प्रयोग हुआ है।

हिन्दी में विभिन्न अधिनियम, नियम आदि अवश्य हैं किन्तु उनमें हिन्दी का प्रयोग अनुवाद की भाषा के रूप में हुआ है। विधेयक मूलतः अंग्रेजी में तैयार किया जाता है। फिर उसका हिन्दी अनुवाद करके विधान-मण्डल के समक्ष प्रस्तुत कर दिया जाता है। ऐसा करने में प्रायः इस सिद्धान्त का अनुसरण किया जाता है कि अंग्रेजी पाठ के प्रत्येक शब्द का हिन्दी पर्याय प्रस्तुत हो जाए। इस प्रकार हिन्दी प्रारूपकार को, जो वस्तुतः रूपान्तकार के रूप में कार्य करता है, न उपयुक्त शब्दों के चयन की स्वतंत्रता होती है और न सुगठित एवं संतुलित वाक्यों तथा सुस्पष्ट वाक्यांशों के प्रयोग में अपनी कुशलता प्रदर्शित करने का अवसर प्राप्त होता है। इस प्रक्रिया में हिन्दी के उन शब्दों के प्रयोग का अवसर ही नहीं आता है जो अंग्रेजी शब्दों के पर्याय नहीं हैं। अंग्रेजी के "आर्डर" शब्द का हिन्दी पर्याय "आदेश" निश्चित सा हो गया है और 'आज्ञा' शब्द के प्रयोग का अवसर ही नहीं आता। क्योंकि मूल पाठ अंग्रेजी में तैयार होता है इसलिए न्यायालयों में भी प्रायः अंग्रेजी रूपान्तर में प्रयुक्त अंग्रेजी शब्दों की ही व्याख्या होती रहती है और हिन्दी शब्दों के अर्थ सुनिश्चित होने का अवसर ही नहीं आता। एक भाषा के शब्दों के पर्याय दूसरी भाषा में मिलना आवश्यक नहीं है और पूर्ण पर्याय मिलना प्रायः कठिन होता है। अनुवाद की प्रक्रिया में हिन्दी शब्द को कभी-कभी उसके वास्तविक या प्रचलित अर्थ में प्रयुक्त न करके, कृत्रिम अर्थ का आवरण पहनाकर रखना पड़ता है, जिससे भाषा में कृत्रिमता और दुरूहता आ जाती है। यह भी संभावना से परे नहीं है कि इस प्रक्रिया का अनुसरण यदि अधिक समय तक किया गया तो हिन्दी शब्द का निर्वचन करने हेतु अंग्रेजी पर्याय देखना अनिवार्य होगा और तत्पश्चात् अंग्रेजी पर्याय की व्याख्या के आधार पर हिन्दी शब्द का अर्थ सुनिश्चित करना होगा। इस प्रक्रिया के कारण हिन्दी शब्द को सही तौर से समझने के लिए अंग्रेजी भाषा का ज्ञान आवश्यक हो जाएगा और इस प्रकार हिन्दी को, उसके सबल चरणों को बांध कर, अंग्रेजी की बैसाखी के सहारे चलने के लिए विवश किया जाएगा। अतएव मूलतः हिन्दी में विधायी प्रारूपण के कार्य का यथासंभव शीघ्र श्रीगणेश किया जाना चाहिए।

कुशल विधायी प्रारूपकार होने के लिए प्रशिक्षण और अभ्यास की परम आवश्यकता होती है। जो प्रशिक्षण योजनाएं चल रही हैं उनमें अंग्रेजी प्रारूपण पर ही बल दिया जाता है। हिन्दी में केवल अनुवाद प्रस्तुत करवाने के कारण मूल रूप से हिन्दी में प्रारूपण के अभ्यास के लिए अवसर ही उपलब्ध नहीं हो रहा है। प्रारूपकार को भाषा की सुस्पष्टता, अभिव्यक्ति की संक्षिप्तता तथा सुबोध और परिष्कृत शब्दों और वाक्यांशों के प्रयोग की ओर अधिक सचेष्ट रहना होता है। यह समुचित प्रशिक्षण तथा पर्याप्त अभ्यास के आधार पर ही संभव है। ऐसी दशा में यह बिन्दु भी विचारणीय है कि हिन्दी में विधायी प्रारूपण के लिए समुचित प्रशिक्षण व्यवस्था होनी चाहिए और तत्पश्चात हिन्दी प्रारूपण का पर्याप्त अभ्यास प्राप्त करने का अवसर भी दिया जाना चाहिए।

