Legal Aid and Public Interest Litigation

(Delivered on 05-07-1985)

P. N. Bhagwati

Chief Justice of India

I am deeply grateful to the Rajasthan State Bar Council for inviting me to deliver the First C. L. Agarwal Memorial Lecture. I had many opportunities of meeting Shri C. L. Agarwal and I came to know him quite well, particularly during the period that he was associated with the Bar Council of India. He was a man of great versatility and there were many areas of activity in which he distinguished himself. He was a extremely competent lawyer belonging to the older generation which believed in certain human values. Today unfortunately there are quite a few lawyers who look upon the legal profession as a money spinning business and who charge exhorbitant fees without giving to the clients their monies worth. But. Shri C. L. Agarwal belonged to a different school. He looked upon law as a noble profession and whatever cases he undertook he attended to them with single minded purpose and gave his best to the clients whose cases he accepted. It is a matter of regret that this generation of lawyers is fast dying out and there are now lawyers who do not get ready with their briefs, who ask for frequent adjournments ignoring the interest of their clients and who do not render as much assistance to the Court as is expected of them. The lawyers must realise that they are priests in the temple of justice and they owe a two-fold obligation, one to the votaries at the temple and the other to the Goddess of justice. The latter obligation must be regarded by the lawyers as of greater importance because their primary commitment must be to the cause of justice. This ethos inspired Shri C. L. Agarwal throughout the period that he practiced law in the Courts. He never consciously did anything wrong nor did he ever make any attempt to mislead the court even if it would help his client. He upheld the highest traditions of the Bar and set an example for the other members of the bar to emulate and follow. He was apart from being an extremely competent and able lawyer, a man of diverse interests. He was an active member of the Bar Council of Rajasthan for a number of years and so widely respected was he, that he was elected as a member of the Bar Council of India and remained such member for almost seven years. He contributed in a large measure to the deliberations of the Executive Committee of the Bar Council of India as also of the Legal Education Committee. It was he, who along with some others conceived the idea of setting up the National School of Law in Bangalore and it was largely due to his initiative that the Bar Council of India Trust took up the work of bringing out text-books on Constitutional law and Income tax law for students. In fact, this text-book on Constitutional law has already been published while the text-book of Income Tax law is under preparation and is expected to be ready within a couple of months. Shri C. L. Agarwal also took active interest in the field of Legal Education and was for several years a member of the Faculty of law of Rajasthan, Udaipur and Jodhpur Universities. He also acted as member of the Law Commission of India headed by Late Shri M. C. Setalvad. It is not possible within the short time at my disposal to enumerate the various activities of Shri C. L. Agarwal. Suffice it to say that these activities were many and varied and they included a wide range of social and public activities. Not only the Rajasthan Bar but the entire Bar of India lost one of its leading lights when Shri C. L. Agarwal passed away in 1978. Though his mortal frame is no more with us, his memory will live forever in the minds of men and continue to inspire lawyers and social activists all over the country.

He has also given to the Rajasthan High Court a highly competent judge who has distinguished himself by his sobriety, maturity, sound knowledge of law and above all, a self-effacing temperament. I feel privileged to have been invited to deliver the First Memorial Lecture instituted to honour the memory of Shri C. L Agarwal.

The subject I have chosen for my lecture today is "Public Interest Litigation". Public Interest Litigation is the product of juristic and judicial activism amongst judges of the Supreme Court and the High Courts. Today we find that in India, as also in the third world countries, there are a large number of interest groups which are being subjected to exploitation, injustice and even violence and In this climate of exploitation, conflict and violence, judges have to play a positive role and they cannot content themselves by invoking the doctrine of self-restraint and passive interpretation. The judges in our country have fortunately a most potent judicial power in their hands namely the power of judicial review and a judicious and sustained use of this power to further the cause of social justice is absolutely imperative. The judiciary has to play an important role in preventing and remedying abuse and misuse of power and eliminating exploitation and injustice. It is necessary for this purpose to make procedural innovations in order to meet the challenges posed by this new role which the judiciary has to fulfil. The summit judiciary, keenly alive to its social responsibility and accountability to the people of the country, has liberated itself from the shackles of Western thought-ways and made innovative use of the power of judicial review and forged new tools, devised new methods and fashioned new strategies for the purpose of teaching justice to socially and economically disadvantaged groups. It has, through creative interpretation by activist Judges, brought about democratisation of remedies to an anextent which could not have been imagined ten or fifteen years ago. The strategy of public interest litigation which the Supreme Court has evolved has brought justice within the easy reach of the common man and it has made the judicial process readily accessible to large segments of the population which were so far placed out of the legal system.

The history of public interest litigation is the history of the last four or five years. It represents a sustained effort on the part of the judiciary in India to provide access to justice for the deprived and vulnerable section of Indian humanity. With a legal architecture designed for a colonial situation and a jurisprudence structured around a free market economy, the Indian economy could not accomplish much in fulfilling the constitutional aspiration of the vast masses of poor and under privileged segments of the society during the first three decades of freedom. As one Indian scholar has characterised it, the court appeared to act during this period as the "conscience keeper of the status quo". But during the last four or five years, judicial activism has opened up a new dimension of the justicing process and given new hope to the justice-starved millions of India.

The Supreme Court has evolved the strategy of public interest litigation response to what Cappelletti calls the "massification phenomena". Today in our contemporary society, because of the massification phenomena, human actions and relationships assume a collective rather than a merely individual character; they refer to groups, categories and classes. of people rather than to one or a few individuals alone. Even the basic rights and duties are no longer exclusively the individual rights and duties of the eighteenth or nineteenth century declarations of human rights, but rather meta- individual, collective, social rights and duties of associations, communities and classes. This is not to say that individual rights no longer have a vital place in our society; rather this to suggest that these rights are practically meaningless in today's setting unless accompanied by the social rights necessary to make them effective and really accessible to all. These social rights require active intervention by the State and other public, authorities for their realisation and the paramount among them are freedom from indigency, ignorance and discrimination as well as the right to a healthy environment, to social security and to protection from massive financial, commercial and corporate oppression, exploitation by vested interests and governmental repression and lawlessness. These social rights need protection and enforcement through effective machinery of implementation devised by the legal process.

But, this immediately raises the problem whether the common law which has developed and grown in an essentially individualistic society to deal with situations involving private right- duty pattern can face the challenge thrown up by the emergence of these new social rights. How can an individualistic based law which deals with atomistic justice arising out of specific transactions meet the challenge of the collective

claims or groups especially disadvantaged groups and dispense a well balanced equitable, distributive justice? How can a twentieth century justice be produced out of a nineteenth century mould? This is the problem which lawyers, Judges and social activists have to resolve and in my own humble way, I have been almost totally involved with it in the past few years. We have made interesting and exciting efforts and tried to make innovative use of judicial power for resolving this problem. It would not be presumptuous on my part to say that our response to this problem is almost unique in the history of development of the law and the judicial process and it may well be worth consideration in other jurisdictions.

The trust of public interest litigation is directed against the establishment and the vested Interests. It is a matter of great pride and satisfaction for me to find that the Government of India is whole heartedly supporting the Strategy of public interest litigation and in fact the Committee for Implementing Legal Aid Schemes which is a Committee set up by the Government of India under my Chairmanship for establishing legal aid programme in the country is engaged in promoting this strategy. The Courts in India have been able to considerably dilute bureaucratic opposition to public interest litigation by emphasising that public interest litigation is not in the nature of adversary litigation, but it is a challenge and an opportunity to the Government to make basic human rights meaningful for the disadvantaged sections of the community and to ensure distributive justice to them and that it is a collaborative effort directed towards that end. When the Court makes an order in a public interest litigation, it does so, not in spirit of confrontation or criticism or into view to tilting at executive authority but for the purpose of drawing the attention of executive to its failure or in action in eliminating and eradicating oppression or exploitation of poor and under poverty ensuring to them the rights and benefits conferred by social legislation and other social and economic rescue programmes and requiring the executive to carry out its Constitutional and legal obligation towards the have nots and the handicapped. Largely due to the efforts of the highest court in the land public interest litigation has been effectively conceptualised and it is now on the way to being institutionalised. It has come to be recognised as an effective weapon in the armoury of the law for securing implementation of the constitutional and legal rights of the under privileged segments of society and ensuring social justice to them. Though this strategy evolved by the Supreme Court has come to be known as public interest litigation. Professor Upendra Baxi, an eminent Jurist prefers to call it social action litigation, because the expression public interest litigation has acquired a certain meaning in the United States of America and it is connected with a particular kind of development which is peculiarly American in its nature. The kind of public interest litigation model which we in India have evolved is different from the public interest litigation model in vogue in the United States.

Our model is directed towards finding "turn around" situation. In the political economy for the disadvantaged and other vulnerable soaps. It is also concerned with other more diffuse and less identified groups. Its focus is the immediate as well as long term resolution of the problems of disadvantaged in our quest for distributive justice. Moreover, in our model the disadvantaged are not regarded just as beneficiaries in a 1 to 1 relationship with the designated lawyer. They are very much a part of, again to borrow a phrase from Professor Upendra Baxi, "taking suffering seriously". That is why, agreeing with Professor Upendra Baxi, I would prefer to call this enterprise as social action litigation rather than public interest litigation. The substance of social action litigation is much wider than that of public interest litigation of United States. In essence much of social action litigation focuses on expose of exploitation of the disadvantaged and deprivation of their rights and entitlements by the vested interests and repression by the agencies of the State and other custodial authorities. It also seeks to ensure that the authorities of the State fulfil the obligations of law under which they exist and function.

Now how did this concept of public interest litigation emerge in India? One of the main problems which impeded the development of effective use of the law and the justicing system in aid of the disadvantaged was the problem of accessibility to justice. Article 32 which occurs in Part III of the Constitution dealing with fundamental rights confers the fundamental right to move the Supreme Court by appropriate

proceeding for enforcement of fundamental rights and vests power in the Supreme Court to issue any directions, orders or writs for enforcement of such fundamental rights. Though this Article of the Constitution is couched in the widest terms and under it, any one can approach the Supreme Court for enforcement of fundamental rights, the position which obtained during the first three decades of the existence of Supreme Court was that this provision meant nothing to the large bulk of the population of India who knew only the majesty of the Court without having felt its justice. The court was for a long time used only by those who were wealthy and affluent and who, to borrow Marc Gallanter's phrase were 'repeat players' of the litigation game. The poor were priced out of the judicial system and they had become what I would call 'functional outlaws'. It was impossible for the poor to approach the Court for justice because they lacked awareness, assertivenese and availability of machinery for enforcing their constitutional and legal rights. The Supreme Court found that the main obstacle which deprived the poor and the disadvantaged of effective access to justice was the traditional rule of locus standi which insists that only a person who has suffered a specific legal injury by reason of actual or threatened violation of his legal right or legally protected interest can bring an action for judicial redress. It is only the holder of the right who can sue for actual or threatened violation of such right and no other person can file an action to vindicate such right. This rule of standing was obviously evolved to deal with right duty pattern which is to be found only in private law litigation. But it effectively barred the doors of the Court to large masses of people who on account of poverty and ignorance are unable to avail of the judicial process. It was felt that even if legal aid offices are established for them, it would be impossible for them to take advantage of the legal aid programme because most of them lack awareness of their constitutional and legal rights and even if they were made aware of their rights, many of them would lack the capacity to assert those rights. The Supreme Court therefore took the view that it was necessary to depart from the traditional rule of locus standi and to broaden access to justice by providing that where a legal wrong or a legal injury is caused to a person or to a class of persons by violation of their constitutional or legal rights and such person or class of persons is by reason of poverty or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public or social action group acting bona fide can maintain an application in the High Court or the Supreme Court seeking judicial redress for the legal wrong or injury caused to such person or class of persons. The Supreme Court also felt that when any member of the public or social organisation espouses the cause of the poor and the down-trodden, he should be able to move the Court even by just writing a letter, because it would not be right or fair to expect a person acting probono publico to incur expenses from his own pocket in order to go to a lawyer and prepare a regular writ petition to be filed in Court for enforcement of the fundamental rights of the poor and deprived sections of the community, and in that case, a letter addressed by him to the Court can legitimately be regarded as an 'appropriate proceeding' within the meaning of Art. 32 of the Constitution. The Supreme Court thus evolved what has come to be known as epistolary jurisdiction where the Court can be moved by just addressing a letter on behalf of the disadvantaged class of persons. This was a major break through achieved by the Supreme Court in bringing justice closer to the large masses of the people. The Court had for a long time remained the preserve of the rich and the well-to-do, the landlord and the gentry, the business magnate and the industrial tycoon and had been used only for the purpose of protecting the rights of the privileged classes. It is only the Privileged classes who had been able to approach the court for protecting their vested interests. But, now for the first time, the portals of the court were thrown open to the poor and the down trodden, the ignorant and the illiterate with the result that their cases started coming before the court through social action litigation. The have-nots and the handicapped began to feel for the first time that there was an institution to which they could turn for redress against exploitation and injustice. They could seek protection against governmental lawlessness and administrative deviance. The Supreme Court became a symbol of hope for the deprived and vulnerable sections of Indian humanity. It acquired a new credibility with the people and began dispensing justice to undertrial prisoners, women in distress, juveniles in jails, landless peasants, bonded labourers and many other disadvantaged groups of people in a manner unprecedented in the annals of judicial history. This new strategy evolved by the Supreme Court was unorthodox and unconventional. It shocked the conscience of conservative lawyers and judges clinging to the worn out values of

Anglo-Saxon jurisprudence. They thought that what the Court was doing was heretical. But so far as the large masses of people in the country are concerned, they warmly applauded this new initiative taken by the Court. They began to feel for the first time that the highest court in the country was shedding its character as upholder of the status quo and was assuming a new dynamic role as the protector of the weak through the adoption of a highly goal- oriented and activist approach by some of the Judges.

Now right from the commencement of social action litigation, one difficulty became manifest and it arose on account of the total unsuitability of the adversarial procedure to this new kind of litigation. The adversarial procedure is supposed to be based on the rule of fairness. It has evolved an elaborate code of procedure in order to maintain basic equality between the parties, to ensure that one party does not obtain an unfair advantage over the other. But the adversarial procedure can operate fairly and produce just result only if the two contesting parties are evenly matched in strength and resource which is quite often not the case. Where one of the parties to a litigation, belongs to the poor and deprived section of the community and does not possess adequate social and material resources, he is bound to be at a disadvantage as against a strong and powerful opponent under the adversarial system of justice, not only because of difficulty in getting competent legal representation but, more than anything else, because of inability to produce relevant evidence before the Court. The problem of proof, therefore, presents obvious difficulty in social action litigation brought to vindicate the rights of the poor and the disadvantaged. This problem becomes very acute in many cases because, often enough, the authorities or vested interests which are the respondents, deny on affidavit the allegations of exploitation, repression and denial of rights made against them; sometimes the respondents contest the bonofide or the degree of reliability of the information of the social activists who come to the court; sometimes they attribute wild ulterior motives to such social activists and sometimes they denounce the sources on which the social activists rely, namely media and investigative reports of social scientists and journalists. How then is evidence to be produced before the court on behalf of the poor in support of their case?. It is obvious that the poor and the disadvantaged cannot possibly produce material before the court in support of their case and equally it would be impossible for the public spirited citizen or the social action group which has brought the litigation to gather relevant material and place it before the court. Of course, there may be well organised social action groups which may be able to carry out research before bringing public interest litigation and they may be able, on the strength of their own resources, to establish the case on behalf of the poor and the disadvantaged groups. But such social action groups would be very few and, by and large, it would be difficult for them to collect the necessary material What is the court to do in such cases? Would the court not be failing in discharge of its constitutional duty of enforcing fundamental rights, if it refuses to intervene because the relevant material has not been produced before it by the petitioner? If the court were to adopt a passive approach and decline to intervene in such cases because relevant material has not been produced by party seeking its intervention. the fundamental rights would remain merely an illusion so far as the poor and disadvantaged groups are concerned. The Supreme Court, therefore, started experimenting with different strategies which involved departure from the adversarial procedure without in any way sacrificing the principle of fairplay. It was found that the problems of the poor and the oppressed which bad started coming before the court were qualitatively different from those which bad hitherto occupied the attention of the court and they needed a different kind of lawyering skill and a different kind of approach. It was necessary to abandon the laizzes faire approach in the judicial process and devise new strategies and procedures for articulating, asserting and establishing the claims and demands of the have-nots, The Supreme Court, therefore, initiated the strategy of appointing socio-legal commissions of inquiry. The Supreme Court started appointing social activists, teachers, researchers, journalists, government officers and judicial officers as Court Commissioners to visit particular locations for fact-finding and to submit a quick and detailed report setting out their findings as also their suggestions and recommendations. There have been numerous cases where the Supreme Court has adopted this procedure. I will mention only a few to illustrate the point. I am making.

In one of the early cases in 1981 there was a complaint by a backward community called 'chamars' who had been traditionally carrying on the vocation of flying the skin of carcasses of dead animals in the rural areas, that their fundamental right to carry on their vocation was being unreasonably taken away through the system of auctioning to the highest bidder, the right to flay dead animals and to dispose of the skin, horns and bones. The chamars were, by reasons of their poverty, ignorance and backwardness, unable to produce any material in support of their case. The Supreme Court therefore, appointed a socio-legal commission consisting of a professor of law and a journalist to investigate the complaint of the chamars and to gather date and material bearing on the correctness or otherwise of the complaint. The Commission submitted a detailed report of its socio-legal investigation and put forward an alternative scheme of carcass utilisation after exhaustive discussion with the concerned administrators and developmental scientists which would safeguard the right of the chamars.

In another case concerning the existence of bonded labour in Faridabad stone quarries the Supreme Court appointed Dr. Patwardhan a Professor of Sociology working in the Indian Institute of Technology to carry out socio-legal investigation into the conditions of the stone quarry workers and on the basis of the report made by him, the Supreme Court gave various directions in the well-known case of Bandhua Mukti Morcha v. Union of India & Ors.

Similarly, in the Agra Protective Home case, the Supreme Court appointed the District Judge of Agra as Commissioner to visit the Protective Home and to make a detailed report in regard to the conditions in which the girls were living in the Protective Home and consequent on the report made by him, various directions were given by the Court from time to time which resulted in the improvement of the living conditions in the Protective Home.

The practice of appointing socio-legal commissions of inquiry for the purpose of gathering relevant material bearing on the case put forward on behalf of the disadvantaged sections of the community in social action litigation has now been placed on sound jurisprudential basis as a result of the judgment of the Supreme Court in Bandhua Mukti Morcha case. When the report of the socio-legal investigation is received by the Court, copies of its are supplied to the parties so that either party wanting to dispute the facts or data stated in the report may do so by filing an affidavit and the court, would then consider the report of the commissioner and the affidavit which may be filed and proceed to adjudicate upon the issues arising in the writ petition. This practice marks a radical departure from the adversarial system of justice which we have inherited from the British.

However even after all the innovations made by the Supreme Court, the question was as to what are the reliefs Which the Court can give to the poor and the down trodden whose problems are brought before the court through social action litigation. The court had to evolve new remedies for giving relief. The existing remedies which were intended to deal with private rights situations were simply inadequate. The suffering of the disadvantaged could not be relieved by mere issuance of prerogative writs of certiorari, prohibition or mandamus or making orders granting damages or injunction, where such suffering was the result of continuous repression and denial of rights. The Supreme Court, therefore, tried to explore new remedies which would ensure distributive justice to the deprived sections of the community. These remedies were unorthodox and unconventional and they were intended to initiate affirmative action on the pant of the state and its authorities To give only one example of the utilisation of the new remedies, I would take the case of Bandhua Mukti Morcha. In that case, the Supreme Court made an order giving various directions for identifying, releasing and rehabilitating bonded labourers, ensuring payment of minimum wages, observance of labour laws, providing wholesome drinking water and setting up dust sucking machines in the stone quarries. The Supreme Court also set up a monitoring agency which would continuously monitor implementation of those direction. In Bihar pre-trial detention cases, the Supreme Court directed that the State Government should prepare annual census of the under trial prisoners as on 31st October of

each year and submit it to the High Court and the High Court should give directions for early disposal of cases where the undertrial prisoner were under detention for unreasonably long periods. The Supreme Court directed in Bihar Blinding cases that the undertrilas who had been blinded should be given vocational training in an Institute for the blind and compensation should be paid to them for setting them up in life. Likewise, in ASIAD Workers Case, the Supreme Court set up monitoring agency of social activists. In another case brought by a journalist called Sheela Barse, the Supreme Court directed that there should be a separate lock up for women in charge of women police constables and in addition, a notice should be put up in each police lookups. The Supreme Court also directed in another case that rehabilitation assistance should be provided in consultation with and in the presence of a specified social action group. There are numerous cases where remedy by way of affirmative action has been directed by the Supreme Court. But it is not possible to refer to all these cases or even to a majority of them in a single lecture.

