

**Collected Works
of
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(1927-2011)**

Judiciary

Rationalist Foundation

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The Indian Judicial System

The Indian judicial system is unique in several ways. When I am speaking of the Indian judicial system, I am including in it not merely members of the judiciary but also members of the Bar who together constitute the system of which, in my opinion, we can legitimately be proud. I have mentioned that this system is unique because it is functioning in the world's largest democracy. We may also remember that in terms of population the Republic of India is the world's largest federation. This unique combination of the world's largest democracy and largest federation itself places upon the Indian judicial system great burdens which have, fortunately, been discharged by the system so far satisfactorily.

Unlike in other federations such as the United State of America and Australia, in India the judiciary is unified; it is unified because the same judiciary deals with laws of both the State and the Centre. There is a High Court for a State and not of a State which can invalidate a Central law. It is not the Supreme Court alone that can deal with the validity or illegality of Central Legislation. There is also an unequivocal provision for the Judges of the High Court being transferred from one State to another. The appointing authority for the Judges of the High Court and the Supreme Court is the same. The Governor of a State does not come into the picture except for the purpose of being consulted in the appointment of High Court Judges. Similarly the procedure for removing the High Court Judges and the Supreme Court Judges is the same. In my opinion, therefore, in all these respects the Indian judiciary is a unified judiciary unlike in the U.S.A. where the State judiciary and the Federal judiciary are different. Similarly, there is now, after the passing of the Advocate's Act of 1961, a unified Bar which has been managing its own affairs by virtue of the powers conferred upon it by the statute itself. The Bar is no longer under the jurisdiction of the High Court or of the Supreme Court. It is independent. Members of the Bar are subject to the supervision and control of their own peers who are elected directly by themselves.

I have called the Indian judicial system a system because it is not composed of mere collection of individuals. Both the constitutional and statutory provisions have brought into existence machinery which, irrespective of the composition of the system, will be continuously working. In the good old days we used to speak of a great and just emperor like Emperor Jahangir or of a great minister

like Ramshastri Prabhune. Today every member of the judiciary can regard himself as a Ramshastri Prabhune.

No person is born as a Judge or as a Lawyer. People achieve these positions or join the Bar after they have taken appropriate education. This itself requires efforts on their part. As a result the Indian judicial system consists of persons who are educated and, therefore, possess some minimum amount of culture unlike in some other professions. I, therefore, think that both members of the Bar and members of the judiciary can legitimately be proud of belonging to this system. One need not be proud of being born in a particular caste or community, but when one belongs to a system by dint of hard work and becomes proud of it, there is justification for it. Today, lawyers are the leaders for any social revolution or intellectual movements. In the good old days, religious preachers used to be in the vanguard of social thought. Similarly teachers used to be the leaders in social and cultural fields. But today the problems are such that religious preachers are not qualified to deal with them. The teachers are not adequately paid to free themselves from the struggle of existence to make themselves available for social work. In these circumstances, in my opinion, it is the professionals and especially people in the legal profession who should take up the work of giving leadership to the community at large.

All of us are interested in the rule of law which, as far as this country is concerned, includes necessarily the separation of the judiciary from the executive. Members of the Bar should take note of any development that is taking place in the country which is likely to affect or destroy the rule of law. The Constitution in Part I provides that the State shall bring about the separation of the judiciary from the executive. If, therefore, in any State in India today any law, with the contents of which I am not concerned, tries to destroy this concept of the rule of the law, the lawyers must make a study of it and if they think that the rule of law is being affected or is likely to be destroyed by the reunification of the judiciary and the executive, then they must raise their voice against the same. It is not enough for them to sit back and allow the events to take their own course. Lawyers can play an important part in tackling the ubiquitous problem of arrears in the Court by helping the Judges with quicker arguments, better preparation of both facts and law. I also urge upon the lawyers to take care of the junior most members, of the judiciary so that they will acquire confidence in discharging their functions.

*Talk Delivered to the members of the Nasik Bar on 23 September
1982*

Women and Law

Sometimes I have doubted as to whether there should be a separate organisation of women lawyers at all. After all the function of law is the same. The rights and obligations of women lawyers are the same as those of men lawyers. The Advocate's Act does not distinguish between men and women lawyers. I hope, equally dedicated to the rule of law which forms bedrock of Indian democracy. I am sure women lawyers do not seek, through organized strength, any special rights though they must be insisting upon equal rights.

In the light of these thoughts when I still wondering on what subject I should speak to you, your President saw me yesterday and told me that the subject has been announced and it was "Women and Law" There was an air of finality - about announcement. I accepted.

In one sense there is a need for women's organizations which will handle women's problems in different fields. Such organizations will deal with women's problems more ardently, more consistently, with greater perseverance than common organisations. This, despite the fact that, I am of the opinion that women's problems are and must be the common cause of the entire society.

Before I examine the different constituents of the subject that has been given to me, I feel it necessary to explain briefly why certain problems resolve themselves into women's problems, why there are women's problems at all when there are no problems peculiar to men. It is not enough to say that it is a male dominated world. Why is it a male dominated world? This is our culture.

This culture has come down to us since times immemorial. This culture is a caveman's culture which was incorporated into laws which were themselves handed down from generation to generation. The subordinate or inferior position of women is not peculiar to one age or one religion. That women are objects of enjoyment is not an invention of some diseased mind of a person living in the 20th century or in the 1982. This concept is there since days of Mahabharat. How was Draupadi treated? During their days of hiding or incognito living (adnatvaas), the five sons of Pandu had given promise to their mother Kunti that whatever any one of them acquired will be shared by all. In fact this promise had been taken by Kunti from her sons. When Arjun won Draupadi by his skill of archery, Kunti asked him to share her with his brothers. And Kunti

was a woman. This is the Mahabharat which has given us the Bhagavdgita, regarded by many as our religious scripture.

Fortunately, after 1956, the Manusmriti has been buried. Yet this work of our law-giver was implicitly obeyed for generations not only by men but also by women without the slightest question, let alone protest. This country has been regarded as the reception center of God's Avatars – descents. Nine Avatars have taken place. Yet the condition of women never changed. Do not misled by the comforting but highly misleading statements made by some that women always been held in high esteem in this country. When you recite the famous verse about five Kanyas whose remembrance alone destroys the most deadly sins do not forget that every one of those five Kanys has been victim of man's duplicity, cruelty or hegemony.

Saints have been born in this country from time to time but it did not occur to even one of them to examine plight of women or improve their conditions. It is simply because the saints never turned their attention to the mundane matters; they never questioned the basic commands of the religious scriptures of which they were slaves.

It is not Hindustan alone or Hinduism alone that has treated the women as unequal. Christianity's record is equally dismal. Lord Denning in the " Due Process of Law" has briefly dwelt on how the women were dealt with by the Church, which in turn made the laws for the Western civilization. (See part Six, Chapter 2 of this book) St. Peter said "Likewise ye wives, be in subjection to your own husbands." (I Petrer III 1) St. Paul was more forthright. He said: "Wives, submit yourselves unto your husbands, for the husband is the head of the wife... So let the wives be subject to their own husbands in everything." (Ephesians V, 22-24). George Bernard Shaw called St. Paul "the eternal enemy of women" but the fact remains that majority of the Christian women have accepted the Saint's maxims without protest. I can multiply instances from several Christian theologians but it is not necessary in this brief talk.

But what surprises me, as it must have surprised many others, is the fact that the Puritans who revolted against the Roman Church and who propounded the practice of religion with family as the unit should have continued to have disdain about woman who formed a necessary part of the family. For example, Milton speaks about the

position of women through the mouth of Eve who addresses her husband Adam as follows:

"My author and disposer, what though bidst,

Unargued I obey. So God ordains.

God is thy law, thou mine; to know no more,

Is woman's happiest knowledge and praise"

(Paradise Lost, Book IV 1.634.)

God is thy Law, thou mine:

What perfect ideal of womanhood:

Yet another religion permits a man to have four wives and a woman can have only one-fourth of a husband. Fornication by man with other woman is prohibited. But, alas, what can man do if there are slave girls or women taken as prizes of war? Then there is no limit to the number of women a man can have.

I am fully conscious that the subject of my talk is Women and Law and I have been dealing with women or more precisely religion and women. I am doing this advisedly because it is my thesis that all law has traditionally come to us from religion and this law has not only consistently discriminated against women but has been responsible for the creation of a culture which is acting as a drag on the smallest reform in law.

The result of this religious grip over the laws governing its followers including the women has been peculiar type of culture. Certain features of this culture may be recapitulated. Apart from the social manners which are inevitably the product of this culture, even jokes, proverbs and literature down the ages have reflected the male dominated culture. All literature has exhorted the virtue of obedience in women. Whenever a woman is confronted with a problem such as rape, every author who has handled this problem has always thought it fit to solve this problem by leading the story or the narration to her death either by design or by suicide. I have always wondered why despite the talk of progressive literature all over the world it has not been possible for authors to handle this problem in a rational and humanist way. Unfortunately women authors have contributed in no small measure to this type of culture.

This has also involved necessarily the devaluation of the life of women and girls. In a recent study called the "Domestication of Women: Discrimination in Developed Societies" by Rogers, the amount of oppression to which the women are being subjected in

developing countries such as India and other countries in Africa has been vividly described. A typical day in the life of a rural African woman is said to commence at 4.45 a.m. when she washes and eats and thereafter, before sunrise, proceeds to work in the field. From sunrise till afternoon she contributes her labour, may be along with the other men folk, to the cultivation of land or other work on the land. In the afternoon she collects firewood and returns home. Between 4.p.m. and 6.p.m. she is busy with pounding and grinding the grain with which she has to prepare the food for the entire family which she proceeds to do between 6.30.p.m. and 8.30.p.m. In between she must be traveling long distance to collect water for the entire family. Thereafter, after washing the children and the clothes, she goes to bed invariably last in the family. Next day morning she again is the first to get up to begin the daily routine.

Let us not delude ourselves by looking at the women in the towns and cities. Ninety percent of our population, as that of Africa, lives in villages and the book mentioned by me above gives a very heart-rending picture of the women in different developing or underdeveloped countries.

The United Nations report "State of the World's Women, 1979" has shown that the women of our globe who constitute nearly half of the human population put in 2/3rde of the human work hours, but they get paid 1/10th of what men earn and own only 1/100th or one percent of the world's property. An interesting example given in one of these two books is of these twins, one of whom is a girl and the other is a boy. In the household of these twins it was seen that the boy got the maximum attention and the measure part of the health-giving food. Over a period of time it was noticed that the boy grew healthier and healthier and the girl became more and more emaciated. When reserves are scarce either in the nation or in the family the gap between the girls' and the boys' treatment grows wider.

Every one of you must have noticed that whenever a Hindu couple sits for some religious rites, it is the man who participates actively in the rites whereas it is the function of the woman merely touches his hand. It is only symbolically that she is allowed to participate and that too as a follower and an obedient spouse of her husband. This is inevitable because the Manusmriti which laid down the law for us says that the woman was by her very nature incapable of receiving

religious instruction. Since she could not have religious instruction, she could not participate in the religious rites.

Nevertheless, woman was felt necessary for the continuance of mankind as a result a woman was usually blessed that she should be fortunate enough to have eight children. Unfortunately this is not confined to this country or to the Hindu alone. That a woman should have as many children as possible is a feeling which has been nurtured and nourished by generations. Recently we read that Loch Walesa's wife gave birth to the eighth child. She deserves praise by Catholics all over the world as being true and faithful wife to her husband. Loch Walesa is only 36 years old.

It is my firm conviction the laws, if they are found to be unjust today or loaded against the woman; it is entirely because of the sources of these laws which are the religious books. There has not been a single religion which has treated women on par with men. Every religion stresses that virtue of the woman consists in unquestionably obeying her husband. Any reform in law which you intend to do must change this culture which is the inevitable result, as I mentioned above, of the sources of law. Unless the law-making is freed from the shackles of religion and religious teaching there cannot be a law equally fair to men and women. Don't pretend that you can secularise the law without impinging upon the religious teachings of your forefathers. Whenever even a small reform of law, especially relating to women, is attempted either by legislation or by a judgement of a Court, suddenly a cry is raised that it encroaches upon the religious freedom of a community. When I am talking of Women and Law I am thus forced to trace the origin of the law-making and to show how the process followed so far involved the subjection of women.

I must now proceed to invite your attention to certain problems which you have to tackle as an organized body of women lawyers. There are two aspects of legal relations with which women are concerned. The first is husband and wife; and the second is of parent and children. On the first of these aspects, naturally one is forced to consider the question of marriage and divorce. There are at least three major systems of laws prevalent today. One is said to be the Hindu law of Marriage and Divorce. If we examine this law you will notice that there is practically nothing Hindu about this law except that it applies to Hindus. None of the provisions in the Hindu Law of marriage and divorce is founded on any Hindu scripture. Then there

is the law governing such minority communities as the Christians and Parsis. The third system of law relates to the Muslims who for technical reasons can be called a minority community, though they constitute a very large proportion of Indian population. The question which has agitated some right-thinking people in this country is whether there should be a uniform civil code for all the communities together? Article 44 of the Constitution of India enjoins upon the State "to endeavour to secure for the citizens a uniform Civil code throughout the territory of India". This directive principle has particularly remained a dead letter. One of the objects of a Uniform Civil Code is said to be that it would bring about national integration. It may or may not bring national integration, but I am of the opinion that a uniform Civil code is a crying necessity in order to improve the status of women in this country. If resort is taken to the cry "of religion in danger" when some effort is being made to improve the lot of women though they belong to a particular community, as a representative body of all the women lawyers in India it is your function to examine whether this cry is justified. If it is not, it is your function to build public opinion in favour of the uniform Civil Code and compel the Government to take measures in obedience to the directive contained in Article 44 of the Constitution.

Dr. Tahir Mohamed has shown that in several Islamic countries themselves the strict Shariat Law has not been followed in respect of the relationship between husband and wife and measures have been taken for bringing about reformation in the personal law. At this forum I will not say more than this but I cannot help asking you this question as to whether it is not possible to bring about at least a uniform civil code applicable to both men and women of the same community? It may be argued that concepts which are part of the law of another community should not be imported into one community, but people like you cannot remain blind to the fact that if this state of affairs continues a large section of the citizens of this country will remain in the backwaters of civilization. If women continue to respect religion which has never treated them generously or with justice, then they would continue to be governed by the same laws. Mrs. Razak Noorjehan, a Member of the Parliament from Tamilnadu, has been fighting for a uniform Civil code and has now introduced a bill in the Rajya Sabha. As you all know, a private member's bill has little chance of becoming law, but the fight is worth taking up and if organisations such as yours build up public opinion and bring sufficient pressure upon those responsible for

making the law it will be a red letter day in the history of the women of this country.

Similarly, the law governing the parents and children has to be examined by you. This law touches upon question of succession of property and the question of adoption. A secular law of adoption is felt a necessity of our time. An attempt to bring this about has once failed. I cannot understand why a law which is only permissive and does not compel any one to adopt children should not be passed. It does not impinge upon religious freedom of any community; it does not impinge upon any religious tenet of any community; it does not defy any tradition of any religious community. Being purely permissive it can be restored to only by those people who want to take advantage of that law.

I cannot help dealing at this juncture to certain developments. As you are all aware, section 125 of the Code of 1973, corresponding to Section 488 of the old Code, provides for maintenance for, among others, women who are incapable of looking after themselves. Section 488 of the old Code applied to all communities. While Section 125 was inserted in the new Code, certain provisions have been made which apparently indicated that the advantage of this provision has been made in the contrast of marriage between a Muslim woman and a Muslim husband for the payment of the maintenance after the dissolution of marriage, Section 125 cannot cease to have effect. It has been held that if the maintenance provide in the contract of marriage is found to be inadequate, then Section 125 must step in and a woman who is not able to support herself on the illusory maintenance provided in the marriage contract can invoke the jurisdiction of the Court for obtaining maintenance. The elementary principle underlining the provision contained in the Section 125 of the new Code as also Section 488 of the old Code is this that an infirm person, especially an infirm woman who is unable to maintain herself should not be left in a state of vagrancy. The large case law that is built up around Section 488 of the old Code clearly shows that the object of Section 125 of the new Code is to prevent vagrancy and not to touch upon any other aspect of the personal laws of the parties concerned. That its citizens should not be vagrants is the legitimate concern of a State, whether it is a secular State or theocratic State. I do not see how the law laid down by Supreme Court on a proper interpretation of Section 125 of the new Code can be said to be an interference with the law of community. Yet, this is sought to be undone by certain persons,

though well-meaning, on the ground that it amounts to interference in the internal affairs of religious minority. It is in such cases that organizations like yours have to take active part and prevent obscurantist forces from putting the clock back. In my opinion, women's liberation can be achieved successfully by actively striving for it. Active striving takes place in the area of specific conflicts and issues. Unfortunately several self-proclaimed champions of women's freedom and liberation are often nothing but one line orators in rhetoric or armchair social reformists. Even organizations such as yours, if they merely meet occasionally and pass resolutions in broad terms without actually participating in or tackling a specific conflict or issue, they will reduce themselves to debating societies.

Sometime back in what is known as Mathura's case, lot of dust was raised and not without total lack of justification. But tragically not a single women's organization has taken up the case of woman being prevented from seeing cinemas in several towns and cities not only in Maharashtra but also in Karnataka. A rape is an occasional crime that is committed though it is a very serious crime. But a sustained campaign of excluding women from certain parts of social life is worse than a rape which is a crime of passion. Yet women's organizations have not adequately rushed to the rescue of these women who are being prevented from seeing cinemas. It was left to a 19 year old girl of Jalgaon District to fight single-handedly on this front.

Though I have briefly indicated the problems you have to handle and the manner in which, in my opinion, you have to tackle them, I must caution you against taking up an attitude whereby you may exclude the cooperation of organizations other than women's organizations in tackling the tasks undertaken by you. Such a course has been adopted unfortunately in America. One Mary Daly has written a book on the women's liberation and its role in a very strong and powerful language. That book is "Beyond God the father: Toward a Philosophy of Women's Liberation". She has in this book employed a highly vituperative language against men, which language has been characterized by some "castratory" language. She is of opinion that men should never be allowed to come anywhere near the women's liberation front. She has looked upon the women's liberation movement as a battle between the two sexes, which is rather unfortunate. Some humanists of America have taken an active part in the women's liberation movement because it has been regarded as a common cause of the society as a whole and not merely of women.

When men join women in this cause, women should realize that their struggle is being shared and not usurped. In fact, as has been pointed out by at least one humanist of America, men are becoming more aware of the need to bring women's liberation because they can directly profit from the work of the feminists. Warren Farrell, in his book "The Liberated Man: Beyond Masculinity: Freeng Men and Their Relationships with Women", has listed several ways in which men may benefit from the feminist movement.

I would request you to seek the cooperation which will not be wanting from different progressive organizations in your efforts to bring about the liberation of women of getting their legal rights for them from other bodies. As has already been mentioned above, in America men are joining willingly and enthusiastically in the women's liberation movement. You should not forget that in the 19th century when even talk of women's liberation was undreamt of, John Stewart Mill wrote his book "Subjection of Women". He was perhaps one of the greatest feminist humanists. It is, therefore, my suggestion that instead of carrying on any movement relating to the movement in a defying or challenging way, it should be carried on in a cooperative, missionary manner.

Before ending I cannot help returning to the theme of the grip of religion over lives of mankind in general and women in particular. This problem is highlighted in a book called "Forgotten Hostages: The Women of Islam". This book is written by one Abida Khanum, a political refugee from Pakistan residing in America. The book is yet to be published. It describes the subject of women in Pakistan who are, compared to at least another country in the Middle East, better off. Even then the book is poignant commentary as the title itself shows. The American hostages in Iran were freed but the hostages of religion have been forgotten, that is the theme of the book. One excerpt from this book published in Nov – Dec 1982 issue of "The Humanist" gives a heart rending account of a girl who wanted to have a son rather than a girl. She gave birth to several children – all of them girls. This woman made every effort including going to various hospitals, mosques and peers for the purpose of getting a boy. From maternity hospital she landed in a lunatic asylum. Ultimately she committed suicide because she thought, and may be rightly so, that she would not give birth to a son. Medical science has clearly established that the sex of a child is not determined by the mother at all. If a couple does not get a child the fault, if any, may lie with either of the spouses. But the sex of the

child is purely a question of chance. Yet we find many times a husband divorcing his wife on the ground that she is not capable of bearing sons for him.

Talk delivered to a meeting of Indian Federation of Women Lawyers, Bombay, on 2nd Dec 1982.

“The Judgment”

We are not concerned with the judgment either in literature or in politics. As Judges we are concerned with Judgments given by the Judges in the course of and as a part of their duties. But the word ‘judgment’ is not to be found in law and law courts alone. That word is to be found elsewhere also. Indeed that word was used in literature, more ancient than statutes procedural or substantive. Again the word has got several meanings. It sounds majestic but means different things to different people. If after being used in spheres other than of law it has found its way in law, it could not have failed to bring with it some of the connotation it had acquired earlier. It would not, therefore, be out of place to notice what judgment means or meant elsewhere.

Beginning ‘must be made with the dictionary meaning. Some of the meanings assigned to it in Chamber's Twentieth Century Dictionary are as follows

“Act of judging” “the comparing of ideas to elicit truth” “opinion formed”, “a misfortune sent by Providence in punishment”. The last of these meanings is usually found in religious discourses. “Repent ye all men, the day of the judgment has come”. Though the religious basis of this meaning is not the immediate concern of ours, it, in one sense, conveys the magnitude of the concept involved. It means a pronouncement which is final and from which there is no escape; it means the visitation upon a person of punishment for the sins committed by him; it signifies the inexorable end... There is no choice.”

Fortunately for us, that is not the concept with which we are concerned. The judgment that is our concern presupposes two competing views and the acceptance of one as the correct one. The process of comparing at least two different actions or words and deciding which of them is the right one and which is the wrong one is the act of judging. This judging is not confined to law or the legal sphere. It actually arose in the early times in the field of morals or ethics. This is how you will find that word used in Bible on several occasions. In the Old Testament in the book “Psalms” the words “judge” and “Judgment” have been used many times. There it is concerned with ethics. There are in everyday life situations which men are called upon to form judgment i.e. being concerned with ethics or law. When a fielder takes a difficult catch or throws ball

from a long distance directly on the stumps, we exclaim “what a judgment”. This we mean he has made the correct decision or the process of taking the action right to the correct end. This he did in a situation within a second or split second. Fortunately for us, judges of law, we don’t have to be so smart.

Let me give you another example which will illustrate the meaning of “judgement”. You must have all heard the saying, “Daniel come to Judgment”. The origin of this saying is to be found in a story in the Apocryphal Book of Sasannah. Sasannah was the wife of a merchant and two peers accused her of infidelity which she stoutly denied. She had almost been condemned when Daniel came forward to test the veracity the accusation. The two accusers were separately examined by Daniel. He put two questions, answers to which showed that they had not seen what they claimed to have seen. The account given by one did not agree with the account given by the other though both of them had insisted that they together had seen Sasannah with her lover. Daniel stated that both of them were liars and saved the honour of a woman whose character was spotless. That shows the act or process of judgment; incidentally this was the first time in history that the technique of cross-examination was employed and the rule seeking corroboration was followed.

So far, I have been dealing with the mental and intellectual process of judgment. I have yet to come to the judgment all of you have in mind. The judgment you have in mind, is of course the written judgment which disposes of a case before you. I have deliberately refrained from starting with the subject of written judgment, because the written judgment is the end and not the beginning. As has been said in "Alice in Wonderland" you must begin with beginning and go till the end and then stop.

Broadly speaking judgment means two things; the act of judging and the written record of that act. You are naturally concerned with the latter because by that you are judged. A judge is judged by his judgment. A good judge gives a good judgment. A bad judgment shows a bad judge. What is a good judgment? That is a good judgment which truly and faithfully reflects in words the act of judging made by the Judge in his mind. The Judgment we have to deliver is not a single act; it is a process of reasoning or ratiocination. After hearing both the sides in a case, you cannot just lean back in your chair and say ‘the suit decreed’ or ‘the accused acquitted’. That may be the end or conclusion of your judgment but that is not the judgment which I have explained. A judgement no

doubt always ends in an order. That order must always be a judge's order and not a general's order. In order that an order should be a judge's order it must be preceded by a considered judgment. I am stressing this fact because it is not always borne in mind by all the Judges. Recently the Nagpur Bench was considering a judgment of a Court below. The judgment had summarized the evidence of both the sides and then ended by saying that side A was correct. No reasons were given; no comparative analysis of the evidence was made. The High Court had naturally to send down case directing the subordinate judge to write the judgment proper. In other words the judgment must reflect the search made by the judge for the truth between two conflicting versions.

It must show the 'process by which the particular opinion was formed. Unless this is done the parties will not be able to know why a particular order was passed and not another order, which according to one at least one of the parties would have been a correct one, was not passed. It is the right of the parties to know the reasons that weighed with the Judge and, therefore, it is the duty of the judge to disclose those reasons.

Now I should come to the act of writing the judgment as distinguished from the act of judging. This is of some irrelevant to you because your judgments are subject to appeals. So apart from the parties to the dispute there are other people who will be examining your judgments. In order to enable you to discharge your functions properly the procedural laws provide some guidance.

Order 20 of the Civil Procedure Code deals with the question of judgment. The word 'judgment' has been defined in S. 2 (9) as a statement given by the judge of the grounds of a decree or order. Rule 4 and 5 of order 20 tell you what the judgment should contain. In Criminal Procedure Code 19 the word judgment has not been defined but Chapter XXVLI contains provisions like Order 20 of Civil Procedure Code, relating to judgment. But these provisions are the bare guidelines. They do not instruct us in the art of writing the judgment. And that gives me the excuse for this talk.

In the hierarchy of our courts judgments are delivered by trial courts and appellate courts. Again there are judgments in civil matters and judgments in criminal matters. What I have said earlier regarding the act of judging applies to all these matters. What can be said about the craft of judgment writing in case of trial Court's judgments will be slightly different from what can be said about appellate Judgments? Since you are concerned with trial court's judgments, I

will confine my observations to them though many of those observations will apply equally to appellate Court judgments.

Bearing in mind that judgment must reflect the act of judging and the process of comparing conflicting views and evidence, we may now have a look at the proceedings in a civil suit. The starting point in civil proceedings is of course the pleadings—the plaint and the written statement. They are not always drafted with meticulous care or strictly in accordance with the provisions of Orders 6 to 8 of the Civil Procedure Code. You have to summarise them at the beginning of the judgment. While doing so you have to weed out the surplus but at the same time faithfully and accurately set out the averments and highlight the points of controversy between the parties. The importance of properly narrating the contents of the pleadings has not always been appreciated. You are aware that pleadings lead to issues which are framed before the start of the trial. On issues so framed alone evidence can be led. If you have not properly and correctly summarised the pleadings, it will give rise to certain arguments at the appellate stage. Many a time it so happens that an issue is framed correctly on the basis of the pleadings but does not appear to be so with reference to the summary of the pleadings given in the judgment. Grievance is made in the appeal court. At least at the admission stage, that an issue which was not warranted by the pleadings has been framed. A good judgment should not give cause for such a grievance.