यह कहना उचित नहीं है कि विधि का प्रारूपण हिन्दी में सफलतापूर्वक नहीं किया जा सकता। भारत सरकार के विधि मंत्रालय ने सैकड़ों अधिनियमों के हिन्दी पाठ प्रकाशित कर दिए हैं और एक वृहत् विधि शब्दावली भी तैयार कर दी है। विभिन्न हिन्दी-भाषी राज्यों का विधायन कई वर्षों से हिन्दी में हो रहा है। हमारे राज्य में हिन्दी में विधायन का कार्य वर्ष १९४७ से प्रारम्भ हो गया था और वह कार्य अबाध गति से निरन्तर होता चला आ रहा है। केवल हिन्दी में मूल रूप में विधायी प्रारूप तैयार करने का प्रयास सामान्यतः नहीं किया गया है। इसमें कोई सन्देह नहीं है कि इस प्रकार का जो हिन्दी विधायन उपलब्ध है उसमें उतनी एकरूपता नहीं है जितनी अंग्रेजी भाषा के विधायन में प्रायः मिलती है। किन्तु इसे अधिक महत्व नहीं दिया जा सकता। भविष्य में केन्द्र की विधि शब्दावली के आधार पर हिन्दी प्रारूपण में एकरूपता रहने की संभावना स्पष्ट है; यद्यपि पुराने हिन्दी अधिनियमों के संशोधन में पुरानी शब्दावली का ही प्रयोग तब तक वांछनीय होगा जब तक मूल अधिनियम की शब्दावली संशोधित नहीं कर दी जाती।

विधि प्रारूपण का यह सर्वमान्य सिद्धान्त है कि एक ही अर्थ का बोध कराने के लिए विभिन्न शब्दों या वाक्यांशों का प्रयोग न किया जाए; अन्यथा अर्थान्वयन (construction) के समय एक भ्रामक अथवा विषम स्थिति उत्पन्न हो सकती है। साहित्य में दो अर्थ वाले शब्द का प्रयोग श्लेष अलंकार मानकर श्लाघनीय कहा जा सकता है। पर विधि के क्षेत्र में द्व्यर्थक शब्द का प्रयोग दोष माना जाता है। इसी प्रकार साहित्य में एक अर्थ के वाचक विभिन्न शब्दों का प्रयोग अलग-अलग स्थानों पर अच्छा माना जाता है; किन्तु विधायी प्रारूपण में इसे उचित नहीं कहा जाता। प्रारम्भ में हिन्दी विधायन हेतु कोई मानक विधि शब्दकोश नहीं था। अतएव विभिन्न अधिनियमों में एक ही अंग्रेजी शब्द के विभिन्न हिन्दी पर्याय प्रयुक्त किए गए। उदाहरण स्वरूप उत्तर प्रदेश में "premises" शब्द का हिन्दी रूपान्तर "भूगृहादि" रखा गया, जबकि केन्द्र में "परिसर" शब्द का प्रयोग किया गया। इस प्रकार पुराने हिन्दी अधिनियमों में एकरूपता किस प्रकार लाई जाए अथवा उन्हें इसी रूप में रहने दिया जाए, यह प्रश्न भी ध्यान देने योग्य है। विधायन में शब्दावली की अनेकरूपता कोई अभूतपूर्व वस्तु नहीं है। यदि आप अंग्रेजी भाषा में बनाए गए कानूनों की ओर दृष्टिपात करें तो विदित होगा कि उनकी शब्दावली भी क्रमशः विकसित हुई है। किसी भी बंगाल रेगुलेशन की शब्दावली वर्तमान अधिनियमों में प्रयुक्त शब्दावली से भिन्न है। यही नहीं, विभिन्न राज्यों के तथा केन्द्रीय और राज्यों के अंग्रेजी विधायन में प्रयुक्त शब्दावली में सुस्पष्ट अन्तर यत्र-तत्र दृष्टिगोचर होता है। अतएव हिन्दी अधिनियमों में प्रयुक्त शब्दावली की भिन्नता से कोई विशेष व्यावहारिक कठिनाई उत्पन्न होने की संभावना नहीं है। हां, यदि क्रमशः एकरूपता कर दी जाए तो बेहतर होगा।