The question then arises as to how the orders made by the Court in social action litigation can be enforced. The orders made by the Court are obviously not self-executing. They have to be enforced through State agencies and if the State agencies are not enthusiastic in enforcing the Court orders, and do not actively co-operate in that task, the object and purpose of the social action litigation would remain unfulfilled. The consequence of the failure of the state machinery to secure enforcement of the Court orders in social action litigation would not only be to deny effective justice to the disadvantaged groups on whose behalf the particular social action litigation is brought, but it would also have a demoralising effect and people will lose faith in the capacity of the Court through social action litigation to deliver justice. The success or failure of this new strategy of social action litigation would necessarily depend on the extent to which it is able to provide actual relief to the vulnerable sections of the community and if the Court orders passed in social action litigations are to remain merely paper documents, this strategy evolved by the Supreme Court would be robbed of all its meaning and purpose. It is, therefore, absolutely essential to the success of the strategy of social action litigation that a methodology should be found for securing enforcement of court orders in such litigation. There are two different methods which could be adopted for ensuring that the orders made by the Court in social action litigation are carried out.

1. The public spirited individual or social action group which has initiated the social action litigation and secured the order of the court providing wide ranging remedies to the disadvantaged groups of people, should not remain content with merely obtaining the court order but should take the necessary follow-up action and maintain constant pressure on the State authorities or agencies to carry out the court order and if it is found that the court order is not being implemented effectively, it must immediately bring this fact to the notice of the court so that the court can call upon the State authorities or agencies to render an explanation as to why the Court order has not being carried out and if there is wilful or contumacious disregard of the Court order, the Court can commit the concerned officers of the State for contempt. The Supreme Court has not so far used the contempt jurisdiction in social action litigation, but if any particular order made in social action litigation is not carried out and the obligation of drawing the attention of the Court to such failure of implementation should be on the individual or social action group bringing the social action litigation. The Supreme Court may have to use this jurisdiction in appropriate cases and the Supreme Court would not hesitate to do so. These observation also apply to the High Court.

2. The Supreme Court has also started appointing monitoring agencies, for the purpose of ensuring implementation of the orders made by it in social action litigation. This is again an innovative use of judicial power. The Supreme Court in Sheela Barse case gave various directions in regard to the police lock ups for women and directed that a lady judicial officer should visit the police locks ups periodically and report to the High Court as to whether the directions of the Supreme Court were being carried out or not. So also in the case of Bandhua Mukti Morca which related to the Faridabad stone quarry workers, the Supreme Court gave 21 directions. Some of which I have already referred to a little earlier and with a

view to ensuring implemention of these directions, the Supreme Court appointed Shri Laxmi Dhar Misra, Joint Secretary, in the Ministry of Labour, to visit the Faridabad stone querries after about two or three months and ascertain whether the directions given by the Court have been Implemented not and to make a report to the Supreme Court in regard to the implementation of those directions. Shri Laxmi Dhar Misra carried out this assignment entrusted to him as monitoring agency and submitted a report which is now pending consideration before the Supreme Court. The Supreme Court also in Neerja Choudhury's case and another case ming from the state of Madhya Pradesh, directed that representatives of social action groups operating within the area should be taken up as members of the Vigilance Committees Constituted under the Bonded Labour System (Abolition) Act, 1976 and that whenever any case of bonded labour is brought to the notice of the District Administration by a representative of a social action group, the District Administration must proceed to inquire into it in the presence of the representative of the social action group who is the member of the Vigilance Committee and rehabilitation should be provided to the released bonded labourers in consultation with and in the presence of such representative of the concerned social action group. The same strategy was followed in the Asiad Construction Workers case also, where the Supreme Court, after clearly laying down the law on the subject, appointed three social activities as ombudsmen for the purpose of ensuring that Labour laws are being observed by the State Administration. This new strategy is still in course of evolution but it holds out great promise for the future because by adopting this strategy the court tries to secure that the orders made by it are obeyed.

These are some of the methodology which have been evolved for the purpose of securing implementation of the directions given by the Court in social action litigation. But I may point out that the judicary in India is still experimenting with new techniques and in the next few years to come I have no doubt that it will creatively develop new methods and strategies for perfecting this powerful tool of social action litigation. But it must he conceded that there is some opposition from interested quarters to this new strategy of social action litigation and it is natural that they should criticise it because of effective use of it is bound to hurt them.

Judicial Independence - A Review

(Delivered on 28-09-1991)

Justice A. M. Ahmadi Judge, Supreme Court of India

Introductory

The concept of judicial independence varies from country to country. India is an ancient civilisation. In the hoary past its judicial system was governed by (i) the Dharma Shastra (ii) the Smrities and (iii) the Arthashastra. During the Muslim rule, the laws were replaced and codified but considerable emphasis was laid on the purity of the administration of justice. Then came the British who introduced their own set of laws and the entire common law system. Therefore, a true picture of the concept of judicial independence as understood in India cannot emerge unless we take note of all those values having a bearing thereon. Every concept has a cultural and historical setting and is best understood in the backdrop of that setting. The concept of judicial independence as understood in this country has its origin in the development of this doctrine in England. It is, therefore, essential to bear in mind the struggle which the British people had to go through for securing judicial independence so vital for any justice delivery system.

II

British Experience

In England for centuries the Monarch was the repository of all powers and the courts set up by him were accountable to none except to him, he being an integral part of the legal administration. Judges were, therefore, expected to work in cooperation with the other administrative instrumentalities of the legal system and were not free to rule against the crown. Their tenure in office was entirely dependent on the crown's pleasure and could be terminated at any time on royal whim. However, during the 17 century there was a clash between the Monarch and the Parliament, each vying with the other to control the judiciary. The judiciary sensed, the opportunity that had come by to assert itself since both the 'Monarch and the Parliament looked for its support as it alone could interpret the scope and the ambit of their privileges. The English Parliament, the countervailing force over the Crown's efforts to retain absolute control on the Judiciary, was, however, not prepared to let go its grip over the judiciary and when strong-willed Judges tried to assert themselves, the Parliament threatened them with impeachment. Notwithstanding such threats Judges like Sir Edward Coke, Chief Justice of Common Pleas, stood their ground and asserted the supremacy of law and the independence.

I feel greatly honoured to be invited to deliver the 'Key Lecture' under the Chiranji Lal Agarwal Memorial Lecture Series, 1990. I have no doubt someone more suitable and closely associated with the deceased could have been requested to deliver this lecture. Yet, in all humility, I take this as a great privilege to be invited to speak to this august gathering of legal luminaries, his friends, relatives and admirers who have gathered here to commemorate the memory of that great doyen of the Rajasthan Bar. He served as a member of the legal profession for almost five decades and made glowing contributions as a member of the Bar Council and the Law Commission headed by that great legal luminary Shri M.C. Setalvad. He did not restrict his activity to the legal field but extended the same to the field of education also and took keen interest in encouraging and promoting educational activity amongst the girls, which was none too easy a task in a tradition bound orthodox society where the drop-out ratio of girls from schools was fairly high. Service to society was his motto, and he spread that message as a member of the legal profession, an educationist, a Philanthropist and a Rotarian. His life is a message to all of us who belong to the legal

profession and if every member of the profession is able to contribute even a fraction of what he did, it will go a long way in enhancing the image of the profession in society which has unfortunately fallen in recent times for a variety of reasons, one of them being on account of our failure to dedicate a few of our working hours to the service of society. Anyone called upon to speak at a lecture series organised in memory of such a personality must rise with a sense of diffidence, nay trepidation, if he has not qualified himself by contributing some of his leisure hours to the service of the society. I stand before you with that feeling and it is for that reason that I am beholden to you for inviting me and for having shown the generosity of sparing your time to listen to me. Keeping the back ground of the deceased in mind and his contributions to the cause of administration of justice, I have chosen the subject of today's talk-Judicial Independence-a subject which though not new admits of a review in the backdrop of new challenges and threats that have surfaced in the post-constitutional era.

Of the judiciary over both the Crown and the Parliament in a series of decisions rendered during the reign of James I. It was entirely on account of the courage and conviction of those judges, that the judiciary could ultimately secure its independence.

Chief Justice Coke's effort to contain the power of both the Crown and the Parliament naturally annoyed both. James II made every effort to dominate the Court and Parliament tried to counter him by legislation. This confrontation between the Crown and the Parliament ended in the former's favour when Chief Justice Herbert in Godden vs. Hales (89 E.R. 1050-K.B. 1686) by majority ruled that the King's power as absolute sovereign could not be stripped by Parliament. This decision was a death knell to the dictum of supremacy of law established by Judge Coke. Emboldened by this acquiescence, James II asserted his super- legal power by a general Declaration of Indulgence (1687) which perhaps proved to be the last straw on the camel's back. Following an uprising, James II was dethroned and Parliament replaced him by William & Mary and thus ensured its supremacy.

It was realised that one of the reasons for the Judges' unwillingness to countermand the Crown was the pleasure doctrine which rendered their tenure in office solely dependent on the royal whim. Parliament, therefore, enacted the Settlement Act of 1700 whereby the duration of tenure was made subject to good behaviour and removal could be upon address of both Houses of Parliament. In addition, the Act provided for the Judges' salaries to be ascertained and established. This was the first legislative step by which the Crown's dominance over the judiciary was sought to be contained. But Parliament's dominance continued since English Courts were debarred from striking down any law enacted by Parliament; even if unreasonable.

III

American Reaction

The concept of supremacy of Parliament though acceptable to the British who were represented, left the unrepresented American colonists sceptic of British intentions as they sensed the possibility of being left without a remedy even if their rights were curtailed by an unreasonable or discriminatory law. It is, therefore, not surprising that they were in favour of court's power to review the reasonableness of legislation.

Even though the English judiciary secured independence, neither the King nor the Parliament was prepared to concede it to the American colonists. On the contrary the insistence was to apply the English laws superseding local laws not consistent therewith the tenure and salaries of the colonial judges were not protected to retain control over them. When in 1759 the Pennsylvania Assembly tried to challenge the

royal control for removal of a judge, the Privy Council disapproved the measure as an attempt to make the judiciary dependent on Colonial Assemblies. This naturally angered the American colonists but their protests merely served to strengthen the Crown's resolve to control the colonial judiciary. This was set up as one of the reasons for the revolution as is evident from the Declaration of Independence which complained that for tenure and salaries the King 'had made judges dependent on his will alone'.

The American concept of judicial independence was, therefore, quite different. They favoured total separation of all the three branches of Government, the executive, the legislature and the Judiciary, so that each would operate as a check on the exercise of power by the other. To ensure judicial independence the founding fathers of the American Constitution provided in Article III: "the judges, of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation which shall not be diminished during their continuance in office". Thus American Judges enjoy powers wider than their English counterparts, in that, they can declare any law enacted by the legislature ultra vires the Constitution. This power of judicial review was and is not available to British Judges.

IV

Indian Judiciary under British Rule

After the advent of the British, the judicial system in India, broadly speaking, passed through three phases. During the days of the East India Company, permission was granted to the Crown, to judge all those working and living under the company in all causes according to the laws of England. This was an exclusively executive arrangement. Thereafter a new judicial system comprising three types of courts was introduced in the three Presidency towns of Bombay, Calcutta and Madras. Although the judicial system thus introduced could be described as elementary, the speech of Governor Aungier at the inauguration of the Bombay Courts can be said to be remarkable, in that, he exhorted the judges who were to function under him to mete out even handed justice to all, particularly the poor, the orphan, the widow, etc., not only against each other, 'but even against myself and those who are in office under me, nay against the Company themselves'. These words coming from the executive chief reveal the Englishman' s love for an independent judiciary. The courts so constituted were replaced by the establishment of Supreme Courts in the aforesaid three Presidency towns which were intended to be Courts of Record and were to enjoy the jurisdiction and authority as the courts of Kings Bench in England. The Chief Justice and other Justices of these of three courts were to hold office during the Crown's pleasure although their salaries were ascertained. In 1862 these courts were replaced by High Courts established under the High Courts Act, 1861. This brought about a fusion in the existing judicial system between the courts in the Presidency towns and those in the Mofussils. Both under the Government of India Act, 1919 and 1935. the power of appointment was exclusively with the Crown but under the latter Act the pleasure doctrine was replaced by providing the age of superannuation of Judges of the High Courts to be 60 years. Thus in the early days after the Company established its foothold in India, the legislative, the executive and the judicial functions were combined in the Governor in Council, after the Crown Courts were established, the Judges became somewhat independent as their appointments were made by the Crown albeit during Crown's pleasure; on the establishment of the Supreme Courts in the three Presidency towns, the Judges were initially independent of the Governor-in-council but later when the appointment power was conferred on the Alderman, their independence was impaired although some strong-willed Judges maintained judicial aloofness and frustrated efforts to pressurise them. After the establishment of the High Courts, since the Judges were appointed by the Crown, they enjoyed independence from the executive although their tenure

was dependent on the pleasure doctrine till the prescription of the age of superannuation under the Government of India Act.

It is by judicial creativity the court itself has added a new dimension to this wide jurisdiction by conferring upon itself epistolary jurisdiction to entertain public interest litigation. The Constitution thus expects the Supreme Court to safeguard the fundamental rights of the people and exercise the power of judicial review if any law or action is found to be ultra-vires the Constitution. Under the Constitution the High Courts have also been conferred extraordinary jurisdiction to issue to any person or authority including the Government similar writs and orders for the enforcement of fundamental rights and for the redress of any injury caused by reason of violation of any Constitutional or statutory provision or any illegality of proceedings (Article 226). The High Court too is competent to exercise the power of judicial review if the legislation is found to be ultra vires the Constitution. The High Courts have also been conferred power of superintendence over all courts subject to its Appellate jurisdiction (Article 227). Provision is also made for the appointment of Judges to man the subordinate judiciary and to ensure its independence it is placed under the control of the High Court and not under the executive (Article 235). It will thus be seen that the jurisdiction of the High Courts stood considerably enlarged after the Constitution. It need hardly be emphasised that the confidence reposed in the higher judiciary would be meaningless unless the judiciary is wholly independent of the executive and the legislature. To place the matter beyond doubt the Constitution obligates the State 'to take steps to separate the judiciary from the executive in the public services of the State' (Article 50).

The Constitution provides that every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts as the President deems necessary and in the case of a Judge after consultation with the Chief Justice of India. In the case of the appointment of a High Court Judge, consultation with the Chief Justice of the State, the Governor and the Chief Justice of India is necessary. Of course the President or the Governor has to act on the advice of his Council of Ministers. Once the appointment is made, the constitution provides that neither the privileges nor the allowances of a judge including his rights in respect of leave of absence or pension shall be varied to his disadvantage (Articles 125 & 221). The tenure in office of a Supreme Court and a High Court Judge is protected by fixing the age for retirement and providing for removal for misbehaviour or incapacity by the President after an address by each House of Parliament supported by a majority of total membership of that House and by a majority of two-thirds of the members present and voting (Article 124(40)). The President is empowered to transfer a Judge of the High Court from one High Court to any other after consultation with the Chief Justice of India (Article 222). The exercise of this power by the executive has been the subject matter of severe criticism from a section of the Bar in the past as an unwarranted interference with judicial independence but of late demands for transfer of certain erring Judges have been voiced. More to it later.

The Constitution makers, who were quite alive to the struggle which the people of England had to go through to secure an independent judiciary and were aware of the reasons which prompted the Americans to introduce Article III in their Constitution, took special care to insulate the judiciary of the country from executive and legislative pressures. With that in mind the tenure, salaries and the procedure for removal of a Judge from office came to be stated in the Constitution itself. The Constitution further places the staff of the Supreme Court and the High Courts under the administrative control of the Chief Justice of the concerned Court. The administrative expenses of the Supreme Court and the High Courts, including the salaries, allowances and pension payable to or in respect of the officers end servants of the court, are

chargeable upon the Consolidated Fund of India to ensure courts and courts subordinate thereto including the posting and promotions of, and the grant of leave to, persons belonging to the Judicial Services of the State is vested in the High Court to insulate the subordinate judiciary. it is now well settled that after a person is selected and appointed to the State Judicial Service, he must look to the High Court and the High Court alone for his career advancement, etc. These are some of the constitutional provisions which have a bearing on the question of Judicial independence.

VI

The Concept of Judicial Independence

Members of every civilised society consider it more appropriate to resolve their disputes and differences through an independent and impartial agency, such as the judiciary. Acceptance of an agency like an independent and impartial judiciary for the resolution of disputes affirms the faith of the society in the system and the rule of law. Inherent in the concept of justice is an implied promise of impartiality and want of bias. Impartiality, therefore, demands that the Judge should be free to decide the dispute brought before him according to his own conscience without any internal or external pressures. It is this freedom to decide the disputes without fear or favour, affection or illwill and solely according to the dictates of one's conscience and the laws that constitutes the essence of justice. But, as the dictum goes, justice ought not only be done but must also appear to have been done, if the society's confidence is to be secured and sustained in the system. It is, therefore, not sufficient that justice is done honestly and impartially but it is even more essential that it must appear to the concerned parties, nay the society as a whole that it has been so done. If the society entertains even a lurking doubt in that behalf. the very foundation on which the edifice of justice rests shall be shaken. In the modern day world the State is one of the biggest litigants, more so in a developing country like India. Therefore, if the society's confidence is to be retained in the justice delivery system, it must be shown beyond any manner of doubt that the system is wholly independent, independent not only of the State but also of all other agencies, external as well as internal, which interact in the adjudicatory process. In other words the system must be independent of not only the executive and the legislature but also of all other interacting agencies and instrumentalities. That was the assurance given when India's first Prime Minister Pandit Nehru said in the Constituent Assembly "It is important that these Judges should be not only first rate, but should be acknowledged to be first rate in the country and of the highest integrity, if necessary, people who can stand up against the Executive Government and whoever may come in their way". Said Dr. Ambedkar "there can be no difference of opinion... that our judiciary must ... be independent of the Executive...". The Constitution of India has translated that assurance into a reality by insulating the judiciary from outside pressures. The various provisions in the Constitution referred to earlier clearly show that once an individual is inducted in the judiciary, no matter at what level, he is, by and large, free to discharge his duties according to the law of the land without interference from internal or external instrumentalities. The intention of the founding fathers is, therefore, clear and unambiguous and it remains to be seen if events that have overtaken us over the last four decades have shown strict adherence to this Constitutional promise.