After the summary of the pleadings and the setting forth of the issues come the summarising of the evidence and its appreciation. Evidence consists of oral evidence and documentary evidence. Here again an attempt at precision in summarising must be made. It is not uncommon to find recap of the entire evidence in the judgment. It shows a lazy mind, a mind which is unable or unwilling to avert it. A proper summary of the evidence will display an organised mind besides making the judgment more artistic. In the case of documentary evidence the temptation to reproduce the contents to show off that one has read the entire document is irresistible. You are a good judge if you have not succumbed for this temptation. In some cases it may become necessary that a major portion of or even the entire document should be incorporated in the judgment for enabling the appeal court to appreciate the true significance of the document. Some times it will be enough if only a small part of the document is extracted and the summary of the rest is given. What should be the proper course will entirely depend upon the nature of

the document and the extent of its relevance. How you will do it will depend upon your individual skill.

Then comes the appreciation of evidence which, in my opinion, is the very soul of a judgment and which is entirely dependent upon your individual personality. There are no rules on how to appreciate the evidence. All the judgments of the Supreme Court and of the High Courts will not tell you the lines on which you should proceed in this task. Your commonsense your knowledge of the world and worldly affairs, your perceptive and receptive powers, your gumption - ethos and other factors will determine the manner in which you will appreciate the evidence; should you believe this witness or not? What do the recitals in a particular document really mean? Does the material before the court really indicate that the landlord is bona fide and reasonably owns the premises? Whether the testator was fully aware of the contents of the will? Answers to these and thousands of other questions you have to decide, will not be found in any book. A man's life as a judge is not divorced from his other life as a member of the society and the family where he is imbibing the experience of the world around him. I would strongly urge upon you to keep your eyes and ears open but your mouth shut wherever you go. A civil Judge is transferred from place to place. He should take the opportunity of studying every place the local conditions, its history, the habits of the people, the flora and fauna of the area, the culture etc. A local library will provide you with the necessary literature. The knowledge thus acquired will help you in appreciating the environment more maturely. It will of course enrich your personality. This is one of the benefits of judicial service especially in younger days when the mind is still plastic and is able to absorb new ideas and knowledge.

In the process of appreciating, the evidence act of judging is involved to the maximum extent. At the end of the process come the conclusions or answers to the issues in the suit. State the conclusions firmly and in unambiguous words. It is needless to say that appreciation of each witness and examination of each document or connected documents should be written in a separate paragraph the end of which should contain the conclusion. Do not push the conclusions or answers somewhere in the middle of the paragraph. In a case involving large evidence and requiring lengthy judgment it would be helpful to all including the judge himself, if the conclusion are again summarised in a separate part towards the end of the judgment.

The judgment is closed with an operative part- namely the order. Few have recognized the importance of precision in the order. It is the final order on the basis of which a decree is drafted by the Court officer concerned, and it is the decree which finally disposes of the rights and liabilities of the parties in the suit. Examples are not wanting where an order expressed in none too precise language provided the starting point of fresh litigation. A little extra thought will not fail to lead to write the correct order. It is no doubt true that when the decree is prepared the plaint is annexed to it. It is also true that a judgment is always available to see what the decree means. But the fact that an order which should, without extraneous aid, to be explanatory. I would strongly urge upon you not to ignore or belittle this part of the judgment.

Now I must turn to some other aspects of the judgment. A judge is in a protected position. As far as his Court is concerned he is the final authority. He has the power to say what he likes in the judgment. He is invested with the right to criticise the witnesses. . But this power and this right carry with them an obligation to display not only judicial decorum in the Court room but also restraint in the language of the judgment. Free use of the words such as liars and dishonest while describing the witnesses is wholly undesirable. English language in which our judgments are written is so flexible that it enables us to show a witness to be a liar without calling him so. This does not inspire confidence". There are so many arc inconsistencies in his testimony of this witness does not commend itself to me". These and many other such expressions equally effective where you want to disbelieve a witness. In this connection I cannot do better than to refer you to a judgment of the Supreme Court in *Ishwari Prasad v. Mohmed Isa.* (A I R 1969 SC 1728) Please read that judgment carefully. It not only describes the role of a judge but also instructs on how the witnesses are to be dealt with. In my humble opinion it is also a fine example of appreciation of both documentary and oral evidence.

A matter of equal or even greater importance s the way you deal with the arguments addressed to you. Our judicial system has adopted what is called the adversary system. Each party is represented by an advocate who with all his forensic skill tries to persuade the judge that justice lies on his client's side. Between he conflicting claims a judge has to find out the truth to the best of his ability. In the process, a judge is bound to make mistakes some times. An infallible judge is yet to be born. Therefore the possibility of making mistakes should never unnerve a judge. You must make a

threadbare discussion of the arguments advanced before you. It is not only your duty but your right to take the maximum assistance from the bar. This mutual dependence between the Bar and the Bench builds a strong Bar and a sound judiciary. All the arguments advanced must be fully discussed without any attempt to skirt the arguments with which you may not agree. A party will not feel, that he is heard unless his view point has been taken note of. A good judgment should give satisfaction even to the losing party. This may be an ideal not easily or frequently achieved but there is no reason why an attempt in that direction should not be made. A judgment that does not do justice to the arguments fails to that extent to do justice to that case. It may even be vulnerable in appeal.

I am now passing on to the question of language. Language, it has been said, is the close fitting garment of thought. That only means that the words you use must convey what you intend to convey. Apart from this I am also of the opinion that the language of the judgments must have a beauty and a style. Unfortunately or fortunately our judgments will continue to be delivered in English, a language in which we may not be very proficient. But that will not be an excuse for writing clumsy judgments. One has to make the best possible efforts to use as elegant a language as possible. For this purpose one has to study not only legal literature but other literature also. Is it too much to expect an educated man to read at least one nonprofessional book once a month? I can tell you very few people at any level do this. Besides I have come across several judgments containing violations of elementary rules of grammar. A book on good English and a book of English Grammar are not out of place on a Judge's study table. Each one of us unconsciously falls prey to the use of clichés and certain peculiar expressions of our own. Recently I came across several judgments of one District Judge who was persistently using the phrase "It appears". In one judgment I found that phrase repeated 12 times on one page alone. Another District Judge was using "I personally think" at least once in every paragraph. One must review one's own past judgments now and then and find out the errors committed and learn lessons for the future.

A colleague of mine is of the view that a judgment should be written in such a language that it will be understood by the parties. I am not sure whether parties before the Court read the judgments at all. The judgments are meant for the advocates and in my opinion it is not necessary to unduly simplify the language. The judgment will and

must reflect the personality and learning of the judge. You may choose whichever style suits you.

Before I come to the conclusion of this talk I must caution you against some of the factors that are likely to affect the act of judging impartially. Some are internal to the personality such as personal biases and prejudices born out of the class or caste in which one is born. Some are born out of personal experiences. There are factors which are external such as general social prejudices, unsettled conditions, and ghastliness of the crime. A judge who is affected by such factors will fail in his duty as a judge.

It is common experience that a piece of work which you do with a liking for it is likely to be a piece of art. If a man does not like the work he is doing he is not likely to do it well. Having opted for judicial service willingly on your own, you must learn to take joy in your work. You will then realize that the work is interesting as well as light. If a judge looks upon judgeship merely as a paid job he will be no better than a hamal on the railway station who for a given amount carries the burden over a given distance. In the year 1971 for the first time in the history of India, a person who had started at the lowest rung of the judicial ladder was appointed a Judge of the Supreme Court. It is said that that every soldier carries in his kit a Field Marshal's baton. Can it not also be said that every civil judge is a potential Supreme court Judge?

Law, Judiciary and Security

(Excerpts throwing light on their correlation)

1. Lord Atkin on the scope of Judicial Power and Duty:

“I view with apprehension the attitude of judges who on a mere question of construction, when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive.

“In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace.

“It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.

“In this case I have listened to arguments which could have been addressed acceptably to the Court of Kings’ Bench in the times of Charles I.

“I protest even if I do it alone against a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the minister!”

2. These ringing words of Lord Atkin in his dissenting judgment in *Liversidge v. Anderson* have provided great inspiration for generations of judges. Lord Atkin dissented from four Law Lords in that case. But the principles enunciated in Lord Atkin’s judgment reflect truly the scope of judicial power and duty.

Lord Atkins pointed out that in times of crisis, judges lose their moorings and place themselves in the shoes of the executive whose actions are before the judges for examination.

Next it was pointed out that in times of war; there is no absence of law or of rule of law.

Thirdly, if war was being waged (Second World War) abroad for the protection or restoration of liberty, how could liberty be lulled to sleep in England? The judges have stood and must always stand between the citizens and the attempts of executive to encroach upon the liberty of the citizens.

Fourthly, the arguments in *Liversidge* smacked of the arguments which could have appealed to the tyrant monarch Charles I who, alas, was executed under the orders of the then Parliament.

Fifthly, if any judge finds himself in the minority of one, he should not hesitate to stand up alone.

3. It must, however, be pointed out that there is consensus among the jurists that the opinion on law and facts given by Lord Atkin was not correct. The facts of the case should be mentioned. *Liversidge* was one of nearly 2,000 persons interned in the Isle of Man during World War II under Regulation 18B. If the Secretary of State has reasonable cause to believe any person to be of hostile origin or association and ... that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained.

4. Four Law Lords upheld the order: Lord Atkin dissented. Lord Denning has the following comment to make on this case, after expressing unhappiness over Lord Atkin's criticism of his brethren as more executive-minded than the executive:

“Yet those offending passages have been applauded by lawyers and laymen ever since. This is because of the emphasis they put on the independence of the judges. The sentiments find an echo in the hearts of every Englishman.”

(Landmarks In the Law; Butterworth 1993, p.232)

5. The similarity between *Liversidge* and *A.D.M. Jabalpur v. Shivakant Shukla* (AI R 1976 SC 1207) needs to be noted. On 25 June, 1975, what is known as state of internal emergency was proclaimed by the President of India in exercise of his powers under Article 352(1) of the Constitution of India as it then stood. Actually proclamation of emergency made in 1971 at the time of Bangladesh war was still in force but that was on the ground that the security of India was threatened by war or external aggression. Proclamation of 1975 was on the ground that the security of India was threatened by “internal disturbance” [These two words have been substituted by “armed rebellion” by the Constitution (Forty-fourth Amendment) Act, 1978.]

6. On 27 June, 1975, the President made an order declaring that the right to move any court for the enforcement of the rights conferred by Part III of the Constitution shall remain suspended. This order was under Article 359(1) as it then stood. Hundreds of people had

been detained and many of them moved the High Courts by habeas corpus petitions which were resisted on behalf of the Governments — the State and the Central — with the contention that in view of the President's order of 27 June, 1975, the petitions were not maintainable. This contention of the Government was rejected by eight High Courts (including that of Bombay) which held that though the petitioners could not move the Courts to enforce their fundamental right under Article 21, they were entitled to show that the order of detention was not under or in accordance with law or was mala fide.

7. The Additional District Magistrate (A.D.M.) of Jabalpur, whose order of detention had been set aside by the Madhya Pradesh High Court, appealed to the Supreme Court. Other authorities, whose orders of detention had also been set aside, joined A.D.M., Jabalpur.

8. The composition of the bench of five judges who heard all the appeals is worth noticing. A.N. Ray, C.J., who presided over the bench, had been appointed as the Chief Justice of India by superseding three senior judges who resigned. The other judges in order of seniority were H.R. Khanna, M.H. Beg, Y.V. Chandrachud and R.N. Bhagwati, JJ. In the light of A.N. Ray superseding three senior judges, any judge who would hold against the Government in these habeas corpus petitions could possibly be superseded. H.R. Khanna, who would be the Chief Justice after A.N. Ray, did not care. Except H.R. Khanna, all the other judges gave separate but concurring judgments resulting in the following order:-

“In view of the Presidential Order dated 27 June 1975, no person has *locus standi* to move any writ petition under Article 226 before a High Court for habeas corpus or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order is not under or in compliance with the Act or is illegal or is vitiated by mala fide fetched or legal or is based on extraneous considerations?” (AIR 1976 SC @ p.1392)

9. H.R. Khanna dissented and in a chilling passage observed:

“As observed by Friedmann ... in a purely formal sense even the mass murders of Nazi regime qualify as law. This argument cannot, however, disguise the reality of the matter that hundreds of innocent lives have been taken because of the absence of the rule of law. A state of negation of law would not cease to be such a state because of the fact that such a negation of rule of law has been brought about by a statute.” (Ibid at p.1260)

10. The following observations of Chandrachud echo what Lord Atkin said about the executive- mindedness of the judges:

“But at the back of one’s mind is the facile distrust of executive declarations which recite threat to the security of the country, particularly by the internal disturbance. The mind then weaves cobwebs of suspicion and the Judge without the means to knowledge of full facts covertly weighs the pros and cons of the political situation and substitutes his personal opinion for the assessment of the Executive.” (Ibid at p.1325)

Thus, Chandrachud, chided the judges of eight High Courts whose judgments supported the liberty of citizens.

11. Fortunately, such a situation will not now arise. During the Janata Party’s regime, constitutional amendments have been made that would make it impossible to shoot a citizen with impunity. President’s order under Article 359(1) can suspend all the Fundamental Rights except Article 20 and Article 21. Article 20 prohibits the retrospective operation of a penal provision and bars a second prosecution for the same offence (doctrine of double jeopardy). Article 21: “No person shall be deprived of his life or personal liberty except according to procedure established by law.” Decisions of the Supreme Court have read into Article 21 “due process of law” which has the effect of saying that law in Article 21 cannot be a whimsical law but a law which is reasonable, just and fair.

12. I have taken the trouble of dwelling upon *Liversidge* and *A.D.M., Jabalpur* to illustrate the danger to liberty that is posed by excessive, capricious and arbitrary exercise of power by the executive. As I will show presently, there are adequate provisions in the Constitution which can be pressed into service effectively for dealing with threats to security without resorting to measures that would undermine the rule of law properly understood.

13. A passing reference should be made to the treatment of U.S. citizens of Japanese origin by the U.S. Government. In December, 1941, the Japanese attacked Pearl Harbour which made citizens of Japanese origin of suspect loyalty. There was not an iota of evidence against even a single such citizen that he had helped the enemy or he was likely to help the enemy. Despite this, the then Attorney-General of U.S. classified them as enemy aliens and persuaded President Roosevelt to pass an order (authorising the Government to relocate such citizens living on the west coast). This drastic measure

uprooted more than 110,000 U.S. citizens from their homes where they had lived for decades. They were shifted to internment camps established elsewhere. They lost their jobs and businesses and became refugees in their own homeland. In December, 1944, the U.S. Supreme Court, on a petition for a writ of habeas corpus, set aside the internment orders, but did not pronounce upon the legality of the removal of such citizens from the areas which were regarded as militarily sensitive — they being on the west coast. In 1948, the U.S. Congress passed a law compensating the displaced persons. The U.S. Government's action was unjust. Dubbing an entire racial group as of doubtful loyalty is indefensible from legal and social points of view. By doing so you undermine the loyalty of a section of the community which is not helpful to the security of the country.

14. *Liversidge* was a wartime case. A.D.M. Jabalpur was a case of internal disturbance. In otherwise normal conditions, we are often faced with terrorism which is also a great threat to security. The experience of U.K. is worth studying.

A Committee had been appointed under the Chairmanship of Lord Gardiner to study the terrorist situation in Northern Ireland and that Committee reported in 1975 as follows :-

"Some of those who have given evidence to us have argued that such features of the present emergency provisions as the use of the Army in and of civil powers, detention without trial, arrest on suspicion and trial without jury are so inherently objectionable that they must be abolished on the grounds that they constitute a basic violation of human rights. We are unable to accept this argument. While the liberty of the subject is a human right under all possible conditions, it is not, and cannot be, an absolute right because one man may use his liberty to take away the liberty of another and must be restrained from doing so. Where freedoms conflict the State has a duty to protect those in need of protection." (1975)

These observations must be confined to a situation where there is a situation like a civil war.

15. The conflict between freedom and security was real and acute in Northern Ireland. I.R.A. members were ambushing the police and other security forces. In response to this situation there was legislation for detention without trial - preventive detention. The law as modified in 1984 has done away with the provision but has provided that residents of Northern Ireland can be excluded from

entry into England and that residents of England can be excluded from entry into Northern Ireland.

16. This power of exclusion is exercised by the Secretary of State on individual basis but on an inquiry by advisers. The justification for this provision has been provided by Lord Jellico in the following words:-

“Exclusion is a matter of public policy. It is based not merely on the conduct of the excluded person, but also - once his terrorist involvement is established -on matters such as the security situation at the time exclusion is considered and the danger the person poses to the public at large.”

The safeguard against the abuse of this power was two-fold:

The accountability of the Secretary of State to the Parliament; and

Secondly, the examination of the material by advisers who were men of high standing in law.

Though the recommendations of the advisers were almost invariably accepted by the Secretary of State, it is on record that the Advisers themselves were of the opinion that they would not favour the system.

17. Lord Denning summarises what he regards as the correct legal position as follows:-

“When a person is suspected of being a terrorist, the Secretary of State can make an exclusion order against him without a trial. It can be made on the evidence of intelligence officers of whom the suspect knows nothing and of whom he has no opportunity of cross-examining. All this is very contrary to the fundamental principle of natural justice. But natural justice must take second place in extreme cases to the national security.”

(Lord Denning: *op. cit* pp 235-236)

Fortunately, the days of internal terrorism are over in U.K.

18. Post 9/11, Tony Blair’s Government got the “Anti-terrorism, Crime and Security Act” enacted. Under this Act, the government acquired powers to detain any foreigner who poses a risk to national security and has links with an international terrorist group.

The European Convention on Human Rights, to which U.K. is a party, would not permit such a law. However, a party could opt out

of this obligation in cases of public emergency threatening the life of a nation.

19. Eleven foreigners, all North African Muslims, were detained by U.K. Government under this Act. The detentions were challenged in the Courts and ultimately the House of Lords set aside the detentions. Nine justices, instead of the usual five, ruled by eight to one that the draconian measures were incompatible with human rights laws. The ruling came on 18 December, 2004.

"Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law. It deprives the detained person of protection, a criminal trial is intended to afford. Moreover the measures discriminated on the ground of nationality or immigration statutes."

They were all foreigners and yet English judiciary gave them the protection of law.

20. As long ago as in 1752, Lord Mansfield had ordered the release of a slave in transit through England with the following memorable words:

"Every person coming into England is entitled to the protection of our laws, what ever oppression he may heretofore have suffered and whatever the colour of his skin. The air of England is too pure for any slave to breathe. Let the black go free."

(Quoted by Lord Denning in op. cit. p.219)

As a result of this judgment, nearly 15,000 slaves were freed.

21. After the post 9/11 war on Taliban Government of Afghanistan, the U.S. Government has held about 550 foreigners in Guantanamo, a part of Cuban territory in America's possession, without trial, without any charge. The Patriot Act permitted the Attorney General to authorise the indefinite detention of any person. The U.S. Supreme Court has invalidated this provision and has held that the persons detained must be charged and tried and has also ruled that the foreigners being held in Guantanamo can challenge their detention in American Courts. The U.S. Government's contention that they cannot avail of the benefit of American laws was repelled. Incidentally, after 9/11, not a single act of terrorism has occurred in the U.S.

22. I will not go into the details of the measures taken in India to deal with terrorism and anti- security acts. For dealing directly with

terrorism 'Terrorism and Disruptive Activities (Prevention) Act' was in force for nearly a decade. Under the pressure of public opinion, that Act was repealed. In due course, Prevention of Terrorism Act (POTA) 2002 was enacted by the joint session of the Parliament as the then Government could not hope to get it through in the Rajya Sabha. In the General Elections of 2004, the Congress Party and its allies promised the repeal of POTA which was done by the Prevention of Terrorism (Repeal) Ordinance, 2004.

23. In 1967, Unlawful Activities (Prevention) Act had been enacted. Simultaneously with the repeal of POTA, Unlawful Activities (Prevention) Amendment Ordinance has been promulgated amending the parent Act which has, according to its critics, the effect of re-enacting POTA. This criticism is not without substance. The Ordinance substitutes new Chapter IV (in place of old Chapter IV in the parent Act) providing for punishment for terrorist activities. Definitions of terrorism and allied subjects have been incorporated. Practically the amended Act is an Act dealing predominantly with terrorism. List of terrorist organisations is given in the Schedule to which further organisations can be added by the Central Government.

24. I have given these details with the purpose of showing that India has over a long period enacted laws for dealing with terrorism which, doubtless, is a threat to internal security and possibly external security. Despite the strong criticism from several quarters against these laws, the country has not dispensed with them. The war against terror is not over till the terrorist organisations are rendered toothless. Hence, POTA, though repealed, has been put in a new bottle.

25. In view of this, it is incomprehensible that the Central Government should advise the State Governments to open negotiations with the terrorist organisations. Among the terrorists organisations with which negotiations have been opened or are proposed to be opened are United Liberation Front of Assam (ULFA), Peoples War Group (PWG) and Maoist Communist Centre (MCC), which are mentioned in the Schedule referred to above. In other words, they have been statutorily stamped as terrorist organisations. Of these three, two are communist - believing in the inevitability of the utopia of communism which must be ushered in by any means. Since this cannot be done in India through the ballot, then bring it about through bullet. This is a vicious doctrine - a *jehadi* approach.

26. Let me now turn to the legal provisions for dealing with acts which affect the internal and external security of the country. Chapter VI of the Indian Penal Code (IPC) deals with offences against the State. Among the offences mentioned in this Chapter are

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Waging war against the State (Section 121);

Collecting arms for waging war (Section 122); and Sedition (Section 124A).

Chapter VII of IPC deals with offences relating to armed forces, such as: Abetment of mutiny, abetment of assault by a soldier on his superior, abetment of desertion, etc. It should be noted that only civilians can be proceeded against for offences under this Chapter. Separate provisions are made for members of the armed forces.

27. The fundamental rights, freedom of speech and expression, right to assemble; forming association, etc., guaranteed under the Indian Constitution can be put under reasonable restriction on the grounds of sovereignty and integrity of the State, security of the State and public order. It is thus that the provisions in Chapter VI of IPC referred to above are protected. The Constitution also provides for preventive detention under certain conditions. Laws such as National Security Act have been enacted under the provisions enabling preventive detention.

28. I have earlier referred to the internal emergency proclaimed in 1975 and the Supreme Court's decision in A.D.M. Jabalpur. A quick examination of the relevant constitutional provision is warranted. Prior to the Constitution (Forty-fourth Amendment) Act, 1978 (which came into force on 20 June, 1979), the President of India could issue proclamation of emergency on the ground that the security of the India or any part thereof is threatened by - War, or external aggression, or internal disturbance.

By the Forty-fourth Amendment, the words "internal disturbance" have been substituted by the words "armed rebellion". Formerly it was not clear whether emergency could be declared in respect of part of the Indian Territory. Now this can be done.

29. It is now sufficiently notorious that Indira Gandhi persuaded the then President, Fakhruddin Ali Ahmed, to sign the proclamation without informing him that at that stage it was not a Cabinet decision. Now, after the Forty-fourth Amendment, the President shall not issue proclamation of emergency unless the decision of the

Union Cabinet that such proclamation may be issued has been communicated to him in writing. Further, Article 359, as amended, does not enable the President to suspend Articles 20 and 21 as I have already mentioned.

30. Laws do not ensure the security - internal or external - of any country. Laws only enable the persons concerned to take effective steps. Persons concerned may misuse the power in which case the security, instead of being protected, may become impaired. Stable governments and stable conditions are necessary for the maintenance of internal as well as external security. Instability provides an invitation to the enemies of the State. Communal riots, for example, undermine the stability of the society in addition to making a section of the society insecure, alienated with a feeling of being under siege. Unstable conditions that you now see in the Hindi belt, the communal riots, Bandhs of various types, waste the resources of the country put unwarranted strain upon the security forces - a fact which is detrimental to the security of the country. A country united by common ideals with its nationals' strong belief in those ideals can ensure security of the country. England was such a country which was able to save the world from fascism.

Balance of Powers Under the Indian Constitution

Students of political science and law will no doubt be surprised by the title of my today's talk for we are all familiar with the phrase and concept of separation of powers and not balance of powers. The concept of separation of powers was first discovered by Montesquieu in 1748 and was developed into a theory by later political scientists and constitutional pundits. The theory formed the framework of the American Constitution in which it was more rigidly enshrined than in the English Constitution from which it was apparently borrowed. In all the written constitutions that come into existence later the theory of separation of powers has been incorporated in varying degrees and the Indian constitution also contains to some degree this theory.

Though this audience needs no elucidation of this theory, for the practical purpose of introducing and explaining the concept of balance of powers I take the liberty of broadly indicating the features of the theory. Every sovereign state has three functions to perform – enacting the law, enforcing the law, and administering justice. In the olden days, the monarch combined in himself all these functions. Due to and in the course of historical developments, these functions coupled with the powers gradually separated from each other. This process does not involve division of the sovereignty which continues to reside at one place. The separation of powers along with the division of functions definitely helped in coping with the ever increasing business of the State, but that was not the genesis of the theory of separation of powers. The justification for the theory was provided by the need to keep apart the power to interpret the laws. This need for division or separation itself was felt to ensure not merely the better management of the affairs of the State but also for the protection of the rights of the individuals. "When the legislative and executive powers are united in the same person or body of persons there can be no liberty, because of the danger that the name monarch or senate should enact tyrannical laws and execute them in a tyrannical manner". That was Montesquieu in 1748. In 1765 Blackstone (Laws of England) echoed the same thought: "Wherever the right of making and enforcing the law is vested in the same man or one and the same body of men, there can be no liberty."

From these quotations it will be easily noticed that earlier the separation propounded was the separation between executive and legislature. This was so because in England where this theory was born and developed, the struggle of the population was directed towards securing freedom from the monarch. The English fought for and secured the right to make laws through the Parliament consisting of elected representatives and freedom from executive action by a monarch which is not based upon law. In other words, the people fought for and secured the sovereignty for the parliament for making laws. The popular revolt or movement was directed against arbitrary executive action and not against parliamentary legislation. It is against this historical background that the concept of sovereignty of the British Parliament (as against the King) has to be understood and appreciated. At no point of time in British history the question of securing protection from laws passed by the parliament arose. The protection from executive action not supportable by law was of course given by the Courts. That there should be Courts to adjudicate upon disputes arising in the system of which they formed a part has never been disputed. The only disputes which they formed a part has never been disputed. The only disputes which could arise and which arise even now under the British system are those between the citizens and the executive. Whenever the executive oversteps the limits of power given to it by law or assumes power not given to it by law, an aggrieved citizen can have recourse from the Courts.

There is no question of a citizen challenging any legislative enactment because the enactment is by a parliament he has elected. Freedom from laws passed by the parliament – that was never the goal of any British movement. Freedom from arbitrary executive action has been at all times the concern of the British citizen and it is by the existence of independent judiciary.

In theory the British Parliament is sovereign. It can do anything except make a man into a woman or woman into a man. Probably even that can be done by creating a fiction by law. In practice, however, there are several limitations on the sovereignty of parliament. One is the fierce public opinion articulated in several ways including the press. This public opinion does not asset only once in five years as it may happen in formal democracies. It is a process rather an episode and acts as a significant and constant check on the parliament's powers.