हिन्दी में विधायी प्रारूपण की शैली में एकरूपता लाने के लिए यह आवश्यक है कि केन्द्र एवं हिन्दी-भाषी राज्य परस्पर सम्पर्क, सहयोग एवं समन्वय से कार्य करें। भारत सरकार के विधि मंत्रालय की समन्वय समिति ने इस क्षेत्र

में कुछ कार्य अवश्य किया है। किन्तु उसे अधिक व्यापक और क्रियाशील बनाने का प्रयास किया जा सकता है। इस समिति द्वारा कुछ मानक प्रारूपण खण्डों का हिन्दी रूपान्तर किया गया है। उनमें अन्य खण्डों का समावेश करना होगा और यत्र-तत्र यथासंभव कुछ परिवर्तन इस दृष्टि से करने होंगे कि वे हिन्दी भाषा की अभिव्यक्ति शैली के अधिक अनुरूप हो जाएं। जिस प्रकार प्रारूपण में हिन्दी शब्दावली की एकरूपता की समस्या है उसी प्रकार प्रारूपण की शैली में एकरूपता लाना भी महत्वपूर्ण है। अभी हिन्दी में न पूर्व-उदाहरण हैं और न पर्याप्त मानक खण्ड (StandardClauses)। किन्तु इससे हताश होने या रुके रहने की आवश्यकता नहीं है। प्रारूपण के क्षेत्र में मार्गदर्शन मुख्यतया अभ्यास से ही प्राप्त होता है। अतएव शैली में एकरूपता लाने हेतु सभी दिशाओं में दृढ़ संकल्प होकर कार्य करना होगा।

हिन्दी प्रारूपण के कार्य में मानसिक स्थिति भी उल्लेखनीय है। सामान्यतया प्रारूपकार की यह धारणा होती है कि वह अपने विचार अंग्रेजी में सुविधा से व्यक्त कर सकता है। अंग्रेजी में विधायी प्रारूपण के सिद्धान्तों के मीमांस-ग्रन्थ उपलब्ध हैं तथा पुराने उदाहरण सुलभ हैं। इस कारण उन्हें अंग्रेजी में प्रारूप तैयार करने में सुविधा प्रतीत होती है। अंग्रेजी में चिन्तन एवं अभिव्यक्ति का अभ्यास होने से हमें उस भाषा के प्रति जो मोह उत्पन्न हो गया है उसका त्याग करके हिन्दी की ओर ध्यान देना है। हिन्दी में पर्याप्त विधि-साहित्य उपलब्ध है, और उसमें विचारों को मूर्त रूप देने की अपूर्व क्षमता आ गई है। हिन्दी प्रारूपकार में केवल आत्म-विश्वास की कमी है। उस भावना को दूर कर लक्ष्य की प्राप्ति के लिए, चाहे उसमें कुछ कष्ट भी सहन करना पड़े, दृढ़ संकल्प होकर, श्रम तथा त्याग का सहारा लेकर निरन्तर प्रयास करना है।