We have noticed earlier that both under the Government of India Act 1919 and 1935 the power to appoint High Court Judges rested exclusively in the executive without the need to consult anyone from the judiciary. The proposal that appointments to the High Court Bench should be with the 'concurrence' of the Chief Justice of India was not approved by the Constituent Assembly although there was a concensus that the judiciary should be independent of the executive. In keeping with the status of the two constitutional' functionaries involved in the appoint of Judges of the superior judiciary, namely, the President of India and the Chief Justice of India, it was generally felt that 'consultation' with the latter should suffice. Since

consultation is not the same as concurrence, a question arose in the leading case of Samsher Singh (1974-2 SCC 831), what is the content of the expression 'consulation'? The Supreme Court observed 'Consultation with the highest dignitary of Indian justice should be accepted by the Government of India' and proceeded to add that 'the last word in such sensitive subject must belong to the Chief Justice of India'. In the subsequent two judges 'Transfer cases', Sankalchand Sheth's case (AIR 1977 SC 2328) and S. P. Gupta's case (AIR 1982 SC 149) the doctrine of 'effective consultation' was evolved. It was emphasised that consultation in order to be effective must be preceded by a full and complete disclosure of all material facts indentical to that disclosed to the President. In S.P. Gupta's case the majority refused to concede primacy to the opinion of the Chief Justice of India in the matter of appointment of a High Court Judge. Since S.P. Gupta's case is under review by the Supreme Court, Judicial propriety demands that I refrain from commenting on the correctness or otherwise of the ratio laid down in that case. It was at the same time observed that if the Chief Justice of India concurred with the opinion of the Chief Justice of the concerned High Court, their view should ordinarily be accepted as such a view expressed by the head of the State and Union judiciary was entitled to great weight. But the fact remains that primacy rests with the executive after the drill of effective consultation is completed. It must be realised that the entry stages, namely, the stage at which selection of persons for induction in judiciary is made, is of vital importance for the reason that if persons of the right stamp are not chosen, they will not command the respect they ought to command not only from the members of the profession but also the community and consequently the judicial fabric will be weakened which will have an adverse impact on the independence of the Judiciary because such weak Judges will not be able to protect it.

Judicial independence is not a mere doctrine, it is the very essence of the system if Judges are expected to discharge their duties without fear or favour, affection or illwill, as the Constitutional oath ordains. It is a dynamic concept which ensures purity of the justice delivery system and sustains public faith in the mechanism for dispensation of justice. The maintenance of judicial independence is necessary to enable courts to discharge their 'judicial functions without any interference, external or internal, so that society can be regulated by the rule of law and on constitutional principles which we regard as fundamental to the enjoyment of our liberty. In that sense judiciary must act as the custodian of all laws, constitutional as well as statutory, so that it can uphold the values by which the society has chosen to be regulated. Any impairment of public confidence in the independence of the judiciary would be a severe blow to the governance of the country under the rule of law. It, therefore, follows that an onerous duty is cast upon judicial officers to so conduct themselves that not the slightest doubt arises in the minds of the members of the community regarding their honesty, integrity and independence. The need of or its protection from interference by outside agencies is all the more pressing when judges are called upon to grant discretionary reliefs or are required to decide cases during times of crisis, e.g. during the period of internal emergency, because those are the times when they are likely to be misunderstood on the slightest indiscretion. The role of the judiciary is, therefore, a difficult and delicate one, namely not only to protect its independence but also to ensure that the public perceives it to be SO.

VII

Constitutional Demands on Judiciary

In a free society governed by the rule of law existence of an independent judiciary is of vital importance, more so' in a developing country like India, with a welfare State and an egalitarian society as its ultimate objectives. Introduction of wide ranging reformative legislation and administrative rules and regulations was a felt necessity to transform the existing socio-economic infrastructure of the country to realise these constitutional objectives. To meet the demands of such a fast-changing society, the judiciary too had to

play an ever increasing and challenging role to grapple with litigation explosion and to resolve the complexities arising from the rights and obligations conferred and cast by the constitutional provisions. The sudden spurt in industrialisation and the increased role of the state in commercial fields led to an increase in the volume of litigation against the government. The Indian judiciary was under tremendous pressure since the nation had charged it with the duty not only to decide the 'lis' between individual and individual but also between individual and State. It was, therefore, all the more necessary to insulate the judiciary from possible external pressure and to instil a sense of confidence in the people that the judiciary was there to look after and protect the individual's rights against the government. The society was undergoing a socio-economic transformation where the rights of the individual citizen were likely to increasingly conflict with that of the State and, therefore, it was all the more essential that public confidence in the judiciary's capacity to dispense even- handed justice between the individual Citizen and the State was not in any manner shaken. Of late, the burden of resolving socio- political issues is increasingly falling on the Courts, particularly the apex court, on account of the executive and the politician failing to resolve the same in time or finding it inexpedient to do so for diverse reasons. The courts are, therefore, confronted with new challenges not hitherto faced and that has increased the social Interest in ensuring the independence of the judiciary.

VIII

The Essential Elements

Notwithstanding the fact that the concept of judicial independence is well recognised, the vigil for its protection must not slacken because the challenge to judicial independence is a continuing phenomenon and assumes different hues and shades, it is at times direct and overt but often indirect and covert. The historical developments traced earlier teaches this lesson. The modern concept of judicial independence has two broad elements, namely, independence from external forces and Independence from internal forces as well. Judicial independence is generally understood to mean Independence of the individual judge in decision making but in addition to this aspect, which undoubtedly is of vital importance, it is necessary to realise that the collective independence of the whole body of judges is equally important. Thus, the essential aspects of judicial independence include personal independence, collective independence, independence from external forces e.g. the press, the members of the profession, social groups etc., besides the executive and the legislature, independence from internal forces etc. IX

IX

Personal Independence

The extent of judicial independence enjoyed by an individual judge depends on several factors, the main being the extent of protection offered in the matter of (i) tenure of appointment (ii) salaries, allowances, pension, etc. (iii) transferability (iv) procedure for disciplinary action and termination of employment, etc. These have been referred to earlier. It has been shown that age of superannuation has been fixed under rules for members belonging to subordinate services and under the constitution for the Judges of the High Courts and the Supreme Court. Similarly rules have been made fixing the salaries, allowances and pension for members belonging to the subordinate judiciary whereas, the salaries of High Court and Supreme Court Judges have been fixed by the Constitution which cannot be varied to the detriment of the concerned Judge after his appointment. The privileges, allowances, pension, leave of absence etc., are

determined by a law enacted by Parliament. The members belonging to the subordinate Judiciary are transferable by the concerned High Court while Judges of the High Court can be transferred from one High Court to another by the President after consultation with the Chief Justice of India. The terms and conditions of service of the members of the subordinate judiciary are determined by the executive while in the case of the High Court and Supreme Court Judges Parliament would have to amend Part D of the Second Schedule in the Constitution for raising the salaries and the relevant statute for revising the privileges, allowances, pension, etc. The executive is not known to act with despatch when it comes to revision of salaries other perquisites of the judiciary and since in the case of the superior judiciary it involves amendment of the Constitution and the relevant statutes, the entire process becomes a time-consuming one causing considerable discomfiture to the judiciary. This brings into sharp focus two other aspects not dealt with earlier concerning the judiciary a dependence on the executive in respect of finances and the Impact of the transfer policy.

X

Financial Dependence

At first blush many may not regard the retention of control over the judicial purse as providing a threat to judicial independence. But on closer scrutiny it seems apparent that financial control by the executive impedes judicial functioning in diverse ways. The refusal to provide budgetary support for filling up existing posts or creating new posts affects a litigant's right to Speedy justice and truncates the working of the justice delivery system. Another method of controlling the judiciary is to refuse to revise the salaries of judicial officers on one pretext or the other, it is a matter of common knowledge that the salaries of High Court and Supreme Court Judges were not revised till 1986-87 even though in the mean-time the salaries of other Officials had undergone an upward revision. Even adjustment on account of price rise was not made till July 1980 while others were allowed dearness allowance on their basic salaries thereby raising their total emoluments above what the judges of the High Courts and Supreme Court then received. This was not only humiliating to the judges but it also affected their status in society. It is true that the integrity of the system does not depend on the salary drawn by an individual Judge but in the modern world it is one of the factors which determines his status and position among the salaried classes. Even in Britain which endears judicial independence, an attempt was made in 1931 to cut down the salaries of judges by 20% by equating them with ordinary civil servants but the move had to be dropped on account of strong public opinion to the contrary. Similarly, in 1980 U.S. Judges successfully frustrated a congressional legislation to freeze judicial salary increase. It is, therefore, evident that financial interference can be direct or indirect, it can be achieved by refusing to adjust judicial salaries to price increases or by freezing judicial salaries or by imposing additional tax burdens. The independence of the judicial system suffers for want of timely release of funds for increasing the number of judges and courts and to meet the additional financial burden that may have to be borne on upward revision of salaries and allowances of judicial officers. Inherent in the existing system of the executive allocating finances to the judiciary is the risk of executive interference in the administration of justice. American courts tried to overcome their financial dependence on the executive by extending the Court's inherent jurisdiction on the principle:

"It is axiomatic that, as an independent department of government, the judiciary, must have adequate and sufficient resources to ensure the proper operation of the courts. It would be illogical to interpret the Constitution as creating a judicial department with awesome powers over the life, liberty 'and' property of every citizen while, at the same time, denying to the judges authority to determine the basic needs of their courts as to equipments, facilities and, supporting personnel. Such authority must be vested in the

judiciary if the courts are to provide justice and the people are to be secured in their rights under the Constitution."

The force of this principle must be appreciated in the backdrop of the fact that in India no systematic and scientific study on judicial man-power planning has ever been undertaken and no serious effort has been made by the Government of India as well as the State Governments to fix norms for the increase in judicial man-power required to deal with the increase in the court dockets. This may be on account of financial constraints or total indifference; whatever be the reason, the fact remains that it deprives the consumers of justice of early disposal of their cases. When the power of the purse is retained by a body which is perhaps the largest litigant in courts, a doubt arises in the minds of the litigants regarding its bonafides and sincerity in the independence of the Judiciary. It is, therefore, high time that an independent judicial body headed by the Chief Justice of India should be constituted to determine the budget requirements of the judiciary of the country right from the lowest to the highest level and funds should be allocated in accordance with the recommendations of that committee. It is unnecessary to go into the question regarding the composition of the commmittee as that is a matter of detail.

XI

Transfer of Judges

In India judges are not elected to office but they are selected for appointment at all levels. While judges of the subordinate courts are liable to periodical transfers within the State, there is virtual irremovability so far as High Court judges are concerned, the only available mode being the time consuming process of Article 124(4) except Article 222 of the Constitution which permits transfer of a Judge from the High Court of one State to that of another State. Under that Article the President is empowered to effect such transfer after consultation with the Chief Justice of India. During the emergency in 1976, sixteen Judges including some Chief Justices of different High Courts were transferred out of their High Courts. The transfers were described as motivated on the ground that those judges had rendered judgments inconvenient to those in Power. One such judge from Gujarat Mr. Justice Sankalchand Sheth who was transferred to Andhra Pradesh filed a writ petition in the Gujarat High Court challenging his transfer as mala fide. The High Court held that 'consultation' contemplated by Article 222 meant 'effective consultation' and since no such consultation had taken place before the transfer, the Presidential order was bad. Against this decision, the Government of India carried the matter in appeal but with the change in the party in power at the centre, the transfer was annulled and the concerned judge was retransferred to his parent High Court. This retransfer was under the very provision under which he was initially transferred. The Constitution framers had seen the need to provide for transfer, for otherwise Article 222 would not have found a place on the pages of the Constitution. However, in order to ensure that judicial independence was not diluted in any manner, the Constitution makers-were aware of the fact that the President would be required to act on the advice of the Council of Ministers introduced the sine qua non of consultation with the Chief Justice of India. This consultation could not be reduced to a formality, it was intended by the Constitution framers to be an effective check on the possible arbitrary exercise of power by the executive. Being the only guarantee for preserving the creed of judicial independence there can be no doubt that a very onerous duty was intended to be cast both on the President as, well as the Chief Justice of India before resort was had to this provision. As has been pointed out earlier even in the case of the subordinate judiciary the Constitution has taken care to ensure that after the protective umbrella of the High Court so far as his posting, transfer, promotion, etc., are concerned. Similarly in the

case of High Court Judges protection was sought to be provided by making Consultation with the head of the Indian Judiciary a condition precedent for the exercise of power. A forteriori, the consultative process must be a meaningful one, it cannot be an idle formality, for if it is so it will not stand judicial scrutiny. In order that the consultation is meaningful, if the proposal for transfer is not initiated by the Chief Justice of India, the entire data-base which persuaded the executive to advise the President to invoke the provision of transfer must be placed before the Chief Justice of India, who must, before expressing himself, carefully verify the same from such other sources as he deems appropriate, e.g. the Chief Justice of the concerned High Court, his colleagues, etc., and also try to ascertain the views of the concerned judge with a view to ascertaining his convenience, etc. The power to transfer exists, it is altogether a different matter when and under what conditions the President should exercise the power. Even those who disapprove of the exercise of power to transfer do not dispute the fact that conditions may arise which may necessitate a transfer. The Government of India later took a policy decision to have a Chief Justice from outside the State and transfer one-third of the judges to other High Courts and vice versa. Such a policy it was said would bring about national integration end improve the health of the judiciary. Besides grievances were also made by the members of the Bar against local Chief Justices. On that account the policy of having an 'outsider' as Chief Justice came to be implemented but, except for certain exceptions, the policy of transfer of the puisne judges has not been implemented. At the initial stage a section of the Bar protested against the introduction of the transfer policy but of late demands for transfer of 'certain Judges' have been voiced e.g. the demand made by the Bombay Bar in respect of four of the judges of the Bombay High Court.

The question then is has the policy of having the Chief Justice of the High Court from outside the State achieved the objective of improving the health of the institution? It is not possible to answer the question in the affirmative or in the negative because the reaction is a mixed one. Much depends on the approach of the individual and his capacity to assess the situation and his colleagues. But a Chief Justice from outside the State is not likely to be fairly well acquaint with the problems facing the judiciary in the State. If his tenure as a Chief Justice is not sufficiently long he may not evince sufficient interest in coming to grips with the problems and may allow them to drift or leave it to the registry to grapple with them. If the problem entails as brush with other instrumentalities, including the Bar, he may tend to shelve it to avoid being unpopular. The popularity concept has caused considerable harm to the judiciary. He would be equally unfamiliar with the calibre of the members of the subordinate judiciary and would therefore depend largely on the advice of his colleagues for their postings and promotions, atleast in the first few months in office till he acquires sufficient knowledge in that behalf. This process is bound to be slow because normally a Chief Justice does constitutional work and has little chance of scrutinizing the judgments of the subordinate judges. A practice which the High Court of Gujarat followed before the transfer policy was implemented needs to be emulated. The Chief Justice constituted a Division Bench with the concerned administrative judge and took up certain civil and criminal appeals for admission every week which gave him an opportunity to evaluate the judicial work of the District Judges. Unless the Chief Justice makes it a point to hear civil and criminal appeals and revision applications arising from orders passed by subordinate judges, He will have little opportunity to evaluate the performance of even senior Judges in the subordinate judiciary. If and when he is required to recommend members of the Bar as well as those in service for elevation to the High Court, he has invariably to depend on the advice of his colleagues. Very often the convention of consulting the senior most Judges is not adhered to but instead a relatively junior judge close to him is consulted for obvious reasons. All this affects the selection process, in that persons of the right stamp are left out and instead those selected on considerations other than merit get recommended. To avoid such situations, a convention of not only consulting the fist two senior most Judges but the including their written opinions in regard to each and every candidate should accompany the recommendation. If this procedure is followed the allegations of favouritism and nepotims will be considerably eliminated. Similar practice should be followed for elevation to the Supreme Court.

XII

Internal Judicial Independence

Having discussed some aspects of violations of judicial independence by external forces, the time is ripe to focus attention on the question of internal independence meaning thereby independence from colleagues and superiors. In order that a judge may decide a dispute brought before him according to the commands of his conscience and the law applicable thereto, it is equally essential that his decision must not be the outcome of pressure from within. It cannot be gain said that internal judicial independence demands that the judge must not be subjected to any directive or pressure from his superior or colleague which would influence his decision. It is common knowledge that before a cause is finally decided by the judge before whom it is brought for adjudication, it passes through two stages which may be described as administrative and substantive (which would include procedural functions as well). If a court is manned by a single Judge, he alone would perform both these functions and therefore the threat to his independence recedes in the background. But the situation is different in a large court where the administrative functions are centralized while the substantive functions are performed by the Judge or Judges to whom the cause is assigned. The colleague who as the institutional head allocates business to other colleagues retains the privilege regarding the choice of business to be allocated. Unrestricted administrative authority nay control, flat only in regard to allocation of judicial business but also pertaining to other matters, such as allotment of chambers, court rooms, residential accommodation, transport, etc., may tend to undermine the independence of a judge if exercised in an arbitrary manner or with bias. It must be realised by one who exercises such authority and control, that he must act in the larger interest of the institution to ensure its efficient functions and not with a view to arranging benches to secure a desired result or disciplining his colleagues to his view point. The issue of the individual Judge's independence in the context of the privilege of distribution of judicial business vested in the institutional head, has, at time raised its head where the distribution of business over a period of time gives the impression that a certain colleague is deliberately denied certain business viewed as important by others. This is often done on the plea of specialisation or for speedy disposal of cases or to maintain court efficiency. But cases are not unknown where this ostensible reason is not the real reason. There have also been cases where a cause which appears before a bench of Judges in usual allocation of business disappears from that bench on the adjourned date even though there is no change in the allocation of business. Cases of bench shuffling are also reported for taking a particular case out of the bench of which a particular Judge is a member. This undermines the image of the institution and sours the cordiality between colleagues. This brings to mind Judge Chandler's case which raised the issue whether he could be denied assignment of cases by the Judicial Council in purported exercise of its administrative powers. Although the power of the Judicial Council to take such action was put in issue, the court did not answer the main issue. The majority seemed to concede the power to the Judicial Council by refusing to interfere on the ground that the order was interlocutory and by directing Judge Chandler to move judicial council to review its decision. But the observations made by Justices Black and Douglas are significant. They saw the council's action as an increasing effort 'to discipline direct Judges and in effect to remove them from offices.' Proceeding further it was observed:

"One of the great advances made in the structure of government by our Constitution was its provision for an independent judiciary-for judges who could do their duty as they saw it without having to account to superior court judges or to any one else except the Senate sitting as a court of impeachment".

Lastly the learned Judges opined:

"To hold that judges can do what this Judicial Council has tried to do to Judge Chandler here would in my judgment violate the plan of our Constitution to preserve, as far as possible, the liberty of the people by guaranteeing that that they have judges wholly independent of the Government or any of its agents with the exception of the United States Congress acting under its limited power of impeachment. We should

stop in-its infancy, before it has any growth at all, this idea that the United States district judges can be made accountable, for their efficiency or lack of it to the judge; just over them in the federal judicial system."

It is important to realise that the possibility of the judge exercising administrative power acting in a manner so as to interfere with the judicial independence of a colleague surfaced in that case. If the action of the judge exercising administrative control over the court is actuated by considerations of institutional efficiency and consumer-service, meaning thereby early disposal of long pending cases, his action may not be interfered with on the judicial side but if he has acted out of personal prejudices or bias or the like his action would certainly tantamount to interference with the judicial independence of his colleague. But at the same time it must be realised that his action would always be suspect and he would be well advised to avoid it. This difficulty arises only where the court sits in benches as in India and not where it sits 'en bloc' as in U.S.A. But one thing is clear, viz., once the business is allocated and a certain case appears before the bench to which it is allocated, judicial discipline and courtesy demand that no attempt should be made by the administrative head to take it out of that bench by withdrawing it or reshuffling the bench, as such action is bound to be misunderstood as a deliberate and arbitrary attempt to interfere with the judicial functions of a judge for ulterior reasons. And if this is done at the behest of external agencies it would tantamount to the administrative head surrendering not only his independence but also impairing the independence of the judiciary as a body. It is, therefore, essential that once the business is allocated there should be no interference from the administrative head and any such attempt must be frowned upon.

The risk of interference with the judicial independence of a judge is much more graver in a hierarchical structure like the one in India. The politico-legal philosophy of a subordinate judge may not be in tune with that of the superior judge or the administrative judge. In such a situation a latent pressure builds up affecting the independence of the subordinate judge. Though rare, cases of superiors having dropped subtle hints to their subordinates have occasionally come to light. It is only to be hoped that those who are charged with the duty to judge the performance of a subordinate judge will show the magnanimity of not allowing their decision to be clouded by any prejudice arising from conflict of philosophies. That will mean that "in the decision making process, a judge can be independent vis-à-vis his judicial colleagues and superiors". This has a direct bearing on the substantive facts of adjudication.