The biggest limitation on the sovereignty of the parliament today is the cabinet system. This may sound paradoxical but true. The evolution of the cabinet system which started in the later years of the Tudor regime and became well defined in the 18th century has resulted in certain compulsive conventions.

The first and the most important one is that the cabinet of members of the parliament. This necessarily means breakdown of the wall, if there is one, of separation between the executive and the legislature. In modern times the urgency and complexity of law-making has invested the cabinet with extra-ordinary powers. The party system has further contributed to the concentration of practically unlimited powers in the hands of the cabinet. It is the cabinet which initiates all the legislative business in present day democracies. The volume of legislative business is such that no private member can ever hope to get any private bill of his passed by the parliament. Total captivity of the parliament to the majority party and therefore the cabinet and probably the leader of the majority party is the picture one gets today. Though in the theory the existence of the Cabinet Government is dependent upon good-will of the parliament, in practice it controls the parliament. In theory the cabinet is the creation of the parliament, in practice it is its driving master.

In England, therefore, there is no separation of powers between the executive and legislature, though one might say there is a functional distinction. On the other hand, there is a connection between the two and if it is broken, the whole system breaks down. But the separation between the judiciary on the one hand and legislation on the other is almost complete. I will now only briefly refer to the American Constitution which more than any other constitution has given the effect to the theory of separation powers. The Congress is the legislature department of the U.S; the President represents the executive branch; and the Supreme Court at the apex is the symbol and fountain of the judicial power. These three institutions have fairly well-defined powers.

The Congress itself consists of two chambers: First is House of Representatives elected directly by the people on the basis of population. The Senate, the upper house, is the second chamber and since 1913 its members are elected directly by the electorate. The senate was originally designed to be and to a great extent still is the representative and the protector of the States which constitute the Union. It was also intended that in a federal State the larger States

should not overshadow or overwhelm the smaller states. United States was intended to be a federation of States, not a Union of States that is Bharat. It was to meet this intention that all the States are equally represented in the Senate irrespective of their size and population. There are two senators from each state. Thus a balance of strength is achieved among all the States. The State is in continuous session because the entire Senate is never dissolved. Only two-third of its members retires every two years.

Those of us know only the Indian Rajya Sabha and the British House of Lords are not likely to appreciate the extent of the powers enjoyed by the American Senate. I will only make a brief mention of the same in a short while. Before I do that, however, I must make mention of the executive under the American Constitution. The President is technically elected by college of electors. In practice, however, the elections have now become a direct election by the people. He is beginning and the end executive power under the American Constitution. As you all know, he is the most powerful single individual occupying any office in the whole world today. The President is assisted by a group of persons appointed by him who are called the Secretaries. For the sake of convenience, in political terminology these Secretaries are called the Cabinet of the American President, though technically speaking they are not the Cabinet in which that word is understood in parliamentary democracies. This Cabinet is not responsible to the Congress which is the legislative body under the American constitution. The explanation is simple because they are appointed by the President who himself is not a part of the Congress who is not accountable to the Congress. Thus it will be seen that a wall of separation between the executive and the legislature under the American constitution is erected unlike in the parliamentary democracies as in India and Britain where executive is a part of the parliament itself. The members of the cabinet of the American President are also elected to either houses of the Congress.

Despite this, there is certain amount of control exercised by the senate over the appointment of the Secretaries by the President. Though the President himself appoints the Secretaries, their appointment is subject to the confirmation by the senate. This is a feature which is not to be found in the parliamentary democracies. Even the appointment of Members of the Supreme Court of the United States and the Ambassadors of the United States to other countries are subject to the confirmation by the Senate. This is a

somewhat larger power than that is enjoyed by the legislature in any other country.

The Congress is naturally the legislative body and unlike in a parliamentary democracy where the cabinet or the Treasury Bench takes the initiative in introducing bills with the object of making them ultimately into laws, in the American congress the executive has no such facility. However, the president may request for the enactment of certain laws for the administration of the country and the party system which has evolved over a period helps him in getting the necessary legislation passed. Here is a case of separation of powers rather than an integration of powers as is found in parliamentary democracies. Though the party system has ensured generally the smooth working of the relationship between the President and the Congress, occasions have several times arisen when the connection between the two has broken and crises have arisen. In fact when the majority party in the Congress and especially in the Senate is different from the one to which the President of the day belongs then there is often reluctance on the part of the Congress to pass laws for the purpose of helping the President. When on the other hand the President belongs to the majority party in the Senate then there is a feverish legislative activity. That is why Prof. Herman Finer has said that because of the party system the Congress in the United States moves between alternating conditions of coma and convulsion.

We have noted earlier that because of the evolution of the party system, the parliamentary democracies have become the captive of the ruling party which may in certain circumstances mean captive of the ruling group in the party. Under the American Constitution a captive congress is practically unthinkable despite the existence of the party system.

The third department of the State, namely the judiciary, in America is also equally separate. The establishment of the Supreme Court at the apex and the other subordinate judiciary was the inevitable result of the written Constitution. The American Constitution has got what is regarded as an entrenched bill of rights which cannot be violated by any law passed by the Congress. That the Congress will not do such a thing that has to be ensured and, therefore, a judiciary becomes necessary in a written constitution especially when there is in that constitution a chapter of rights. It is true that originally the framers of the Constitution had not envisaged the dominant role

which Supreme Court is playing in the United States today. It is only after the masterly stroke of Chief Justice Marshall in *Marbury v. Madison* that the Supreme Court acquired tremendous powers which have been by and large used for furthering the democratic interests in America. The appointments in America to the Supreme Court are not made on the same principles in which similar appointments are made in India or in Britain. Many of the appointments in America are downright political. They always talk of Roosevelt's judges or Taft's judges. You might even be interested in knowing that for being appointed as a judge of the Supreme Court in the United States, a person need to have any particular qualifications; even legal qualification is not necessary. In America, unlike India, though both are federal States, there are two separate judiciaries' One is the Federal Judiciary and the other is the State Judiciary. Each State has got its own Supreme Court. The Federal Courts are concerned with the administration of the Federal Laws, whereas the State Judiciary is concerned with the State Laws. There is undoubtedly a point at which they meet and cases go upto the Supreme Court of the United States, but there is in America a separation for the federal and the State Judiciary.

This brief outline of the American picture shows that in America there is a separation not only of the legislative executive and judicial powers but also of Federal and State powers. The separation of powers in US has been sometimes described as the tripartite scheme of allocation of commands and has acquired a reputation as "the most hallowed concept of Constitutional theory and practice" and as "the very character of the American political system". But the picture is one of an arrangement rather than integration. There is juxtaposition rather than a dovetailing of the powers and the various institutions in which these powers are vested. Nevertheless, the Americans have been able to work their institutions with great success and they take legitimate pride in what they call the American way of life. The American constitution as also the Indian Constitution has been subjected to certain stresses and strains, but when the people for whom the Constitution is meant intend to work out the Constitution they can do without breaking the constitution. Ultimately each nation must decide which constitution is best suited to its genius.

Now coming home we must notice some of the similarities between the US and the Republic of India. Both are federal States. In that respect there is a resemblance with the US. But there is also a

resemblance with the United Kingdom because both India and the UK have parliamentary democracies. We have thus engrafted in our own soil, and in my opinion with sufficient success, features of two exotic constitutions. Though in a federal State there is normally a separation of powers, in our country because of the parliamentary democracy having been coupled with a federal character of the constitution there has been what I would prefer to call a balance of powers rather than a separation of powers. Separation indicates an estrangement and conveys the possibility of friction. Separated powers when they came into contact with each other might give an appearance of a collision. In India so far the arrangement of the powers made under the Constitution is such that it has not led to any collision. This statement I am making despite the fact that there have been several occasions on which talk of confrontation between executive and the judiciary has taken place. In my opinion, such talk has taken place when rightly or wrongly certain strains and stresses have been placed upon the Constitution, but the Constitution has weathered all these storms and has survived.

As students of law you are all fairly well acquainted with the broad outlines of the Indian Constitution. It is not, therefore, necessary for me to proceed to trace the outlines again. I can only mention the significance of the structure of the Indian Constitution. Both the Lok Sabha and Rajya Sabha are creatures of Constitution as indeed all authorities in India are creatures of Indian constitution. The rights, powers, privileges, duties, obligations – all these are enumerated in the Constitution with great details, greater than in any other Constitution of the world. As a result, in India the Courts did not have to resort to the doctrine of implied powers while interpreting a law passed by the Parliament. When one talks of the sovereignty of the Parliament, one must remember three things in the Indian context.

First is that as in the US there is in India an entrenched bill of rights which is contained in Part III of the Constitution. That is the chapter of fundamental rights. No law passed by the Parliament or for that matter by any State legislature can violate the fundamental rights guaranteed to the citizens of this country under Part III of the constitution. If this is so then the concept of sovereignty of the parliament is necessarily qualified by the restrictions contained in part III of the constitution.

Secondly one must also remember that India being a Federal State there are several law making bodies. For each State there is a Legislative Assembly and there is for the Union of India as a whole the Parliament. The powers of these two sets of legislative bodies have been enumerated in great details in the Constitution itself so that one legislative body will not while enacting a law impinge on the field of another legislative body. In other words, the parliament cannot pass laws in respect of items which are reserved for law-making by the A State legislative bodies. If it does so it would be exceeding the jurisdiction vested in it by law which is the Constitution. The State legislatures will naturally challenge the authority of the Parliament to legislate in respect of matters which are reserved for them. Similarly, the legislature of a State cannot pass a law in respect of a matter which is in the Union list. If it does so it will be trespassing in to the territory of the Union parliament. There is thus under the Indian constitution a balance of shared powers struck between Central legislature and the State legislatures. There is of course a concurrent list connecting of those items in respect of which both the Parliament and the State legislatures can pass laws but then, subject to certain exceptions the Central law will prevail over the State law. This itself is a sort of device to avoid the possibility of any friction that may arise. This shows that in India apart from the separation of the powers between the different departments of the State there is a separation of the powers between the Center and the State, but this separation has resulted in a sort of equilibrium or balance of powers. The possibility of friction has been reduced to the minimum.

The third thing which you must remember while talking of the sovereignty of the Parliament or of a State legislature is the rise of the party system giving in turn, rise to the establishment of the cabinet which controls the entire business. The comments in the case of this Indian Parliament will be the same as those in relation to the English Parliament.

The Cabinet: The Executive in India consists of the President as the head and the Cabinet formally appointed by him. Practically the same position as in England prevails here. Conventions also have been developed along the British lines.

The Judiciary: Unlike in the US, in India there is a unified judiciary. For every State there is a High court. It is not a High court of the

State. The Supreme Court is at the apex of the unified judiciary. We have adopted the British system of non-political judiciary.

The Indian judiciary is unified in more than one sense. In the first place it is the same judiciary which deals with both the Central and State laws. For example, a suit for specific performance of contract under Specific Relief Act, which is a Central Act, has to be filed in the same Court in which a suit of possession of leased premises under the relevant State Rent Act has to be filed. Though there is a dichotomy of executive and legislative powers, there is no dichotomy of judicial powers.

Secondly, though a High Court is for a particular State, it can invalidate a Central Act applicable to the whole country. The writ of the High Court, however, will run only in the territory to which its jurisdiction extends.

In the third place, there is in the Constitution of India an unequivocal provision that the Judges of one court can be transferred to another High Court. This will not amount to reduction in rank or of powers of the transferred judges.

The fourth sense in which the Indian judiciary is unified is very striking. The judges of the High court for a State are appointed by the same authority who appoints the judges of the Supreme Court, namely the President of India. The Governors of the States are not the appointing authority for the High Court judges, though they are invariably consulted.

What about the removal of the judges? The State Government or the State Governor or the State legislature does not come into the picture at all in the removal of the High Court Judges. It is the parliament alone which can by impeachment remove the judges of both the high Court and the Supreme Court.

Like other institutions, judiciary is also a creature of the constitution though it calls upon by the very statute creating it to uphold, defend and protect that statute. It is the judiciary which is invested with the ultimate power of interpreting the constitution and ensuring compliance with the same by all authorities in the State. Thus it is the judiciary which is kingpin of the constitution. Without the judiciary, the other parts of the constitution will fall into separate pieces; with the judiciary they are all held together. The crucial

position of the judiciary in the constitution ensures that there will be unity among the different organs of the State as well as among the different units of this Federal Republic.

One must also note the other inter-relationship between the different organs of the State. As far as the legislative and executive are concerned, normally there is no scope or occasion for conflict between the two. In the parliamentary democracy, which has been adopted by us, executive is responsible to the legislative. The party system ensures that the majority or the party having together majority of seats in the concerned legislature will form the Government of the day. It is that party or the group of parties which will elect a leader to become the Prime Minister or the Chief Minister, as the case may be. Earlier I have mentioned that because of the party system the legislature instead of being master of the executive may in certain circumstances tend to be captive of the executive itself and even in some cases of the chief of that executive who is normally the head of the party which command the majority of the seats in the legislature.

Nevertheless, the legislature is not totally helpless despite the fact that it is dominated by the members of the majority party. The rules of the legislature ensures that the government of the day is constantly on vigil that it will grace the public opinion expressed not only through the members of the opposition but through its own members and that the country at large or the State at large is kept informed of all important developments through the answers at the question time. The Speakers of the legislative bodies though often elected from the members of the Ruling Party in practice, it must be said to the credit of the grant parliamentary sense of our people, they have acted not as representatives of the party to which they belong but as the custodians of the rights and privileges of all the members of the legislature. Thus we often see that a Minister is chastised for not being present in the house when his presence is required or when he gives incomplete or incorrect information. The Speakers do not stand between the executive and the members of the opposition for the purpose of acting as a buffer nor do the Speakers prevent the members of the Opposition from embarrassing the Government by the permitted parliamentary practices.

The relationship between the executive and the judiciary has to be viewed in the context of the power invested in the judiciary to control the administrative action of the State. There cannot be two

opinions about the need to control the executive action. The executive in this country includes the administration right from the Prime minister to the Talathi of a village. With the complexity of modern life and with the allocation of more and more functions, characteristics of a welfare state by the State there has been proliferation of the executive departments. Lord Hewart has characterized the modern executive as Modern Leviathan. After Lord Hewart's time the activities of the modern state has increased manifold with the result that the government is omnipresent though not necessarily omni - incessant. Instead of one Leviathan, the executive today consists of several Leviathans. If in Lord Hewart's days there were Secretaries and Under Secretaries, in our days there are 5 to 6 grades of Secretaries apart from the large array of the administrative officers. Besides this, there are also Corporations established by statutes which are also amenable to the jurisdiction of the high Courts or the Supreme Court. Indeed, some authors have made distinction between the executive as headed by the President or the Council of Ministers and other executive. The former is transient, temporary, existing for a particular period of time as provided in the Federal laws or in the Constitution. The latter, on the other hand, has been described as the permanent and continuing branch of government. In fact this has been characterized as the fourth branch of government.

All executive action has to conform either to the statute under which the action is taken or the subordinate legislation which itself is brought about very often by the executive itself.

In such a state of affairs there must be some authority to see that the executive is conformed to the law of the land. Our Constitution itself has invested the judiciary with the power to issue various prerogative writs. Writ of mandamus is issued to see that the executive power is exercised in accordance with law. The mandamus may ask the executive to do or not to do a thing. Illegal appointments can be controlled or quashed by the issue of the writ of quo warranto. As it is well known, the Constitution provided that the appointment of the District Judges shall be made by the States only in accordance with the recommendations of the High Courts. In the Uttar Pradesh, in the 1960s, several appointments had been made without the recommendations of the High Court in that regard. All those appointments were held to be illegal and quashed. This required a Constitutional amendment which was made in the year 1964.

The importance of a writ habeas corpus cannot be overestimated. Article 21 of the Constitution provided that no person shall be deprived of his personal life of liberty, except in accordance with law. The liberty of the citizen, therefore, is ensured. If any person is detained illegally or without authority, then the high Court can issue a writ habeas corpus. The role of the High Courts during the time when what is known as internal emergency was in operation is too well known to be mentioned.

All the labours and efforts which are made by the High Courts are directed towards implementing the laws of the land as enacted by the legislature. It is not as if the High Courts are interested in running a parallel government or for that matter in voluntarily or sue motu interfering with the day to day administration of the States. The High Courts are only discharging the functions which have been assigned to the High Courts under the Constitution because the Constitution makers thought that if the will of the elected representatives as expressed in the laws of the land is not being properly respected by the government of the day, there must be some authority to ensure that respect. It is in this sense that the High Courts are and the Supreme Court is discharging the functions in order that the will of the elected representative is upheld and not that the will of the elected representative is defied.

The relationship between the legislature and the judiciary is somewhat more delicate and has unfortunately been the most controversial subject. Since India is a Federal State, it is inevitable that there must be some authority to determine whether the legislature realm of the Central Parliament has usurped any subject on which the legislature of the State alone has competence to pass laws. An arbitration machinery to decide between the validity of the laws passed by the Central Parliament and the State Legislatures in the light of the distribution of subjects among them is inevitable and this is in which the judiciary is called upon to play in India. In this context it will be out of context to talk of the sovereignty of the legislature because there are two types of legislatures in this country. One is the Central Legislature called the Parliament and the other is the State Legislature called the Legislative assembly. The parliament cannot pass a law which impinges upon the jurisdiction of the State law and vice versa. If we do so then the validity of that law can be questioned in a High Court or the Supreme Court. Ultimately the judges will have to decide whether a particular law is valid in the

light of the distribution of legislative powers among the legislatures of the State and the Parliament. A parliament cannot by itself decide whether its law is valid. So also a State Legislature cannot decide upon the question of the validity of a law passed by it. If there is no Central Machinery by which the competence of the laws passed by the different legislatures can be decided, the result will be the destruction of the federal character of the republic. The balance between the Centre and the States is to be maintained and this can be held only by the judiciary.

Apart from this, the laws enacted by the legislatures, both Central and States, must conform to the restrictions maintained in Part III of the Constitution. The Constitution of India, like the Constitution of US has entrenched what can be called a bill of rights. We have designated them as fundamental rights which are found in part III of the Constitution. No parliament or the legislature is free to enact any law which will infringe the fundamental rights guaranteed by the Constitution. Here again the question has to be decided by an independent authority – independent of the legislatures. The Founding Fathers of the Constitution decided that this power must be exercised by the judiciary. The judiciary itself is not claiming any power which has not been given to it under the Constitution.

That the judiciary will perform its functions in a fearless and fair manner is ensured by certain safeguards which are internal to the judiciary itself. We have adopted principles prevalent in England, namely that the judges of the High Court and the Supreme Court shall be non-political judges. Certain basic qualifications and experience have been prescribed for such appointments. The judiciary also has been restrained from embarking upon an inquiry into the validity of law by what it may itself regard as just and proper. The due process of law found in American Constitution has been after deliberation rejected by the Constituent Assembly. On the other hand, Part III of the Constitution mentions reasonable restrictions in the exercise of the fundamental right can be imposed.

There are also certain external safeguards which ensure the independence of the Bench and also the smooth functioning of judiciary. The close and friendly relationship between the Bar and the Bench, developed over a period of time have ensured that the judiciary will get appropriate help from the Bar while discharging its functions. The Indian Bar has always a high respect for the rule of the law in the maintenance of which it is deeply interested. Though

there might be occasional confrontations between the Bar and the Bench, these occasions are very few and have had, fortunately, no lasting impact on the relationship between the Bar and the Bench. The members of the Bar and the Bench are "trained and dyed" in the British tradition. There is thus amongst them a common outlook, a common approach and a common desire towards achieving a common idea.

Fortunately for the Indian judiciary, in the early years of the Supreme Court, we had men of high intellectual ability and moral integrity. They were giants. Besides, the Bar also could boast of great stalwarts. A person like Motilal Setalvad has done towards the proper development of the Constitutional law as any Judge of the Supreme Court.

A quick look at the rules of interpretation adopted by the Supreme Court while interpreting the Constitution of India will show that there had never been an eagerness on the part of the Judges to invalidate the law. I may give below some of the rules of interpretation followed by the Supreme Court. They form part of Chapter III of Seervai's Constitution:

1. There is a presumption in favour of constitutionality, and a law will not be declared unconstitutional unless the case is so clear as to be free from doubt; "to doubt the constitutionality of a law is to resolve it in favour of its validity".
2. Where the validity of a statute is questioned and there are two interpretations one of which would make the law valid and the other void, the former must be preferred and the validity of the law upheld.
3. The Court will not decide Constitutional questions if a case is capable of being decided on other grounds.
4. The Court will not decide a larger constitutional question than is required by the case before it.
5. The Court will not hear an objection as to the constitutionality of a law by a person whose rights are not affected by it. Not a debating society.
6. A statute cannot be declared unconstitutional merely because in the opinion of the Court it violates one or more of the principles of liberty, or the spirit of the Constitution, unless such principles and that spirit are found in the terms of the Constitution.

7. In prosecuting the constitutional validity of a statute, the Court is not concerned with the wisdom or un-wisdom, the justice or injustice of the law.
8. Ordinarily, Courts should not pronounce on the validity of an Act, or part of an Act, which has not been brought into force, because till then the question of validity would be merely academic.

Not even one in 1000 laws by the legislature has been invalidated by Courts. There also only a section or two.

Comparison with US Supreme Court Quote figures from Abraham. It is incorrect to say that our Supreme Court has rushed in when other Supreme courts have feared to tread.

Laws invalidated by the US Supreme court:

1789 to 1930		59
1930 to 1936	Hughes Court	14
1936 to 1953		3
1955 to 1969	Warren Court	21
1969 to 1974	Burger Court	12
	Total	109

(Ref: Henry Abraham's "Judicial Process" 5th Edition, pp. 286)

A proper understanding of the judicial process will remove possibility of conflict.

"Our legislatures have undoubtedly plenary powers, but these powers are controlled by the basic concepts of the written Constitution itself and can be exercised within the legislative fields allotted to their jurisdiction by the three lists under the Seventh Schedule; but beyond the lists, the legislature cannot travel. They can, no doubt, exercise their plenary legislative authority and discharge their legislative functions by virtue of the Constitution, but the basic of the power is the Constitution itself. Besides, the legislative supremacy of our legislatures, including the Parliament, is normally controlled by the previous contained in Part III of the Constitution. If the legislatures step beyond the legislative fields assigned to them, or acting within respective fields they trespass on the fundamental rights of the citizens in a manner not justified by the relevant articles dealing with the said fundamental rights, their legislative actions are liable to be struck down by Courts in India. Therefore, it is necessary to remember that though our legislatures

have plenary powers, they function within the limits prescribed by the material and relevant provisions of the Constitution....."

See Hamilton's "The Federalist Papers" pp. 78.

"Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honours but holds the sword of the community. The legislature not only commands the purpose, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of wealth of the society; and can take no active resolution whatsoever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm for the efficacious exercise even of this faculty."

From what has been mentioned above it is easily seen that the role of the judiciary is regulatory and like the balance wheel in a watch it keeps all the other parts working in their appropriate places and properly.

Sometimes I have heard people talking of a conspiracy of the judges. It has not been mentioned for what purpose such a conspiracy, if there is one, is hatched. What do the judges gain by conspiring? What do they in fact conspire for? Such irresponsible outburst against what is called a conspiracy of judges have been made sometimes when a judgement is given against one of the two parties before the Court, namely the Government. Today the Government is the largest litigant in the country and it is inevitable, therefore, that sometimes judgment will go against the Government. This is especially so when the governmental machinery is all pervading and governmental actions extend to the lives of the citizens to the unprecedented degree. As I have earlier mentioned, today it is not Leviathan but an army of Leviathans with which the citizens have to deal. The citizens approach the Courts for relief against executive action which they think arbitrary, mala fide or illegal. It is in the open Courts that the evidence is led, arguments are advanced and the judgment is delivered and this is done by one

or two judges at a time. From this, you will easily see how irresponsible the statement that there is a conspiracy of judges is.

Apart from this, by the very nature of the circumstances in which the judges are placed, there cannot be a conspiracy of the judges for any purpose, not even for the purpose of doing justice. In the first place, the judges come from different social and cultural background. The ages of the High Court Judges vary from 40 years to 62 years. Different judges have been appointed at different points of time. They belong to different castes, religions and linguistic groups. Even the educational attainments of the different judges are not uniform though they are required to satisfy certain minimum qualifications. You must also notice that the judges do not meet in conference at any time. Sometimes the Chief Justice of India holds conference with the Chief Justices of the different High Courts in which nothing but matters affecting the judiciary are discussed. I hope, what I have said will lay the ghost of the conspiracy of judges permanently to rest.

A proposal well intended by some and mischief intended by others, has been made that the legislatures themselves should act as the judges of the validity of their own laws. I am of the firm opinion that this proposal destroys the basic principle of the rule of law because a person who makes the law cannot be a judge of the validity of the law made by him. Besides this, I will give several other reasons why this proposal is hopelessly misconceived. In the first place, we have already a well-established institution for the purpose of deciding the validity of the laws passed by the legislatures. It would be foolhardy to remove this institution altogether.

Secondly when several representative elected by the public sit in judgement over the laws passed by them they will be wasting public time because they will have to test the validity of every law that is passed. Normally the Courts are not called upon to decide the validity of law unless that validity is questioned in any properly constituted proceeding on a grievance made by the citizen. Out of the hundreds of laws that are passed by the legislature, hardly one percent are examined to test their validity. If the functions of the Court are taken over by the legislature, where will it have time to decide the validity of law? It is no answer to this question to say that the legislature might itself appoint a Committee who will constitute the Judicial Committee of that particular legislature because this

Judicial Committee will have to be composed of persons well-versed in law. If that is so, then what is wrong with the judges themselves handling this problem?

Thirdly, every law in an abstract sense looks valid. The rules of the various legislatures and of the parliament in fact provide that a law which is prima facie invalid shall not be passed by the legislatures or the parliament. But it is only the "cases" which will show whether a particular law is valid or not and a "case" would arise only when a citizen is aggrieved by any action taken pursuant to a particular law and not when an abstract law is debated in an academic manner. The next ground on which I would oppose this proposal is that the adversary system which renders valuable issues in deciding the validity or otherwise of the law will not be available to the legislature. Moreover, every legislature is not trained for this technical job which requires not merely knowledge of the law but also knowledge of the large mass of rules of interpretation and the material which has accumulated over the years while deciding the cases.

I may also mention that the legislative process and forum are not suited to a cool dispassionate analysis of the law passed by the legislatures themselves. The legislatures are the representatives of the people giving vent to their aspirations and they are rightly required to attend to the problems of the people at large. They have been elected for performing the majestic and noble task of enacting law with a view to bringing about social movement of the country. It is, therefore, inadvisable that they should burden themselves with the additional job of interpreting the validity of the laws.

It has been estimated that in the Parliament an average of Rs. 1000 per minute (1981 figure) is spent. If this is so calculate what amount will come per day and per year? The cost is prohibitive. On the other hand, we have already established machinery or a system which has been discharging its functions by and large to the best satisfaction of the country at large. The fact that whenever there is a problem to be investigated or a charge is to be examined; people ask for a judicial inquiry shows the importance given by the Constitution to the judiciary and the reputation enjoyed by the members of the judiciary are not misplaced. Any change in the present system is likely to produce unpredictable results without any corresponding advantage. In these circumstances it is wholly undesirable that even the talk of

entrusting to the legislatures the task of deciding the validity of the laws must cease.