राष्ट्र संघ के द्विभाषी पाठ और हिन्दी विधि लेखन

- डा. मोतीबाबू

१. हमारे संविधान के अनुच्छेद ३४८ की व्यवस्था के अनुसार यह आवश्यक है कि कानून हिन्दी में बनाए जाने पर उसका अंग्रेजी अनुवाद राज्यपाल के प्राधिकार से प्रकाशित किया जाए तथा यही अंग्रेजी अनुवाद उस कानून का प्राधिकृत अंग्रेजी पाठ हो जाता है। हमारे उच्च न्यायालय की पूर्ण न्यायपीठ ने श्रीमती रामरती बनाम ग्राम समाज - आ.इ.रि. १९७४ इला. १०६ में यह निर्णय भी दिया है कि ऐसे हिन्दी व अंग्रेजी पाठों में अन्तर होने पर अंग्रेजी पाठ अधिक मान्य होगा। हमारा विनम्र निवेदन है कि इस निर्णय से मतभेद का काफी अवसर है। किन्तु जब तक अन्यथा निर्णय नहीं हो पाता या विधिक स्थिति नया कानून बनाकर स्पष्ट नहीं की जाती, कार्य माननीय उच्च न्यायालय के निर्णय के अनुसार ही होगा। हिन्दी में विधि प्रारूपण का प्रश्न उठने पर यह स्मरण रखना होगा कि कानून का हिन्दी पाठ ही नहीं, अंग्रेजी पाठ भी बराबर देना होगा। फिर हमारे न्यायालयों की परम्परा अंग्रेजी पाठों के आश्रय से काम करने की है। विधिज्ञों का अभ्यास भी उसी भाषा का है। अतः शासन यह साहस नहीं कर सकता कि अंग्रेजी पाठ को महत्व न दे। अब तक पद्धति अंग्रेजी पाठ के अनुसार हिन्दी पाठ को बनाने की रही है, हिन्दी शब्दों और वाक्यों में चाहे जितनी तोड़-मरोड़ करनी पड़े। हिन्दी में प्रारूपण प्रारम्भ होने पर स्थिति एकदम नहीं बदल सकती। अतः यह प्रश्न बराबर उठेगा कि इन दोनों पाठों को कहाँ तक समरूप होना चाहिए।

२. इस संबंध में राष्ट्रसंघ की पद्धति अनुकरणीय है। वहां प्रसंविदाएं (conventions) नियम, विनियम आदि कई भाषाओं में बनते हैं, जिनमें अंग्रेजी और फ्रेन्च प्रमुख हैं। इनकी तैयारी की प्रक्रिया जो भी हो, एक भाषा में प्रारूप तैयार करके ही दूसरी भाषा में अनुवाद किया जाता है क्योंकि यदि दोनों पाठ अलग-अलग बनाए जाएं तो उनमें महान अन्तर आ जाएगा। इनकी तुलना करने पर प्रकट यह होता है कि प्रत्येक भाषा का पाठ उस भाषा की प्रकृति के अनुसार तैयार किया जाता है, एक भाषा के शब्दों और वाक्यों की दूसरी भाषा में प्रतिकृति या फोटो उतार कर नहीं। दूसरे शब्दों में, अनुवाद शाब्दिक न करके केवल भाव-साम्य की ओर ध्यान दिया जाता है, तथा भाषा की स्वाभाविकता की रक्षा के लिए सभी प्रकार की स्वतंत्रता बरती जाती है। वे भी कानून ही हैं और अन्तर्राष्ट्रीय स्तर के कानून हैं। उनके निर्वचन का प्रश्न बराबर उठता है तथा पाठों में अन्तर होने पर बड़ी कठिनाई उत्पन्न हो सकती है। किन्तु इतिहास यह बताता है कि उक्त पद्धति से कोई व्यावहारिक कठिनाई उत्पन्न नहीं होती। यह पद्धति हमारे लिए सर्वथा अनुकरणीय है। अतः हम यहां इस बात की ओर ध्यान दें कि भाषा की प्रकृति की रक्षा के लिए कहां तक स्वतंत्रता बरती गई है।

3. पहली बात हम यह पाते हैं कि फ्रेन्च पाठों में वाक्य अपेक्षाकृत छोटे होते हैं तथा अनेक स्थानों पर अंग्रेजी के एक वाक्य को दो या अधिक वाक्यों में विभाजित कर दिया गया है। उदाहरणार्थ, हम फंकशनल कमीशनों की नियमावली से एक नियम का अंग्रेजी पाठ उसके फ्रेन्च रूपान्तर तथा उस रूपान्तर के शाब्दिक अंग्रेजी अनुवाद के साथ देते हैं :-

अंग्रेजी पाठ

Rule 46.