XIII

Active Independence

In S.P. Gupta's case, Justice Fazal Ali pointed out that judicial independence comprises two fundamental and indispensable elements, viz., (i) independence of the judiciary as an institution and as one of the three functionaries of the state, and independence of the individual judge to which attention already been called hereinabove. So far as the former is concerned it must be realised that the judiciary will not be able to satisfy its role as an important social and constitutional organ unless it as a body corporate enjoys independence and is insulated from outside pressures. This is essential that unless the judiciary as a whole enjoys independence it will not inspire a strong sense of independence in the individual judges constituting the court. The concept of active judicial independence, therefore, needs to be assessed as the health of not only the judiciary as a whole even the individual judges is largely dependent on it. But collective independence individual independence may prove effective. The important yardstick for determining extent of independence of the judiciary as a body is the extent of independence that the court enjoys on the administrative Side e.g. the supervision and control over the court staff, financial independence, maintenance of existing court building and construction of new ones, etc.

XIV

Judiciary and the Bar

Since the enactment of the Advocates Act, 1961, and the transfer of disciplinary jurisdiction over advocates from the High Courts' to the Bar Councils, there has been a steady deterioration in the behavioural pattern of members of the Bar, perhaps because the State Bar Councils are not known to take disciplinary action against erring members and even if action is taken it is too lenient to have a telling-effect. The importance of maintaining high professional standards can never be over-emphasised. Yet disrestectful behaviour by members of the Bar has become a common spectacle in courts. Efforts to create scenes in court and attempts at brow-beating the Judges with a view to extracting a favourable order have increased considerably. This is the scenario that one witnesses in courts at all levels including the apex court. While generally speaking the relations between the Bar and the Bench are cordial, there are certain elements who do not hesitate to vitiate the court atmosphere to satisfy their self-interests. When strong-willed judges resist such attempts and threaten to take action against the erring member of the profession, they are persuaded to desist from taking action under the Contempt of Courts Act by leading members of the profession by exerting subtle pressures in chamber or by a 'paper' apology. However, the Bar Association takes no action nor does the Bar Council do so-not even a reprimand. Unfortunately this is not confined to junior members of the profession who can perhaps be pardoned for being unaware of expected ethical standards and norms of behaviour, but extends to senior members also. Cases are also known where judges who do not freely grant discretionary interim orders, such as, injunctions, appointment of receivers, bail, etc., are made the target of vicious propaganda or court boycotts. Many responsible members of the Bar have complained that they too are brow-beaten into accepting such resolutions. Sometime back an advocate who was sentenced for contempt came in appeal. Finding him to be a youngman not belonging to affluent circumstances, a suggestion was made to him to consult a senior member of the Bar in the hope that the latter may be able to make him see reason. The facts of the case were hard but the idea was to impress upon him that such behaviour could not be countenanced and he must mend his ways if he is serious about a professional career. He refused to take the hint. The facts were peculiar. He had filed a suit against the Government and had sought permission for waiving the statutory notice under section 80(2), C.P.C. The trial judge did not see any urgency, rejected his application and directed him to institute the suit after the expiry of the statutory period of the notice. Promptly this young advocate filed a complaint against the trial judge in the magistrate's court for the commission of an offence under section 219, I.P.C., alleging that he had corruptly or maliciously passed an order in a judicial proceeding knowing it to be contrary to law. Unfortunately the magistrate on being brow- beaten or fearing similar action issued process against the trial judge which forced the judge to move the High Court for quashing the process. The High Court while quashing the process issued notice for contempt and finding that this was the second misdemeanour sentenced him to imprisonment and fine brushing aside his apology as not genuine. The apex court retained the fine only hoping that he will improve. Only sometime back a relatively senior advocate made disparaging remarks in open court against the Presiding Officer of the Court who refused to oblige him with an ad-interim order pending the filing of a counter by the opposite party. The judge made a record of his utterances and reported the matter to the District Judge who in turn reported the matter to the High Court to initiate contempt action. He was found guilty and fined. He appealed to the apex court which dismissed his appeal and refused to accept his apology as a mere device to escape. The apex court pointed out that what was at stake was the larger issue of judicial independence.

Even before the ink was dry on this judgment came the deplorable Ghaziabad incident which, if the newspaper account is accurate, was a direct threat to judicial independence.

From the above it is evident that incidents of misbehaviour court are on the increase particularly because the Bar council have failed to chasten their members. Unless strict action is taken judicial independence is in peril.

XV

Judiciary and the Press

The apex court has declared time and again that the freedom of the Press is included within the ambit of Article 19(1)(a) of the Constitution, which guarantees freedom of speech and experience. An informed, alert and fearless Press can be of great device to the judiciary, if it reports court proceedings fairly, faithfully and objectively. Since court proceedings are conducted in open court, except those rare ones which are for trial reasons held in camera, there can never be any objection while the press carries the same to the people through its public-relations. In fact the press plays a significant role in maintaining confidence of the people in the court and the judges who decide over them. Fair and objective criticism of court decision must also be welcomed so long as it . does not smack of malice. Court or judge would not object to fair and unbiased criticism. Public scrutiny of courts in a restrained style if it does not pose any danger to the independence of the judiciary must be welcomed. Of recent development is the phenomenon of Press Reporters who closely watch court proceedings, carefully follow arguments made by counsel and scrutinise the case law relied on. They take copious notes of the discussion that takes place and some even record them verbatim in shorthand. Very often questions put by individual judges to counsel are reproduced in questions and answer form in the name of the concerned judge. Since the Press is largely responsible in shaping public opinion, it is essential that it's reports are restrained and not intended to sensationalise every remark made in the course of hearing. The tendency to report the exchange between judge and Counsel in their names should be avoided for the reason that while the reporter who is familiar with court proceedings knows that certain questions are asked to stimulate discussion. However, they are often perceived, by members of the public as the views of the individual judge. This builds up avoidable pressure on the judge and throttles free discussion. Excessive pressure on the judge affects his style of functioning and impinges on his independence. It would, therefore, be more appropriate if the questions are attributed to the court and not to the judge.

The judiciary as an institution and the individual judges have been subjected to increased criticism by editorials, reports and articles in the Press. The increased popular pressure thus built on the judiciary and the judges has at times resulted in avoidable tensions between the judiciary and the Press. Even the Press has transgressed its limits, courts have always been themselves against the use of contempt jurisdiction as they are satisfied that the Press was not actuated by malice deliberately. Therefore, the attempts at undermining individual and institutional dependence can only be described as reprehensible. Phiroza Kesaria, a Bombay advocate rightly says:

"Fearless Judges are expected to have strength and independence to withstand and independence to withstand the pressures brought by groups of disgruntled, but influential advocates in various ways indicating their ire, such as by moving bar resolutions, collecting signatures on letters of protest, making complaints to the Chief Justice in chambers or by condemnatory speeches in public or articles in the press etc."

The question is not what the judges should do? But how the Press should conduct themselves.

New trends are noticed to influence court decisions in active cases. Besides using the Press as above, agitations organised by certain interested groups at court door slogan shouting is also resorted to and disparaging remarks are made, all of which are highlighted by the Press to build an adverse public opinion. Interviews of so-called luminaries and articles written by them not only appear in newspapers, magazines and periodicals but are also mailed to the judges hearing the case to influence their thought process, If any particular reasoning has been registered with a judge and the same is not projected in the course of the hearing and the judge omits to seek a clarification thereon from the concerned counsel and uses it in decision making it would be unfair to the party against whom it is used. It is essential that such 'outside advice' should be discouraged as it is likely to prejudice the opposite party.

More can be said on the subject but on account of the constraint of time I will conclude. Once again I thank you for sparing your valuable time. I thank the organisers, particularly Brother Mr. Agrawal, Mr. Khan, Mr. Gupta and others for the honour done to me by giving me this opportunity to share a few thoughts with you.

Accession of Kashmir - Historical and Legal Perspective

(Delivered on 12-05-1996)

Dr. Justice A.S. Anand Judge, Supreme Court of India

The Indian native States, of which the State of Jammu and Kashmir was one such State, were those areas in the Indian subcontinent which were for internal purposes outside the administrative, legislative and judicial sphere of the British India Government. Each such State had a hereditary rulers, who, subject to the paramountcy of the British Crown, exercised, with some exception, unlimited power over the States ruled by them. These States covered more than half the area of the Indian subcontinent and were referred to as Indian India. The other part of India comprising the provinces and certain other areas was referred to as British India. The rulers of the native States were sovereign subject to the paramountcy of the British Crown. On her assumption of direct rule in India in 1858, the Queen Empress through a proclamation declared to the native princes of India that all treaties and engagements made with them by or under the authority of the East India Company would be honoured and scrupulously maintained. That the rights dignity and honour of native princes would be maintained.

The aftermath of the Second World War and the assumption of power by a Labour Ministry in England, brought about a change in the British policy towards India. The Secretary of State for India, Lord Petrick Lawrence announced on 19-2-1946 the decision of the British Government to send a delegation of three Cabinet Ministers to India to find a solution for the problem of India. The delegation popularly known as "Cabinet Mission" arrived in India on 23-3-1946. On 25-5-1946 the Cabinet Mission issued a memorandum dated 12 5-1946 in regard to the native States. In this memorandum the Mission affirmed that on the withdrawal of British Government from India, the rights of the States which flowed from their relationship with the Crown would no longer be possible to exist and the rights surrendered by the States to the paramount power would revert to the rulers of those States when the two new dominions of India and Pakistan were created.

Paragraph 5 of the Memorandum is as under:

"When a new fully self-governing or independent Government or Governments come into being in British India, His Majesty's Government's influence with these Governments will not be such as to enable them to carry out the obligations of paramountcy. Moreover, they cannot contemplate that British troops would be retained in India for this purpose. Thus, as a logical sequence and in view of the desires expressed to them on behalf of the Indian States. His Majesty's Government will cease to exercise the power of paramountcy. This means that the rights of the States which flow from their relationship to the crown will no longer exist and that all the rights, surrendered by the States to the paramount power will return to the States. Political arrangements between the States on the one side and the British Crown and British India on the other side will thus be brought to an end. The void will have to be filled either by States entering

into a federal relationship with the successor Government or Governments in British India, or failing this, entering into particular political arrangements with it or them."

The Cabinet Mission, however, advised the rulers of the native States to enter into negotiations with the successor Government or Governments and evolve a scheme of the precise form which their cooperation would take. On 20-2-1947, the British Government made announcement that independence would be granted to British India. This was followed by another, statement on 3-6-1947 setting out its plan for the transfer of power. The plan inter alia provided that the Muslim majority areas in British India should constitute the dominion of Pakistan and the Hindu majority areas in British India the dominion of India. In this plan the position of the princely States was dealt with in the following manner:

"His Majesty's Government wish to make it clear that the decisions announced above (about partition) relate only to British India and that their policy towards 'Indian States contained in the Cabinet Mission Memorandum of 12-5- 1946, (Cmd. 6835) remains unchanged."

Thus, it would be seen that on the withdrawal of paramountcy from the princely States were to become independent and the communal basis of division of British India was not to apply ipso facto to the States. Neither the Cabinet Mission nor the British Government made any positive suggestions regarding the future of the princely States. The only thing that was made clear was that the sovereignty was to revert to the rulers of these native States. Lord Mountbatten, as the Crown representative addressed the Chamber of Princes on 25-7-1947. He advised the princes and their representatives that although legally they had become independent, they should accede to one or the other dominion, keeping in mind the geographical contiguity of their States. (Kings Contemporary Archives, 9/16-8-1947, p. 8765). Lord Mountbatten told the Chamber of Princes that accession of the State to either of the dominions was to be under the Cabinet Mission Memorandum of 16-5-1947 which contemplated surrender to the dominion of three subjects, namely, defence, external affairs and communications. Lord Mountbatten caused to be circulated for discussion a Draft Instrument of Accession which explicitly provided for surrender to the appropriate dominion the power over the three specified subjects and stated that the dominion would have no authority over the internal autonomy of the State. In the Indian dominion the accession was to be made under Section 6 of the Government 1935 as adopted by Section 9 of the Indian Independence Act, 1947. A State could accede to either dominion by executing instrument of accession signed by the ruler and accepted by the Governor-General of the dominion concerned. The decision whether to accede or not and to which. dominion were in the exclusive right and discretion of the Ruler.

On 15-8-1947, India became independent in accordance with the Cabinet Mission plan of May 1946. Following the creation of the dominions of India and Pakistan, Kashmir bordering on both India and Pakistan had, like any other native State, three alternatives, viz., to assert complete independence, to accede to Pakistan or to accede to India. Power to take the decision vested exclusively in the ruler according to the British Government's declared policy.

The Quit India Movement in British India had its echo in Kashmir where the National Conference had launched "Quit Kashmir Movement" with renewed vigour from 28-6-1938 demanding that Maharaja Hari Singh should quit the State with bag and baggage and leave the people of the State to decide their own

future by having a responsible Government. It gained even more momentum in 1944. The Maharaja's Government made efforts to crush the "Quit Kashmir Movement". Arrests of the political leaders followed. On 15-8-1947 most of the leaders of the National Conference and the Muslim Conference were in prison. The movement, however, did not die. In the absence of British help which the Maharaja was hitherto getting, the Maharaja found himself in a tight corner. "He disliked the idea of becoming a part of India, which was being democratised or of Pakistan which was a Muslim State. He thought of independence." (Brown, W.N., The United States, and India and Pakistan, Cambridge 1953, p. 162). He was procrastinating and wanted time to take his own decision. He therefore offered to sign a standstill agreement with both India and Pakistan aimed at continuing the existing relationship pending his final decision regarding the future of the State.

No standstill agreement came to be concluded between Kashmir and India though the Foreign Secretary to the Government of Pakistan on 15-8-1947 indicated to the Maharaja that the Government of Pakistan was agreeable to have a standstill agreement with the Government of Jammu and Kashmir. It was followed by the visit of the them Private Secretary to Mr Jinnah to Srinagar and "His Highness was told that he was an independent sovereign, that he alone had the power to give accession; that he need consult nobody, that he should not care for the National Conference or Sheikh Abdullah... that he need not delegate any of his powers to the people of the State and that Pakistan would not touch a hair of his head or take away an iota of his power" if he acceded to Pakistan. [Mahajan, M.C., Accession of Kashmir (The Inside Story), Sholapur, p. 2] In the second week of August, however, there occurred a Poonch revolt, against the authority of the Maharaja. The State Government found that the revolt in Poonch was due to infiltration from Pakistan but the charge was refuted by Pakistan Government. On the other hand Pakistan Government charged the Government of Jammu and Kashmir with attacking Muslim villages in the state. (White papers on Jammu and Kashmir, New Delhi, 1948, Documents, Part 1, pp. 6-13). At the same time there started an economic blockade from Pakistan.

The Government of Pakistan did not unequivocally deny the charge of economic blockade but pleaded "special circumstances" and difficulties in sending supplies to the State due to reluctance of the drivers of lorries to carry the supplies between Rawalpindi and Kohala. While the Pakistan Government was pleading "special circumstances", Dawn, the Muslim League's official organ, wrote on 24-8-1947, "the time has come to tell the Maharaja of Kashmir that he must make his choice and choose Pakistan". Should Kashmir fail to join Pakistan, "the gravest possible trouble would inevitably ensue". This threat alarmed the Maharaja of Kashmir. Looking to the upsurge in the State, Sheikh Abdullah was released on 29-9-1947. On 20-10-1947, a large column of several thousand tribesmen armed with "machine guns, mortars and flame throwers" attacked the frontiers of the State of Jammu & Kashmir. "Srinagar trembled before the danger of the tribesmen's invasion." It was alleged that the tribesmen were being aided by Pakistan. Margaret Bourke White in her work Halfway to Freedom. p. 208, wrote:

"Certainly these miniature ballistic establishments (the small factories in the tribal areas) would hardly explain the mortars, other heavy modern weapons and the two aeroplanes with which the invaders were equipped. In Pakistan towns close to the border arms were handed out before daylight to tribesmen directly from the front steps of Muslim League Headquarters. This was not quite the same thing as though the invaders were being armed directly by the Government of Pakistan, Still Pakistan is a nation with one political party-the Muslim League."

The tribal invasion caused grave devastation in the State.

The indecision of Maharaja Hari Singh gave place to deep-seated alarm and to a genuine concern for his personal safety. On 25- 10-1947, the Maharaja appointed Sheikh Abdullah as the emergency administrator. The raiders were fast approaching Srinagar, destroying and looting whatever came their way. The State was in imminent peril. Sheikh Abdullah advised the Maharaja that if the State was to be saved, he must accede to India and ask for immediate military help. This advice paved the way for accession of Jammu & Kashmir to India. Maharaja also found no other alternative and he addressed a letter to Lord Mount batten, the Governor General of India stating:

"I have to inform your Excellency that a grave emergency has arisen in my State and request the immediate assistance of your Government. As your Excellency is aware, the State of Jammu and Kashmir has not acceded to either the dominion of India or Pakistan. Geographically my State is contiguous with both of them. Besides, my State has a common boundary with the Union of Soviet Socialist Republic and with China. In their external relations the dominions of India and Pakistan cannot ignore this fact. I wanted to take time to decide to which dominion I should accede or whether it is not in the best interests of both the dominions and my State to stand independent, of course with friendly relations.

After giving an account of the tribal invasion, the letter With the conditions obtaining at present in my State and the great emergency of the situation as it exists, I have no option but to ask for help from the Indian dominion. Naturally, they cannot send the help asked for by me without my State acceding to the dominion of India. I have accordingly decided to do so and I attach the Instrument of Accession for acceptance by your Government."

Attached to the letter was an Instrument of Accession duly signed by the ruler, Maharaja Hari Singh. The operative part of the same read:

"Whereas, the Indian Independence Act, 1947, provides that as from the fifteenth day of August, 1947, there shall be set up an independent dominion known as INDIA, and that the Government of India Act, 1935, shall with such omissions, additions, adaptations and modifications as the Governor-General may by order specify be applicable to the dominion of India;

And whereas the Government of India Act, 1935, as adopted by the Governor-General, provides that an Indian state may accede to the Dominion of India by an Instrument of Accession executed by the ruler therefore;

Now, therefore I Shriman Indar Mahander Rajrajeshwar Maharajadhiraj Shri Hari Singh ii Jammu Kashmir Naresh Tatha Tibet adi Deshadhipathi Ruler of Jammu and Kashmir in the exercise of my, sovereignty in and over my said State do hereby execute this my Instrument of Accession ..."[1]

Lord Mount batten, the Governor-General of India indicated his acceptance in the following words:

"I do hereby accept this Instrument of Accession.

Dated this twenty-seventh day of October Nineteen hundred and forty seven."

This Instrument of Accession was in no way different from that executed by some 500 other States. It was unconditional, voluntary and absolute. It was not subject to any exceptions. It bound, the State of Jammu

[1] A.S. Anand: The Constitution of Jammu & Kashmir-its Development and Consumers Second Edn. 1994-(updated reprint 1995) pp. 90-91.

† (Campbell Johnson, Alan, Mission with Mount batten, p. 225)

and Kashmir and India together legally and constitutionally. The execution of the Instrument of Accession by the Maharaja and its acceptance by the Governor-General finally settled the issue of accession of the State of Jammu and Kashmir.

After accepting the Instrument of Accession, Lord Mount batten wrote a personal DO letter to Maharaja Hari Singh in reply

to his letter which had accompanied the Instrument of Accession but was not a part of the Instrument of Accession. In his letter Lord Mount batten wrote:

"... my Government have decided to accept the accession of Kashmir State to the dominion of India. In consistence with their policy that in the case of any State where the issue of accession has been the subject of dispute, the question of accession should be decided in accordance with the wishes of the people of the State, it is my Government's wish that, as soon as law and order have been restored in Kashmir and its soil cleared of the invader, the question of State's accession should be settled by a reference to the people.

This statement has figured as a controversial feature of Kashmir's accession to India. Critics of the accession have steadfastly maintained that this stipulation renders the aaccession conditional and that the question of State's accession has to be settled by a reference to the people of the State. The criticisms, however, appears to be born out of ignorance of the correct legal position.