The review which I have made of the three branches of our Government which shows that a fine balance has been made, maintained and almost perfected among the three branches. In a democracy the status of the Judiciary is a fair index of the liberty enjoyed by its citizens. An independent Judiciary is necessary not for the judiciary's sake, not merely for the citizens' sake, but for the sake of executive itself. When there are charges and allegations against executive which has now become, as I have already mentioned above, the largest litigant in the country, it is desirable in order to establish credibility of the executive itself that the charges and allegations should be examined by a body which is independent of both the executive and the legislature. Since in India the principal executive is recruited from the legislature itself, it is necessary that the judiciary must be independent of both the executive and the legislature.

We have had some experience, even before independence, of working out some of the democratic institutions. Even the man in the street is by now aware at the different roles played by the executive, the legislature and the judiciary. The present system is, in my opinion, suited to the genius of our people and the requirements of the federal character of our republic. The system of balance of powers has helped us to work out the largest democracy of the world. If we have a look around our country and some of the countries in Africa which became independent after the Second World War, one cannot fail to notice that India is probably the only country where democracy has been worked out without interruption since independence. Most of the countries have been at one time or another gone under dictatorial rules. Some of them have been perpetually ruled by dictatorship. It is in this sense that we should be proud not only of the fact that we have been continuously a democratic nation despite some of the pressures to which the body politic has been sometimes subjected. This has been made possible not only because of the people's consciousness about their right but also because of the provisions made to keep the wheels of democracy well oiled.

Some men in public life have been toying with the idea of a Presidential form of Government. They often compare India with America and some of them think that if America, which is also a

federal government, can have a presidential form, India can also have presidential form of Government. The comparison between America and India is somewhat deceptive. The two federations are different in character. Historically America has been a federation of different States coming together surrendering their powers. The Constitution of the US in fact did not originally envisage such a strong President as is to be found today. Apart from this, there are several reasons as to why there should not be a change in the present form of Government. In the first place, the need for changing the present form of Government has not been demonstrated. As already mentioned above, the present system has enabled the country to work out the largest democracy in the world and no weaknesses in the same which would not arise under presidential form of Government have been disclosed. In the year 1967, the London Times prophesied that the 1967 general elections would be the last elections in this country. Happily that prophecy has been belied and the present system has worked successfully even for the fifteen years after that gloomy forecast.

Some people are talking of the presidential form of Government as if it is a new form of government and as proud as Columbus was probably when he discovered America. They are forgetting that there is no single form of presidential government. When one talks of having presidential form of government in our country, one must first ask the question whether it is the American presidential form of government that you require, or is it the French presidential form of government that you require, or is it one or the other types of presidential form of government prevalent in Africa that you require. When you proceed to answer these questions you will immediately notice that none of these forms is suited to this country. Indeed in America there is now a clamour for parliamentary government because of the large powers which are being usurped by the President of America.

The presidential form of government is also inconsistent with the needs and the special features of Indian democracy. India is too large a country inhabited by large population made up of different groups, culture, linguistic, religious etc. The articulation of the aspirations of all the people must reach the persons who are concerned with the governance of the country. If there is a presidential form government, say of US type, then the cabinet will not be representative of the people at large as it is today in the parliamentary form of government. The head of the government will

be too remote, too distant to feel the pulse of the people. A single individual even aided and assisted by a competent council of people will not be able to do justice to the different regions and interests that may be reflected in the legislature. I would go further and say that the presidential form of government is less democratic than the parliamentary form of government which we have today. The presidential form of government is more likely to lead to a friction between legislature and the executive which is not possible under the present system because the executive is answerable to the legislature and is in fact a creature of the legislature itself. We cannot afford to have frictions between the different branches of our government.

One also should not shut one's eye to the fact that the presidential form of government will bestow larger powers on the judiciary which it is not necessary under the present form of government. The judiciary is already overburdened and it is better that fresh obligations are not imposed upon the judiciary. The size of this country and the size of the population make the presidential form of government less responsive. In difficult times and crises, wider consultation and advice which is automatically available under the present form of government will become difficult and will definitely be slower in availability. This will affect the effectiveness of the government. Moreover, in the process of change-over, damage to the democratic weal is possible and the end will probably be semi-presidential, or a quasi-presidential, or even a pseudo-presidential form of government against which we must guard ourselves.

What you need today is the working of our existing institutions with greater devotion and dedication and with a pronounced sense of loyalty to the ideals of democracy enshrined in the Constitution. If the Constitution is not working today it is not because it is defective but we are unable to live fully upto the ideals enshrined in the Constitution. The Constitution has not worked badly, but the people have worked the Constitution badly. It is ultimately the people who have to work the Constitution and we must prepare them for the same. If an approach is made to the Constitution in this manner, I am sure it will not fail us or the people of this country.

Talk delivered to the students of I.L.S. College Pune, April 1981.

MPs and Bribery

Among the Countries that shook off the colonial rule and became independent after the Second World War, India is the only country which has retained democratic regime consistently throughout. The rule of law, as provided in the Constitution of India, has been sustained. Even the eighteen months' emergency of 1975-77 was at least technically in accordance with law - so said the Supreme Court of India. Elections have been held regularly in accordance with the Constitution and law.

Lok Sabha - right up to the 18th Lok Sabha - have been elected regularly and no Lok Sabha has been dissolved except as provided by law. Unlike in Pakistan, where no Government has been removed by a decision of the incumbent Government or by a vote in the Parliament, in India no government has been 'thrown out.'

All this continuity in India has been made possible not merely by the Constitution (several countries which went under dictatorships had also constitutions) but by the strength of Indian democracy, which is reflected through the people's will in the Indian Parliament. The Parliament of India is the largest democratic parliament in the world. The people of India, through the Constituent Assembly placed the most unlimited trust in the Houses of Parliament and gave both the Houses great powers and privileges, to enable them to discharge the legislative functions without hindrance or interference. The uncodified privileges of the Indian Parliament are as wide as the privileges of the British House of Commons. Apart from the exclusion of jurisdiction of any court to question the validity of the procedure and proceedings in the Parliament, which is provided for in Article 122 of the Constitution, there is a total immunity to a Member of Parliament in respect of anything said or any vote given by him in the Parliament. The relevant provision viz. Article 105(2) deserves quotation,

"No Member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof..."

The protection given to the legislators was to enable them to discharge their duties without fear or favour or hope of favour. The assumption underlying this provision, as other provisions relating to duties, is that the person charged with duty and endowed with the power to perform this duty will perform that duty and exercise that power honestly and in good faith, though not always wisely and

well. Exercise of that power by a legislator for personal gain is wholly inconsistent with the majestic status of the Parliament under our Constitution and also with the sacred duty of the legislator in whom the voters have placed trust. To act knowingly dishonestly is obviously to commit breach of trust. But it is not a criminal breach of trust nor is it an offence otherwise punishable — so says the Supreme Court of India.

The question that the Supreme Court had to consider was whether a Member of Parliament accepting bribes to vote on a resolution in the Parliament as per the bribe givers' wish is liable to punishment in accordance with law relating to bribery and corruption. The Supreme Court said: “No.” Some Members of the 10th Lok Sabha, owing allegiance to Jharkhand Mukti Morcha, were alleged to have accepted money to vote against a resolution expressing no confidence in the Government headed by P.V. Narasinha Rao. The no confidence motion moved on July 26, 1993 was defeated on July 28, 1993. The alleged acceptance of money by the Members of Parliament was patently consideration other than legal remuneration. That they were public servants was not disputable. The case was thus clearly covered by the penal provisions of the Prevention of Corruption Act, 1988. If the charges held were proved in the trial, these Members of the Parliament would be convicted. Under the law, the bribe givers (P.V. Narasinha Rao was among them) would also be guilty of a criminal offence.

The prosecution launched by the Central Bureau of Investigation was challenged by both the bribe givers and bribe takers and this challenge ultimately landed in the Supreme Court of India. The Bench, which heard this case consisted of five judges — Justices S.C. Agarwal, G.N. Ray, A.S. Anand, S.P. Bharucha and S. Rajendra Babu. The bench by a majority of 3 (S.P. Bharucha, S. Rajendra Babu and G.N. Ray) held that in view of the provisions contained in Article 105(2) of the Constitution, the bribed members of Parliament enjoyed immunity from prosecution because, said the learned three judges, having regard to ‘in respect of’ in Article 105(2), it must be held that the said provision protects a Member of Parliament against proceedings in Court that relate to or concern or have a connection or nexus with anything said or vote given by him in Parliament. The judgment of the Supreme Court is reported in (1998) 4 SCC 626 under the title P.V. Narasinha Rao v. State.

The reasoning in the judgment of the majority was that the charge against the alleged bribe takers was that they “were party to a

criminal conspiracy and agreed to or entered into an agreement with” the alleged bribe givers “to defeat the no confidence motion ... by illegal means viz. to obtain or agree to obtain gratification other than legal remunerations” from the alleged bribe givers “as a motive or reward for defeating the no confidence motion”. In pursuance of this conspiracy the alleged bribe givers “passed on several lakhs of rupees” to the alleged bribe takers and the same amounts were accepted by the latter. The stated object of the agreement was to defeat the vote of no confidence (by the bribe takers voting against it). The moneys taken were “as a motive or reward for defeating” the no confidence motion. “The nexus between the alleged conspiracy and bribe and the no confidence motion is explicit.”

The learned judges were no doubt indignant at what the bribed legislators did, for they said, “Of course the offence that the alleged bribe-takers are said to have committed is serious and if true, they bartered a most solemn trust committed to them by those whom they represented. By reason of the lucre that they received, they enabled a Government to survive.” (Without this crime, the Government would have fallen). The learned judges said, “Court’s sense of indignation should not lead it to construe the Constitution narrowly, impairing the guarantee to effective parliamentary participation and debate.” How does a bribe enable a legislator to effectively participate in the proceedings? How does a refusal to be bribed prevent a legislator from voting honestly?

Does the prosecution for taking bribe to vote in a particular manner, amount to prosecution for “any vote given by him in Parliament?” Alas, the majority judgment does not deal with these questions satisfactorily. The majority judgment in P.V. Narasinha Rao case has done as much damage to parliamentary democracy as the majority judgment in ADM Jabalpur v. Shukla (AIR 1976 SC 1207) did to the concept of rule of law in this country. The majority (of one) judgment in ADM Jabalpur is now acknowledged as laying down a rational interpretation. If a situation similar to the one in P.V. Narasinha Rao’s arises (one hopes it will not arise), it is hoped, a view similar to the one adopted by the majority will not be taken. The following from the minority judgment illustrates the damage done by the majority judgment:

“An interpretation of the provisions of Article 105(2) which would enable a member of Parliament to claim immunity from prosecutions in a criminal court for an offence of bribery in connection with anything said by him in Parliament or any

committee thereof and thereby place such Members above the law would not only be repugnant to healthy functioning of parliamentary democracy but would also be subversive of the rule of law which is also an essential part of the basic structure of the Constitution.”

The majority judgment pointed out that for the past more than 100 years legislators in Australia and Canada have been liable to be prosecuted for bribery in connection with their legislative activities and with the exception of United Kingdom, most of the Commonwealth countries treat corruption and bribery by Members of the Legislature as a criminal offence. In the United Kingdom also there is a move to change the law in this regard. “There appears no reason why legislators in India should be beyond the pale of laws governing bribery and corruption when all the other public functionaries are subject to such laws.”

Prior to 1947 or in the Prevention of Corruption Act, 1947, bribing the legislators or bribe taking by the legislators was not an offence. This was so because the definition of public servant did not include a legislator. It was under the widened definition of “public servant” in The Prevention of Corruption Act, 1988, that a legislator would be a public servant. (For an interesting account of bribery of legislators under the British rule, see the Chapter “Bribing Legislators during the Raj” in A.G. Noorani’s Constitutional Questions in India, Oxford University Press, 2000). References to the position in some democratic countries would be in order.

The law in the USA was laid down by the US Supreme Court headed by Chief Justice Earl Warren in 1972. A Senator who had accepted favours as a member of the Senate put up a defense that prosecution would violate Article 1 - Section 6 of the US Constitution which protected Members of the Congress in respect of votes or speeches in the Congress. The US Supreme Court ruled (6:3) that the Constitutional provision did not prevent the indictment and prosecution for taking bribes, which is not a part of any legislative process or function. The relevant clause was not for the personal benefit of a legislator but it was to protect the integrity of the legislative process.

In Australia, Section 73A of the Crimes Act provides that an MP asking for or receiving or offering a benefit in return for the exercise of his duty as an MP is liable to a sentence of two years’ imprisonment. In Canada, for the same offence, sentence of up to 14 years is provided for. In both the countries there are specific provisions on the subject.

In Britain, it is noticed that the Royal Commission on Standards of Conduct in Public Life (1974-76), headed by Lord Salmon opined that neither the statutory law nor the common law covers the bribery of an MP in respect of parliamentary activities: it is a mere breach of privilege. The Salmon Commission was of the view that a legislator does not hold an office. Interestingly, Lord Salmon on another occasion has observed that the Bill of Rights, which is the charter of the rights and privileges of the Members of English Parliament, does not deal with the subject of legislators' misconduct of corruption though the crime of corruption is complete when the bribe is offered or given or solicited or taken.

Recently many cases of English parliamentarians accepting favours have been coming to light. In October 1994, Prime Minister John Major announced the appointment of a Committee: "to examine current concerns about standards of conduct of all holders of public office, including arrangements relating to financial and commercial activities and make recommendations as to any changes in present arrangements, which might be required to ensure the highest standards of propriety in public life. For these purposes, public life includes MPs"

The Committee was headed by Lord Nolan, a law Lord. I should mention here that the impetus for the appointment of this committee was provided by two disclosures made by two newspapers. In July 1994, the *Sunday Times* revealed that the MPs accepted £1000 to ask questions in the Parliament. In October 1994, *The Guardian* came with a disclosure that the rate was doubled in one instance because the giver of the bribe was one of the richest persons in England viz. the owner of Harrods, Mohammed Ali-Fayed, whose son perished with Princess Diana in the car crash in Paris. Lord Nolan Committee in its first report submitted in July 1995, said,

"In the interests of Members as well as the wider public interest, it is important that the extent to which the actions of the Members are subject to the law of bribery should be clarified as soon as possible."

The Government of the day responded by announcing,

"The Government reaffirms its commitment to consolidate the laws on corruption and welcomes the opportunity to clarify the law relating to the bribery of or receipt of a bribe by a Member of Parliament alongside that consolidation."

In English law, the Parliament itself is the High Court which can try an offence, but it would be more expedient and practical to entrust this to regular investigating agencies which have the time, training and experience for the investigation of offences.

In the meantime, the matter is bogged down at the level of discussion of privileges.

Let not our law makers destroy the rule of law. All of us seek the protection of law. It is the rule of law which upheld will protect us.

“Dharm rakshati rakshitah”

Criminal Law in India

There is common inadequate understanding or often misunderstanding about criminal law in India. In recent years, the media, especially the electronic media, are broadcasting great information in a summary manner in such a way that it conveys the impression that the police are doing their job but the Judges are not. Especially in T.V. telecasts, the police announce, almost boast, that the accused have made confessions and narco-tests have been conducted which unmistakably indicate that those arrested by the police are the offenders. While it is not possible to give a detailed exposition of criminal law in India, in this small essay, it is necessary to know, in a brief outline, the essential feature of law that governs crimes in India.

There are three major Acts that deal with crimes. The first is Indian Penal Code, passed in 1860, but amended several times later. It lists several acts and omissions which amount to offences. In this sense, Indian Penal Code is a substantive law. In the second place there is the procedural law that is the law which prescribes the procedure which the police and the courts should follow while dealing with crimes. First enacted in 1898, the Code of Criminal Procedure, 1973 is in operation. It has also been amended.

Indian Evidence Act, 1872, with some minor, later amendments, is in force. It is a beautiful piece of art and it is impossible to improve upon it. While on the one hand it protects and also enables a witness to come out with the truth, parties to the litigation can properly put forth their cases.

Apart from the offences mentioned in the Indian Penal Code, there are several major and minor offences which are dealt with in several other Acts, but the law of procedure and evidence is substantially the same. It is enough for average citizen to know the procedure in one case generally.

If a person is aggrieved, he may file a complaint in the police station. This is called in popular parlance First Information Report (F.I.R.), though this phrase is not found in any statute. There are two kinds of offences; cognizable and non-cognizable. Cognizable offences are those that cannot be handled by police without any order of the Court. Non-cognizable offences can be investigated by the police if a Court directs. A person has to file his complaint, not

in a police station, but in a Court. Cognizable and non-cognizable offences are specified in the Code of Criminal Procedure.

There is another classification, namely, warrant cases and summons cases, also specified in the Code. There is a small difference in the Court procedure. Similarly, there are bailable and non-bailable offences. In the case of non-bailable offence, the Courts alone, if at all, grant bail. More about it later.

There are Magistrates and there are Courts of Sessions. More serious cases are tried by Sessions Courts only on the cases being committed to them by the Courts of Magistrates. A case instituted by the police has first to go to the Court of a Magistrate who, if he finds that it is triable by a Sessions Judge, sends it to a Sessions Court. In order to reduce the burden on Magistrates, the State Government may invest some Government Servants or retired Government servants with power to try petty offences like breach of traffic rules, keeping a shop open on unauthorized days or beyond prescribed rules. Such Honorary Magistrates cannot impose sentence of imprisonment for a period of more than three months.

In every case before a Sessions Court, a charge is to be framed. In a summons case, a charge may not be framed. The prosecution starts with the examination of witnesses who may be cross-examined by the lawyer on the other side or the other side itself. If the Judge is satisfied that there is a case for conviction, he will ask the accused for an explanation of circumstances appearing against him. The accused may answer orally or may give a written explanation. Two things must be remembered. One, the accused is never on oath. Second, no adverse inference can be drawn against an accused if he does not take an oath. He may, if he so likes, examine himself on oath in which case he may be cross-examined. He may also examine witnesses in defence.

After this the Judge shall give a judgment in which he must give reasons why he prefers one case and not another. The accused, if he is convicted, may appeal to the higher Court. If he is acquitted, the prosecution may appeal. In the latter case, the grounds of appeal have got to be stronger. The presumption of innocence of a person is strengthened by acquittal. This is usually the route which is taken by a prosecution.

There are, however, certain concepts which must be borne in mind in criminal law. In the first place, there is the presumption of innocence. A person is presumed to be innocent until it is proved

otherwise. This presumption runs like a golden thread in criminal law. Merely because the police have arrested a person, it does not lead to the conclusion that the person is guilty. A person is tried not on allegation but on proof. In the language of Indian Evidence Act, a fact is said to have been proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, act on the supposition that it exists.

In a criminal case, the prosecution must prove its case beyond reasonable doubt. It must be reasonable doubt, not the doubt of doubting Thomas. The evidence must be carefully weighed. The Judge must not lean on either side.

Benefit of doubt, if any, arises only when one has to consider the inferences from a particular fact. When on the evidence two possibilities are available, one which goes in favour of the prosecution and the other in favour of the accused, the latter must be preferred. The doubt refers to inferences, not to facts. It is necessary to distinguish facts which may be called primary or basic facts on the one hand and inferences of facts to be drawn from them. In the case of basic facts, the courts must apply the usual test. There is no scope for the application of the doctrine of benefit of doubt. A case may be proved even by circumstantial evidence in which case the circumstances should be of definite tendency pointing to the guilt of the accused. The chain of circumstances must not be broken.

The burden of proof is always on the prosecution. Only in certain cases the onus shifts to the accused. The accused must prove an exception if he pleads one. In a corruption case, if the prosecution establishes that the accused is in possession of assets disproportionate to the means of the accused known to the prosecution, the accused must prove that it is not so.

It is not necessary that a particular number of witnesses is necessary to prove a fact. Even one witness is enough. Evidence is to be weighed, not counted. The Quranic rule that adultery must be proved by six witnesses has no place in Indian or in any common law criminal jurisprudence.

No person can be compelled to be a witness against himself. That is the Constitutional protection. However, for the purpose of identification of a prisoner, his fingerprints can be obtained and his photograph can be taken.

Often one reads that a person/witness has turned hostile. In the law of evidence, there is no “hostile witness”. However, when a witness is not giving evidence in favour of the party calling him, he is, with the permission of the Court, declared hostile. He can then be cross-examined by the party calling him as a witness.

In India, during the course of investigation, the police may record the statements of persons to be examined by it. But those statements cannot be signed but may be used to contradict a witness when he is examined. There is no presumption that the police have recorded the statements correctly or faithfully. To that extent there is distrust of the police.

This distrust extends. No confession made to the police or when a person is in the custody of the police is admissible in evidence. Often it is seen the police boasting on T.V. that the crime is proved because the accused has confessed. Confessed to whom? Confessed to the police or in the custody of the police? Such confessions are inadmissible. If such confessions are the only material, the accused will be acquitted. Blame the Courts.

However, there is one exception. An accused makes the following statement while in the custody of police: “I have murdered “A” with a knife which I have hidden in the loft”. A statement leading to the discovery of a fact can be proved, not confession of guilt. Knife hidden in the loft, if found can be proved by the statement – not confession of his murdering. If the knife from the loft is discovered, it can be assumed, despite the usual methods of the Indian police, that the statement is true. This much concession has been made by the legislature.

Often it happens that the defence challenges that a witness has never seen the accused. In order to obviate such an eventuality, the police arrange what is called an identification parade in the presence of an Executive Magistrate and independent juries (*panchas*) and without the presence of the police. In a line, the person to be identified is mixed with six or seven persons and the witness is called to identify the accused. If he identifies, the witness is good.

If he does not, normally he is rejected as unreliable. The idea of placing a suspect in a line up with others is to find out whether the suspect is the perpetrator of the crime.

All oral evidence must be direct. If a fact is said to be seen, it must be deposed to by the person who has seen it; if a fact is heard, it must be deposed to by the person who has heard. If "A" says that "B" has seen or heard, it will be hearsay.

There are, however, some exceptions. The most important is the one that is called a "dying declaration". It is an exception to the hearsay. It makes admissible the statement of a person who dies, whether by homicide or suicide, provided that the statement relates to death or to the circumstances leading to death of that person. If after making the statement the person does not die, the statement cannot be admitted. The person must appear in the Court and depose. The statement called dying declaration may be recorded by a witness, doctor, or even police officer in unsuspecting circumstances, uninfluenced by outside agency. The assumption is that a dying person tells the truth.

An unusual provision in the present Indian Evidence Act relates to what is called anticipatory bail. It is doubtful whether such a provision exists anywhere else in the world. It has been inserted in the Indian Evidence Act on the recommendation of the Law Commission in view of the peculiar conditions of this country. A person may make a complaint of non-bailable offence against another person who, if arrested, may have to spend a day or two in lock-up. He may be innocent and will be released by the Magistrate. But the stigma of being arrested remains. Therefore, the Parliament has provided that when any person has reason to believe that he may be arrested on accusation that he has committed a non-bailable offence, he may apply, before being arrested, to the High Court or to the Sessions Court to be released on bail, if arrested. This is called anticipatory bail. This provision introduced in 1973 was widely used in the beginning, but not much used today. The Court may pass an order of release by imposing conditions. The Court may cancel the order later if it is satisfied that the person has *prima facie* committed a non-bailable offence.

It must be noted that the Code after 1973 contains several provisions which underline the liberty of a citizen. It was noticed by the Law Commission that an accused person continues to be in detention

because of long investigation. Therefore, now it is provided that if charge sheet is not filed within 90 days in the cases of offences punishable with death or imprisonment of not less than 10 years and within 60 days in other cases, the accused **shall** be released on bail. The average citizen should know and understand the concepts and principles explained above. It is not necessary to know the details of trial or prosecution. Broadly speaking, an accused is brought before a Court; witnesses are examined in support of the case against him. Witnesses are cross-examined by him or his lawyer to see if there are infirmities or contradictions in their testimonies. Sometimes, very rarely, the accused produces his witnesses – called defence witnesses. The Magistrate or the Judge then, after examining the matter before him, decides whether the case against the accused is “proved” beyond reasonable doubt. He must give a reasoned judgment, not a captious order. A good Judge will give reasons as to why he chose one version instead of another, why he believed or did not believe a particular witness. If he finds that there is reasonable doubt, as explained earlier, he will pass an order of acquittal. It must be remembered that a person cannot be prosecuted on the same facts. This is called the doctrine of double jeopardy. Where an accused is convicted, he may appeal to a higher Court. There is only one appeal. Where the prosecution is aggrieved by an order of acquittal, it may also prefer an appeal. In an appeal against acquittal, the higher Court will not normally interfere for two reasons. One, the presumption of an accused to be innocent stands fortified by his acquittal. Secondly, if there are two views possible and the Court below has taken one of them, the higher Court will not interfere.

If the Sessions Court has awarded a sentence of death, that is always subject to confirmation by the High Court. So the entire material is re-examined and order passed. In a confirmation case, that is when the higher Court is examining the death sentence, the accused can show that the conviction is wrong, whether he has preferred an appeal or not. Witnesses are always examined on oath in the name of God if they believe in God. In case of a particular witness, solemn affirmation is sufficient. In any case, the Judge must be satisfied that the witness understands the solemnity of the occasion and the necessity of deposing to the truth. It is notorious that witnesses in India do not always tell the truth, even on oath. A witness who lies on oath will be punished by God in the afterlife and will also be punished for perjury. A person who tells lies on solemn affirmation will, of course, be punished for perjury.

Something must be said about some of the investigative methods followed by the police in India. There was a time when even a Head Constable would bring out the truth by intelligent questioning during investigation. In recent years, the method of intelligent interrogation has practically vanished. Brain mapping and polygraph tests are permissible because they are a continuation of interrogation without invading the freedom of the accused. But “narco-analysis”, which is being used frequently, is a third degree method. It consists of administering an injection of Sodium Pentothal or Sodium Amytal which makes the person semi-conscious and thus gives ‘right’ answers to the interrogator. It is done under an order of the Court. Giving injection without the consent of a person is causing him hurt which is punishable under the Penal Code. That is why the police take the permission or order of a Court. The answers given by the suspect are not admissible in evidence. They only give some clues for investigation. Moreover, the answers are not given consciously or in a voluntary manner. It is being used by the police as a substitute for intelligent questioning. Courts should not give permission for such tests as it is none of the functions of the Courts to assist the police in investigation.

As the name itself shows, Criminal Procedure Code contains several procedural matters about which an average citizen need not know. The Courts and the lawyers will take care of the same. There are several laws, apart from Penal Code, which create offences. There are also procedural nuances. There are, in Criminal Procedure Code, procedures to control mobs, for extenment proceedings and maintenance of peace. It is enough for a citizen to know and understand some concepts like benefit of doubt as explained above. Despite it being a procedural statute, the Criminal Procedure Code contains some provisions which are not strictly criminal in nature. If any publication, newspaper, pamphlet or book contains material which is offensive to any religion or which brings about enmity between two or more communities in the country, the Government may declare such publication as forfeited to the Government. This order can be set aside by a Bench of three Judges by being moved by the aggrieved person.