The commission may limit the time allowed to each speaker and the number or times each member may speak of any question, except on procedural questions, when the chairman shall limit each intervention to a maximum of five minutes.

फ्रेन्च पाठ

Article 46.

Law commission pour limiter le temps de parole de chaque orateur ele membre de fois que chaque membre peut prendre la parole sur une meme question; toutefois pour les questions de procedure, le president limite le temps de parole de chaque orateur a cing minutes.

शाब्दिक अंग्रेजी अनुवाद

Article 46.

The commission can limit the time of speaking of each speaker and the number of times that each speaker may take to speaking on the same question, however, for questions of procedure the president limits the time of speech of each speaker to five minutes.

इस उदाहरण में यह भी दर्शनीय है कि अंग्रेजी के अपवाद खण्ड को स्वतंत्र वाक्य बना दिया गया है तथा अंग्रेजी के 'shall' के स्थान पर फ्रेन्च पाठ में क्रिया के वर्तमान कालिक रूप का प्रयोग किया गया है, जो फ्रेन्च भाषा की परम्परा के अनुसार है। उसमें विधि के आदेश प्राकृतिक नियमों की भांति वर्तमान काल में ही प्रकट किए जाते हैं।

४. जिस प्रकार अंग्रेजी के एक वाक्य के स्थान पर फ्रेन्च में दो वाक्य हो गये हैं, उसी प्रकार पदों को स्वतंत्र खण्डों का रूप दे दिया गया है। इस प्रकार फर्कशनल कमीशनों सम्बन्धी नियमावली के नियम २ में 'whenever practicable' का फ्रेन्च रूपान्तर 'chaque fois que cela est possible' अर्थात् 'each time that it is possible' है, तथा नियम २६ में question under consideration का रूपान्तर question qui est a l'examen अर्थात् question which is under examination किया गया है, तथा नियम ४३ में question before the commission का फ्रेन्च रूपान्तर question dont est saisie la commission अर्थात् question of which the commission is seized किया गया है।

५. इसी प्रकार सुरक्षा परिषद् विषयक नियमावली में at the request of का फ्रेन्च रूपान्तर है si elle est demande अर्थात् if it is asked for अथवा en fait la demande अर्थात् if the request is made (नियम ३२, ३८, ४५, व ४६ देखिए)। ट्रस्टीशिप काउंसिल की नियमावली में appropriate meetings का फ्रेन्च रूपान्तर है seances qui seront consacrees

a ces questions अर्थात् meetings which are devoted to this question (नियम १२) उसी के नियम २१ में unexpired का फ्रेन्च रूपान्तर qui reste a courir अर्थात् which remains to run किया गया है, तथा नियम ६९ में at its discretion का फ्रेन्च रूपान्तर comme il le juge necessaire अर्थात् as it considers it necessary है।

६. इसी प्रकार से वाच्य विषयक अन्तर भी बराबर मिलता है। उदाहरणार्थ, फंकशनल कमीशनों विषयक नियमावली के नियम ७७ के amendments to these rules of procedure can be made only by the commission का फ्रेन्च रूपान्तर seul le conseil peut modfier le present reglement interieur अर्थात् only the council may modify the present rules of procedure है।

७. यही नहीं, ऐसे अनेक स्थल मिलते हैं जहां भाषा की अपनी प्रकृति के अनुसार पुनः प्रारूपण कर दिया गया है। उदाहरणार्थ, उक्त नियमावली के नियम ४९ में No discussion on such motions is permitted का फ्रेन्च रूपान्तर les motions en ce sens ne doivent pas faire l' object d'un debate अर्थात् The motion to this effect should not make the object of a debate है। ट्रस्टीशिप काउंसिल की नियमावली का नियम ५६ दोनों भाषाओं में अलग-अलग ढंग से प्रारूपित है, तथा एक नियम में adjourn का पर्याय एक स्थल पर adjournment है, और दूसरे स्थल पर levee है तथा adjournment का प्रयोग postponement के लिए भी किया गया है। बालकों व स्त्रियों के दुर्व्यापार विषयक प्रसविदा (convention) में laid down के लिए dit अर्थात् said है तथा within the meaning of के रूपान्तर में etant attendu अर्थात् being understood बढ़ा दिया गया है (अनुच्छेद २) व shall be open का रूपान्तर purra etre consulte'e अर्थात् can be consulted किया गया है (अनुच्छेद १३)।