The only documents relevant to the accession were the Instrument of Accession and the Indian Independence Act and both the constitutional documents did not contemplate any conditions and therefore there was no question of the access on being conditional. The finality which is statutory cannot be made contingent on conditions imposed outside the powers of the statute. Pakistan, however, to suit itself, refused to recognise the accession. It called the accession as an act of "cowardly ruler" engineered with the 'aggressive' help of the Indian Government. It charged that the accession had been obtained by force. Alan Campbell Johnson in his treatise 'Mission with Mount batten' writes: "Indeed, the State's Ministry, under Patch's direction, went out of its way to take no action which could be interpreted as forcing Kashmir's hand and to give assurances that accession to Pakistan would not be taken amiss by India." On his return to London, Lord Mount batten narrated:

'Had he (the Maharaja of Kashmir) acceded to Pakistan before August 14, the future Government of India had allowed me to give His Highness an assurance that no objection whatever would be raised by them."

Moreover, it cannot be denied that the Maharaja of Kashmir offered to accede to the Indian dominion after the assaults and raids had started on the State from across the borders. When at his meeting with Lord Mount batten on 1-11-1947 Mr. Jinnah claimed that the accession of Kashmir had indeed been brought about by violence, Lord Mount batten replied, "the accession had indeed been brought about by the violence, but the violence came from tribesmen, for whom Pakistan, and not India was responsible."

The accession of the State of Jammu and Kashmir to India imposed an obligation on the dominion of India to defend the State. To drive the invader out of the State was the task which the dominion of India

was asked to face as soon as it finally accepted the Instrument of Accession. The requests and warnings of Government of India to the Government of Pakistan to deny assistance and bases to the invaders met with no response. India, therefore, decided to lodge a complaint with the Security Council.

India invoked Article 35 of the Charter of United Nations and complained to the Security Council against Pakistan. Under Article 35, a member is entitled to bring before the Security Council a 'situation' which imperils International peace. The Government of India appealed to the Security Council, to ask the Government of Pakistan:

(1) to prevent Pakistan Government personnel, military and civil from participating in or assisting the invasion in Jammu and Kashmir State;

(2) to call upon other Pakistani nationals to desist from taking any part in the fighting in Jammu and Kashmir State:

(3) to deny to the invaders:

(a) accesses to and use of its territory for operations against Kashmir;

(b) military and other supplies;

(c) all kinds of aid that might tend to prolong the present struggle.

(Security Council Document No. 5/628 dated 2-1-1948.)

On 15-1-1948, there was delivered to the Secretary General of the Security Council a letter from Pakistan Government emphatically rejecting the Indian charges. The letter made counter charges against India. Those amongst others included:

(1) a persistent attempt to undo the partition scheme;

(2) a pre-planned and extensive campaign of genocide against the Muslims in East Punjab and Punjab princely States;

(3) the acquisition of Kashmir's accession by fraud and violence.

(Security Council Document No. S/646 dated 15-1- 1948)

Throughout the prolonged deliberations of the Council, India's spokesmen concentrated their attention almost exclusively the tribal invasion and the legal fact of Kashmir's accession to India. This was, indeed, the limited issue referred to the United Nations. Indian spokesman concluded his opening statement by declaring:

"We have referred to the Security Council a simple and straightforward issue... the withdrawal and expulsion of the raiders and of the raiders and the invaders from the soil of Kashmir and the immediate stoppage of the fight are... the first and the only tasks to which we have to address ourselves."

(Security Council Verbatim Report No, S/P.V. 227 dated 15-1-1948).

The Security Council, in accepting India's complaint did indirectly recognise the accession of the State of Jammu and Kashmir to India and indeed the legality of the accession was not the point which India had brought before the Security Council. It is important to note that the question of aggression alone fell within the competence of the Security Council. The Indian spokesman's statement was followed by a brilliant address by Shri Mohammed Zafarullah Khan of Pakistan who with his brilliant eloquence 'broadened' the issue and sought to bring various disputes between India and Pakistan together. Frankly speaking it was at this stage that the 'aggressor' and 'victim of aggression' were put on a par in the Security Council. The result of these deliberations at the floor of the Security Council was the resolution dated 17-1-1948 which both India and Pakistan accepted. In this resolution the Security Council called upon India and Pakistan 'to immediately take all measures within their power (including public appeals to their people) calculated to improve the situation and to refrain from making any statements and from doing or causing to be done or permitting any acts which might aggravate the situation..

(Security Council Document No. S/651 dated 17-1-1948.) On 27-1-1948, India and Pakistan submitted draft proposals to the President of the Security Council on the appropriate methods of solving the Kashmir dispute. It was in this proposal that India agreed to the holding of a plebiscite in Kashmir as the ultimate determinant of Kashmir's status. The Indian representative observed on the floor of the Council:

"In accepting the accession they (India) refused to take advantage of the immediate peril in which the State found itself and informed the ruler that the accession should finally be settled by plebiscite as soon as peace has been restored."

It is this statement which has been used to raise some doubts about the finality of the accession till the holding of plebiscite (self-determination) in the State of Jammu & Kashmir.

The accession of Kashmir was an issue arising out of the partition of India and the negotiations preceding it. It does not appear to be within the competence of the Security Council to reopen this question either at the instance of India or of Pakistan. The question of 'aggression' alone falls within the competence of the Security Council. Though that is the strict standpoint from the legal angle, has the right of "self-determination" not been exercised by the people of the State? It is well known in International Law that "self-determination" can be achieved through different modes the basic idea being to ascertain the wishes of the people.

The idea of convening a Constituent Assembly for Jammu and Kashmir State was conceived during the "Quit Kashmir Movement" even before the partition of India was contemplated and would have been implemented but for the invasion of the State, later the partition of India, by the tribesmen from across the Pakistan territory. When in 1948, the National Conference formed an interim Government in the State under the proclamation of Sir Hari Singh dated 5-3-1948, it was expressly declared in paragraph 4 of the proclamation that, "as soon as normal conditions were restored, steps would be taken to convene a

National Assembly based upon adult suffrage, to frame a Constitution for the State". The convening of the Constituent Assembly in 1951 was, thus, a natural outcome of the desire of the people of the State to have a democratic Government responsible to the legislature, elected by the people. The Constituent Assembly was invested with the authority to frame the Constitution for the State and to decide its future.

"... of destiny. A day which comes only once in the life after centuries we have reached the harbour of our freedom which for the first... will enable the people of Jammu & Kashmir, whose duly elected representatives are gathered here, to shape the future of their country after wise deliberation and mould their future organs of the Government. No person and no power can stand between them and the fulfilment of this their historic task..."

declared Sheikh Mohammed Abdullah in his inangural address to the Constituent Assembly and added that the Assembly shall give "its reasoned conclusions regarding accession". The dispute regarding Kashmir had come to a standstill at the U.N.O. The Constituent Assembly in Kashmir, comprising of the representatives of the people, elected on the basis of adult suffrage, in order to end the uncertainty about the future of the State, after due deliberations and consideration, ratified the State's accession to India in 1954, through a resolution passed by the Constituent Assembly without even a single dissent.

Thus, the Constituent Assembly of the Jammu & Kashmir State which was convened on the basis of adult suffrage comprising of the representatives of the people of the State and which represented the people of the entire State in unequivocal terms ratified the State's accession to India, through a well- considered resolution of the Constituent Assembly on 15-2-1954, after great deal of debate, discussion and consideration. The debate was free and frank. The people of the State of Jammu & Kashmir, thus, finally settled the controversy regarding accession through the Constituent Assembly comprising of their elected representatives. No one even the worst critic, has ever doubted the representative nature of the Constituent Assembly. Self- determination is a one-time slot the people of the State through their elected representatives in the Constituent Assembly of the State took a final decision and, therefore, the question of any further "self-determination" or 'plebiscite' does not arise either legally or morally. The 'wishes' of the people of J&K have been duly ascertained through the duly elected Constituent Assembly. The States' accession to India, therefore cannot any longer be questioned or doubted. The 1954 resolution of the of Constituent Assembly was followed by incorporation of Section 3 in the Constitution of Jammu and Kashmir which reads: "The State of Jammu and Kashmir is and shall be an integral part of the Union of India." This section is in confirmation and reiteration of the wishes of the people of the State to be an integral part of the Union of India. Besides, Section 3, declaring the State as an integral part of India, has been put beyond the powers wers of the State Legislature to amend by virtue of the mandate of Section 147 of the Constitution. This provision was apparently incorporated in order to "avoid any fissiparous tendencies raising their ugly heads in the future".

Thus, it follows that the accession of Jammu and Kashmir to the Union of India is legal and constitutional which has been 'ratified' by the people of the State also. It is therefore complete, final, legal and irrevocable. The sovereign British Parliament vested the power to sign the Instrument of Accession in the ruler in his own discretion under the Indian Independence Act, 1947 read with the Government of India Act, 1935. Its acceptance was within the power of the Governor-General. The Instrument of Accession of Jammu and Kashmir was signed by the ruler and accepted by the Governor-General of India. As per the

assurance given to the Security Council, the question of accession has been finally set at rest by the people of the State through their elected representatives in 1954 and 1957. If the accession of Kashmir has to be reopened, the same reopening would imply going back 46 years and reopening the whole question of the independence of India and Pakistan, for it was the same statute as provided for the accession of the princely States to either of the dominions which also granted independence to India and Pakistan.

It is interesting to note that the accession of Kashmir to India is quite analogous to the annexation of Texas by the United States of America. When Mexico separated from the Spanish Empire and set up as an independent Republic. Texas was an integral part of the new State. Later, Texas revolted against the Mexican authorities and established itself as an independent entity. The independent status of Texas was recognised by the United States of America and the principal power of Europe. In 1844, the Government of Texas, threatened by the menace of predatory incursions from Mexico, requested the Government of the United States of America to annex the State. This proposal was sanctioned by the American Congress in a joint resolution in March 1845.

After this sanction, America sent its army to defend the western frontiers of Texas. The Government of Mexico strongly protested against and alleged violation of the rights of Mexico and even the diplomatic intercourse between the two Governments was suspended. The Mexican protest evoked the following reply from the Government of the United States of America:

"The Government of United States did not consider this joint resolution as a violation of any of the rights of Mexico, or that it offered any just cause or offence to its Government; that the Republic of Texas as an independent power, owing no allegiance to Mexico, and constituting no part of her territory or rightful sovereignty and jurisdiction."

In Texas case it has never been contended that the annexation was not valid nor was the action of the United States to send an army to defend the western frontiers of Texas ever questioned. The case of accession of Kashmir stands at a much stronger footing than that of Texas and the criticism regarding the validity of the accession of Jammu and Kashmir to India is wholly meaningless and unsustainable the accession of the State of Jammu and Kashmir to India is legal, final, binding and irrevocable.

The Law of Contempt - Is it being stretched too far?

(Delivered on 01-12-2001)

Fali S. Nariman

Former Attorney General of India

I.

Introduction

I am very happy to deliver this years "C. L. Agarwal Memorial Law Lecture" organised by the Bar Council of Rajasthan. It is a tribute to the memory of a great and fearless lawyer.

I had met with and had known the late Mr. Agarwal who was a doyen of the Bar in Rajasthan. I had first seen and heard him when I happened to be in Jodhpur for a case in my early days at the Bar. The hearing was to take place on 28th May, 1964 but then suddenly Panditji died the day before and the Court did not sit. A reference was held in Chief Justice Dave's Court, which I attended. Mr. C.L. Agarwal as President of the Bar spoke. It was there that I first noticed his habit of speaking (in moments of emotion) with his eyes closed.

He was not only a great lawyer but a great benefactor of humanity as prosperous lawyers should be. He helped many causes and set up with his own money several Trusts including the C.L. Agarwal Memorial Library Trust and the Rajasthan Education Trust.

I am happy to be here for another important reason I have known C. L. Agarwal's son for many-many years. He was practising in the Supreme Court when I shifted from Bombay to Delhi in 1972 on my appointment as Additional Solicitor-General Delhi in. Soon thereafter-in 1978bet his pointed to the high Court of Rajasthan and I did not meet him for many years.

I used to visit Jodhpur from Delhi, and though I never appeared before Justice Agarwal I heard very good reports of his judicial acumen, his judicial approach and his integrity. When he was appointed to the Supreme Court-I saw him again and frequently appeared in his Court. As Judge in the Supreme Court he quietly showed his prowess as a man who knew his law but was always responsive to the cause of justice.

He made a good judge. He is a fine human being; make no mistake: a fine human being will always make a good judge.

II.

Scandalizing the Court - Why this Topic?

Now a word about the topic-it was chosen at the request of your Bar Leaders, which I acceded to since I too believe that in the branch of the law relating to 'insults to the Court" the almost unlimited powers of Judges needs to be cautioned: I advisedly use the word 'cautioned' not controlled' no one can keep the power under control except the Judges themselves. The track record of the Courts does show a marked tendency to use the power for committing persons for contempt (for scandalizing the Court) much too frequently. It is in fact being stretched too far-and it is time it was reined in, by the Judges themselves. There is also another reason, which prompts me to speak to you on this subject. If all judges were like Suresh Agarwal there would be no harm in empowering the Justices of Superior Courts with that questionable jurisdiction to commit for contempt for insults to the Court.

No lawyer or as far as I know no litigant was ever rude or offensive to Justice Agarwal because he was never rude or offensive to any one..

III

Should scandalizing the Court remain punishable?

In an adversarial system of litigation like ours there are always two parties, one must lose, the other must win. And when it goes through three-tiers of litigation-again an unfortunate characteristic of our law-the party who ultimately wins sometimes harbours inbuilt (often Unjustified) grievances against one or more Judges down the line who may have decided against him.

People who propagate these grudges are often lawyers themselves. Top lawyers have big egos. And egoistical lawyers never like to lose, and when they do, some of them are not averse to blaming the judge or suggesting to their clients that there was some ulterior motive.

Now, judging cases is a difficult business and the occupational hazards of judging are many the memory of a wrong decision (or what is ultimately found to be a wrong decision) sometimes festers; it also (though less often) gives rise to irresponsible sometimes scurrilous comment-first about the case itself, and then inevitably about the Judge or Court which rendered judgment.

The law reports are strewn with cases of disgruntled litigants (and occasionally lawyers as well) going to great lengths in making charges, often unfounded, against the Judiciary.

The law of contempt-that part of which is so colourfully described as "scandalising the Court" is intended as a wall of protection against the vicissitudes of judging. Ours is a very litigious society and there are (as you all well know) a number of 'nuts': in the system: persons who will make any type of allegation against anyone at the drop of a hat.

This is why I believe that this part of the Criminal Contempt Jurisdiction though now obsolete in England, should remain in India:

But there are problems-in this branch of the law the lines are thinly drawn and are not very clear: and they depend very much on the perception of the Judge administering the Contempt onsdiction in the name of the Court The public, the men and women of the media, and lawyers are content to accept constraints imposed by the "Rule of Law", but are not prepared to accept ad hoc rules imposed according to the whims, vagaries and Idiosyncrasies of individual Judges. This ad-hocism was typified 1 in the V.C. Mishra case.[2]

No one liked what V.C. Mishra said and did in Allahabad, but the three-Judge Bench that decided his case in their enthusiasm to teach him a lesson deviated from the law: ultimately, sobriety prevailed; the Constitution Bench of the Supreme Court[3] also did not like what Mishra said or did and yet they overruled the punishment meted out to him and set, out the true contours of the penalties that can be imposed in contempt cases. This case has set an example and prompts a word of advice to all: lawyers and judges.

---

[2]1995 (2) SCC 584.

[3] 2. Supreme Court Bar Association vs. UOI- 1998 (4) SCC 409.

Never-never behave as Mishra did. And never, never lose your temper as the three Judge Bench did in Mishra's case: always keep your cool as the five judge Bench did, and so earned the admiration of all.

Mishra's case has established (a fact over looked by Judges in the High Court) that the contempt jurisdiction must not and cannot be used to discipline the lawyer in conduct of a case: this must be left to the Bar Councils entrusted with disciplinary powers under the Advocates Act.

IV.

Scandalizing the Court:

There are no rules there are no constraints: It is a mercurial jurisdiction

It was Jeremy Bentham (the theoretical jurist) who characterized the Common Law as "Dog Law."

"When your dog does anything you want to break him off'. (he wrote in 1823), "you wait till he does it, and then beat him for it. This is the way you make laws for your dog, and this is the way judges make laws for you and me."

The law of contempt of court in Anglo-Saxon jurisprudence both in England in the past, and in India in the past and present, has been no more, no less "Dog-Law". There are no rules, no constraints no precise circumstances when the administration of justice is brought into contempt. The judgments are strewn with pious platitudes that give little guidance to the editor, to the commentator, to lawyers, and to members of the public: this part of the law of contempt though necessary, is a standing threat to free expression. It leaves too much to the discretion of the particular judge (or judges). And at times decisions do give rise to a strange feeling that the status of the person who scandalizes the Court perhaps did affect the ultimate result.

In 1988 a sitting Cabinet Minister made wide and improper remarks against Judges of the Supreme Court he said:

"Zamindars like Golaknath (he was speaking of Golaknath's Case) evoked a sympathetic cord nowhere in the whole country expect the Supreme Court of India.

And the bank magnates, the representatives of the elitist culture of this country ably supported by industrialists, the beneficiaries of independence, got higher compensation by the intervention of the Supreme Court in Coopers case (1970), **Anti social elements. FERA violators, bride burners and a whole hoard of reactionaries have found their heaven in the Supreme Court."**[4]

The minister then went to say that because the Judges of the highest Court had their "unconcealed sympathy for the haves" (as opposed to the have nots) they had interpreted the expression "compensation' in the manner they did: clearly attributing motives.

And yet a Bench of two Judges (in Duda's case) exonerated him. Let me read to you what the Bench said: (I quote)

[4] P.N. Duda vs P. Shiv Shankar: AIR 1988 SC 1208 at 1213

"Bearing in mind the trend in the law of contempt (they were speaking of the liberal trend) established by the 4 judgment of Justice Krishna Iyer in Mulgaokar's case[5] the speech of the Minister has to be read in its proper perspective, and when so read it did not bring the administration of justice into disrepute or impair administration of justice. The Minister is not guilty of contempt of the Court."! (unquote)

Admirable. Laudable. Free speech upheld. But one cannot help wondering whether their Lordships would have been quite as liberal if the criticism had been made by a less important personage than a Cabinet Minister!

Again when an important personage Mr. Mohd. Yunus, Chairman of the Trade Fair Authority of India known at the time to be very close to the Prime Minister-had criticized a judgment delivered by a Supreme Court Judge in the Jehovah Witness' case holding that the singing of the National Anthem for a particular sect of Christians was not compulsory-Mr. Mohd. Yunus said that this Judge (Justice Chinnappa Reddy) "has no right to be called either an Indian or a Judge."

An Association of individuals called the Conscientious Group[6] filed a petition seeking a direction that Mr. Yunus should be hauled up for contempt. But close colleagues of Justice

Chinnappa Reddy daily sitting with him suddenly found themselves powerless to even call for an explanation from Mr. Mohd. Yunus- on the technical ground that when the Attorney-General was approached by the petitioners to give his sanction he had declined, and the Solicitor-General had also demurred.

They knew that the power to issue notice suo motu for any contempt was plenary (not dependant on the fiat of the Attorney-General or Solicitor-General)-yet they chose not to invoke it, even though a sitting Judge of the Supreme Court had been described as a person not fit to be an Indian, not fit to be a Judge!

Yet in a later case (also reported) a not-so-important litigant was held guilty of contempt for saying that a Judge was anti- national. When a Bench of the Supreme Court of India hearing a miscellaneous application[7]" said that it was inclined to think that a particular case should go before a Bench, which had earlier passed some orders, an inconsequential member of the public Mohd. Zahir Khan (the litigant) addressed the Court in a loud tone thus:

"Either he is an anti-national or the Judges are anti- nationals."

A notice was issued and the litigant was found guilty of contempt of-court and made to suffer imprisonment for one month! These examples are given not to deride our Judges or criticize previous decisions, It is only to illustrate very graphically-that the true nature of this aspect of contempt jurisdiction: is mercurial and unpredictable.And the disturbing trend persists.