There is a provision which obliges a person to grant maintenance of Rs.500/- to his wife or parent who is unable to maintain herself or himself. This is now regarded as applicable to all communities. Otherwise, maintenance is payable, among Hindus, under the Hindu

Adoptions and Maintenance Act, 1956. For an average citizen it is not necessary to know more. The basic concepts should be kept in mind so that you will not be misled by the press or electronic media.

Fundamental Duties: A Misconception

The Constitution of India is unique in the sense it contains the usual provisions. It also contains fundamental duties (not human rights which are inherent in them, but fundamental rights over which a citizen of India has an un-attainable right). The rights are always against the State. The State cannot disallow my speech, speaking, or disallow me to write etc. (except some provisions). These are called fundamental rights. These rights cannot be infringed. In case of infringement, you can always go to a Court. These are constitutional rights. Something that is given by the Constitution can be and is taken away. Formerly, before 1978, there were eight fundamental rights. We used to call them eight lamps. But right to property has been taken away by the Parliament in its constituent power on 20th June, 1979. It was not a basic power [see *Keshavanand Bharati v. State of Kerala*, (AIR 1973 Kerala 146)]. By the same amendment (Forty-fourth Amendment) Clause (f) of Article 19(1) has been deleted but Article 301-A has been now inserted. Right to property is no longer a fundamental right, property could be acquired in the interest of general public. Today it can be acquired for any purpose. The price to be paid is under either of these provisions. But it should be adequate. The State cannot pay one rupee for a Singur land. Then there is a Chapter on Directive Principles of State Policy. Some of these provisions were originally among the fundamental rights. But it was not difficult to see that those provisions could not be easily implemented or enforced. It would cost an enormous amount. Moreover, some of them were un-enforceable. Giving humane work, living wages are not matters which a citizen can compel a government to do and such other matters were included in Part IV which deals with directive principles of State Policy. In the language of the Constitution itself *“The provisions contained in this Part shall not be enforceable by any Court, but the principles therein laid down are nevertheless fundamental in the governance of the country and shall be the duty of the State to apply these principles in making laws.”* Probably, property cannot be compulsorily acquired without public interest; probably without adequate compensation.

Under Article 301-A, the State may acquire any property by paying proper compensation. It need not be for a State purpose or public purpose. In Singur, lands are being acquired for purposes mentioned therein. You can challenge that acquisition on the ground that it is not for those purposes.

We have so far two important parts of the Constitution. Now it is important to see another part, namely, Part IV-A. It should be remembered that nowhere in the world such a provision exists. Nor was it there in the early Constitution. In order to educate and enlighten Indians, this was introduced as Article 51-A of the Constitution. Part IV-A consists of only one Article, though eleven clauses. The clauses are not continuously coherent. This Part was inserted in the Constitution by the Parliament (when Mrs. Gandhi's tenure was nebulous) by the Forty-second Amendment.

Please read the Article and clauses carefully. They are noble thoughts and they must be followed. We all agree that a citizen, as the recent advertisements proclaim, must pay income tax regularly. But if I do not pay the income tax at all, there is nothing in Article 51-A to penalize me. It is the income tax read with the relevant Finance Act which will fine me or send me to jail. It is not the fundamental duty I am being enforced; it is the criminal liability that is being imposed on me.

Article 51-A is in the Constitution and every minister, before taking office, takes an oath that he will abide by the Constitution, which includes Article 51-A. When an officer takes an oath under the Constitution, he undertakes to abide by the Constitution, including Article 51-A. An officer put in the witness box will admit that he does not know or read Article 51-A. Yet he takes oath. These oaths, as you know, are promissory oaths. If a person contravenes this oath, he cannot be prosecuted. In this age of public interest litigation, it is worthwhile taking an officer to the Court for a definitive view from the Courts.

Not all candidates will be ready. An oath taken under Article 51-A(h) is itself ready. Examples of unscientific acts abound. Mrs. Indira Gandhi probably never went to the temples or Sadhus and Sanyasinis seeking the latter's' blessing. She was, however, wearing beads. In those days there was a "Sadhu" who had magic feet. A photo which appeared in the newspapers showed Balaram, a trusted Indira Gandhi follower and a leading politician, putting his head below the "sacred feet" of the Sadhu. Article 51-A(h) was already in force. Probably, Balaram might have sworn by it. Shankar Dayal Sharma, another Indira Gandhi's trusted follower and at that time the Vice-President, who later became the President, frankly and openly admitted that he became the President because of

the blessings of Lord Venkateshwar of Tirumalai. In order to propitiate the God, he went by a Government's plane to Tirupati and got not only his head tonsured but also eyebrow shaved. This much Sharma admitted.

Once, Indira Gandhi supported Sanjeeva Reddy for Presidentship. However, she let him down and V.V. Giri became the President. Sanjeeva Reddy was honest. When he became the President, his success was due to the blessings of Lord Venkateshwar. This was after Article 51-A was introduced. Later he took the oath that he "will faithfully execute the office of the President ..." and will to the best of his ability "preserve, protect and defend" the Constitution. All these after Article 51-A was inserted in the Constitution. This is the scientific temper of the President of India.

Please work out the implications of this. He (God) made Mrs. Gandhi play the double game and saw to it that she was defeated. God also saw to it that the requisite numbers of legislators were elected. (Remember, Giri was elected by one legislator's vote).

As the elections are approaching, politicians have become suddenly religious. After filing the nomination papers, they start visiting temples. But Jesus Christ said "Many are called, few are chosen". So only few are elected because of God's blessings. The success or failure of a candidate should depend upon the electorate, not upon God. Otherwise, it will be an election of people versus God. If a candidate is chosen by God, is it not unfair to the other God? Considering all these factors, the Election Commission should include in its rules the following to be subscribed by a candidate:

"I hereby swear that I have not prayed to God for succeeding or I will not thank God for my success."

The Election Commission has the power to frame such a rule. Sonia Gandhi, if she desires, can get such a rule framed. The authority administering the oath must specifically ask the officer taking the oath whether he has read Article 51-A. Incidentally, there is only one Article in Part IV-A.

Where the constitutionality of an election is challenged, the Court must look at Article 51-A. There is a precedent (one does not know about its validity). The High Court of Allahabad quashed a notification under the Land Acquisition Act as *mala fide*. The High

Court dismissed the significance of Article 51-A(g) and reminded the litigants that a new Article has been inserted in the Constitution. The Court pointed out that “excellence meant surpassing merit, virtue, etc.” Constitutional lawgivers have provided that the citizens of this great nation shall perform their duties, in an excellent manner rather than perform their duties half-heartedly. The performance of those duties falls within the Constitution (AIR 1988 All 309).

P.M. Bakshi has suggested that the Courts may look at the fundamental duties while interpreting the Constitution. If it is not possible to enforce these duties (frankly it is not), let Part IV-A be deleted. A solemn resolution may be passed. I must pay income tax; if I do not, I will be penalized. I must develop rich heritage of the country. If I do not, nothing can be done. There is no law in this regard. Duties are alright, but duties cannot be enforced. Is our Parliament bold enough to pass the laws? If not, delete Part IV-A. Otherwise, it is only a cosmetic attempt.

Police and Investigation

Arushi's murder and the ensuing investigation by the U.P. Police and C.B.I. occupied the space of electronic media for more than a month. Almost every day electronic news channels telecast what was going on in the case. Everyday the police – both U.P. and CID – were giving interviews to the television channels and discussed the stage of investigation. On a couple of days, I remember, one TV news channel (name withheld) devoted its entire time on Arushi episode. The news channels gave not only news but their views as well on the incident. Some of them even held some persons guilty basing their views on the garbled version of the case given by the investigating agencies. Suddenly, with CBI conceding that there was no evidence against Dr. Rajeev Talwar, the unfortunate father of the girl, he was released and the news channels went dumb.

The enormous national interest in the case was due to the fact that a teenage girl was involved and her father, a dentist, was arrested and was in custody for 50 days. The ham-handed approach of the U.P. Police and more particularly of the NOIDA Police throws up several points for discussion. First, the police giving interviews to the media every day disclosing the stage of investigation. Secondly, the remarks made by the Inspector General of Police of U.P. on the character of the victim was not only unwarranted but was also in bad taste. Naturally, the Central Minister of Child Welfare took strong objection to those remarks.

In the initial stages of investigation, the U.P. Police showed rank incompetence. First they neglected in not guarding the place of offence. Secondly, they suspected the domestic help who himself was found murdered at the same time and place. His body was found on the terrace of the building in which Dr. Talwar resided. The first principle of investigation, namely preparing a Panchanama of the place, was ignored. If they had done so, the body of the domestic help would have been found. The investigation was contaminated by this and some other factors.

The U.P. Government in a sense washed its hands and entrusted the case to CBI. The case was, may be, complex; may be a difficult one. But it was not an inter-State offence nor was it an offence against a Central law. Why should the CBI take such a case? In any case, the CBI has not come out with flying colours. Since the news

channels are silent till going to the press, it is not possible to know the present stage of investigation.

Initially no search of the weapon of offence was done. It is an elementary principle of investigation that the weapon of offence must be found out. Secondly the investigating officers, whether of the U.P. Police or of the CBI, went on telling of 'confessions' or statements of various persons. Such confessions or statements made to the police are inadmissible in evidence (See Sections 25 and 26 of the Indian Evidence Act). It is easier to tell the public of evidence (not inadmissible in Courts) of the guilt of the person arrested and then blame the Courts for letting off the person.

The police, in the instant case, resorted to narco tests in order to know the lines of investigation. Briefly, let us see the various methods by which truth is sought to be detected. The one is the polygraph. It is sometimes erroneously known as a lie detector. It is a non-invasive test. The underlying theory is that when people lie they become nervous and give all sorts of replies. The suspect is asked about the case and from his answers some inference is drawn. However, the replies do not come within the ambit of evidence. The suspect is not even touched physically. It is essentially a question and answer session.

Encephalograph or P-320 is another method. It involves brain mapping. The person involved is directly asked questions relating to the offence. In two stages the questions are asked. In the first stage, innocuous questions are asked. In the second stage, questions directly related to the case are asked. The encephalograph shows certain changes. It should be remembered that it is an invasive test. The brain does not speak. The investigator can only guess whether the person concerned is telling the truth or not. Though the test is invasive and is handled by experts, it does not lead to truth. Both the above two tests have not been used in India or at least in Courts, to the writer's knowledge.

Narco analysis test is the most controversial test. It is an invasive method inasmuch as the person under analysis is given an injection and is made half-conscious. It is being used under anesthesia. The test is conducted by administering 3 grams of sodium Pentothal dissolved in 3000 milliliters of water. This solution is administered intravenously under the care and supervision of a qualified doctor. Less than 3 grams of sodium Pentothal might keep the person

awake; more of the solution might make him unconscious, unable to respond to any question, thus making the test ineffective.

History behind the test is worth knowing. A lady was administered anesthesia. But the doctor required an article. She alone knew where it had been kept in the house and she told her husband. Thus it was realized that a person who is half-conscious tells what is in his or her mind. This is tantamount to psychotherapy and in the writer's opinion it is a third degree method. The person concerned is not telling anything willingly or consciously. The administration of injection amounts to harm as understood in Indian Criminal law. It amounts to an offence under Section 323 of Indian Penal Code. That is why the police always take the permission of the Court. There is no Supreme Court decision on the validity of the test. However, the Bombay High Court has held it valid. The usefulness of the test depends upon its validity.

Moreover, what is the value of the test? The person under test is unconsciously or half-consciously giving information which is heard by the doctor administering the test. The information is not given voluntarily or consciously. Has it any value? If a police officer is also present during the test, any statement made to him is inadmissible in evidence. May be, the information given by the person may be a clue to the police while conducting investigation. This is a very crude method of conducting investigation. Investigation is an art and the police should be properly trained in it. It is easy for a police officer to sit in an easy chair and conduct investigation by third degree method. Information collected in this manner and given in Court, however, fails and acquittals result. That is why so many acquittals are taking place in the country.

Recently, the Mumbai police are relying on a new test. It is called Brain Electrical Oscillation Signature (BEOS). In this test, electrodes are applied to different parts of the brain to detect activation of the brain. The person is then made to wear a cap with 32 electrodes. The answers given are then recorded in a computer. Criticism of narco-analysis made earlier applies to this test also. Answers are not voluntary. It is not evidence as required by the Indian Evidence Act. It is invasive. Its legality has not been tested even by the Bombay High Court. The usefulness of revelations made in such a test depends ultimately on their acceptance in evidence by the Court.

The police in India must be properly taught the methods of investigation. Sir James Stephens writing as long ago as in 1883 had made adverse remarks on the third degree methods of Indian police. It is far pleasanter to sit in the shade rubbing red pepper on a poor devil's eye than to go about in the sun 'hunting for evidence'. Questioning of witnesses is an art that requires great patience and involving hours of work which the police in India are not able to do or not willing to do. Proper and adequate training should be given to the police to acquire this skill. The Courts must be made to believe that investigation is conducted fairly and the evidence is collected properly. That way, alone, the number of acquittals can be reduced.

Judicial Activism

‘What is judicial activism?’ The question must be properly understood by all the persons who extol and who criticize judicial activism. It is unfortunate that some people praise judicial activism while some say that Judges are “acting smart”. This is partly because these persons have not understood the system of government envisaged by the Constitution and prevalent in the country.

Our country adopted the Westminster model of the system except that unlike in U.K., the mother of Constitutional Government, our Constitution has a judiciary given the power of issuing writs and orders regarding the Government and statutory bodies. Ours is a written Constitution as in the U.S.A. It is well known that in the U.S., the Supreme Court invalidates a law and issues various writs and no one talks of judicial activism in the U.S. Tomes have been written on the role played by the U.S. Supreme Court. Free comments are made on the judicial conduct and social philosophy of the Judges. They speak of orthodox and conservative Judges and of progressive judges. Fortunately in India, judgments are not seen in the light of philosophy of the Judges. Our Judges, in line with the Judges of U.K., have always adopted judicial approach. In the judiciary itself there are checks and balances. To talk of judicial approach is to miss the mark:

Unlike in U.S.A., but like in U.K., our Constitution has three distinct institutions. There is in the first place, legislature. Secondly, there is executive, which is as in U.K., a part of the legislature. Lastly there is a judiciary with Supreme Court of India at the top. Besides, there are, for the good governance of the country, other constitutional authorities as the Election Commission of India and the Comptroller and Auditor-General of India. Each of these authorities has a well-defined sphere of jurisdiction. In U.K., the judiciary has no power to set aside a law on the ground that it is invalid and illegal. The Parliament is supreme and sovereign. It is jocularly said that the Parliament can make a man into a woman and a woman into a man. Of course, the Parliamentarians will be mad if they make any such law.

Not so in India where there is a written Constitution. Sovereignty rests in the Constitution which is supreme. All the authorities are the creatures of the Constitution. Laws made must be consistent

with the provisions of the Constitution. The authorities cannot overstep the lines allotted to them under the Constitution. If a law made by the Parliament is not in its list, it can be and will be set aside. When the Parliament is not supreme or sovereign, there must be some authority which can and should invalidate a law made contrary to the provisions of the Constitution. That authority is the judiciary.

A written Constitution in a democracy necessarily means that laws can be scrutinized by the judiciary. That is so under the oldest written Constitution, that is of U.S.A. and that is so in India. The Parliament and the State Legislatures have passed several laws since the Constitution came into force and it must be said, the Supreme Court and the High Courts have not been in hurry to declare the laws invalid. Some laws have been declared unconstitutional as being in contravention of Part III (Fundamental Rights) or not in exercise of legislative powers as mentioned in the Seventh Schedule of the Constitution. If any law infringes a fundamental right, it has got to be set aside as otherwise the citizen will be left with no remedy. Ours is a federal country and if one or the other legislative body passes a law not in accordance with the Seventh Schedule, it will destroy the federal structure and, therefore, it has to be invalidated. This invalidation has to be done by the judiciary – whether the Supreme Court or the High Courts under Article 32 or Articles 226 and 227 of the Constitution. If this is not done, the Courts will be shirking their duty. If this is done, one cannot say that it is judicial activism.

By and large, the Parliament and the Legislatures have done well, fairly and satisfactorily, by passing laws in the social and economic and even other fields in response to the needs of the society, as they are expected to do in a democracy. They have passed and the executives have enacted measures for the weaker and vulnerable sections of the society. And the judiciary has not interfered with such laws and measures. This is not judicial activism. Unfortunately, whenever a law is struck down, or a measure is invalidated, it gives rise to great publicity and a cry is raised of judicial activism. It is common knowledge that in recent years the quality of legislation and executive actions has suffered. Books and articles have been written on judicial control of legislative and executive actions and these are not by Judges. Judges, at least Sitting Judges, do not venture to defend their judgments. In the

words of Mr. Leaned Hand, a Judge of the United States Supreme Court, Judges should not peddle their wares in the market place.

Unfortunately, the legislatures sometimes do and have passed laws that are invalid for one reason or the other. This is a feature of the Indian State which has been pointed out by several legal and social commentators. The eminent Scandinavian scholar Mr. Gunner Myrdal has called India a soft State, partly because the Governments have not the will, the discipline and wisdom to implement properly the laws which have been even legally passed. The result is that several schemes in the social and economic sectors are not implemented or implemented defectively.

In such a state of affairs, on complaints brought before the Courts, the Courts have redressed the grievance. A scheme is not being implemented or being implemented inadequately or unsatisfactorily. This may be due to ignorance or lethargy. In such a situation there must be someone to remind the executive and it is this function that the Courts do. The Courts have powers to do so under the Constitution. One cannot call this judicial activism. Nowadays the Courts are more frequently called upon to do this job. This is inevitable, though unfortunate. When the Courts perform their duties in such a manner, it is called “judicial activism” in a pejorative sense.

It is at this stage that one should take note of what has been called public interest litigation. Public interest litigation in this country, partly popularized by Justice P.N. Bhagwati, has played a vital role. It must be remembered that an action becomes the subject of judicial review if it is without jurisdiction or in excess of jurisdiction. It may be in denial of jurisdiction in accordance with law. There are various situations in which an action may be legally wrong. The inconvenient but necessary job of examining such actions is with the judiciary. You cannot call this judicial activism.

Judiciary has shown activism in what is called Public Interest Litigation. In this litigation the Petitioner is not always the person affected. An objection is often raised that the petitioner has no complaint of his own and, therefore, cannot maintain an action. The really aggrieved person is not the Complainant – that is the contention. The problem is that the person aggrieved or prejudiced has not the wherewithal to start or maintain litigation. Very often, as in the case of environmental problems, the Petitioner is only one

of thousands or lakhs of persons affected. I will shortly give some examples. In such cases the Court will find out the contents of the complaint and will not be worried by the identity of the Complainant. The truth of the complaint and not the identity of the Complainant should be the criterion.

It is true that some times the public interest litigation is abused and sometimes private grousers are sought to be settled. In the past, sometimes the Courts have fallen victims to such abuses. There has been strong reaction on the part of both the bar and the judiciary against public interest litigation of doubtful use. Nowadays, the Courts carefully examine the Petitions to see whether they contain real public grievance. No substantive orders are passed with hearing the contending parties. The Courts have also certain rules regarding Public Interest Litigation. The Supreme Court has in one case (*Sheela Barse v. Union of India*, AIR 1988 SC 2211) observed as follows:-

“In a public interest litigation, unlike traditional dispute resolution mechanism, there is no determination or adjudication on individual rights. While in the ordinary conventional adjudication, the party structure is merely bipolar and the controversy pertains to the determination of legal consequences of past events and the remedy is essentially linked to and limited to the logic of the parties. In a public interest action the proceedings cut across and transcend these traditional forms and inhibitions.”

The workers were engaged in the construction work of Asiad at the instance of the Central Government and yet they were not paid minimum wages fixed by law of the legislature. They could not approach the Supreme Court. At the instance of Peoples Union for Civil Liberties, the Supreme Court issued several directions giving relief to the workers. The pollution in the city of Delhi caused by small-scale unregulated engineering units could only be alleviated by starting public interest litigation. The conversion of diesel engines into CNG engines in public vehicles could only be directed in public interest litigation. The corrosion of Taj Mahal in Agra by the large number of foundries could be stopped not by any individual but by a lawyer by public interest litigation. There are a large number of such cases. One can say such litigation involving public interest is judicial activism. In such cases, the individual whose right or interest is affected is not before the Court. The principle of *locus standi* is given a go-by in such cases.

The essentials of public interest as emerging from *S.P. Gupta*'s case can be summarized in the following manner:-

- There must be a legal wrong caused to a person or a determinate class of persons.
- The wrong must arise from violation of a constitutional or legal right.
- The person or the class of persons concerned must not be able to approach the Courts.
- The Court should be anxious to ensure that the person initiating the proceeding is acting *bona fide*.
- In a given case, the public interest litigation may be of benefit to the society.

It may be noted that public interest litigation is resorted to for wrong reasons. The Courts should be aware of such abuses. We should not be averse to public interest litigation. We should look to the enormous good it has done. The cause of liberty and public good has been served well by public interest litigation. The Courts are very often aware of the mistakes they commit and they are eager and willing to correct themselves. To take an example: The Thirteenth Amendment (1865) abolished slavery in U.S.A. Unfortunately, the U.S. Supreme Court in 1890 held that segregation is legal on the ground of separate but equal principle. This wrong decision was overruled in 1954 by a Full Bench unanimously in *Brown v. Arkansas* and the Court held that what is separate cannot be equal. Today a black person looks like being the President of U.S.A. It was the Court which acted as an agent of changes.

In 1970 the activist phase of the Supreme Court of India began. Partly it was a reaction to the abuses of internal emergency. The issuance of passport, the prisoner's rights, the right to speedy trial, the right to privacy, etc., have been the matters of Supreme Court decisions. The Supreme Court or for that matter the High Courts, in public interest litigation, have plugged the empty places in law. To take one example – there is no statutory law in India on sexual harassments. In *Vishakha v. State of Rajasthan* (AIR 1977 SC 3011), the Supreme Court held that sexual harassment in the work place is a violation of Articles 15 and 21 of the Constitution. The Court gave detailed directions on the subject and held that the rules in the Convention of the United Nations would be the law in India until suitable legislation is passed. For more than eleven years, the Government has not done anything in the matter. It is the judiciary that has practically legislated on the subject.

It is quite true that in some cases the Courts might have overstepped the limits. One must, however, look at the generality of the picture. Judged from this angle, judicial activism has done a great service to the country. It is high time the Government must govern – construction of roads, attending to problems of pollution, laying down the railway timetables and running the trains accordingly. Let the empty places be occupied by the governments and let the Courts do their legitimate duties of adjudication. The arrears can thus be reduced.

'Disappearances'

More than two decades ago Mr. Justice Mullah of Allahabad High Court dubbed the U.P. Police as the most lawless body in the country. Then most people did not take him seriously though what he said was pregnant with meaning. The citizens today complain that F.I.R. cannot even be registered. After the exposure of Nathari Killings people have suddenly woken up the inactive U.P. Police. But the Police are not so active. They are under the thumb of politicians. It is most unfortunate that the popular Hindi actor should canvas the view on the T.V. that U.P. is a State mostly free from killings. This is a sponsored, paid view seeking to invite foreign investments in the State. Indians, mostly Ambanis, may have the inclination to invest in U.P.; they may be having their own 'axe' to grind. Foreign investors are, however, not so gullible to 'impressed' by unidentified flying object (UFOs). In any case, investment climate is not an unidentified flying object.

The people, in general, and human rights activists, in particular, have spoken of having exposed several human rights violations. Torture in the hands of Indian Police, not merely U.P. Police, is a prominent tool to need exposure. Custodial deaths have been noted, written about by law experts. At one point, the Law Commission recommended that the Indian Evidence Act should be amended as to charge the police officer in charge of a police station with murder if any undertrial prisoner dies. The types of human rights violation within the imagination of Indian Police are many.

Encounter deaths in Maharashtra, especially in Mumbai, became too numerous so as to persuade the Bombay High Court to appoint the Bombay City Civil Court Principal Judge to inquire into such deaths. Some police officers are 'popularly' known as encounter specialists. In fact, a Hindi film eulogies an encounter specialist officer.

What the U.N. Human Rights Commissioner has called "a glaring gap in international human rights law" is existing for a long time. Mr. Pinochet, the ex-President of Argentina, perfected the art of enforced disappearances. Formal arrests were unknown. A citizen is called for inquiry and thereafter nothing is known about him. Many times, people **formally** arrested are released but no one knows what happened to them. Cases of persons just whisked away and not seen thereafter are not unknown.

The cases in Mumbai of Dr. Yunus are well known. He was one of many persons arrested for murder. He was taken from Mumbai to Aurangabad (also in Maharashtra) and was being brought back. He never reached Mumbai. The Court, when it intervened, was told that he jumped from the police jeep and **disappeared**. When it was pointed out that a person with handcuffs does not disappear that easily, the police contended that he committed suicide. He was in the custody of the Police. The explanation was fast. Now, a case is registered for murder against the police officers who had the custody of the man.

It is well known that the police kill beggar children in Rio de Janeiro, because they are ugly signs of the beautiful city. Then they are thrown away in the mighty Amazon River. The case of Plaza de Mayo is too well-known in human rights circle. People have disappeared for nearly thirty years and their mothers are still waiting. The instance of Argentina is also mentioned. Nearer home, disappearances are common in Jammu and Kashmir. It is reported that at least 500 women have decided to hold demonstration before Union Home Minister to highlight the cases of their children who were picked up for inquiry but never seen again.

In the year 2006 alone, “the Working Group of Enforced Involuntary Disappearances” received more than 300 new cases from 12 countries around the world. The number of cases seems an underestimate. Even the **Amnesty International** is unable to keep track of disappearances. Many cases never reach the Working Group. From 1980 till today, the group has examined 51000 cases, and no clarification is forthcoming from 73 countries from where these complaints have come.

The grief, pain and anguish felt by the families whose members have disappeared can easily be imagined. Ms. Louise Arbour, the UN High Commissioner for Human Rights, reports that recently, during her visit to Japan and Nepal, she learnt, once again, about the “unmitigated pain that disappearances bring into countless lives”. Countless Japanese have been abducted by North Korea while Maoists in Nepal have taken many citizens as captives. In Nepal alone, the United Nations has received 500 complaints. In the name of fight against terrorism, abductions are taking place.

The French Government took a leading part in raising and drafting the International Convention for the Protection of all Persons from Enforced Disappearances. It is a revised version of the 1992 Convention. It stipulates, “No one shall be subjected to enforced disappearances. The Convention does not allow carving out new exceptions. Neither war nor threats of war, internal instability, internal or external emergencies, will be permissible excuses. Crucially it calls on States to define disappearance as offence against their own **laws**” (Emphasis provided). The Convention also establishes the right of the victims to know the truth and to claim compensation.

But, unfortunately, it is only a Convention. Though there are several obligations on the signatories, there are no ways of enforcing. The Conventions of 1976 on human rights suffer from the same disability. Nevertheless, it is heartening to know that the international community is aware of the evil. As Ms. Louisa Arbor recognises: *“When the euphoria of celebrations for the remarkable inhuman rights advancement evaporates, the hard work will begin. Early signature and ratification will mark a strong step in the promotion of human security.”*

Death Sentence

The debate on the utility or the futility will go on for some time. The UN General Assembly in December 2007 took a significant step towards the abolition of death sentence. Of course this was only a resolution which is not binding on the members of the United Nations. However the resolution has the effect of enhancing the human right and inviolability of person.