८. क्रियाओं में काल (tense) तथा लकार (mood) विषयक अन्तर भी बराबर मिलता है। इसी प्रकार से पदों का प्रयोग भी अपने-अपने ढंग का है। उदाहरणार्थ, not less than तथा at least दोनों का फ्रेन्च रूपान्तर au moins अर्थात् at least है, जो हिन्दी की प्रकृति के भी अधिक अनुकूल है। case और circumstances दोनों शब्दों के लिए भावार्थ एक ही होने पर cas अर्थात् case शब्द का ही प्रयोग किया गया है। under consideration का रूपान्तर faisant l' object d'examen अर्थात् making the object of examination भी किया गया है। इसी प्रकार for this purpose फ्रेन्च में a cet effet अर्थात् to this effect किया गया है। in application of तथा in accordance with दोनों का फ्रेन्च रूपान्तर en vertu de किया गया है। इसी प्रकार फ्रेन्च conformemen a अर्थात् in conformi अर्थात् by virtue of ty with का प्रयोग उक्त अंग्रेजी पद के लिए ही नहीं, अपितु in accordance with के लिए भी किया गया है। as a rule तथा normally दोनों का रूपान्तर en principe अर्थात् in principle है। कहीं for the purpose of का काम केवल pour अर्थात् for से चला लिया गया है तथा following का रूपान्तर indique ci

desson अर्थात् indicated below किया गया है। फ्रेन्च शब्द question का प्रयोग केवल उसी अंग्रेजी शब्द के लिए नहीं बल्कि भाव के अनुसार item व matter के लिए भी किया गया है। और दूसरी ओर अंग्रेजी के question के लिए point का प्रयोग किया गया है। फ्रेन्च शब्द disposition का प्रयोग provision, disposal तथा arrangement तीनों के लिए संदर्भ के अनुसार किया गया है क्योंकि उसके तीनों अर्थ होते हैं। फ्रेन्च में motion शब्द अंग्रेजी के उस शब्द के लिए ही नहीं अपितु proposal के लिए भी प्रयुक्त हुआ है। अंग्रेजी के pending शब्द का अनुवाद pendant तो किया ही गया है, किन्तु जहां उसका अर्थ 'की प्रतीक्षा में' है वहां उसका फ्रेन्च रूपान्तर en attendant अर्थात् awaiting किया गया है। इसी प्रकार अंग्रेजी के if, when, whenever व in the case of का रूपान्तर भाषा के प्रवाह के अनुसार quand (when), si (if) आदि भिन्न-भिन्न तरह से किया गया है। lorsque का प्रयोग if व when दोनों के लिये किया गया है।

९. ये कुछ उदाहरण मात्र हैं। दोनों पाठों की तुलना से यह बराबर प्रकट होता है कि ध्यान शब्दों की ओर सीमित न रहकर भाव की ओर रहा है और उस भाव को प्रकट करने के लिए अपनी भाषा का जो शब्द या पद बेहतर लगा उसका प्रयोग किया गया। यह भ्रान्तिपूर्ण है कि शाब्दिक अनुवाद से अर्थ सुनिश्चित रहता है I am in possession of the book का शाब्दिक अनुवाद 'मैं किताब के कब्जे में हूँ' होगा। प्रत्येक शब्द का अनुवाद सही है, किन्तु भाव बिल्कुल उलट गया।