V. In this Branch Of The Law The Dice is Loaded.:

At a conference held in Bangalore many years ago a prominent American journalist recalled how he had been "cited"

---

[5] S. Mulgaokar's case: AIR 1978 SC 727

[6] Conscientious Group vs. Mohammed Yunus and Ors: AIR 1987 SC1451

[7] Mohd. Zahir Khan vs. Vijai Singh & Ors: 1992 Supp (2) SCC 72

in the United States for contempt for reporting a pending case in colours too fanciful and garish for the Judge. The journalist told the Federal Judge (somewhat brashly):

"We want no accommodation from you. The First Amendment is on our side. We will fight it out".

The Judge responded,

"Have it your way-but remember, who is the umpire in this battleground!"

Always my friends remember this first, in this branch of the law the Judge is the prosecutor, second, you are presumed guilty till you convince him of your innocence: and third it is the Judge against whom or against whose decision you spoke that will decide whether or not you should be sent to jail! The dice is loaded-the great question is: should it be so loaded? Is this the right procedure or the right approach?

The origin of the branch of law known as "scandalizing the court" is shrouded in antiquity-it has been described in text books as both "dubious and controversial"[8]. It originates from a celebrated dictum of Justice Wilmot in his judgment in Wilkes Case[9] way back in 1765-a judgment which was never actually delivered, but meant to be delivered, and later published by Justice Wilmot's son when his father's papers were edited. It was a judgment reserved after argument, and when ready to be delivered it was discovered that the writ against Wilkes was incorrectly titled and since an amendment of the Writ was not consented to, the case had to be abandoned. This is the real ancestry of that part of the law of contempt known today as "scandalizing the Court": it is based on a judgment never delivered in a case, a case which had already abated!

The Constitutional angle :

Never use this jurisdiction to suppress those who speak against Courts or Judges nor merely to uphold the dignity of the Court or of its Judges.

The Law of Contempt is an exception to the fundamental right of free speech and expression guaranteed under Article 19(1)(a) of the Constitution, the law must then be justified on the ground that it is a 'reasonable restriction" under Article 19(2): otherwise it would be unconstitutional.

There is a judgment of the Division Bench of the Calcutta High Court[10] delivered some years ago, which correctly appreciated this constitutional principle. It was not widely reported and deserves greater publicity than it has so far received. It is a judgment of a Bench of two judges-S. C. Sen & U. C. Banerjee JJ (each of whom became judges of the Supreme Court of India, and one of whom is sitting there). The fact that the law of contempt is an exception to the fundamental right of free speech has been nowhere more felicitously described than in this judgment (delivered for the Bench by Justice Banerjee). In that case the Court was called upon to decide whether an article in a Calcutta daily, which had condemned a prior Judgment of the Calcutta High Court, unread and by distorting facts, was contemptuous.

[8] Borric & Lowe-Law of Contempt-3rd Edition page 331
[9] R. vs. Almon 1765 Wilmot 243 VI.
[10] Smt Archana Guha vs. Sri Rajnit Guha Neogi @ Runu Guha Neogi 1989

The article had the disquieting heading "Let the High Court save itself from Ignominy". A suo motu rule was issued by the High Court. When it came up for hearing-no apology was called for or tendered. But the Newspaper was exonerated: the contempt notice discharged. The judges said: (and I quote)

"None of the articles can be defended as fair comment made in temperate language about a Court case. In fact:

(1) Calcutta High Court Notes (CHN) 252
the distorted version of the judgment given and the language employed in the articles may have the effect of shaking the confidence of the people in the judiciary and thereby lowering the dignity and majesty of the law."

And yet, Upholding the prime importance of freedom of speech the Calcutta High Court held that the publication was not contempt-though the judges did say that the language used could have been better, polite and more sober. Freedom to criticize (even wrongly and obtusely) a judgment of the Court was upheld as part of the cherished freedom of speech.[11]

The judgment of the Calcutta High Court makes me recall what was said by Lord Denning in a now famous contempt case: Quinton Hogg son of a Lord Chancellor and a future Lord Chancellor of England himself had written an article in very critical and caustic tone about a decision of Lord Denning in a gaming case. The litigant Blackburn moved for contempt and this is what 11 Lord Denning said[12]: (it is a beautiful passage the relevant part of which I must quote in full):

"This is the first case, so far as I know, where this court has been called on to consider an allegation of contempt against itself. It is a jurisdiction which undoubtedly belongs to us, but which we will most sparingly exercise: more particularly as we ourselves have an interest in the matter. Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself. It is the right of every man, In Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public Interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication.

Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires, provided that it Is pertinent to the matter in hand. Silence is not an option when things are ill done.

---

[11] The decision of the Calcutta High Court helps to underscore an important point that contempt jurisdiction is not to be used merely because a proceedings in a court of law are erroneously reported; for this, resort should be had to the Registrar communicating to the press pointing out what the correct facts are? It is only if the misreporting is persisted in that invocation of the contempt jurisdiction may perhaps be justified, not otherwise.

[12] R. vs. Metropolitan Police Commissioner-1968 (2) AER-319 at 320.

So it comes to this. Mr Quintin Hogg has criticised the court, but in so doing he is exercising his undoubted right. The article contains an error, no doubt, but errors do not make it a contempt of court. We must uphold his right to the uttermost.

I hold this not to be a contempt of court, and would dismiss the application."

Lord Denning in England, like Justices Sen and Banerjee in India put free speech first-in a conflict between this freedom and the contempt jurisdiction.

VII
Personal insults uttered Without malice-Not Contempt.:

I recall the visit of Lord Templeman some years ago with a British team of judges and lawyers to participate in an annual feature called the Indo-British Legal Forum. Lord Templeman was then the senior-most sitting judge in the House of Lords in England, having since retired. One of the topics we discussed at the Forum was "Freedom of the Press including Contempt of courts". It was 12 shortly after the controversial decision in the Spycatcher Case[13] which attracted worldwide attention. Lord Templeman believed that Peter Wright who wrote Spycatcher, and had it published in the U.K., should be held fast to the undertaking given by him which was not to publish confidential information obtained by him in his capacity as a member of the British Secret Service, not withstanding that the information had, with lapse of time, percolated into the public domain. Two of his colleagues (in the House of Lords) agreed with him which put Lord Templeman in the majority. The Press (the free Press-if you will-but certainly not a responsible Press) held them up to ridicule; the Daily Mirror published photographs of all three Judges (Templeman included) and below the photographs was written in capital letters "OLD FOOLS".

I pointedly asked him why no contempt proceedings were initiated against the particular newspaper (The Daily Mirror). And what has endeared him to me was his answer. He smiled, and without a trace of bitterness, said that Judges in England did not take notice of personal insults uttered without malice. After all, he said, he was old, and though he believed he wasn't a fool, someone else who sincerely thought he was, was entitled to his opinion.

And then his eyes lighted up. 'But if they (he meant the Editor and Publisher)-had said we were dishonest or not true to our conscience, I would have promptly hauled them up'.

I said to myself here is a Daniel come to judgment: a judge who was so conscious of his enormous power that he knew when not to use it: a self-restraining quality which (I believe) greatly enhances the prestige of all judicial power. I respectfully commend this attitude to all judges, present and future-both in the High Courts and in the Highest Court.

VIII
In this branch of the law of contempt-Truth must be a defence

Then there is another disturbing aspect of this branch of the law. Unlike defamation truth, is not considered to be a defence-Does the law of contempt then impose reasonable restrictions on freedom of speech-if you are not permitted to speak and establish the truth? India's noted constitutional historian H.M. Seervai had no doubt on the point. This is what he had to say in the Fourth Edition of his famous book on the Constitution of India-

[13] Attorney Gen vs. Guardian 12. Newspaper 1987 (3) AER 316 (HL)

"a law relating to defamation, which provided that truth, spoken or written, for the public good shall not be a defence in a libel action would impose restrictions which would be unreasonable.' the position would be no different if a law were to enact that truth should not be a defence to a charge of contempt of court, if it consists in scandalizing a judge".

Seervai then goes on:

"In a criminal prosecution for libel, the prosecution would fail if it were shown that specific charges were true and it was for the public good that they should be made. But is there one law for a corrupt Minister and another for a corrupt Judge?" The author then boldly says that no Court in India would say that there was one law for a corrupt Minister and another for a corrupt Judge, and says quite confidently that no Court would by any process of reasoning punish for contempt the writer of an article who, in sober language sets out specific acts of bribery and is able to successfully prove them.

For this view the author relies on a judgment of a Constitution Bench of the Supreme Court itself-in B. Ramakrishna Reddy vs. State of Madras 1952 SCR 425 where Justice B.K. Mukherjee said:

"The article in question is a scurrilous attack on the integrity and honesty of a judicial office. Specific instances have been given where the officer is alleged to have taken bribes or behaved with impropriety to litigants who did not satisfy his dishonest demands. If the allegations were true, obviously it would be to the benefit of the public to bring these matters into light. But if they were false. they cannot but undermine the confidence of the public in the administration of justice and bring the judiciary into disrepute."

Unfortunately these observations were read in a later case (by a bench of three Judges) in Perspective Publications Pvt. 13 Ltd. & anr. vs. State of Maharashtra (1969)[14] as not laying down affirmatively that truth and good faith could be set up as a defence in contempt proceedings; and ever since then the law in the Perspective Publications Case is the law that is followed. Wrongly, I would submit.

Particularly since years after the Perspective Publications case another Bench of three Hon'ble Justices of the Supreme Court (in August 1976) set aside a Full Bench decision of the High Court of Punjab, which held that a prima facie case for contempt was made out. In that case fifteen members of a Bar Association made a complaint about observations of a High Court Judge made during an inspection at the District Court Bar- the Judge had said nas! things about politicians and the lawyers felt that the judge was wrong to talk about politics and they said so in the letter. The letter was addressed to the Chief Justice. But It was placed before a Bench of the Court for the consideration and on perusal of the contents the Bench held that a prima facie case of criminal contempt was made out. Mark this-None of the allegations in the letter against the judge were disputed or challenged.

Yet the High Court proceeded on the basis that even though the letters written correctly recorded what had happened and commented adversely on the Judge's conduct the authors were guilty of contempt. The Supreme Court overruled and by so overruling emphasized that allegations when true were not capable of sustaining a charge of contempt.

[14] 13. (1969) 2 SCR 779

The most recent endorsement of this view is the decision of the Privy Council[15] (March 1999 in which Lord Slynn in an appeal from the Republic of Mauritius), whilst upholding the constitutionality of the offence of scandalising the Court, under the Constitution of Mauritius, emphasised two things: first, that the scope of the offence was a narrow one (mark the word "narrow") and second, that exposure and criticism of judicial misconduct plainly in the pubic interest would not necessarily constitute contempt that is to say truth and good faith would trump the Contempt Law, which is as it should be.

Our Constitution makes freedom of speech and expression a fundamental right, and the exception to it is the law of contempt- not any law of contempt-but reasonable restrictions in that law.
(2) W.L.R. 1305 The Contempt of Courts Act does not say that truth cannot be a defence and will not be a defence and it is for the Courts to interpret the meaning of the word "scandalise."

If it is part of the law as understood that a person commits contempt if he truthfully publishes as a fact that a particular Judge (God forbid and hypothetically speaking) has accepted a bribe for giving a judgment in a party's favour-then such a law would be void as imposing unreasonable restrictions on the freedom of speech and expression: the Judge who took the bribe would be false to his oath, to do justice without fear or favour, and it would be absurd to say that although Article 124(4) provides for the removal of a judge for proved misbehaviour, no one can offer proof of such misbehaviour except on pain of being sent to jail for Contempt of Court.

This is a glaring defect in our judge-made law that needs to be remedied-hopefully by the judges themselves; if not, reluctantly then by Parliament.

It is interesting to notice that when the Ontario Court of Appeal some years ago considered the offence of scandalizing the Court in the light of the Canadian Charter of Human Rights, the majority in the Court concluded that scandalizing the Court was no longer compatible with the fundamental freedom of speech and expression.[16]

The dictionary meaning of the word scandalise (and this is the expression used in Section 2(c) of the Contempt of Courts Act) is "to utter false or malicious report of a person's conduct". There you are. Truth can never scandalise. "Sunlight is the best disinfectant" and "electric light is the most efficient policeman": which is what a great American Judge (Justice Brandeis) always used to say: and it was a favourite quote of former Chief Justice Venkatachaliah.

IX
What of complaints against erring Judges?: Resort to in-house Procedure:

But we have still to live with the regrettable decision of the Supreme Court in avichandra lyer vs. Bhattacharji (1995) 5 SCC at page 478 (popularly known as Bhattacharji's case) Regrettable because the Bench in that case said that even Bar Associations cannot take up matters and pass resolutions with regard to allegations of corruption against sitting judges. They must take up the matter first with the Chief Justice and await his response for a "reasonable period'. And what if the Chief Justice does not respond-what after that? Their Lordships gave no answer. It is Bhattacharji's case which quotes Harry Edwards, Chief Justice of the US Court of Appeals of the District of Columbia who was at one time Chairman of what is known as the Judicial Council in

[15] . Gilbert Ahnee vs. Director of Public Prosecution 1999

[16] R vs. Kopyto 1987 (47) DLR 4th Series.

the United States (a Council for disciplining federal judges in the US-Judges who are appointed for life).

I had the privilege of visiting Justice Edwards when a team of judges and lawyers (Indo-US Legal Forum) toured the United States some years ago. He is a charming person, and he told me how the Judicial Council in the US dealt with all manner of charges against all manner of judges (including his own colleagues-federal judges) when litigants made complaints they were investigated; he handed me a decision of his in respect of a colleague (whom I saw sitting on the Bench with him) where a litigant had made certain allegations in a particular case; the allegations were investigated and dealt with in a speaking order in a judgement that was printed and circulated.

There was no hard feeling amongst the Judges-the in- house procedure in the United States is both open and transparent.

In Bhattacharji's case our Courts quoted from an article by Harry Edwards in which he had said, and I quote: Ideal of judicial independence is not compromised when judges are monitored and regulated by their own peers. This limited system of judicial self-regulation present no constitutional dilemma as long as the removal power remains with Congress. I argue that the judiciary alone should monitor this bad behaviour through a system of self-regulation."

We have so far lacked a system of a "transparent judicial self-regulation" and this must now be adopted. I was particularly happy to hear the Chief Justice of India say so, (on the occasion of Law Day - early this week (as you know in Delhi we celebrate every year the 26 November the day the Constituent Assembly adopted the Constitution of India as Law Day. The CJI said: (quote):

"Where the subordinate judiciary is concerned, the High Court exercises adequate disciplinary jurisdiction and it is very necessary that errant subordinate judges should be disciplined, after adequate inquiry. This would send out a message not only to other judges but to the public at large that corruption within the judiciary is not tolerated. So far as the higher judiciary is concerned, impeachment is the only legal remedy and it is available only in the cases of what are called "high crimes and misdemeanours'. In any case, a recent experience of the impeachment process showed how flawed it could be. The only alternative is internal, namely, the in-house procedure, and I would like to see it enforced whenever the conditions to do so exist.[17]

[17] The issue of Judicial Accountability had been discussed at the Conference of Chief Justices held in 1990 and on the basis of the broad consensus emerging out of the deliberations the then Chief Justice of India had summed up the position in the following words: "The Chief Justice of the High Court has the competence to receive complaints against the conduct of the Judges of his own court and when he Chief Justice Bharucha knew the importance of an in- house procedure". He was a Senior Judge in the Bombay High Court, where it was first initiated and tried. In June 1990 two Bar Associations in the High Court of Bombay resolved that none of its members would appear before four named Judges of the High Court against whom there had been repeated allegations of nepotism and corruption by responsible members of the Bar and which had gone unheeded by the Chief Justice of Bombay, and also by the then Chief Justice of India; The resentment had been building up and simmering among all sections of the Bar not just for a few months, but over some period of time. In fact, when I was invited to speak at the 125th Anniversary of the Bombay High Court I had mentioned in my address about the problem of the two Great C's (Corruption and Caste) creeping into the higher echelons of the judiciary in the State (i.e. State of Maharashtra) Chief Justice Dharmadhikari who presided, acknowledged that the High Court was faced with this very grave problem, and was glad I had openly raised it, but alas this able judge could do nothing about it, as he was then only acting as Chief Justice, His successor, Justice chittatosh Mookerjee who hailed from Calcutta and who (then) knew nothing of the problems in Bombay was just finding

receives any he would look into it for finding out if It deserves to be closely looked Into. Where he is satisfied that the matter requires to be examined, he shall have facts ascertained in such a manner as he considers appropriate keeping the nature of allegations in view and if he is of the opinion that the matter is such that it should be reported to the Chief Justice of India, he shall do so.

The Chief Justice of India shall act in a similar manner in regard to complaints relating to conduct of Judges of the Supreme Court and in regard to conduct of Chief Justices of the High Courts.

his feet-he was a great judge: (judging was in his veins his father Justice Ramaprasad Mookerjee and his grandfather Sir Asutosh Mookerjee before him had presided over the High Court of Calcutta). So, when two representative Associations of the Bombay Bar, exasperated at the lack of initiative from the judges and from the CJI, took the unprecedented step of virtually declaring guilty four named sitting judges-yes, without even hearing them: on the principle that the hand that holds the scales of justice must not be "seen by responsible sections of the Bar to manipulate them". Chief Justice Chittatosh Mookerjee did the right thing: He carefully read the representations, made his own inquiries, and then refused to assign any work to any of the three judges named in the Bar resolutions (the fourth having resigned earlier): not in deference to the near unanimous wishes of the Bar, but because he himself had gone into the allegations and found them not lacking in substance. On a later visit to Bombay a former Chief Justice of India reportedly upbraided the Bar Associations for having taken this hasty step; many judges of the Supreme Court had then felt likewise. But my sympathies were and are with the Bombay Bar- not because I believe in the boycott of Courts by lawyers (I have for long openly protested against lawyer's strikes) but because I believe the Bar was left with no choice: the Higher Judiciary though repeatedly given the opportunity, did not, only because it would not, take care of its own domestic problems; if the Bombay Bar had not acted when it did, the entire High Court (I believe) would have soon been swamped with ill-founded rumours by disgruntled litigants.

It is for this reason that I recall with a personal sense of joy the spirited words of the Chief Justice of India spoken on Law Day early this week.

X.

The line between destructive attacks and trenchant criticism is a thin One- The experience in other jurisdictions:

There is passage in a speech of the great Lord Atkin- which is purple prose. It has been forgotten by most modem judges (at least in the developing world) even after sometimes quoting from it:

"The path of criticism is a public way: the wrongheaded are permitted to err therein Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, 17 even though outspoken, comments of ordinary men".[18]

I commend to our Judges the Atkin approach-"balancing" the two public interests is not difficult; with this approach; absent the Atkin approach the dice gets loaded against "free speech"!

The line between "destructive attacks" and trenchant criticism is always a thin one-not only in India but in other countries as well. A case in the European Court of Human Rights illustrates the difficulty of making choices. A few years ago the European Court of Human Rights-had to decide the case of Prager and Obershilick vs. Austria. The Petitioners before the European Court were:

On the basis of the facts ascertained, the Chief Justice of the High Court or the Supreme Court, as the case many be shall take such appropriate action as may be considered proper, keeping the interests of the judiciary as the paramount consideration.

My comment on this is that there has to be more transparency, more accountability-something to show that the in-house procedure is in fact in operation and is being used.

[18] Andre Paul v. Attorney-General (1936), AC. 322

Prager a Journalist living in Vienna, and Obershilick, Publisher of a periodical known as "Forum". An article by Prager was published in the "Forum' entitled DANGER"! HARSH JUDGES!". It contained a diatribe against Judges In Austria's Criminal Courts. Prager said they exercised absolute power, exploited the weaknesses or peculiarities in the accused, acquitted only as a last resort, and treated lawyers for the accused "like miscreants". He described Judges as "arrogant bullies', who maintained their independence as Judges only to inflate inordinately their own self-importance which enabled them to apply the law in all its cruelty and irrationality, without scruple and without anyone being able to oppose them. And so it went on.