The resolution cast a serious doubt over the deterrent effect of death sentence. It highlighted the danger of errors on the application of capital sentence and the obvious irreparability of the sentence. It took into consideration mistakes which occur as seen by the application of modern Science of the DNA.

Amnesty International has estimated that 135 countries have abolished death sentence. Mr. Justice Dorab Patel was the Chief Justice of Pakistan who resigned when general Zia-ul-Haq was the Martial Law Administrator. He said that if he was to be judge again he would not award death sentence. Why? because of the fallibility of the person awarding it and the faulty legal systems.

After his retirement he, along with others, founded the Human Rights Commission of Pakistan (HRCP) - a purely private organisation. Ms. Asma Jahangir, UN Reporter of Human Rights, is a leading member of the Commission and has done excellent work. At its 1986 conference the HRCP passed a resolution demanding the abolition of death sentence. This is in accordance with the principled stand which Amnesty International and Human Rights Watch have taken.

Unfortunately, Pakistan remains one of the 62 countries which have retained death penalty. HRCP in its report "Slow March to Gallows" has mentioned that 7400 men and 36 women were awaiting their execution (in 2007). In 2006, 1591 executions took place; 40% of these executions were in Pakistan. Unfortunately, Islamic countries have retained Death Sentence.

It may be noted that all European Countries have abolished death sentence. Plus, no country can become a member of European Union (EU) if death sentence is prevalent in that country. Mr. Ocalan, a Kurd leader, was sentenced by Turkish courts. Turkey has

been eager to become a member of the EU. The Turkish Parliament passed a law abolishing death sentence as a result of which Mr. Ocalan continues to be alive. With death sentence prevalent, Turkey can not apply for EU membership. At the time of writing this article Manjit Singh is alive in Pakistan and Afzal Guru's mercy petition is pending with the government of India.

The deterrent effect of death sentence is said to be doubtful. Amnesty International has studied this subject in great details and has come to the conclusion that deterrent effect of death sentence is doubtful. The homicide rate has fallen by 40% in Canada since 1975 when death sentence was abolished. Canada's big brother, however, namely USA continues to use death sentence. In fact, the maximum number of death sentences has and are being taken place in USA.

In Texas, the largest number of homicides and death sentences take place. It is somewhat curious that another state, say California, has judges from the same society and yet the proportion of death sentence is lower. Recently, New Jersey has abolished death sentence. It means that New Jersey is the first US state to abolish death sentence in 40 years. In USA, the Supreme Court has barred the execution of minors and pregnant women. It is again examining the means of execution.

Japan which was awarding death sentence and executing the same freely has now abolished it. Internationally the opinion against death sentence is building up. The International Criminal Tribunals for the former Yugoslavia and for Rwanda, both established by the Security Council do not provide for capital punishment. Similarly the International Criminal Court and the UN-supported mixed tribunals have taken a similar line. On 18th December 2007, Mr. Ban Ki-moon the Secretary General of UN welcomed the Resolution of UN General Assembly hoping that capital punishment will eventually be abolished. He noted that 104 states voted in favour of the Resolution and 54 against. Twenty-nine states abstained. The anti-vote and absentees together are far less in number than those in favour which is a good sign. The Resolution of the General Assembly is likely to be re-examined in September 2008.

Fortunately the advances in science have reduced the number of death sentences. This is partly because of effective investigations. In USA researches have been conducted which show that death sentences have been wrongly given. Even in the past, persons, who

are no more alive, had been erroneously convicted and sentenced to death. The HRCP noted in a recent press release: “The relations between India and Pakistan have long affected the population of South Asia. One of the factors contributing to the tensions between the two countries is the horrible treatment they mete out to one another’s prisoners.” See the cases of Sarabjit and Afzal Guru. It is heartening, however, to see that there are human rights activists like Asma Jahangir and Ansar Barney in Pakistan.

The debate, however, continues. International Covenant on Civil and Political Rights has, in Article 6(2), mentioned that in countries which have not abolished death penalty “sentence of death may be imposed for the most serious crimes “ It has also, in Article 6(4) provided that “Amnesty, pardon or commutation of the sentence of death may be granted *in all cases.*” In 1972, the US Supreme Court stayed execution on the ground of cruel and inhuman treatment but in 1976 the sentence was revived. Several persons who were in the death row for several years were given death sentence. Mr. R.K. Raghavan, former director of CBI, says, “Scholars are, however, sharply divided over the wisdom of preserving with what is on the face of it a barbaric practice.”

In America, if stay is obtained regarding death penalty, several years will have elapsed before a case is decided. This, it is said, is expensive. That is why some of American economists have supported death penalty. This means “no appeal or no stay”. The cost of human life is ignored even by economists. Gary Becker, Nobel Prize winner for economics in 1992, has supported death penalty on the ground that it acts as deterrence. Does it? So far no proper scientific study has been made regarding its deterrent effect. In any case, empirical evidence is not decisive. The problem has to be addressed on sociological and moral grounds. Morality suggests that the state should not give to another person cruel and inhuman treatment though that person has given such a treatment.

In September 2007 Supreme Court of the United States imposed a moratorium on death penalty. One Ralph Baze killed a Sheriff and his deputy when they went to execute a warrant. In another case Thomas Bowling murdered a husband and wife outside their shop. Both were double murder cases. In both cases the Constitutional validity of death penalty has been challenged on the ground that it amounts to “cruel and unusual punishment” which is prohibited by the Constitution. Probably because of this moratorium Earl Berry

was saved temporarily at least, just 19 minutes before he was to be executed. He was in death row for nearly 20 years. The last mentioned case was widely reported in India.

Mr. Raghavan says that the moral of the whole story is that we need not be conscious all the time how we treat our convicts.

Fortunately, the Indian picture is not too bad. Death penalty is prevalent in Indian jurisprudence, it has been held to be constitutionally valid by the Supreme Court of India though the test of “cruel and inhuman treatment” was not applied. Later, while upholding the Constitutional validity the test has been applied. In the Indian Connotation, unlike the American Constitution cruel and inhuman treatment has not been mentioned.

The Supreme Court has held in no uncertain terms that Capital Punishment is valid and legal. It does not, according to the Supreme Court, violate Articles 14, 19 and even 21 of the Constitution.

(Bachan Singh v State of Punjab AIR 1980 SC 898).

The Indian Penal Code prescribes death sentence or life imprisonment for murder as defined in S. 300 of the Code. Technically, depending upon the severity of the crime, a Court can give one or the other of the sentences, though death penalty is by its very nature irrevocable. But under Section 354(3) of the Criminal Procedure Code a new provision has been introduced to say that when the conviction is for an offence punishable with death or life imprisonment, the judgment shall state the reason for the sentence. More relevantly, the judgment shall state the special reasons for awarding death sentence. Death penalty does not follow automatically. It would thus seem that normal sentence for murder is no longer a death sentence.

There are, in addition, certain in-built safety measures in the system. Death sentence awarded by the trial judge is subject to revision in the High Court, irrespective of whether the convict prefers an appeal or not. There is thus always a second look. Even in the absence of consideration of rarest of rare cases the Supreme Court had held that death sentence was not the rule. Later in an unusual judgment the Supreme Court laid down that death could be given on “rarest of rare cases”. This was a sort of caution to the trial judge to be careful. The Law Commission had already turned down the challenge to the Constitutional validity of Section 302 of the Indian Penal Code. It

had also turned down the plea of undesirability of retaining that section of the Statute book. The Law Commission was of the opinion in 1967 that the country should not take the risk of abolishing death penalty. Somewhat curiously, without any evidence in this regard, the Law Commission thought that capital punishment had a deterrent effect.

Be that as it may, it can be safely said that though in India death penalty is prevalent, it is in a diluted form; there are several safeguards. No proper, detailed study has been made of the extent and effect of death penalty. It is hoped that after the Resolution of the General Assembly of the United Nations, our legislators and the Law Commission will take a second look at the penalty.

Judging the Judges

The resignation of Justice S K Desai of the Bombay High Court from the office of judgeship of the high court does not settle the issues which have been thrown up by the controversy and the debate which preceded the resignation. The resignation itself may not have opened a Pandora's Box but it has certainly not answered several questions agitating the mind of the public who are genuinely and earnestly concerned with the health of the Indian judiciary. The recent events, not excluding the conduct of Justice Ramaswamy of the Supreme Court, have confirmed the suspicion, not expressed openly because of various factors, that something is rotten in the state of the Indian judiciary.

The facts leading to the resignation of Justice S. K. Desai themselves are simple and would have been probably ignored, but for the fact that the members of the Bar in an organised way decided to force the hands of Justice Desai. Justice M. P. Kenia, who was hearing with Justice Desai one heavy case involving a claim of nearly a crore of rupees, made a grievance that he was being coerced or threatened into agreeing with a judgment proposed to be given by Justice Desai in favour of one party. It was not alleged by Justice Kenia, or for that matter by anybody, that Justice Desai was a party to any arrangement in favour of one of the parties. Inferentially, however, the members of the Bar thought so and it is a measure of the reputation enjoyed by Justice Desai that a large number of people came to believe that there was such an arrangement. The press reports suggested that there was the influence of one lady which often guided the hands of Justice Desai in several cases. This was also believed by members of the Bar.

Justice Desai tendered his resignation only when he received the order from the president of India transferring him to another high court. Presumably, this order of transfer was preceded by a letter from the Chief Justice of India to Justice Desai to showcause why he should not be so transferred.

The issues involved are the judicial conduct and the reputation of the judges. In Justice Desai's case, judicial conduct was not directly involved. Since there is total absence of allegation of a specific misconduct against Justice Desai, it is reasonable to infer that the proposed transfer was on the basis of reputation - a reputation built up, naturally, over a period of time. In any case, a large number of

the members of the Bar, both on the Original Side and the Appellate Side of the Bombay High Court, accepted that Justice Desai's reputation was such as to warrant his removal from the Bombay High Court, if not from the judiciary itself. The advocate-general of Maharashtra also believed so - going by press reports regarding a letter which he is said to have written to the governor of Maharashtra. The reputation of a judge, like that of any other person, is built up over a period of time. How is it that members of the Bombay Bar did not agitate against Justice Desai till his reputation, like *Pradarbha* reached a particular level in the case of *Mehta v Mehta*? Probably this case triggered off a general reaction which took note of the conduct of Justice Desai over a period of time. Justice Ramaswamy of the Supreme Court is said to have indulged in several financial irregularities in his administrative capacity as Chief Justice of the Punjab and Haryana High Court. The Bar is naturally agitated about the same. But the members of the public have unfortunately forgotten the case of Chief Justice Veeraswamy in whose house a sum of Rs 32 lakh was found while he was in office. The Central Bureau of Investigation registered a case against him under the Prevention of Corruption Act for being in possession of assets disproportionate to his known sources of income. This prosecution has been challenged by Veeraswamy in the Supreme Court which, however, has not decided the case for over a decade. It is most unfortunate that a case involving the rectitude of the conduct of a chief justice of a high court should remain undecided for such a long time.

The procedure for taking action against a judge of the high court or of the Supreme Court is too cumbersome and tardy. The procedure for the investigation and proof of the misbehaviour or incapacity of a judge of the Supreme Court or of a high court and for the presentation of an address by Parliament to the president is embodied in the Judges (Inquiry) Act, 1968. This Act has been passed pursuant to the provisions contained in Article 124 (5) and Article 217 (1) of the Constitution of India. The framers of the Constitution recognised the fact that the judiciary or at any rate the higher judiciary should not only be not corrupt but should also not be corrupted. It is in this context that the status of irremovability was conferred upon the judges of the high court and the Supreme Court. Though for a long time after the coming into force of the Constitution the conditions of service of the judges of the high court remained stagnant, recently they have been considerably improved

and next to the governors of the states the high court judges are the highest paid officers of the state.

The apparently attractive terms and conditions of service of the high court judges, however, cannot be a match for the earnings of a middle order member of the Bar. The earnings at the Bar are said to be at an obscene level. A lawyer is said to charge anything between Rs 2,000 and Rs 5,000 for an application for interim relief. If ten such applications are handled by a lawyer in a month, his earnings on this account alone would be between Rs 20,000 and Rs 50,000, not all of which may find its place in the income- tax return.

Yet the judiciary has attracted several men of talent and character. This is because of the high status enjoyed by the judges of the high court. The high status has been enjoyed not merely because of the provisions in the Constitution but the actions and conduct of the predecessors of the present occupants of the posts. Over a century the judges of the high court by their conduct, independence and fearlessness have carved a special place for themselves in the state and the society. To belong to a judiciary of this type was itself regarded as a privilege and a matter of honour. This has been undoubtedly a factor which attracted men of talent and character to the judiciary. The opportunities which the office of a high court judge offers to a person to do work which is satisfying in the best sense of the word are also attractive.

If this image has now been tarnished by the recent events, naturally the judiciary may cease to attract men of calibre and integrity, thus setting in motion a process of further deterioration of the judiciary. The independence of the judiciary may suffer at the hands of the outside agency. It may also be threatened by actions of an excessively zealous executive, as it did happen during the internal emergency seen 1975 and 1977, But it is also possible that the independence of the judiciary may be compromised by the members of the judiciary themselves. In any case, the image of the judiciary is more likely to be destroyed by members of the judiciary from within than by propaganda from outside, though the role by the latter cannot be underestimated.

It is high time some thought was given to the question of restoring the judiciary to a position of independence, integrity and credibility by adopting certain measures. The government is now seized with a proposal for constituting a high-powered committee for the

appointment of judges of the high court and the Supreme Court. One is not sure as to whether the credibility of the judiciary has been impaired by the method so far followed while appointing judges of the high court. The apple when it is picked from the garden is good; the worm surfaces later. What is required is a proper system of monitoring the working of the judiciary. The judiciary has, with some justification, enjoyed a certain measure of immunity from criticism. Even the criticism of a judge of the high court in his administrative capacity has been held to constitute contempt of court by the Supreme Court in *Baradkant Mishra v Registrar of Orissa High Court* (1974-1 Supreme Court Cases, 374), though by a narrow majority of 3 to 2. In a recent judgment, the Bombay High Court has held that truth cannot be pleaded as a defense to a charge of contempt of court when such charge is that the contempter has attributed motives of dishonesty to a judge while deciding the cases before him. (See *V M Kanade v Madhav Gadkari*, 1989 Mh L J 1078.) It is not the purpose of this article to examine the correctness or otherwise of these judgments which are at the moment the law of the land. If the law bestows such total immunity upon the judiciary, it is not good for the health of the judiciary itself. The phenomenon of 'Reigning Favourite' has been immortalised by Henry Cecil in his book *Tipping the Scales*. That phenomenon is not peculiar to England; it is prevalent in this country also. If a system of monitoring existed in this country, probably the Desai episode might not have occurred.

Successive chief justices' conferences have resisted the suggestion of a code of conduct for the judges of the high court on the ground that formulation of such a code is inconsistent with the dignity of the high office of the judges of the high court. In view of the recent developments it is no longer possible to pretend that the high dignity or the status of the high court judges will be diminished if certain measures are devised to restore the confidence of the public in the judiciary. The measures may be devised by the executive or by the legislature by enacting a law or by providing exceptions to a charge of criminal contempt of court. If the members of the judiciary represented by the chief justices of the high courts in the conference of the chief justices themselves evolve a code of conduct by reference of which they will be judged, the purpose of upholding and protecting the representation of the judiciary would be served to a large extent. Some of the suggestions made herein are worth being incorporated in such a code of conduct. Judges must be extremely punctual in their attendance or court work. At one time, at least in

the Bombay High Court, no judge ever sat late in the court, whether in the morning session or in the afternoon session. It is doubtful whether the same can be said of the present day judges. In other high courts conditions are probably worse. It is not inconceivable that some contribution may be made towards the solution of arrears in the high courts by the judges exerting a little more and by working full five hours and all the 210 days in a year. Members of an institution who are supposed to discipline the administrative branches of the government surely can at least impose such discipline upon themselves.

The case of 'Reigning Favourite' has been referred to above. As the Bombay High Court pointed out in the case of Madhav Gadkari, it is impossible to determine as to whether a particular person enjoyed a position of favoritism in a court because in order to prove it, it is necessary to prove in the first place that all judgments given in cases where a particular advocate appeared were wrong. Such a thing cannot be done except in appeals or revisions. But if a general reputation grows to the effect that a particular advocate is enjoying a favoured position before a particular judge, that might easily be corrected by the senior advocates approaching the learned judge and cautioning him about the same. One may also suggest in this 'regard that a monitoring committee consisting of the senior most judges of the Supreme Court may be established and to that committee instances of this kind may be referred. All this may be done in confidence so that the dignity of the concerned judge is not compromised. Such a high-powered body as a committee of senior Supreme Court judges will naturally exercise a healthy check over the wayward behaviour of the judges without harming the reputation of the upright judges.

Possession of assets disproportionate to the known sources of income of a high court judge cannot but be regarded as a greatest blot upon a judge and the judiciary as a whole. If in 10 years a judge of the high court acquires assets worth Rs 10 lakh that must surely be regarded as a case for inquiry by the monitoring committee referred to above and indeed even for an appropriate action under the law of the land.

The image of judges being tarnished by judges hobnobbing with the members of the public in public places has been the subject of comment and criticism at more than one place. (See *To the Best of My Memory* by Chief Justice Gajendragadkar.) The free acceptance

of invitations from all quarters and being seen in parties which have no sanction or any, proper reason has been commented upon with sadness by H M Seervai. The code of conduct suggested above should include a prohibition against acceptance of such invitations. For a judge to be seen drunk in a public place is not setting an edifying example.

The independence of the judiciary is affected not merely by the blandishments of the private parties appearing before the judges. It may also be affected by the offer of post-retirement offices by the executive. Many of the high court judges after retirement are offered, and they accept, the post of members of different tribunals and other posts under the government. Convention has established that when high court judges are appointed to such posts they are entitled to draw the same salary which they were drawing at the time of retirement. Nowadays there are several advisory boards under the detention laws. Sitting or retired judges of the high court are appointed as members of such advisory boards and it is estimated that the earnings of such members of the advisory boards are not negligible. The manner of regulating the appointment of retired high court judges will have to be provided either by law or by a convention accepted by all the state governments and the central government. Such convention must make it impossible for any sitting judge of the high court to entertain a temptation of deciding cases in favour of the executive. Judges should not aspire for post-retirement offices. Fortunately there is enough work available for retired competent judges in the form of arbitration, but not all judges have the same reputation for competence and in such cases the need for - curbing the temptation by establishing proper conventions or by formulating a law become necessary.

All these suggestions will not necessarily remove all the possibilities of the judiciary being contaminated, but the measures will certainly provide certain norms with reference to which judges can be judged. The possibility and the prospect of being judged with reference to particular norms of conduct will definitely act as a check on the conduct of the judges. It must however, be emphasised that this article has been written with the full knowledge that an overwhelming majority of judges in this country possess moral character of a high degree and the corrective measures are required to be taken only in respect of some whose conduct is likely to tarnish the image of the entire judiciary.

The Judges and the Commissions of Inquiry

In the year 1952, when the Commissions of Inquiry Act was passed by the Parliament, nobody imagined that it would give rise to innumerable Commissions of Inquiry in the future. What was intended as an exceptional measure of finding out the truth of a matter of public importance has over a period of years become the rule. At the slightest provocation, subjects ranging from the suicide of a college girl to the outright murder in broad daylight in the bazaar, have been referred to the Commissions of Inquiry set up by the Government. The year 1977 marked the Silver Jubilee Year of the Commissions of Inquiry Act and as if befitting that auspicious" occasion the largest number of Commissions of Inquiry for any single year came into being in that year. Commissions continued to be appointed to investigate into diverse questions of apparently public importance. *Milap Chand Jain Commission* to inquire into the conspiracy angle of Rajiv Gandhi Assassination - a matter requiring a penetrating and secret investigation - and Srikrishna Commission to inquire into the Bombay Riots have recently submitted their reports. Reactions to the findings in these two reports have been of different kinds.

In the opinion of the author, a time has come to examine not only the desirability of appointing Commissions to investigate into the variety of subjects which have so far formed the terms of reference of Commissions of Inquiry, but also the desirability of Judges and in particular the Judges of the High Courts and the Supreme Court associating with such Commissions of Inquiry.

The need for such an examination has arisen because experience has shown that the end results of the labours of most of the Commissions of Inquiry have been negative. Either because there was a public demand for such Commissions or because the authorities anticipated that there would be such a demand or sometimes even to prevent any large-scale, public discussion on a particular subject, Commissions of Inquiry have been appointed. A Commission of Inquiry may be set up to avoid an embarrassing discussion in the Legislature. However, after the Commissions of Inquiry have submitted their reports labouring over several years, no action is seen to have been taken or has not been taken at all. If at the time of appointment of a Commission of Inquiry there was some

urgency about the problem to be investigated, that urgency is in no time dissipated and both the appointing authority and the members of the public have almost invariably forgotten the purpose for which commission was set up.

Universal Futility

In view of this fate and the almost universal futility of the efforts of the appointment of the Commissions of Inquiry, the Judges have to examine for themselves as to whether they must end the assistance of their names reputation and the weight of their office to such Commission of Inquiry. This is especially so because rightly the Judges enjoy a high degree of reputation and public confidence in relation to their impartiality and integrity. Whenever there is a problem agitating the minds of the public, invariably there is a demand for a judicial inquiry. It is no doubt flattering to the members of the judiciary, but if the trend of the futility of the results of the labours of the Commissions of Inquiry continues. It will greatly affect the reputation of the Judges. It is not merely the inaction that is shown following the submission of the reports by the Commissions that is disturbing, it is also the nature of the assignments that are being given to the Commissions which is likely to affect the credibility of the Judges who would be handling such assignments. Recent experience suggests a very cautious if not a wholly negative approach.

The apprehensions about the efficacy and utility of the Commissions of Inquiry into such a large number of subjects are justified not only by the experience but also by the provisions of the Act itself under which such Commissions are appointed. A careful study of the provisions of the Act and the nature of the powers of the Commissions of Inquiry indicates that the Commission is not suited to investigate into several types of subjects irrespective of the fact that those subjects may be of public importance.

No Binding Force

It is too well known to be mentioned that the recommendations of the Commission are purely recommendations and have no binding force either upon the authorities appointing the Commissions or upon the persons who appear before such Commissions As has been pointed out by the Supreme Court in *Ram Krishna Dalmia vs. Justice S. F. Tendolkar* (AIR 1958 Supreme Court, 538), the Commission is merely to investigate and record its findings and recommendations without having any power to enforce them. The

inquiry cannot be looked upon as a judicial inquiry in the sense of it being an exercise of judicial function properly so-called. The Commission has no power of adjudication in the sense passing an order which be enforced proprio vigore. This view of the Supreme Court about the nature and scope of work and the recommendations of the Commissions of Inquiry has been consistently followed and is universally recognised as the correct position in law.

England's Example

In England, a Tribunal had been convened under the Tribunals of Inquiry (Evidence) Act, 1921 to investigate a complaint of assault against two police officers in Scotland There was criticism both in and outside the Parliament of the usefulness of the Act as well as the Tribunal The then Lord Chancellor in reply to the debate in the House of Lords defended the English Act in the following words

.....The sanction of the public inquiry is necessary on occasions for the purpose of maintaining a high standard of public administration and, indeed, of public life. The modern system has developed in consequence of the inadequacies of the machinery of inquiry by Select Committee on the one hand and the limitations of the ordinary processes of law on the other.

.....The ordinary processes of law are geared to a charge or claim brought by one person against another They do not fit when it is necessary to discover what has actually happened before the responsibility of or between individuals can arise, and as has been discussed earlier in this debate, there are other fields, such as inquiries into accidents, courts of inquiry in the Services and the Committee of Privileges of the House of Commons, where the inquisitorial procedure is necessary concomitant of their work. In all those cases the question of discovering what has actually happened is of prime importance. ... After the true facts have been found and stated, it maybe necessary to stigmatise conduct which, although not a criminal offence or a civil wrong, falls short of requisite standards of our public life. It may be necessary to kill harmful rumours which are found to be unjustified....

Public Importance

The above extract from the speech of Lord Kilmuir fairly sums up the nature and the functions of the Tribunals of Inquiry appointed in the United Kingdom and also of the Commissions appointed in

India. Such Commissions must naturally be occasionally appointed and should not become substitutes for the ordinary processes of law. They must again deal with the questions of national or of great public importance and should not be pressed into service to inquire into actions or offences which can be more specifically investigated into by permanent machinery established under the law of the land. The Royal Commission on Tribunals of Inquiry (1966), United Kingdom, expressed its opinion in the following terms:

“We are strongly of the opinion that the inquisitorial machinery set up under the Act of 1921 should never be used for matters of local or minor public importance and should also be confined to matters of vital public importance concerning which there is something in the nature of nation-wide crisis of confidence.”

The best illustration of a proper Commission of Inquiry was the Chagla Commission appointed to inquire into the investments of Life Insurance Corporation in the companies controlled by Haridas Mundhra. After a heated debate in the Lok Sabha resulting from a painstaking investigation made by Feroze Gandhi the Government had to concede the demand for the appointment of a Commission of Inquiry. It was headed by the then Chief Justice of the Bombay High Court and its inquiry covered the conduct of not only the Chairman of the Life Insurance Corporation but also the Secretary of the Finance Ministry and of the Finance Minister himself. When such high dignitaries are involved and the allegations themselves do not disclose the commission of any cognizable offence but are directed at the impropriety of the action taken by the Government, a Commission of Inquiry could be a proper forum.

The status that the *Chagla Commission* enjoyed could be seen from the fact that no less a person than the then Attorney General, Mr. Motilal Setalvad, himself came to assist the Commission in its work. As is now well known, the findings of the *Chagla Commission* led to the resignation of a powerful Minister like Mr. T. T. Krishnamachari. This shows that if a proper subject is handed over to a Commission headed by a respected and senior Judge and if the job is done quickly and efficiently, the findings of the Commission may lead to far-reaching results.

Mischiefous

It is always desirable that a senior permanent judge should be associated with an inquiry. A Judge who is not even confirmed is less likely to inspire the necessary confidence. The selection of the Judge to head the Commission must be done by the Chief Justice uninfluenced by the suggestions by or the preferences of the Governments. The Governments sometimes send a panel of three or more Judges, one of whom be selected by the Chief Justice. This is mischievous.

The fact that the Commission has got only powers of recommendations and of recording findings has already been referred to above. The respect with which normally the public treat the orders and the judgments of Courts is missing in the case of the recommendations of the Commission. There is also a general apathy to the findings and the recommendations of the Commission because they are not even binding upon the authorities who may either reject all or any of the recommendations and decide not to act on any of the recommendations. The speed with which the report is examined and action taken will, to some extent, invest the report of the Commission with some sanctity and credibility. If, therefore, the Commission has to depend for its own credibility upon the action of another authority, then it is inevitable that the work of the Commission will fail to inspire confidence. It is true, as has been pointed out by the Supreme Court in *P.V. Jagannath Rao vs. State of Orissa* (AIR 1969 SC 215) that the fact that ultimately the Government might not take any action on the report of the Commission is irrelevant to the validity of the appointment of a Commission. But it is not irrelevant to the question as to whether the Judges should lend assistance of their office and prestige to a work which would in all probability end in nothingness.