१०. शाब्दिक अनुवाद की जो प्रक्रिया हमने अपनाई है वह सैद्धान्तिक एवं व्यावहारिक दोनों ही दृष्टियों से त्रुटिपूर्ण है। यह एक भाषा वैज्ञानिक तथ्य है कि प्रत्येक भाषा की अभिव्यक्ति-शैली और शब्दावली उसके प्रयोक्ताओं की सभ्यता, संस्कृति एवं जीवन-चर्या के अनुसार होती है। अतः एक भाषा के शब्दों के दूसरी में पूर्ण पर्याय मिलना आवश्यक नहीं है। भिन्न-भिन्न भाषाओं में एक ही विचार को व्यक्त करने के लिए विभिन्न शब्दों एवं अभिव्यक्तिशैलियों का प्रयोग किया जाता है। फ्रेन्च और अंग्रेजी भाषाओं की भिन्नता ऊपर प्रकट ही की जा चुकी है। इस भाषावैज्ञानिक तथ्य की उपेक्षा करके किया गया कार्य कभी सफल नहीं हो सकता।

११. यही नहीं, यह पद्धति निर्वचन (interpretation) के मूलभूत सिद्धान्तों के भी प्रतिकूल है। अर्थान्वयन (construction) का यह सामान्य सिद्धान्त है कि किसी भी विधि-वाक्य का अर्थ प्रथमतः उसके कोश और व्याकरण के अनुसार लगाया जाना चाहिए। किन्तु शाब्दिक अनुवाद की पद्धति में हम दोनों की उपेक्षा कर देते हैं और भाषा के स्वयंनियुक्त ब्रह्मा बनकर स्वच्छंदतापूर्वक शब्दों और अर्थों का सृजन करने लगते हैं। वास्तव में यह लक्ष्य ही विस्मृत हो जाता है कि हिन्दी में लिखा गया वाक्य ऐसा होना चाहिए जो प्रचलित कोश एवं व्याकरण के अनुसार वांछित अर्थ दे सके। हम इसी को अपना लक्ष्य बना लेते हैं कि अंग्रेजी पाठ की फोटो हिन्दी में खिंच जाए, चाहे कोई हिन्दी-ज्ञाता उसे समझे या नहीं। फलतः भाषा ऐसी बन जाती है कि स्वयं हिन्दी-प्रेमियों तक को उससे वितृष्णा होने लगती है। जो काम हिन्दी-विरोधी नहीं कर पाते वह हिन्दी-सेवी करते हैं। वे संविधान के अनुच्छेद ३५१ में दिए गए हिन्दी की प्रकृति की रक्षा के निदेश को ही विस्मृत कर देते हैं। अंग्रेजी में सारी हिन्दू विधि अनूदित हो गई और उन्हें कोई शब्द गढ़ना नहीं पड़ा और एक हम हैं कि शब्द गढ़ना ही प्रमुख विधि-कार्य

हो गया है। माना कि ग्राम-बाला को राजकन्या बनाने के लिए संवारने-सजाने की भी आवश्यकता होती है। किन्तु कंगन पहनाने के लिए हाथ ही छील देना कहां तक बुद्धिसंगत है।

१२. यह नहीं भूलना चाहिए कि हिन्दी राष्ट्रभाषा किसी सरकारी आदेश के कारण नहीं बनी, उसके पक्ष में सारी कानूनी व्यवस्था इस कारण की गई कि यह राष्ट्रभाषा है, जनभाषा है। उसका महत्व उसकी छवि में है जो जन-जन के मानस में अंकित है। उस छवि से हिन्दी को वंचित करके हम उसे जीवन-रहित बना रहे हैं। उसको उसकी नैसर्गिक सबलता से वंचित कर अंग्रेजी की खूंटी पर टांग रहे हैं। आदर्श सौंदर्य लाने के लिए अंग-भंग कर कृत्रिम अंग लगा रहे हैं। स्फूर्तिमय एवं जीवन्त भाषा को अपनी कल्पना की छाया में परिणत कर रहे हैं। आज जब हिन्दी में विधि-प्रारूपण की बात हो रही है तो हिन्दी की नैसर्गिकता की रक्षा पर विशेषतः विचार करना होगा। हम हिन्दी चाहते हैं, अंग्रेजी की प्रतिभा नहीं।