On April 26, 1995, the European Court of Human Rights handed down its opinion. It was a majority opinion-a narrow one
. The majority said:

"Of the accusations levelled by those allegations, some were extremely serious. It is therefore, hardly surprising that their author should be expected to explain himself. By maintaining that the Viennese Judges "treat every accused at the outset as if he had already been convicted", or in attributing to a Judge "bullying" and "contemptuous" attitude in the performance of his duties, the applicant had, by implication, accused the persons concerned of having, as Judges, broken the law or, at very least, of having breached their professional obligations. He had thus not only damaged their reputation, but also undermined public confidence in the integrity of the judiciary as a whole".

There were strong dissents however equally forcefully expressed. Judge Pettiti's views were expressive of the opinion of the minority of four Justices:

"Clearly judges must be protected from defamation, but if they wish to institute proceedings it is preferable for them to opt for the civil avenue rather than criminal proceedings. States that allow judicial proceedings to be televised accept by implication that the judge's conduct is exposed to the critical view of the public. The best way of ensuring that objective information is imparted to the public for its education is to secure fuller and franker co-operation between the judicial authorities and the press'.

The case from Austria shows that there is a sharp divergence of opinion even amongst eminent judges as to which of the two great concepts are more necessary to be maintained and upheld in a democratic society: Free Expression or Independent Judiciary. And Judge Pettiti's recommendation of a "fuller and franker" cooperation between the judicial authorities and the press" comes not a day too late. The concern of the journalist (or media-person) is not just that Courts can (and do) issue restraining orders, but that if a gag order is disobeyed, the same court will issue a contempt citation, which is enforced even if the restraining order is eventually reversed by a higher Court! Most journalists (and media-persons) genuinely believe in the law of the land, but do not believe that the judge-as opposed to the editor-is the one to strike a just balance between the concepts of "Freedom of Expression' and "Fair Trial".

All this is further compounded by judicial distrust of the press. In the play "Night and Day", Tom Stoppard has one of his characters saying: "I'm with you on a free press. It's the newspapers I can't stand!' Some Judges share this view but will not publicly admit it.

XI.
Conclusion

The current state of the law is certainly not ideal: till altered we must cope with it. I take the liberty of offering some guidelines to Bar and Bench.

(A) To Lawyers:

(1) Argue your cases competently and vigorously and be as critical of judgments of Courts as you wish; but do remember never to use offensive and exaggerated language: not only is it bad form but it rebounds on you.

(2) If on rare occasions you do have to criticise Courts, Judges and the administration of justice tread softly- because you tread on the feet of judges: some of whom are more easily hurt than others; We Lawyers must never forget that we are also part of the administration of justice and derogatory irresponsible comments reflect on lawyers themselves.

(3) Exercise your right of free speech and make your point-but pause in your choice of words: so that people who hear or read do not get the impression that you are attributing motives or malice to the judge or to the Court;

(B) And to Judges:

I would respectfully commend to them the Atkin approach and the Templeman approach: Courts are not fragile flowers; they do not wilt in the heat of argument nor of criticism, howsoever trenchant and caustic. I would suggest: that the contempt power not be used to discipline either the lawyer or the press: this creates a needless conflict which (with tact) could be avoided. As for the litigant a 'benign neglect" is recommended treat contempt with "benign neglect': or in other words treat contempt, with contempt!

".... An American Judge had once said about the US Supreme Court-'the important thing we do there is not doing: useful words to remember in the area of contempt jurisdiction."

(C) Generally:

The law regarding scandalising the Court can never be codified because the circumstances in which the Courts and the administration of justice are scandalised are too diverse for exact definition: but I would recommend three things:

(i) First:-

that truth and good faith must be reinstated as valid defences in the power to punish for contempt (either by judicial diktat or by law): because they are vital for the future administration of justice. The motto should be: let nothing defile the temple of justice, not the errant litigant, not the errant lawyer nor even the errant judge. (ii) Second:-

In view of the vagueness of the contours of contempt jurisdiction, the power to punish for scandalising the Court or the administration of justice must never be invoked by a single judge or even a Bench of two judges: it must always be exercised by a Bench of at least five judges both in the High Courts and in the Supreme Court: because when the judges speak in contempt case they speak for the Court and it is important that what they say is representative of the thinking of the Court as a whole.

(iii) Third-

Power to commit for contempt should never be conferred on Commissions or Tribunals even if they are manned by retired judges of the highest Court-Judges when they retire love to have the full panoply of power which they enjoyed as sitting judges: the Contempt of Court power is too serious and fraught with too many grave consequences to be left to any ad hoc institutions, howsoever important except established by the High Courts and the Supreme Court of India.

And, Lastly in this branch of the law, the watchword is to "keep your cool': Contempt law to be justly administered requires robust commonsense and an abundant sense of humour: the ability to laugh at yourself: which prompts me to conclude with a story, reputedly a true story:

It concerns Chief Justice Tate of the U.S. Supreme Court who once went to his former law school and jokingly told the Dean (formerly his own law teacher):

'Well, Dean, I suppose you still teach your students that all judges are fools;"

To which the Dean very politely (but pointedly) responded:

'No, No, Chief Justice-we let them find that out for themselves!"

Freedom of Expression - Emerging Trends

(Delivered on 23-11-2002)

Justice Rajendra Babu Judge, Supreme Court of India

Shri C.L.Agrawal's name has become a legend in the annals of the Rajasthan Bar and social life. His growth as a lawyer was phenomenal and he became a leader of Bar at a very young age. Which position he held until his passing away in the year 1979. Having not known him personally, it would be too much on my part to dilate on his legal talent of which I have heard in creditable terms from many of my friends. He was interested in the welfare of the Bar and was associated with the State and the Central Bar Councils in one capacity or the other for a long time and was the President of the Bar Association for a decade and a half. His interest in spreading education is indicated in the two Trusts he created by making munificent donations. He was well known as a philanthropist having donated large extent of land to Bhudan Movement and also providing funds for running a medical clinic. He was also active in public life in many capacities particularly as a Charter Member of the Rotary Club of Jaipur having acquired the distinction of the 'Paul Harris Fellow'. Perhaps if the Bar Association or the Bar Council had approached me to deliver a lecture in his memory, I would have hesitated to do so daunted by the stupendous personality of Shri C.L. Agrawal. However, because of his illustrious son, Justice Suresh Agrawal who has been my Guru in having initiated me in the Supreme Court, I did not have the courage not to abide by his 'command' to address you.

Let me first pay my tributes to late Shri C.L.Agrawal and dedicate this lecture which I am going to deliver to his cherished memory.

Under Article 19(1)(a) of the Constitution freedom of

expression is guaranteed to the effect that all citizens shall have the right to freedom of speech and expression, subject to clause (2) thereof which authorises the State to impose restrictions upon the freedom of speech and expression on the grounds like sovereignty and integrity of the State, Security of the State, Friendly relationships with other countries, Public order, Decency or morality, Contempt of Court Defamation, Incitement to an offence and others. Freedom means the right to express one's conviction and opinions freely by word of mouth, writing, printing picture or electronic media or in any other manner addressed to the eyes or ears. Thus, it would include not only the freedom of the press, but the expression of one's ideas by any visible representations such as by gesture and the like. Expression naturally pre-supposes a party to whom the ideas are expressed or communicated. In short, freedom of expression includes the freedom of propagation of ideas, their publication and circulation and their right to answer the criticism levelled against such views, the right to acquire and impart ideas and information about matters of common interest. It would not, however, include every con-commitant right. Freedom of expression is indispensable for the democratic freedom. In order that the restrictions upon any of the rights

guaranteed under Article 19(1)(a) not only should it be related to any other permissible grounds enumerated above, but it must further be reasonable. Freedom of expression is the most cherished right, zealously guarded by the Courts.

The right to freedom of speech and expression would 92 include the freedom of a citizen as a viewer/listener/reader to include and to communicate or disseminate information and ideas rethout interference. Expanse of the right of free speech and expression is not restricted to a few persons and is available to all citizens equally. State is under obligation to ensure conditions in which the right can be meaningfully and effectively enjoyed by all citizens and prevent its monopoly or dominance by a few. These concepts were considered by the Supreme Court in L.I.C. v. Manubhai D. Shah, (1992) 3 SCC 637 and Ministry of Information and Broadcasting. Government of India v. Cricket Association of Bengal, 1995 (2) SCC 161. Right of access to broadcasting, of individual or groups, was held to be implicit in the right to freedom of speech and expression which included the following facets:-

(a) freedom of the broadcaster which means freedom from State control and in particular from censorship by Government;

(b) freedom of the listeners/viewers to a variety of views and plurality of opinions based on their retaining an interest in free speech-restraints on broadcasters justifiable on ground of free speech;

(c) right of the citizens and groups of citizens to have access to the broadcasting media basis of such right- danger of certain groups getting unduly privileged or in a dominating position;

(d) right to establish private Radio/TV stations.

Need for regulation by a regulatory body was also indicated. It is made clear that no citizen has a right to use airwaves, which is public property, to disseminate his views and opinions. Hence the right to establish private broadcasting stations, permanent or temporary, statutory or mobile, cannot be read into Article 19(1)(g). Out of these facets, the right of the listeners and viewers and not of the broadcaster is paramount. Monopoly over broadcasting by Government or anybody else was held to be inconsistent with free speech and interest of citizens. It was indicated that use of airwaves, which is public property, must be regulated for its optimum use for public good for the greatest number. Scarcity of frequencies calls for regulation of broadcasting and control must be vested in independent public corporation in as much as electronic media is more pervasive, potent and influential.

But at the same time, you must have come across that expression has now become a saleable commodity. Why I say that is that now you want to propagate your ideas either by print or by electronic media. How do you do it. You purchase time over television or in the newspaper. If you have to publish or insert an article or express the view, whether it would conform to the views of the proprietors or conform to the ideas of the advertisers, they publish the ideas; otherwise they do not. You please notice what happened to Salman Rushdie. He wanted to bring out the book "Satanic Verses" What happened? When the book was sought to be published in England, by Viking, the book was published. But in India, when an Indian Edition was to be published by Viking, it is believed that on advice that there would be some problem, it was not published in India. That way, though there is no State intervention in the right, still there are certain other constraints in the exercise of freedom. That is the aspect I would like to highlight.

State action constructs the value of speech; state withdrawal exposes speech to powerful market forces and private action is the greatest constraint to free speech. How far the market is free

market? Politics construct all markets; State defines every right to property including intellectual property in an era of mass communication such rights can be incredibly valued. The main- theme of my talk today will be how other constraints arise in respect of free speech and how one can maintain ones dignity or self respect in regard to the same. It is very interesting to note that the Supreme Court in Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd., 1995 (5) SCC 139, held that commercial speech is a part of freedom of speech and expression guaranteed under Article 19(1)(g). Therefore, commercial advertisement is a form of commercial speech and is protected under Article 19(1)(g) subject to Article 19(2). Yellow Pages attached to the telephone directory consisting of page advertisement for businessmen, traders and professionals procured by the contractor through whom MTNL got the directory printed and published for distribution to telephone subscribers was help to constitute commercial speech. Such a service was not treated as a public utility service. Publication of Yellow Pages and publishing of a telephone directory cannot be within the exclusive function of the Nigam and, therefore, cannot only the contractor has right to print and publish the Yellow Pages in the directory. The contractor cannot print and publish an entry containing only the names, addresses and telephone numbers as usually published in a telephone directory.

In Shankar v. State of Tamil Nadu, 1994 (2) SCC 478, the Supreme Court had occasion to consider the impact of films and TV exhibiting scenes of sex, violence, bootlegging, drug trafficking, etc. which are crimes in modem urban society and it was indicated that the Censor Board was required to take firm steps in this regard. Likelihood of films having remotely influenced the mind of the offender though is not a mitigating circumstance.

The society, in general, demands that the law shall secure the 'public morality' as a condition of orderly social life. I hasten to stress that I am not sanctifying a demand that any particular much less every precept of morality be legally supported; even less that it be enforced by the criminal law or that judges should be vested with power or discretion to attach criminal penalties to attract any positive morality. I am only saying that the society demands the maintenance of the general morals should be a constant concern of the law, alongside other claims, for example, those as to minimal standards of individual life, cultural and political progress or the individual aspects of these in terms of freedom of the physical person and of opinion and expression. And, this means that the laws securing the general morals will vary in degree at particular times and in particular kinds of conflicts, just as it does with other claims.

However, throughout the law, there may be found provisions aimed directly to protect accepted standards of morality. One such law is that which prohibits obscene publication. 'Obscenity' may be taken, as meaning offensive to chastity or modesty expressing or personating to the mind or view something that delicacy, purity and decency forbid to be expressed. The idea as to what is deemed as obscene, of course, varies from time to time and region to region depending upon social values.

Though the accepted standards of the matter remain stable over a long period, they are subject to change. The immorality or indecency of one age may be propriety of the next and vice versa. The social pressure for observance of some standard remains, but its content often changes.

The quality of offending decency and of tending to deprive the corrupt persons whose minds are open to sexually immoral influences and into whose hands the matter in question may come. It accordingly concerns language, literature or representations dealing with erotic, pornographic and sexually perverted subjects. But, the obscenity of any matter lies in its effect on the mind of the reader or a viewer more than in any definable quality of the matter itself.

You are aware of a very well known work Lady Chatterley's Lover by D H. Lawrence. When that was sought to be published in India, the Supreme Court held in Ranjit v. State of Maharashtra, 1965 (1) SCR 65, that the book is held to be obscene on the ground that the utterances are likely to undermine decency on the slity. The importance and interest of obscenity lies in the attempts made to define and to suppress it, particularly obscene books or pictures. In this context, I may refer to the American view on this matter. The standard is the reasonable adult and that work is obscene if it appealed to prurient interest in sex. Test is whether the work as a whole has a libidinous effect. A work is obscene if the 'average person' applying contemporary community standards finds that the work taken as a whole appeals to prurient interest; if the work depicts or describes in a patently offensive way indicating sexual conduct and if the work taken as a whole lacks serious literary, artistic, political or scientific value.

In SHAW v. D.P.P the House of Lords stated that an indictment would lie for a crime of 'conspiring to corrupt the public morals', the most controversial laws directed to protecting the social interest in the general morals were those concerning obscene literature. The difficulty arises not merely from the truism that decency is in the eye of the beholder, but also from the countervailing claims of free expression with which cultural and political progress are heavily involved. The more leeway is left for subjective judgment, the greater the threat to free expression. In the characteristic modern formulation as to literature, that 'obscenity' means undue emphasis on matters of sex, that fighting word is obviously 'undue'. The indeterminacy is by no means wholly removed by exempting from the obscenity law, works of literary or artistic merit' or bonafide medical or scientific works; nor even when such exemptions are embraced in a wider category of justification as being for the public good' on the grounds of other objects of general concerns'. The difficulties are far-greater what censorship prior to publication is imposed, and there broods over this whole area the question whether the ground of regulation is the relief of the community's sense of outraged morality, or some actual threat of corruption to some class or classes of persons. If the latter alone were the gist, one might have expected both opposed positions, especially the suppressive one to marshal far more decisive empirical evidence than appears to be thus far available about such corrupting effects.

Bobby Art International v. Om Prakash Hoon: 1996 (4) SCC 1: In the matter of certification of film "Bandit Queen" (Life of Phoolan Devi) when the question arose whether it contained scene against 'decency or morality' the matter was decided by the Supreme Court on the test that scenes should advance message of the film intended to convey. The film intended to depict consequences of social evil and can show evil itself to the extent it is relevant for the purposes of the film.

A film that illustrates the consequences of a social evil necessarily must show that social evil. The guidelines must be interpreted in that light. No film that extols the social evil or encourages it is permissible, but a film that carries the messages that the social evil is evil cannot be made impermissible on the grounds that it depicts the social evil. At the same time, the depiction must be just sufficient for the purpose of the film. The drawing of the line is best left to the sensibilities of the expert Tribunal.

In the context of obscenity what is usually dealt with is any book or literature published in any newspaper or magazine is characterised as pornography. But, now the obscenity does not stop with only books and the press media but extends to cyberspace. But with the electronic network and the computer technology having rendered entire world into one cyberspace hereby reducing it into a global village, the relevance of software gains utmost importance.

Novel technologies offer new means of dissemination.

When the French Government launched its electronic conferencing system of Minitel, more than 20 per cent of the message were sexually charged. American Online invites computer users to meet electronically in a series of public rooms-Naughty Girls", electrance Connection', 'Gay Room' and then adjourn to private Roms for confidential conversations; participants can use faxes tooransmit sexually explicit photographs. Sierra On-Line offers an interactive version of the best-selling adult software programme, Leisure Suit Larry, in which participants can configure the appearance of their characters and engage in sexual adventures with each other.

In United States vs. Playboy Entertainment Group, 529 US 803 (146 L Ed 2nd 865) the question raised for consideration is whether Section 505 of the Telecommunications Act, 1996 restricting transmission of cable television channels primarily dedicated to sexually oriented programme violates the free speech guarantee.

Section 505 of the Telecommunications Act. 1996 required to restrict transmission of cable television channels primarily dedicated to sexually oriented programme either to fully scramble or otherwise fully block these channels or to time channel, that is, limit transmission to hours when children are unlikely to be viewing it This provision was held to be violative of the free speech guarantee where it was not alleged that the programming in question is obscene as (1) Section 505 is a content-based regulation of speech that enjoys first amendment protection; (2) Section 505 singles out particular programmers for regulation; (3) The only reasonable way for a substantial number of cable operators to comply with Section 505 is to time channel which silences the protected speech for 2/3rds of the day in every home in a cable service area regardless of the presence or likely presence of children or of the wishes of the viewers; (4) To prohibit this much speech is a significant restriction of communication between speakers and willing adult listeners; (5) Although Section 505 was enacted to address the problem of 'signal bleed' a phenomenon under which audio or visual portions of the scrambled programmes might be heard or seen the evidence is inadequate to show that signal bleed is a pervasive problem (6) No support for such a restriction can be found in the legislative record relevant to Section 505; (7) The Government's interest is thus not sufficiently compelling to justify such a wide spread restriction on speech and (8) Section 505 has not been shown to be the least restrictive means for addressing the problem in question, for (a) a less restrictive alternative is provided by Section 504 of the Telecommunications Act which requires cable operators to block undesired channels at individual households upon request and, (b) Section 504, it publicised in an adequate manner, may possibly be an effective means to achieve the Government's policy.

While this is the view of the Five Judges of the Supreme Court, Four Judges including the Chief Justice dissented from this view. The minority was of the view that the statutory scheme reflects more than a Congressional effort to control incomplete scrambling. Through signal bleeding, the scrambling technology allowed non-subscribers to see and hear what was going on and in those circumstances, the Congress decided to bring in the fresh legislation. They were of the view that the statute respected viewer preferences. It regulates transmissions by creating two default rules applicable unless the subscribers decide otherwise. Section 504 requires a cable operator to fully scramble any channel if a subscriber asks 'not' to receive it and Section 505 requires a cable operator to fully scramble every adult channel unless a subscriber asks to receive it. Therefore, these two provisions create a scheme that permits subscribers to choose to see what they want. But each law creates a different default assumption about silent subscribers. Consequently, a subscriber wishing to view an adult channel must opt in and specifically request that channel (Section 505). A subscriber wishing not to view any other channel must opt out, (Section 504). The minority held that the view of the majority that the Government failed to prove the seriousness of the problem, that is, receipt of adult channels by children whose parents did not request their broadcast is flat out wrong. For one thing the parties conceded that basic scrambling

does not scramble the audio portion of the programme. For another Playboy itself conducted a survey of cable operators who were asked: is your system fully in compliance with Section 505? 75% of the cable operators answered 'No'. Therefore, the majority concluded that most cable operators had no practical choice but to curtail adult programming by switching to night-time only transmission of adult channels. If signal bleed is not a significant problem, then why in light of the cost of its cure must, so many cable operators switch to night-time hours. There is no realistic answer to this question. If, as the majority suggested, the signal bleed-problem is not significant, then there is also no significant burden on speech created by Section 505 and the majority cannot have this evidence both ways. Secondly, it was noticed that the majority was of the view that the Government failed to demonstrate the absence of a less restrictive alternative which presents a closer question. The decision was based on an earlier decision in 521 US 874 where it was held that less restrictive alternative must be at least as effective in achieving the legitimate purpose that the statute was enacted to serve. Therefore, the minority emphasised that 'words similarly and effective are critical, that is, they imply a degree of leeway, however small for the legislature when it chooses among possible alternatives in the light of predicted comparative effects. On the major point of disagreement, it was stated that the record makes clear that Section 504 opt out is not a similarly effective alternative. Section 504 (opt out) and Section 505 (opt in) work differently in order to achieve very different legislative objectives and referred to several decision to conclude that the Government has a compelling interest in helping parents by preventing minors from accessing sexually explicit materials in the absence of parental supervision. Though this may be the position in regard to the United States, so far as our Constitution is concerned, Article 19(2) makes it clear that even a law can be made to impose reasonable restrictions on the exercise of the right of freedom of speech and expression in the interest of decency and morality. While in the decision adverted to just now, it has been held that though the expression may be 'Indecent' still not 'obscene'. That difficulty may not arise in the context of our Constitution.