Pros and Cons

Lord Kilmuir has pointed out the advantages of a Commission of Inquiry; in India itself there have been instances where the findings recorded by the Commission of Inquiry have resulted in some public good or at least in public knowledge of affairs which would have never otherwise seen the light of the day. The classic example of the Chagla Commission has already been referred to above. Undoubtedly there are pros and cons to this question. Two views in theory are possible. The first view is that because in India the Judges have been enjoying large public confidence and have maintained a high degree of reputation it is the Judges alone who should take up this work because the findings recorded by them will inspire greater

confidence. The Commissions of Inquiry Act itself does not mention who should head a Commission of Inquiry.

Technically, therefore, any person with some status in the society and with reputation of impartiality and integrity can be appointed to head the Commission, but there is always the risk of the public criticising the appointment of such a person as being politically motivated or as an appointed person who is likely to be influenced by the Government. In the case of appointment of a Judge of the High Court or of the Supreme Court, such criticism cannot be made. The Judges of the High Court and of the Supreme Court in the course of their normal duties decide hundreds of cases where the Government is a party. Rightly they are enjoying reputation of being impartial between citizens and citizens and the State. They belong to a category of officers whose tenure of the office is constitutionally protected. It is, therefore, always felt that the Judges should not hesitate to accept such assignments when they are offered to them. When a call comes for a Judge to do something for his country which a Judge can do so well, he should not hesitate to undertake it.

Second View

On the other hand, there is the second view that Judges should do their judicial work and such extra-judicial work should not be their concern. One American author has said:

“Surely, too, there is enough qualified brain-power in this nation of 200 million people (i.e. U.S.A.) not to have to call upon judges to perform extracurricular jobs. However important those tasks may be and however laudatory the motives of the participants, such a practice subtly erodes the indispensable confidence of people in the impartiality and integrity of the judiciary.

(Prof. Miller - The Supreme Court: Myth and Reality)

At one place Mr. Justice Krishna Iyer has noted that the indiscriminate use of Judges and retired Judges for extra-judicial work has come in for criticism and unless wisely restrained, may injure judicial credibility. He has further said that “the ultimate public good is illusory as even the frequency of use blunts the instrument”. It has been feared that the frequent use of the members of the judiciary for such extra - judicial work may degenerate into political devices to ward off mounting public disquiet or

administrative embarrassment. “It sometimes happens that judges are used by politicians in power to pull their chestnuts out of the fire by appointing commission with men in robes to preside. This is regarded by some as dubious step because the credibility of such reports is in controversy, political artillery from the affected side being invariably turned on the Judge”. (Mr. Justice Krishna Iyer in his Foreword to *The Commissions of Inquiry Act* by Ramasubramaniam.)

Extreme Positions

In the author’s opinion, these two views represent two extreme positions. It is undoubtedly a call to duty if a Judge is appointed to head a Commission of Inquiry to inquire into the affairs of national or of public importance. It cannot be laid down as a rule that he should not answer such a call of duty. But at the same time it is also not a rule that every time the Government requests, the Chief Justice should make available the services of a Judge. It might be broadly said that a Judge should not even tread in areas where the issues involved and the findings that are likely to be given are likely to affect the prestige and the reputation of the Judge or of the judiciary. Moreover, one should also bear in mind that a Commission of Inquiry is appointed for uncovering the facts and not for expressing opinions. If, therefore, a particular assignment is likely to lead to the expression of opinions by the Commissioner, then a Judge should decline to accept that assignment. This is not the place to enumerate in detail the types of work that can be accepted by a member of the judiciary. But, in the author’s opinion, there are at least three categories of subjects from which the Judges should keep away.

Political Questions

Any assignment which requires the Judge to sit in judgment over the policies of the Government must be avoided. If the Government has followed, according to the allegations, a wrong policy in respect of a particular matter, the forum for airing the grievances is naturally the Parliament and not a judicial or quasi-judicial body. The remedy is also essentially political and lies with electorate which, if it disagrees with the policies of the Government, is free to change the Government. The question whether economically the sale of gold by the Reserve Bank was a wise policy could not be the subject-matter of judicial or quasi-judicial inquiry. If, however, the intention of the appointing authority was to find out whether the policy has caused any damage, then conceivably it could be inquired into by a

Commission of Inquiry because whether or not damage has been caused is a question of fact.

It is also the author's opinion that purely political questions should not form the subject matter of inquiry by the Commission headed by a Judge. For example, what should be the solution to the Assam question can only be the responsibility of the Government or of the political parties in the country. A solution to that problem cannot be suggested by judicial or quasi-judicial authorities. However, it may be borne in mind that merely because the persons involved are politicians, a Judge should not refuse to accept the assignment. What is to be avoided is a political issue and not a question which may affect the politicians. Whenever a Commission is set up by a Government to inquire into allegations against a former Minister, allegations of malafides and political vendetta will naturally be made. But, as the Supreme Court has pointed out in *K. B. Sahay's case* (AIR 1969 SC 258), the truth or otherwise of the allegations of either side must be found out by the Commission itself, And further "when a Minister goes out of office, his successor may consider any glaring charges and may, if justified order an inquiry. Otherwise, each Ministry will become a law unto itself and the corrupt conduct of its Ministers will remain beyond scrutiny" (on page 261).

Cognizable Offences

A field which is wholly unsuited for the inquiry by a Commission headed by a Judge is the investigation into cognizable offences. When the public mind is agitated rightly or wrongly by reports about the commission of a cognizable offence, it should not be regarded as a matter which should be looked into or investigated by a Commission of Inquiry, especially one headed by a member of the judiciary. There are several reasons why this is so. In the first place, there is already a well-established machinery for investigation into the offences which are registered as cognizable offences under the Criminal Procedure Code. This ordinary process of law should not be circumvented by adopting any other procedure.

If a commission holds an inquiry into the subject-matter of an alleged commission of a cognizable offence, it is beset with several difficulties in its task. The Commission itself cannot locate witnesses who can fruitfully throw light on the subject. At best it will only issue notification inviting such members of the public, who are in the know of the alleged offence or of the circumstances

leading to the said offence, to come and depose before it. Not all the persons would be ready and willing to oblige the Commission of Inquiry in this task. On the other hand, regular investigating machinery can, with the large number of personnel working in it, locate the persons who are witnesses and go to their doorsteps or call them to the police station and record their statements.

Regular Trial

In the case of a Commission by the time the witnesses are brought before it considerable delay will necessarily have taken place and what even the willing witness may be telling before the Commission will be from faded memories. Their statements having not been recorded at the earliest, it will be impossible to test the veracity of what they would be deposing before the Commission. It is conceivable that several persons who can contribute nothing to the work of the Commission may come before the Commission and waste its time while vital witnesses may stay away from the Commission. On the other hand, the regular investigating machinery under the Criminal Procedure Code will do a quicker job, if it intends to do, by arriving on the scene immediately and by recording the statements of the witnesses. As is well known, contact with one person gives clues to the names of other persons who can be of possible help. In this manner several witnesses are contacted within a matter of hours and their statements are recorded.

Another factor which militates against the desirability of using the Commission for inquiry into the commission of cognizable offences is the fact that ultimately it is a court of law which will decide where the truth lies. Witnesses who have deposed before the Commission will have again to be examined by the police who will be recording the statements under Section 161 of the Criminal Procedure Code; thereafter a regular trial will have to be held before the persons who are found to be, if at all, guilty by the Commission are convicted and sentenced in accordance with law. What could be finished off within six months will take years if a Commission of Inquiry is entrusted with this job to begin with.

Many Statements

It is well known that when witnesses are examined in the Court, cross-examination is often directed to exposing contradictions in the statements of the witnesses made on different occasions. When a Commission of Inquiry has been appointed, there will be a statement

of a witness before the Commission; thereafter again there will be a statement under Section 161 of the Criminal Procedure Code; and subsequently there will be a deposition in the Court. It will indeed be a miracle if a witness who will thus be ultimately examined in the Criminal Court does not disclose at least some contradictions in his statements made on three different occasions. The credibility of the witness is often tested by reference to the presence or absence of contradictions. A witness who might have been found wholly truthful by the Commission of Inquiry may be dubbed as a total liar by the Criminal Court because in the latter forum that witness will be subjected to severe cross-examination by the counsel for the accused. Since before the Commission there is no accused, there will be no counsel for the accused.

The third objection to Judges accepting assignments connected with cognizable offences is still more serious. The findings given by the Commission are subject to further review by a regular criminal court presided over by a judge who may be of a position subordinate to that of the judge who presided over the Commission. It is highly improper that a superior judge's findings should become the subject matter of sort of re-examination by a subordinate judge. But this is inevitable in view of the system prevalent in this country. It is well known that evidence in a court of law is weighed and not counted. In a criminal trial, all the so called findings of a Commission may sink to the bottom by witnesses turning hostile or may be blown into pieces by a new witness who might have been in the meantime discovered and who might be found to be wholly truthful. These are all hazards of the time-consuming process which results from the appointment of a Commission.

FIRs

If a Judge of the High Court heading a Commission of Inquiry inquires into the allegations relating to the commission of cognizable offences and thereafter his conclusions are subjected to a further review by a Sessions Judge in a trial, as indeed they are bound to be, then the entire work of the Commission of Inquiry will have been an exercise in futility. In the author's opinion, in cases where specific allegations of the commission of cognizable offences are made, the only rational thing that ought to be done is the registration of these allegations as First Information Reports and to entrust the work of investigation to the regular investigating machinery. In case the members of the police force themselves are involved, the investigation could be entrusted to some other branch

of the police department or to the CID or CBI It may even become necessary to entrust this work to some trusted officer of known competence from a place outside the place where the offence has taken place.

Loss of Confidence

It is true that in recent months the public confidence in the police and even in such agencies like CBI has considerably shaken. However, entrusting the work to a Commission of Inquiry is no answer to the loss of confidence in the regular or special investigating machinery of the land. The Government must find out or establish an investigating machinery in which the public confidence will be created and sustained The quickest investigation and the promptest trial of persons accused of cognizable offences are the only answers to the problem and not keeping the whole matter suspended for months or years together by entrusting it to a Commission of Inquiry. This is bound to result in grave miscarriage of justice A Government must govern and must govern strongly for the maintenance of law and order. Public confidence in Governmental machinery will be destroyed if dilatory methods are adopted In any case, Judges, in the author's opinion, must scrupulously avoid being parties to a process which is likely to result in miscarriage of justice.

In the light of the public agitation as a result of the refusal of the Government of Maharashtra to accept Srikrishna Commission Report some points need to be clarified. The agitators seem to be under the impression that the findings given by the Commission are binding on the Government which must necessarily act upon them. This view is untenable. The law does not say so. It has been unequivocally laid down by the Supreme Court on more than one occasion that a Commission's findings are not binding upon the Government or on any party.

There is a rationale behind this. In the regular judicial process, there is almost invariably an appeal provided against a decree or a conviction. There is no such provision in respect of findings of a Commission of Inquiry. Our jurisprudence does not contemplate finality to a finding against which there is not even one appeal.

It should also be noted that on the basis of the findings of the Commission, no arrests can be made of the persons indicted; indeed

no criminal investigation can be begun. For a criminal investigation to begin, what are called “first information reports” have to be lodged under Section 154 of the Code of Criminal Procedure. This essay is an attempt to explain the nature, scope and limitations of an inquiry by a Commission appointed under the Commission of Inquiry Act and also the results of the labours of such a Commission. A proper understanding of the same is necessary to avoid false expectations leading to bitter disappointment.

Uniform Civil Code: An Anti View

From time to time, the debate on Uniform Civil Code erupts. By 'Civil' here is meant mainly personal laws or family laws like marriage, divorce, succession, minority and guardianship. Even academics and judges have not remained aloof from the debate. Even if the point has not arisen from the facts before it, the Supreme Court has ventured to pass remarks on the subject. Sometime it is mentioned that *uniform Civil Code* will help national integration. Before touching the pros and cons of the subject, it is necessary to point out that no one has prepared a draft of the intended Code. The one prepared by the Indian Secular Society is nothing but a repetition of Hindu laws.

This apart, most people, including those who oppose the Uniform Code, have not read the relevant provisions. Hindus, including the politicians and the legislators, have not read Article 44 of the Constitution, which speaks of Uniform Civil Code. The Constitution being a legal document must be interpreted properly. Every word in the relevant Article must be read, interpreted and understood. The relevant Article in the Constitution reads as follows:-

“Article 44: Uniform Civil Code for the citizens.

The State shall endeavour to secure the citizens a uniform civil code throughout the territory of India.”

No properly constituted debate anywhere outside the Constituent Assembly has taken place and that was 50 years ago. There was a long debate in the Assembly on the question and after hearings all the parties agreed that the provision should be inserted in the part dealing with the Directive Principles of State Policy and not the Fundamental Rights.

As it is by this time well known that the part dealing with the Directive Principles, unlike the part dealing with Fundamental Rights, cannot be enforced in a Court of law and as the name itself suggests, the principles are directive. So the State should, as far as possible, try to implement the same. The Courts also must be guided by them. As pointed out by the Supreme Court in *Pannalal Bansilal v. State of Andhra Pradesh*, uniform law for all persons may be desirable. But its enactment, in one go, may be counter-productive to the unity of the country.

India is a liberal and free country. No uniformity can be imposed. Laws are territorial, not necessarily community-wise. Even territorial laws are not always uniform. The evolution of laws, the background of the communities must be taken into consideration. Equality clause in the Constitution is not available here. Equality tells you to treat similarly situated persons similarly; not to treat dissimilarly situated persons similarly.

Once it is recognised that the Supreme Court or any Court, cannot legislate, uniformity cannot be imposed. Unless the point arises directly or indirectly before it, no Court should decide that point. It is a well-recognised principle that no Court should adjudicate or express its opinion on a point not arising before it. In that sense the obiter of Justice Kuldeep Singh in *Sarda Mudal v. Union of India* must be held to be irrelevant. The ruling that a Hindu cannot become Muslim only for the purpose of taking a second wife was correctly given, from the viewpoint of law as well as equity and good conscience. Similar observation in other cases must also be held to be irrelevant. Where the point has directly arisen, the Supreme Court has refused to implement the Uniform Civil Code. See, for example, commentary by P.M. Bakshi on the Constitution of India. Please also see:

- (a) *Ahmedabad Women Action Group v. Union of India*, 1997 (3) SCC 573;
- (b) *Pannalal Bansilal v. State of Andhra Pradesh*, AIR 1966 S.C.W. 507;
- (c) *Maharshi Avadesh v. Union of India*, (1994) 1 Supp. SCC 713;
- (d) *Raymond Rajmani v. Union of India*, AIR 1982 SC 1261.

It can be safely said that though the Supreme Court on occasions has piously expressed the hope that there should be Uniform Civil Code, it has consistently refused to issue any writ to the State.

It is submitted that in *The State of Bombay v. Narsu Appa Mali* (AIR 1932 Born., 84), it was correctly held that it was not the function of the Court to legislate. The demand was *for* the extension of Bombay Prohibition of Bigamy Act to Muslims. The Court held that the subject being one of reform, the State could, if it so liked, decide one section of the society for the reform. The purpose of law in plural societies is not the progressive

association of minorities in the majoritarian milieu. As Lord Scarman has said –

“...the purpose of law must not be to extinguish the groups which make the society but to devise political, social and legal means of preventing them from falling apart and destroying the plural society of which they are members.”

As the retired Chief Justice of India, Mr. Venkatchaliah, in a lecture in Delhi said, the function of law and the choice of legal policies in pluralistic societies are by far the most fascinating challenges to our civilization. Proceeding further he said that the challenges are staggering by their sheer scale and veracity. Moreover, the challenges are pervasive and assist the basic assumptions of justice, democracy, rule of Law, morality, political authority, systems of Government, the role of judiciary, etc. There is one common thread running through our society and the Constitution and that is the thread of pluralism. For thousands of years, we have more or less peacefully lived together. Unlike in the Balkans we have never attempted genocides.

The ultimate question is, as a humanist would put it, whether civilizations on earth have the moral maturity to accept the human person as the unit and measure of all things. To return to Lord Scarman, it may be noted that he said:

It is a platitude that a society must be just. But what in the Context of plural society do we mean by justice? Are we seeking justice between groups?”

Lord Scamian reminds of the inscription over the portico of the U.S. Supreme Court building. It says that “We clearly desire both; justice as between the groups and equal justice for every one of us.”

Ambedkar’s effort to get a law of the Hindu got a stiff opposition that Nehru had ultimately to drop it. In that atmosphere, it was foolhardy to expect and pass a Code for Muslims. Nehru had adapted a good strategy. After laying the example of Hindu, probably he thought of going after the Muslims. Having sat through the Constituent debates knowing Muslims well, he knew it was a Herculean task.

Before going into the Constituent Assembly debates, it will be advisable to see the Muslims and the British administering the laws. The Muslims administered the Shariat law; the Hindus were administered their law. When both the parties were before them, the law was administered according to judgment, equity and good sense.

When the British came into power they broadly classified law into two parts - those which affected the community member only, i.e. we call personal or family law. Then the laws, which the different law into contact with one another, theft, assaults, etc. would be judged only by one law. How many witnesses were necessary to prove a fact? Under Islam law, four women were necessary to a contractual fact. In India, a written contract was not necessary. In a given circumstance, the evidence of a prosecution alone is sufficient to prove rape. In Islam, at least six witnesses were necessary to prove adultery. This is in consonance with Ayesha affair. In such a situation it would be difficult to prove anything. The British made the following laws applicable to all communities:

1. Indian Penal Code
2. Criminal Procedure Code
3. Indian Evidence Act

Many of the provisions of these laws were inconsistent with Shariat, Nobody protested. Setu Madhavrao Pagdi has given the example of Maulavis objecting Ayed Mohammed wearing trouser because according to them it was un-Islamic. How would you bring in uniformity? These questions cannot be easily decided.

After Godhra incident, riots took place on a large scale in Ahmedabad and in Gujarat. Two Honourable Judges are engaged in finding out the truth. The Gujarat riots took place in the first half of 2002. We are now in the year 2007. The hope that truth will be about soon is dwindling. Anyway, I would like to think that what happened is an aberration both in Godhra and Gujarat. In the long run the plurality of India will hold. The Ages old pluralism of the country will not and should not be broken. When Amartya Kumar Sen wrote *Argumentative India* it was basically to show that Indians differ and go on arguing. At no time in the history of India a Hindu King has gone to war on the ground that he was a Hindu. The Hindus fought for land or for women - never for Dharma. In fact no Muslims fought for Dharma but for territory.

Now, if you turn to the Constituent Assembly and its Committee deliberations, you will find there inter se opposition to Uniform Civil Code. One thing you must remember - Muslims believe, rightly or wrongly, that Quran is given to them through Paigambar. What is given by God cannot be changed by man. Muslims do not stop to consider whether what is given is good. Under Muslim law there are only 5 compulsory things:

1. Acknowledgment that Allah is the God and Mohammad is his messenger
2. At least one pilgrimage to Mecca
3. Five times Namaz per day
4. Fasting during Ramadan
5. Zakat

These are must. They are compulsory. It is better to keep away from the number of people who actually perform the five functions.

Others are permissive. Quran says, under certain circumstances you can have four wives. Having more than one wife is so expensive, so that few, if at all, people attempt it. Even today when bigamy is prohibited among the Hindus, more Hindus have second or third wives (especially in Rajasthan). Prior to 1956, a Hindu could have any number of wives. Bhupendm Singh of Patiala had more than 300 wives. The Kuhn system in Bengal allowed a man to marry 30 wives, without seeing. Shivaji had eleven wives. It has been estimated that to equal Hindus, Muslims will need no less than 365 years.

Now these things are of the past. If Muslims are convinced that marrying four wives is only a permission and not injunction, they themselves may give it up. In Pakistan if you have to take divorce, you have to go before a board of conciliation in the spirit of Islam. See Sura 4; poem 3:

*If you think that you shall not
Be able to deal justly,
With the orphans,
Marry women of your choice,
Two or three or four.*

This is not a command and Parliament can, with the consent of Muslims, easily bring about monogamy. There has been no

unanimity among the Sunnis and Shias on *nikahnama* and *talaq*. The All-India Shia Muslim Personal Law Board has raised another voice. Let us take the case of triple *talaq - talaq* given three times in one sitting. The All - India Shia Muslim Personal Law Board has approved it, though specifically they have said it is contrary to Quran. Yusuf Ali has pointed out that *Talaq* is the most heinous act among the Muslims. Quran says (*Sura 3 to 5*):

*If you fear that you shall not
Be able to deal justly with the orphans
Marry women of your choice.
Two or three or four.
But if you fear that you shall not
Be able to deal justly with them
Then one only as a captive
That your right hands possess
That will be more suitable
To prevent you
From doing injustice.*

The Quran specifically says that he must go to a senior. *Talaq* may be unjustified and may be revoked. This means *talaq* is revocable. Allah knows better. If triple *talaq* is given in one sitting, it becomes irrevocable and one must regard it as an insult to Allah. That is why Mohammedans regard *talaq* as a very offensive act. This is a permissible action where Legislature can step in and bring about uniformity. Iqbal, as long as in 1928, has stressed the importance of evolution even in Islamic law and recommended jihad. Zakaria had emphatically asked as to why Muslims are not following it. Muslims may be different but should not be separate.

It will be worthwhile to make a brief reference to Constituent Assembly debates. Granville Austin is categorical that the Constitutions' spirit came from third of three sources which were based upon the documents of the Congress itself. Nehru moved the objective resolution, paragraphs 4 and 5 of which are as follows:

(4) Wherein shall be guaranteed and secured to all the people of India justice, social, economic and political; which were based on status, of opportunity, and before the law freedom of thought, expression, belief, faith, worships, vocation, association, and action, subject to law and public morality;

(5)Wherein adequate safeguards shall be provided for minorities, backward and tribal areas, depressed and other areas.[Constituent Assembly Debates(C.A.D.),Vo1, p.9].

Pluralism is writ large in the Objective Resolution. Remember, this was despite the fact that both countries were surcharged with communalism and violence. There was the Advisory Committee and the Sub-Committee on Fundamental Rights. An overwhelming majority of people, including Hindus, agreed with separate Code for Muslims, The members of the Minority Sub-Committee reiterated that all personal laws of India should not be interfered with. Mohamed Ismail Sahib pointed out that for creating and augmenting harmony in the land, it is not necessary to compel people to give up their personal laws. A warning came from Maulana Hazarat Mahani (U.P.):

“I say from the floor of this House, that they will come to grief. Mussalmans will not submit to any interference in their personal law, and if anybody has got ‘ie courage to say so, then I declare ...“(C.A.D. Vol VII, p.780).

He continued to say that Mussalmans will never submit to any interference in their personal laws and they will have to face an iron wall of Muslim determination to oppose them in every way (C.A.D. Vol. VII, p.780). This is the national integration talked of by the Supreme Court. Speaking of the present Article 44, Dr. Ambedkar said that there was no obligation upon the State to do away with the personal laws.

Language of any person can be changed without harming him. A person like the author speaks different languages in the house. My brother’s daughter-in-law is a Bengali while son-in-law is a Saxena, speaking Hindi. All these have not disturbed our relation. India has not yet found a national language. Many - most - people think that Hindi is the national language - it is not. It is the official language of the Centre. South Indian States (barring Kerala) will never allow Hindi to become a national language. Language cannot bring about India’s unity and integrity - Let the wise Supreme Court Judges remember this.

It is better to know the nature and source of Muslim Law. Quran is dictated by God through Gabriel to Mohammad. That is their faith. All Muslims believe so. Muslim Law subject to Hadith, as contained

in Quran cannot be altered by human beings. The Legislature of any country cannot change it. It can by way of evolution, as Iqbal says, take it forward. This is a major impediment in the way of Personal Law of Muslims conforming to any other law. For many centuries converted Muslims spoke their original language. It is only recently that Muslims have identified with Urdu.

When announced in Bangla Desh, it was heard that Jinnah said that Bengalis are proud of their language. Rabindranath's poems were broadcast over the radios every day in Bangla Desh. Urdu could become the language of Punjabis only. Baloochis spoke Baloochi; Sindhis spoke Sindhi; Pakhtoon spoke Pustu. Yet there was national integrity.

Proud Hindus should not forget that the Hindu Kings fought on the issue of Hindu territory. Mussalmans, when they originally came, came not for converting people but for grabbing a piece of territory. There had been no Hindu-Muslim wars as such in India. No doubt, Akbar married Jodhabai, but not as a result of war. There is so much currency and cross currency in Hindustan, it is difficult to see who fought whom.

Though India was not a strictly liberal State to begin with, after the advent of the British, because of English education, Indians became liberal. During their 700 years of rule, Muslims left hardly any impact on the life and literature of Hindus. Hindus being influenced by the British, though in only half-hearted measures, were ready to learn liberal ideas. In Islam, nothing was of the kind.

Apart from all this, Mr. Venkatachalya points out the different kinds of marriages in Hindus. In the South the preferred form of marriage of a man is with his sister's daughter. Rig-Veda has sanctioned the marriage of a man to his *mama's* daughter. The most unusual marriage in Punjab is between a brother and his brother's widow. Uniformity in these conditions meant chaos.

The upshot of the discussion is that as there are so many varieties it is difficult to reconcile them. In fact the richness of practices gives multi-dimensional colour to the society which one would not like to get rid of.

Let there first be uniformity among the Muslims - *talaq*, polygamy, etc. So slowly let there be uniformity in Muslim law - so also in

Hindu Law. Cosmopolitanism will dawn in the country in due course.

Article 370

This Article in the Constitution of India deals with certain special features of the State of Jammu & Kashmir (J & K). There are certain Constitutional obligations on the President of India. These obligations and compulsions do not detract from the fact that State of J & K is an integral part of India. The First Schedule of the Constitution of India says that J & K is a part of the territory of India. However, it is provided that any amendment affecting the boundaries or area of the State of J & K cannot be made except on the resolution of the Government of that State. Moreover, the very Preamble to the Constitution of J & K says the people of the State have resolved ‘to further define the existing relationships of the State to Union of India as an integral part thereof.. .’ Further, Section 3 of J & K Constitution avers that “The State of Jammu & Kashmir is and shall be an integral part of the Union of India”. It is thus clear that constitutionally and legally J & K is an integral and inseparable part of India. This is so despite the fact of certain developments that has taken place in that State. Incidentally, J & K includes that part of the State illegally occupied by Pakistan. Why is it that, that State is having a separate Constitution? Reasons will be given shortly.

The demand of BJP and other like-minded groups for the abrogation of Article 370 stems from overlooking or ignoring the circumstances or compulsions under which it was inserted. It was introduced in the Constitution of India after mature consideration of all facts and circumstances prevailing at the time of accession of that State and at that time the Constitution of India was framed. Those who demand the abolition of Article 370 have never tried to remember those facts and circumstances and also they do not seem to have read Article 370 properly.

Article 370 assured the State all benefits of independent Kashmir without sacrificing the advantages of being an integral part of India. This was the basis on which the State acceded to India. This was the basis also on which Constitution-makers accepted that accession. It is, at this stage, not necessary to go back into the history of the accession in details.

Briefly stated, J & K State originally did not want to accede to India or Pakistan. It had entered into a standstill agreement with Pakistan. A similar agreement was to be arrived at with India but, before that

happened, Pakistan-sponsored tribal forces raided Kashmir plundering, looting and even raping. The Maharaja of J & K wanted to accede to India but India said it would not defend the State unless it became part of India. Maharaja signed the Instrument of Accession and mostly protected Kashmir.

The Instrument of Accession is generally on the same lines on which several other States had acceded to India. Accession placed on India the duty to govern the State in the matters of defense, external affairs and communication. The accession was not in respect of other subjects. It is true that other States signed the instruments of accession in respect of above-mentioned three matters, but later practically on all matters with India. Not so J & K. Hence, the special provisions.

Though in the marginal note of Article 370 it is described as Temporary Provisions, it is, in effect, a Special Provision. It is described as a Temporary Provision, but if one looks and examines the provisions of Article 370, one can easily see that it governs the State permanently. It must be noted that in the Constitution of India, special provisions have been made in respect of Sikkim, Nagaland, Mizoram, etc. Therefore, one should not raise one's eyebrows if special provisions are made for a State which has acceded.

Confusion regarding the States of J & K has arisen because of several reasons. One is the language of the marginal note. Secondly, it is often asked why one State should be given a special status. This objection is easily met by the fact of the State acceding to India in a peculiar manner. Thirdly, those demanding abrogation of Article 370, including politicians, have not carefully read the provisions of Article 370. In this writer's opinion, that Article cannot be abrogated. Reasons for this opinion will be given shortly.

The Instrument of Accession itself mentions the conditions subject to which accession has been made. It reserved for the then ruler the right to legislate over matters not expressly entrusted to the Union of India. It further stipulated that the terms of the Instrument by any amendment of the Government of India Act, 1955 (which was then in force) or the Indian Independence Act, 1947, would not apply unless such an amendment was effected by the then Ruler by a supplementary Instrument. By a provision contained in Article 370, the President of India has passed several orders extending the jurisdiction of Union of India to the State of J & K. (I have related

upon *The Constitution of Jammu & Kashmir* by Justice A.S. Anand for the documents relevant on the subject).

An examination of Article 370 is in order. I have already mentioned that marginal note of the Article has created confusion. Normally the marginal note does not control the meaning of the main provision. But the Supreme Court has held that in the Constitution it is good as a provision. However, when one sees the language of Article 370, one can easily see that the marginal note in the instant case is subordinate to the Article. There is nothing temporary about the Article.

One need not be jealous about J & K having a special status. Junagarh, Hindu population, Muslim ruler, acceded to India. Hyderabad, a Muslim ruler and Hindu population acceded to India after a police action by India to subdue the Razakars and to protect the passengers of the trains passing through the State. India stuck to its position of secularism and in order to retain that reputation encouraged Kashmir, with large Muslim population, to accede to India. Fortunately, Shcikh Abdullah, the undisputed leader of the State, was a secularist and it helped.

For restraint of space, I am not reproducing Article 370 while I am analyzing that Article. The Article specifically states that the Parliament can make laws regarding matters specified in the Instrument of Accession. It may make laws in respect of other States but with the concurrence of the State. These other matters have to be specified by an order. By an order, issued in consultation with the State Government, other provisions of the Constitution of India may apply. It must be made clear that the Constitution of India means, the Constitution of India in its relation to J & K. What is important for the purpose of this article is clause (3) of Article 370, which must be reproduced: “(3) Notwithstanding anything contained in this Article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications from such date as he specifies. Provided that the recommendation of the Constituent Assembly ... shall be necessary before the President issues such notification.”

The Constituent Assembly of the State dissolved itself after framing the Constitution, consisting of 158 Sections. Section 147 of the State Constitution forbids any amendment of the Constitution which

makes any change in the provisions of the Constitution of India as applicable in relation to the State.

The Constituent Assembly is no longer in existence. So there is no question of the President taking the recommendation of the Constituent Assembly, as per Clause (3) which conceivably may be pressed for abrogating Article 370. Can the Indian Parliament, under Article 368 of the Indian Constitution, amend Article 370 by deleting it? If the Indian Parliament passes an amendment to that effect, the President has to issue an order under Article 370 (3) which he cannot do today. The politicians are not realizing that in the light of this situation, Article 370 has become permanent; it is no longer temporary as mentioned in the marginal note. One need not be sorry about this as it has been pointed out earlier; the integration of the State into Union of India has become final as per the Constitution of the State as well as the Constitution of India.

It may be pointed out that since 1954; the President has passed over 80 orders as per law and Constitution which have extended major provisions of the Indian Constitution to the State. The state of affairs today is quite satisfactory except the emotional problem. That is a political issue which needs to be solved by consensus by the politicians.

In view of the legal and constitutional impossibility of deleting Article 370, we must find out feasibility of integrating emotionally the people of Kashmir with the Union of India. One should not grudge the retention of those provisions which forbid outsiders acquiring immovable property in the State. After all, such a provision has been in existence for centuries. This has prevented people in India (especially builders) from colonizing that State. Instead of crying hoarse, as the BJP and like-minded people are doing, for abrogation of Article 370, the people of India should work towards assimilating the people of that State in the mainstream of India. India has, next to Indonesia, the highest Muslim population. India should be an ideal secular State. It has not been possible to mention several provisions of the Constitutions and law because of limitations of space in an article in a monthly magazine.

Readers are invited to refer to or read: *The Constitution of Jammu and Kashmir*” by Justice A.S. Anand for the detailed provisions of the Constitutions and the laws.

Right to Know

Right to know is sometimes regarded as being wider in scope than the right to information. In practice, however, in my opinion, the distinction is not crucial. As far as journalists are concerned, right to know can be treated as being equivalent to right to information.

Right to know in the broader sense is the right to acquire knowledge and no impediments should be placed in the way of that right. Impediments may be placed by the State by banning books and journals; or by censorship. Censorship played havoc during 18 months from June, 1975 to February, 1977 when the Government of India had imposed censorship of the extent not seen even during the War period. A film star was alleged to have been involved in shoplifting in America. The newspapers in India were prohibited from publishing that news. Even if it had been published, nobody would have probably believed it - considering the status and affluence of that lady. Rabindra Nath Tagore's "When the Mind is Without Fear" was not allowed to be quoted. You could not quote John Stuart Mill in any article. This censorship was only one degree better than the censorship imposed by General MacArthur in Japan when he was administering that country after the Second World War. Under General MacArthur's order of censorship, there was prohibition against mentioning that there was censorship. Incidentally, the indiscriminate censorship that was implemented during the emergency of 1975-77 gave rise to rumours and rumour-mongering attributing worst actions to Indira Gandhi Government and people believed those rumours - a fact which is said to be partly responsible for Indira Gandhi's defeat in the elections of 1977.

There was the censorship of the Roman Catholic Church. The Vatican had a list of publications - *Librorum Prohibitorum* - commonly known as Index - which the Catholics were prohibited from reading. Among them were books, which dealt with such subjects as evolution and astronomy. Of course, it listed D.H. Lawrence's *Lady Chatterley's Lover*. The Index, which was established in 1557, was ultimately abolished in 1964 - it was in existence for more than 400 years.

In these instances, the right to know is being denied by those who are not necessarily in possession of that knowledge. The knowledge is available at some place but you are being prevented from having

access.

The right to information is denied when the person of that information refuses to part with that information. He may be refusing for no reason; he may be refusing it on the ground that it is not customarily shared with others; he may be refusing it because law prohibits him from giving that information.

It is sometimes suggested that right to information is essential for the exercise of the right to freedom of speech and expression and therefore the right to information should be treated as an integral part of the right to freedom of speech and expression which is guaranteed as a fundamental right in Part III of the Constitution of India. Article 19 (1) postulates that all citizens shall have freedom of speech and expression (subject of course to the restrictions mentioned in clause (2) of Article 19). Howsoever elastically this expression is stretched, it cannot be said to include the right to information. It is not the function of the State or any authority to enable you to exercise the right to free speech more effectively. The only obligation on the authority is not to deny that right.

Some commentators have tried, in support of the right to information, to draw help from what has been said by the Supreme Court in what is known as the Judges' case. (*S. I. Gupta v. Union of India*, AIR 1982 SC 149). Among the questions involved in that case, one was whether there was effective and real consultation between the Government of India and the Chief Justice of India before transferring a judge from one High Court to another. Such consultation is necessary under Article 222 (1) of the Constitution. The Union Government refused to disclose the correspondence between it and the Chief Justice of India on the grounds that (a) the correspondence formed part of the advice tendered by the Council of Ministers to the President and the Court was precluded from looking into it by virtue of Article 74(2) of the Constitution and (b) that the correspondence was protected against disclosure under Section 123 of the Indian Evidence Act. Arguments were advanced and judgments were given only on these questions. No one invoked the right to information. The ultimate decision had nothing to do with the right to information as a part of the right to free speech and expression, though at one place Bhagwati, J, as he then was, observed "The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)

(a)". The language of the judgment of Bhagwati, J. emphasized that in a democracy there should be transparency in the governance and citizens ought to know what their government is doing and how. These observations justified the demand for a law for the right to information; they did not lay down that there was such a right. Even international declarations and covenants do not recognise the right to information. What they speak of is the freedom to seek, receive and impart information and ideas.

With the passing of *The Freedom of Information Act, 2002* by the Indian Parliament and of *The Freedom of Information Act, 2000* by the British Parliament, much of the discussion on the need to enact such laws has become academic. But I wish to explain the tortuous course through which the agitation for enacting laws for the freedom of information went.

Let us begin with England which has been notorious in conducting governmental functions in utmost secrecy. It has been characterised as the traditional culture of secrecy. In 1899, James Bryce, an M.P., had the following to say in the House of Commons:

“But on the general question of keeping documents secret there is no country in Europe which is so scrupulous and old-fashioned in imposing secrecy as is this country.”

He was giving an example of an American scholar who wanted to see some papers relating to the American War of Independence of 1776. He was told that the papers were considered secret. (See, Sir David William’s contribution “Freedom of Information: The British Experience” on page 244 to ‘Constitutional Perspectives’ Ed. Venkat Iyer: Universal Law Publishing Co. Pvt. Ltd., Delhi: 2001).

The greatest obstacle in the way of obtaining and spreading information is the law relating to official secrets. The first Official Secrets Act was of 1889. But even before that secrecy of information was protected by governmental instructions and Treason Act of 1814. In 1878, one Marvin, who was working in Foreign Office, gave the details of a secret treaty between England and Russia to a newspaper. He was prosecuted but it was found that there was no law under which he could be convicted. He had not stolen any document; he had memorised the contents of the Treaty. The Official Secrets Act, 1889 which was passed was to plug this loophole. The Act made it an offence to communicate to unauthorised persons information obtained by a government servant

in his employment. This Act, however, placed the burden of proving that the disclosure was not in the interests of the State or the Government.

Therefore, a stronger law - The Official Secrets Act, 1911 which served as the model for India's Official Secrets Act, 1923 was passed. This Act imposed a complete prohibition on the unauthorised dissemination of official information - whether connected to defense or security or not. It did not make provision for the substance of the information so that, as one writer on law has put it, technically it criminalised disclosure of the colour of the carpet in a Minister's office. The eventual demise of the Act came about due to its abuses as well as failures. I must mention three cases which were tried under this Act.

The U.K. Government was giving aid to the Government of Nigeria in its war against the breakaway province of Biafra in 1971. A journalist, Aitken by name, found out that the U.K. Government was supplying 70% of Nigerian arms instead of 15% as mentioned in the official figures. Aitken had collected his information from an official document called the Scot Report and passed it on to the press. Actually the figure worked out by Aitken could be arrived at from other sources which were not official.

In the trial by jury, Justice Caulfield practically gave a direction for acquittal with the suggestion that freedom of the press should prevail. It should also be noted that the information given by Aitken did not in the remotest way affect the defense or security of U.K. In the next case which was decided in 1984, the Government's immorality was exposed, though the person concerned, Miss Sarah Tisdall, the accused, was convicted on a plea of guilty. She found that the Government was intending to make the announcement of the delivery of cruise missiles in the Parliament after the question hour so that no questions or supplementary could be asked. She took the view that this political subterfuge was morally wrong and leaked the information to the *Guardian*. In the trial she pleaded guilty and was sentenced to six months' imprisonment.

The next case, which showed the deviousness of the Ministers in the Government, was decided in 1985. The Opposition MPs were pressing for information on the sinking of a ship in the Falklands War. Clive Ponting, a senior officer in the Ministry of Defense, prepared a detailed answer in the course of his duty but the Minister

for Defense did not use this note but used a briefer note which did not contain the whole truth. This prevented the Parliamentary Committee from effectively scrutinising the working of the defense Department. Ponting anonymously sent the material prepared by him to an MP who in turn leaked it to the press.

Ponting was convicted. His plea that Section 2 of 1911 Act permitted him to communicate to a person in the interests of the State - which meant the nation as a whole - was rejected. Justice McGown held that the interests of the State were synonymous with the interests of the Government of the day - a dubious proposition. (These cases have been taken from *Civil Liberties* by Helen Fenwick - 1995 edition. A later edition of this book, published by Cavendish Publishing Limited and distributed in India by Lawman (India) Private Limited, New Delhi, is now available).

Later, the British Parliament enacted the Official Secrets Act, 1989, which de-criminalised to a great extent the unauthorised disclosures of official information. Moreover, specific defenses were made available. I have not come across any case decided under this Act and, therefore, I leave it there. Soon, moves to enact a law for the freedom of information were set in motion. I must now refer to the well-known case of *Spycatcher*.

Spycatcher was the name of the book written by one Peter Wright. The book made allegations of illegal activities engaged by MI5, the intelligence service of UK. It was disclosed that MI5 indulged in bugging foreign embassies and illegally entering private premises. There was the suggestion that MI5 attempted to destabilise Mr. Harold Wilson's administration. The book was first published in USA in July, 1987. Excerpts from it were being published in England, especially by *Guardian*. The paper could not be prosecuted because on its part there was no breach of official secrecy. The Government started civil proceedings in which injunction was obtained restraining *Guardian* from publishing any more from the book. This is what is known as prior restraint which can be used for killing any story. The litigation went on for nearly three years and ultimately in 1990 the House of Lords held that no injunction should be granted because –

(a) The interest in maintaining confidentiality was outweighed by the public interest in knowing of the allegations made in *Spycatcher*;

(b) Injunction to restrain in future publication in relation to secret service matters would amount to a comprehensive ban which would prevent the determination of public interest.

I will make a slight digression to USA. One of the most morally abhorrent, politically unwise and militarily disastrous wars, ever conducted by any nation, is the Vietnam War in which USA was the participant. Intervention in the conflict between North and South Vietnams was begun by John Kennedy and was accelerated by Lyndon Johnson - all with the object of preventing North Vietnam, a Communist country, from overrunning South Vietnam, a bogus democratic country propped up by the Americans. Thousands of documents came into existence in relation to this war. The Pentagon Generals were not always on the same wavelength as the civil authorities including the President and sometimes the Secretary of State. It must be said to the credit of American student world that when the immorality and futility of the war began emerging, the Universities rose in revolt. Anti-war demonstrations took place in the campuses. Ultimately it was President Richard Nixon, otherwise notorious for the Watergate Scandal, who ended the war.

Before that happened, however, one Daniel Ellsberg managed to "obtain" seven thousand pages of documents covering nearly 20 years of American policy relating to Vietnam and gave them to *New York Times*. They were all classified papers - that is they were secret. President Nixon was in office and he was considering the withdrawal from Vietnam on grounds which were also secret. There was initially a Court order blocking the publication but ultimately the U.S. Supreme Court held in favour of *New York Times*. And the papers were published. These are the famous *Pentagon Papers*. You can find the history and contents of these papers in *People's History of the United States* by Howard Zinn (Harper Perennial, New York, 1995). Later, in 1989, Erwin Griswold, who as Solicitor-General had represented the U.S. Government in the Supreme Court, confessed that he had not seen any trace of a threat to the national security from the publication of *Pentagon Papers*. However, the credibility of the Administration came under a cloud.

Nixon faced another challenge to his own credibility in what is known as Watergate Scandal. The Secret Service agents had entered into the Watergate Building to plant bugs during the Democratic Party's Convention. In trials connected with this break-in it started becoming clear that White House was involved and certain tapes,

which were in the custody of the White House, could throw light on this. The President unsuccessfully resisted the summons to get them produced before the Court. Ultimately Nixon resigned halfway during the impeachment proceedings. It may also be mentioned that the Watergate Scandal was exposed by two correspondents of the *Washington Post* who obtained information from an unidentified person - referred to as Deep Throat.

We are dealing with matters of public importance or connected with public authorities.

Why should there be right to information? Why is it necessary that the government and government servants be compelled to part with information which they think should not be known and should not be debated? How is it in the public interest that the papers which form the basis of governmental decision and action should be exposed to the public gaze?

There are theoretical as well as practical considerations requiring the disclosure of information in democracies. In a democracy the government elected by the people is accountable to the people for the actions it has taken. If the people have to decide, as they are entitled to decide, whether the government has taken the right decision, they are entitled to know the basis of that decision. The basis of the decision is contained in the information with the public authorities. When this information is disclosed, it will be possible to judge whether the public authorities have acted reasonably or not.

Not often the public authorities refuse to disclose the information because there is no information. Actions are regarded as discretionary. But the discretion cannot be unfettered. The discretion has to be judged with reference to the purpose for which it was exercised. Unfettered discretion is entirely alien to a system of democracy.

Abuse of power is inevitable if unfettered discretion and uncontrolled power are vested in the public authorities. Such discretion and such power are in the nature of a blank cheque which the public authorities will overdraw.

I would advance another, perhaps stronger, ground in support of the argument for open government. Power is given to the government and to the public servants so that they will exercise it for the public

good. The government is not only by the people but also for the people. Power conferred upon a public authority is conferred upon the condition that it will be used for good and sufficient reasons in the public interest. The people are entitled to ask whether the power is exercised for the right reasons. This can be decided only when the information relating to reasons are disclosed. When reasons are disclosed one can find out whether the reasons are relevant. If they are not, corrective action can be taken.

The doctrine of discretion is invoked by the authorities when they in fact act arbitrarily. Discretion, as has been observed by one English authority –

“Is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections?” (Quoted by Sir William Wade in *“Public Law in Britain and India”*, Tripathi, Bombay, 1992, p.39).

In practical terms, the duty to disclose information and reasons results in better government. Even an honest bureaucrat realises that if he has to disclose the information and the reasons on the basis of which he has taken the decision and action, he will record the reasons. The duty to disclose the information and the reasons will dissuade the authority from acting dishonestly.

I would give additional reasons for a law of freedom of information in India.

First, the extent of corruption: This has been made possible at least partly by the absence of the law relating to the right to information.

Secondly, the multiplicity of activities of the State and public authorities: All the activities and the projects may not affect all the people. Nevertheless, the people who are affected have the right to know why certain decisions were taken and why other decisions were not taken.

Thirdly, in the absence of good quality debates in the Parliament, there must be some means by which information becomes available to the citizens.

Fourthly, in the absence of good, well-informed Parliamentarians like Madhu Limaye, who could rattle the Government during the question hour, information on vital questions is not coming to light.

At this stage I must come to Aruna Roy whose intrepid campaign for the right to information woke up the nation. Aruna is a Tamilian Brahmin lady who joined the Indian Administrative Service and was allotted to Rajasthan cadre. She joined the IAS in a mood of public service. She thought she would be able to serve the people by properly and honestly implementing the laws and the policies of the government. She wanted to participate in the building up of a just India. Within seven days she realised that the IAS was not implementing the letter, let alone the spirit, of law. But she strove for seven years after which she resigned and joined her husband Sanjit Bunker Roy who had founded a social service organisation in a Rajasthan village.

It is not possible to give the details of the activities of this intelligent and brave lady within a short space. Her experience in the administration helped but she modestly states that the campaign to secure the right to information about the government transactions was launched and carried on by the villagers themselves who had now formed Mazdoor Kisan Shakti Sanghatan. In meetings after meetings, the sham figures of governmental spending on welfare projects were exposed. The villagers went on bombarding the government officials with questions which directly concerned them. There were no satisfactory answers. The ghost projects were laid bare - veterinary hospitals, health centres, roads, dams which stored no water, and so on. The movement for information was led by women of the rural area. The town people cynically called them ‘the skirt platoon’. During the course of this movement it was realised that babus at the district level and the State level were not the only persons who were the obstructionists. The campaign revealed that there is no one more cunning than a lowly village official, no one more knowledgeable in the ways of stonewalling - the patwari, the talathi, now called gram sevak. The officials, it is said, guarded the information as zealously as gold in Fort Knox. Ultimately, Rajasthan passed the Right to Information Act. Aruna Roy was the recipient of Magsaysay Award. A good amount of information about Aruna Roy is available on the Internet. You may also read with interest Mark Tully’s account of her life in his *“India in Slow Motion”* (Viking 2002 - p.82)

A similar campaign by Parivartan, an NGO of Delhi, compelled Delhi Government to get a law of freedom of information passed in 2002. Maharashtra has also passed similar law.

By now, (i.e. Sept 2003) about six States have the right to information on the statute books. Observers say that in none of the States, except Goa, this right has been used adequately. Even journalists have been slow in utilising this opportunity of obtaining the information. Why? Because of two reasons:

They do not know what information they should go after, Secondly, even when they know what they need, they have no patience or they cannot wait to follow the course prescribed under the law. They find it easier and more productive to go in for investigative journalism. The *Indian Express* has been in recent months publishing massive material which it would have taken months to obtain through the official channel. Many a time the information which is significant is squatting on your doorstep but you overlook it. Many a time, with a little patience and alertness, you can get the topmost secret information without breaking the law. It may be remembered that in 1999 Admiral Bhagwat was dismissed as the Chief of the Navy Staff- an unprecedented event in the history of Navy of any country. There were too many unpleasant facts surrounding that event which did no credit to successive defense ministers and the Ministry of Defense over the years. Mr. Buddhi Kota Subbarao, a former officer of the Indian Navy and now a practicing lawyer, obtained copies of the petitions filed by the contenders for the top post in High Courts. Petitions were not secret though they contained a mine of secret information. In addition there were affidavits and counter-affidavits. Utilising this information Mr. Subbarao wrote an article which exposed the working of the Defense Ministry, more specifically under George Fernandes. The article published in *The Hindu* of 11th May, 1999 can be used as a masterly guide by the journalists. When a matter of some interest or importance is pending in Court, it is easy for the journalists to get all the information they need on the subject. Nowadays the lawyers and litigants are too eager to talk to the media. They will give copies of the petitions, affidavits and affidavits-in-reply for the asking.

Right to information is not that important for the journalists. The journalists are in a hurry to file their story and therefore the legal route even if it is open is not useful. The alternative of obtaining that information in other ways is better suited to the journalist's profession.

The right to information as a statutory right is, however, important for the general public. The Indian Parliament has now enacted The

Freedom of Information Act, 2002 (Act 5 of 2003). It is yet to come into force. The Act is quite liberal in scope. Exemptions are not too many; grounds for rejection of requests for information are precisely worded and reasonable. Duty is cast upon the authorities to give reasons for rejecting requests for information. Duty to give reasons is now regarded as an important rule of natural justice. Provision for appeal against an order rejecting the request has been made. Section 16 of the Act provides that the Act will not apply to the intelligence and security organisations specified in the Schedule to the Act. The Official Secrets act has not been repealed but the provisions of this Act would have effect notwithstanding anything inconsistent with the provisions of that Act.

Ultimately, the usefulness of this law will be judged by the way it is worked by the public authorities. The security of the State is a ground on which information can be refused. 'Security of State' can be stretched by the authorities to cover inconvenient facts.

When it comes to the question of citizen's right to know about the candidates in the elections, all political parties get united in denying this right. In public interest litigation, history of which is not being given here, the Supreme Court of India, in a judgment on 2nd May, 2002, held that voters have a right to know the criminal and financial antecedents of the candidates and therefore the Election Commission should ask for such details in the nomination papers of the candidates. In compliance with this directive, the Election Commission issued a notification on 2nd June, 2002.

Immediately all the political parties came together and permitted - and practically asked - the Government to nullify the effect of the Supreme Court decision. On 16th August, 2002 the Government of India issued an Ordinance amending the Representation of Peoples act by providing that the candidates in the elections shall not be required to give information not necessary to be given under the Representation of Peoples Act. On 23rd August, 2002, the President, to whom the Ordinance was sent for signing, returned the Ordinance to the Government for reconsideration. On the very next day i.e. on 24th August, 2002, the Cabinet again sent it to the President without making any changes. The President was obliged to sign the Ordinance so returned in view of the provision in Article 74(1) of the Constitution.

This amendment, namely insertion of Section 33B in the Representation of Peoples Act, was successfully challenged before the Supreme Court which invalidated that Section by its judgment on 13th March, 2003. The Supreme Court held that the Parliament cannot abridge the citizen's right to know. It must be stated that the information provided would not affect the eligibility of the candidate, but failure to provide the information would result in the rejection of the nomination paper. It is not as if today the bulk of the voters are not aware of the criminal record of the candidates. But with the disclosure of such information "the little man (voter) may think over before making his choice of electing lawbreakers as lawmakers". The Supreme Court has also directed that educational background should also be disclosed.

Among the items of information to be disclosed, the charge pending against a candidate involving an offence punishable with imprisonment of one year or more is one. That is how you see the activity of deleting some charges against the ministers who are among the accused in Babri Masjid demolition case.

In giving their judgment, the Supreme Court read into Article 324 of the Constitution the power of the Election Commission to insist upon information for the conduct of free and fair elections.

Justice R.A. Jahagirdar (Retd)

Justice RAJahagirdar (Retd) studied economics and politics for his graduation and post graduation. During his college days he took part in dramas, debates, and elocution and Students ' Union activities. He studied Law while in employment and passed Law examinations meritoriously in 1959. Having passed the I.A.S. examination, he chose not to join the Civil Service. He served as Government Pleader, Professor of Labour Law in K.C. College and in the University of Bombay.

In 1976 he was appointed Judge in the Bombay High Court and retired from there in 1990. After retirement he was appointed Chairman of Monopolies and Restrictive Trade Practices Commission but did not continue for long for personal reasons. He was also Chairman of the Committee for Fixing the Fee of Higher Education in Maharashtra.

In addition to his qualifications in Economics and Law, Justice Jahagirdar is a student of Philosophy, History and Religion. A voracious reader, Jahagirdar is fond of Will Durant and his wife Ariel, the famous philosopher-historian couple and quotes them often. His personal library, containing all the volumes of "The History of Civilization" written by this couple, is huge. Recently he has donated all his books to Academy of Political and Social Studies and SM Joshi Foundation Library, in Pune.

He is connected with free thoughtmovement and organisations and has spoken and written extensively on rationalism and secularism. He had been the Chairman of Indian Rationalist Association, President of Maharashtra Rationalist Association and Editor of "The Radical Humanist". As a Founder-Trustee of the Rationalist Foundation he has contributed Rs. 5 lakhs towards its corpus.

Dr. (Mrs.) Sharad Jahagirdar, daughter of Late Justice P.B. Gajendragadakar (whom Mharashtrians know very well), is a well known and an extremely successful gynecologist. Together, Dr. Sharad and Justice Jahagirdar have very generously donated to the cause of Rationalism, Secularism, Humanism, Social Justice and Freedom of Expression.



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