I am referring to this important aspect because of a sensational decision rendered by the Federal Court in Philadelphia. The U.S. Government statute called 'The Communications Decency Act' (CDA) was enacted on the basis that the whole information revolution was jeopardised, the cybernauts believed, by a primly named U.S. Government statute-CDA signed into law by the then President Clinton. C.D. Act was supposed to restrict On-line pornography and make the net safe for children by banning 'indecent culture. But, the legislation was so vague and broad that uploading Ulysses to the World Wide Web could have been construed as a felony punishable in the U.S. by a hefty fine and two years in jail. If that is the kind of treatment James Joyce would get, what hope would there be for poor Bianca and her Smut Shack? The Federal Court ruling extends over cyberspace but under the umbrella of U.S. Constitution's First Amendment, which protects free speech. They pronounced that the Government's attempt to regulate On-line content more closely than print or electronic media unconstitutional and profoundly repugnant. The proponents supported CDA fuelled by the outrage that hard core pornography can be found on a computer net work to which children have access. But the Philadelphia jurists found no indication that children were at particular risk to exposure of 'cyberporn'.

The network allows parents to search out offensive material. They concluded that whatever danger was posed for kids by the presence of indecent offerings On-line was best addressed byparents/teachers. They found no evidence to show that sexually oriented material is the primary type of context in this medium. They observed communications over the internet do not 'invade an individual home or appear on one's computer screen unbidden. They noticed that even official witnesses admitted that odds were skim that a user would come across a sexually explicit site by accident. They ruled that obscenity was already illegal under current statutes and hence no need for fresh law. The Justice Department was enjoined from not only enforcing the Act but also even

investigating the alleged malfeasance, at least for now. The judges declared the Internet a medium of historic importance, a profoundly democratic channel for communication that should be nurtured, not stifled. They stated because the net is still in its infancy, it deserved at least as much constitutional safekeeping as books and newspapers, if net more. As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion. In enjoining the 'indecency" provisions of CDA, ACLU vs. Rena, 136 L. Ed 2d 436 (1996), reasoned that content providers on the internet for technical reasons are unable effectively to determine identity and age of users accessing the material. And so the possibility of the prosecution for communication to minors would "chill" speech generally on the internet and restrict constitutionally the speech targeted at adults.

Obscenity is traditionally referred to in the context of literature, media, films, plays, songs and alike. Now after the network of cyberspace is established and with the video tapes becoming popular the scope of dissemination of information is much wider and consequently, greater scope for its abuse as it is possible to publish, telecast or communicate obscene matters.

In these days, when human beings themselves brand as commodities and become marketable in the sense that a film star becomes the sole property of a 'Company' which can exploit him for the productions to be made in collaboration with it. In such cases, when they engage in obscene activities how far the State can control the activities? or intervene in the prevention or prohibition of such acts as are contrary to morals and decency is a moot question. Indeed, beauty parades are held where women endowed with great beauty and personality participates. Some of the feminists characterise the same as pandering to the: male ego. certain others applaud the same. And when any of the participants get laurels of a Miss Universe or a Miss World the highest executive of the Government would grant audience and parades are held in the City, which she visits to celebrate festivals and feasts. If in participating such parades a beauty queen does or does not indulge in obscene activity is a matter for your consideration, for she tries to reveal as much of her body as possible for the appreciation of the judges. In the same manner, when models exhibit their physical ware in advertisements the question of decency arises.

We had a very interesting episode in relation to Mrs. Anjali Kapoor, an Advocate practising at Delhi, who had posed for a magazine, which according to some constitute obscene exposure of her body. In this context, I must refer to Milind Soman and Madhu Sapre promoting certain commodity by posing as amorous couple in nude which is subject matter of a criminal case in a Bombay Court. To prohibit or prevent free exposure of oneself by displaying beauty and its conflict with the right of expression does arise, when advertising is held to be part of fundamental right under Article 19(1)(a) of the Constitution.

Coming as you do from the land where there is worship of the phallus; worship of nude women by Tantriks; worship by nude service at Renuka temple at Chandraguthi; in a temple religious service is rendered by using obscene expression with reference to the deity; erotic sculpture is part of temple architecture; that Vatsayana wrote on art of love in his 'Kama Sutra", will afford the necessary sense and sensibility of culture and decency to discern between Art or Science on the one hand and Obscenity on the other.

Concept of respect I derive from Article 21 of the Constitution. Right to life is enshrined in Article 21. It has been Completed in Maneka Gandhi's case to mean something more than interpral or animal existence. It would include right to life with human dignity. It would include all aspects-of life to make man's hue meaningful. That was how it was interpreted in a case that had arisen in Maharashtra in relation to a detenu who was detained under Prevention of Detention Act. To procure books from outside the jail for publication there being nothing in the books,

which is prejudicial to the ground he had been detained. Similarly, the right was recognised in respect of a prisoner who was debarred to secure books for his study as the books purchased incite violence and defeat the very object of his imprisonment. That is how I relate the concept of expression to the doctrine of respect.

Certain illustrations are relevant. Firstly, I take up the case that arose before the Supreme Court where the Supreme Court recognised the right to produce a film is part of the fundamental right of expression. That was recognised in S. Rangarajan vs. P. Jagjivan Ram & Ors., 1989 (2) SCC 574. In that case the Supreme Court was concerned with the case in which the High Court had revoked the certificate issued by the Censor Board to a Tamil film by name "Ore Oru Gramathile" meaning "One Villages for public exhibition.

The Supreme Court took the view that the film is unobjectionable and cannot be constitutionally restricted under Article 19(2). It is the duty of the State to protect the freedom of expression since it is a liberty guaranteed against the State and the same cannot be curtailed on account of threat of demonstration and procession or threats of violence, it so happened that the film Censor Board certified and Government felt that it would not be able to control certain section of people, who are likely to guard the people they wanted. The State cannot plead its inability to handle the hostile audience problem. Freedom of Expression, which is legitimate and constitutionally protected, cannot be held to ransom by an intolerant group of people.

In another case, Rajagopal v. State of Tamil Nadu, (1994 (6) 8CC 632) the question of publication of an autobiography of a condemned prisoner is considered. The right of the press to publish extract thereof, was also raised which affects the right of privacy arising under Article 21 of the Constitution. The Supreme Court took the view that neither the Government nor its officials have any right to impose prior restraint either on the Editor or the Publisher of a magazine as they, have a right to publish autobiography, in so far as it appears from public records even without consent or authorisation from prisoner though not beyond that. Right to information is likely to be realised after the relevant law comes into force and extent to which public has access to official information, openness in structuring discretion and information is an important weapon in litigation about lawful exercise of power. But can we extend this principle to have access to information relating to individual and publish the same. And I have in mind investigation journalism who can gather information about a person or body corporate and analyse the same in a slanted manner to publish it or defame a reputed personality, thereby invade one's privacy.

When Salman Rushdie wanted to publish his book "Satanic Verses', the publishers in India did not encourage the same Government of India also did not allow the book to be brought into India, on the ground of private action of some of the Muslim fundamentalists, who threatened its publication with serious consequences ultimately resulting in Khomeini's fatwa.

There was a story published long-long ago in Deccan Herald a Bangalore Chronicle. It was the story of Mohammed. The story was totally unconnected with Muslim Community or Islam. The name of the character there happened to be Mohammed, an idiot. Ultimately that story provoked people. The story appealed on the last page of Sunday Magazine section of the Deccan Herald. I have been a subscriber to Deccan Herald ever since its inception in 1950. But I had not read that story until the controversy arose. However, who are the people who went to Deccan Herald Press and to attack it? Those who would not have read an English newspaper-autorikshaw drivers, jutka drivers and butchers. These persons went and attacked because they were incited to do so.

You know what had happened to the movie "Bombay". In Bombay when it was to be exhibited there was obstruction and a multi film hero intervened enabling the film to be brought out, but

with certain cuts. Then where is the concept of freedom of expression? In none of these cases there is State intervention. In all these cases there is intervention by certain fundamentalists. This happened when Deepa Mehta wanted to produce a film entitled "Water". When a play was to be staged to present Godse's point of view in the assassination of Gandhi; and when another play was to be staged with reference to the Sixth Wound of Christ meaning thereby that he had a weakness for Mary Magdelene which is ordinary for any mortal and Jesus was not an exception.

These stories share a common core. They concern values that inspire deep emotion; fury at that sexual objectification of women versus conviction that sex is irreducibly ambiguous; racism versus equality; the truth of religion versus religious scepticism. Each confrontation implicates more fundamental controversies; group and individual; particular and universal, traditions and innovation, authority and freedom-antimonies that have haunted mankind for centuries. Each side views its values as absolute while vilifying its opponents as an antithesis for which no synthesis is possible. This struggle allows no compromise-anything less than total victory is ignominious defeat, if values constitute the manifest content of these stories however respect is their sub-text. Women are demanding respect from producers and consumers of pornography, who make them instruments of voyeuristic pleasure. Racial and religious minorities are asserting equality against racists and anti-Semites, who defend their own superiority. Muslims are asserting equality with Hindus, immigrants with natives, traditionalists with modernists, locals with cosmopolitans while religious sceptics and creative artiste challenge orthodox hegemony. Disembodied values are not colliding in vacuum. Every assertion of value is an act of symbolic politics, a competition for status. In championing values, speakers simultaneously claim moral superiority for their groups. The eternal varieties of religion encountered the absolute of serious literature. In "Satanic Verses" controversy Muslims feel the honour of Islam is at stake while Westerners maintain superiority of their artistic, intellectual and political traditions. Status is equally visible in their controversies. But, at the same time, you please see how women conduct themselves. There is apparent contradiction in their conduct and in what they proclaim. We hold beauty contests. It is also a kind of expression of oneself. They come up on the stage in very little clothes, they appear on the stage and they get prizes. In fact, the President of this country or the Prime Minister of this country gives them audience. They adulate. But at least there are feminists who 'proclaim that there ought not to be such petty differences'. Where do we stand?

That struggles over collective status should continue to preoccupy society violates the modernist credo, now a century old, which characterises history as an inexorable movement from status to contract, particularism to universalism. Marx saw status as a feudal relic largely eradicated by the bourgeoisie and irrelevant to the proletariat a theorisation that blinded generations of Marxist scholars to the importance of race and gender. Instead of disappearing, however, status groupings embody an irrepressible nostalgia for community, an imperative to preserve, recreate and strengthen collective identity. Regional, political and economic integration not only co-exists with a resurgent nationalism but actually accelerates the very international migration and communication that invigorates competition.

Language and other symbolic communication are the principal medium of collective status competition. Although wealth and power can confer status or derive from it, yet all the three are relatively independent. A dominant group whose wealth or power is declining often clings desperately to its residual tokens of respect while a subordinate group frustrated in its aspirations to wealth or power may still assert its dignity. Because status, unlike wealth, is an indivisible good whose meaning is relational, competition is a zero-sum game. Even if a subordinate group asks only a minimum of respect, the dominant group rightly perceives this as challenging its superiority. Collective status pervades daily life. It motivates controversies over legislation

ostensibly directed toward practical ends; sodomy, AIDS, abortion, animal rights, tobacco, gun control, crime and social disorder, welfare and immigration.

Speech is essential to self-realization, social life, politics, economic activity, art and knowledge. But speech can also inflict serious harm and can reproduce and exaggerate status inequalities. How should we deal with this tension? Private action can constrain speech as serious as State. Feminists picketing pornography, the Bradford book-burning, Khomeini's Fatwa and Penguin's publication decisions. Tolerance can become self-destructive. Again these stories have revealed a central drawback-efforts to suppress a message may amplify it; banning a movie enlarges its audience, Muslim fundamentalists greatly increased Salman Rushdie's name, recognition and sale of his book if not his readership. If communities encouraged speech, victims to seek apology through informal process, then pitfalls can be avoided. Status competition is conducted through language whose ambiguity can vary. Given the ambiguity of speech, context is vitally important in attribution of meaning, who is addressing whom, before what audience, in light of what history. Status competition through speech tends to escalate and ramify compromise is extremely difficult because status competition is a zero-sum game conducted through medium values. Francois Mitterand-"All dogmatism which through violence undermines freedom of thought and right to free expression, is absolute evil". Rushdie-"Free speech is life itself".

Once offensive speech had impaired its victims' status they demand a remedy that would correct the inequality. Apology is a de-gradation. Rushdie offered apology after 'Fatwa'-but Khomeini refused to forgive. Rushdie offered further apologies to break the impasse, which merely resulted in threats of annihilation.

I am neither endorsing nor confronting the myriad ways in which private activists relegate speeches but merely seeking to demonstrate that such interference is pervasive and profound. Audiences hear what speakers say, speakers limit what audiences hear and intermediaries do both in pursuit of their own ends. Freedom of speech without State intervention would be world of constraint not freedom. Each instance or private power must be evaluated by criteria that are substantive, not formal. By obsessing about power of State regulations to constrain speech, civil liberties theory paralyses them. By disregarding the power of private activists, civil liberation theory fails to hold them accountable. This vision of State abstention and neutrality joined to private irresponsibility is fatally impoverished. Just as public activities cannot avoid regulation and partisanship, so also private activists cannot avoid power. But both must shoulder burden of choice.

Law is the construction of boundaries, which always are over or under inclusive. But when the State regulate speech every categorisation is a hard case, but just those at the edge. Bans against pornography, hate speech or blasphemy are forced to admit exception for politics, art, literature and scholarship that are capable of engulfing the rule. Aesthetic criteria are inescapably political. All symbols are irreducibly ambiguous. Context, history, identity, audience, relationship and motive can invert the moral quality of speech. But law decontextualises and aspires to universality, and finds motive hopelessly elusive.

Pornography is theory and rape the practice. Although there may be rare instances in which we can confidentially create the genesis of actions in expression, the relationship is usually more complex. An image may be stimulus, but it may also work revulsion, represent fantasy or often catharsis. The attribution of casualty tends to disregard the speaker's moral tone. Life may imitate art as often as art imitate life, but each is an improvisation, a variation on the other.

Government ban on speech suffer the problem common to State regulations and some of them are unique. Law dichotomizes experience rupturing its inherent continuities. Boundaries are arbitrary and therefore indeterminate. It is impossible to distinguish speech from the routine opportunism of politicians pandering to popular prejudice. Some emphasise 'costs' of immigration, calling for 'law and order' depicting AIDS as divine retribution, attacking racial quotas, or extolling family values.

Legal distinctions evaluate form over substance. Sceptics may attack religious belief as long as they do not mock the believer, film makers may exploit sex if they portray the behaviour as an artistic veneer; racists and anti-semites can include in their hatred in the language of pseudo science or history. Legal efforts to regulate speech flounder on the incredible ambiguity of meaning. The significance and moral values of symbols vary radically with speaker and audience and can reverse rapidly, even instantaneously, like the optical illusion that flips between a vase and two profiled faces. Whereas circumstances only aggravate or mitigate the heinousness of other crimes, they can transform speech from abhorrent to commendable and vice versa. Subordinated groups play with their stigm.... in order to neutralise them. Although the moral quality and hurtfulness of symbols depend on the creator's motive, this is singularly difficult to discern. Author or critic may insist that extreme misogyny turns into parody, as Bret Ellis protested about his novel "American Psycho" and Henry Louis Gates Jr. said of '2 Live Crew.' And even the beat intentions may only mitigate, not excuse. The equally pivotal audience response is unpredictable, divided, and fickle. The history of art, literature, politics, religion, morality and even science should inspire healthy scepticism about the durability of contemporary judgments.

The severity of legal remedies can be justified only by exaggerating the consequences of speech but consequential reasoning is fatally flawed. Causation is complex and the responsibility or speech unsubstantiated. All audiences actively engage in interpretation and criticism even young children are seemingly mesmerised by television cartoons. Pre-occupation with the extremes which alone provokes. sufficient outrage to mobilise the political support necessary for prohibition-diverts attention from the quotidian-which inflicts far greater harm. Hard-core porn and neo-nazi ranting contribute much less to reproducing attitudes towards race, ethnicity, gendering, popular culture, political rhetoric, child rearing practice, education and religion. But legislators and judges openly refuse to confront moral behaviour

If consequences of speech are too indeterminate to justify punishment, the effects of punishment are positively perverse. The severity of legal punishment, combined with uncertainty and disagreement about the moral quality of speech, make prosecutors reluctant to charge, judges or juries unwilling to convict, and hesitant to punish. Formal law diverts attention from the content of speech to the procedure used to suppress it, delaying the outcome and thereby distorting and diminishing the impact of legal remedies. The ambiguity of symbols facilitates evasion, allowing speakers to cloak their motives in the garb of art, science or politics-forms that Law's Literalism cannot penetrate. Regulation may fall most when it appears to succeed. Because speech is the offence, a repeat performance at trial aggravates the injury. The greatest perversion, however, is that law, far from silencing harmful speed, rather encourages, valourises and publicises it, transforming the offender into victim and offence into romantic defiance.

An analysis of controversies over pornography, hate speech and blasphemy would reveal struggle for respect between status of groups. Contemporary societies respond by oscillating between the extremes of liberalism and unauthoritarantism, uncritical tolerance and perfectionist control. Liberalism demands faith that truth and justice will triumph in the long run Politicians court fickle public by promising the quick fix of more laws and heavier penalties. Both sides construct moral

panics. Liberals warn that any restraint on speech is a step down the slippery slope towards fascist and communist totalitarianism; Government partisanship revives memories of State religion and agitprop prohibitionists justify bans on pornography and hate speech by raising the spectre of physical attacks on women, racial, religious and sexual minorities. Either extreme is subject to criticism. Unbridled liberty cannot inform a principled stance towards speech, yet regulations invite excesses and errors. Liberal political theory is enthralled by the chimera of neutrality, hoping to avoid the responsibility of political choice by finding a principled basis for the exercise of power. But the search is deemed to fail and entails high costs. The 'haves' come out ahead not only in the pursuit of justice, the contest for power, and the competition for wealth, but also in the struggle for respect. Authority that is wilfully blind to real inequality perpetuates and magnifies it. The explosive growth of homelessness has rendered Anatole France's century old aphorism even more timely. "The law in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." Defending the denial of political asylum against a charge of racism, British Home Secretary Kenn Baker offered an unwitting paraphrase: "Our policy is colour blind. It applies to people wheresoever they come from, whether it is Africa, Asia, or Eastern Europe.' It clearly was irrelevant that North Americans and West Europeans were not clamouring at the gates. Baker's leader displayed greater candour. Opposing changes in the Inheritance Tax, John Major declared. "I want to see wealth cascading down the generations. We do not see each generation standing out a new, with the past cut off and the future ignored.' For the same reason he supported educational inequality.

Forced to express preferences about speech, the liberal state typically emphasises from over content. But the time, manner and place restrict that. Inevitably favouring those who can comply and still be heard. As we have seen, regulation often targets extremes, hoping that stylistic excess will foment enough anger to generate a consensus for restraint. As religious fervour declined, blasphemy laws punished only the worst insults. As sexual taboos fell, only the portrayal of violent sex was prescribed, racism, anti- semitism and homophobia are so pervasive that only the most virulent forms are regulated. Preoccupation with the extremes/ tolerates and appears to condone quotidian harms. In any case outrage is not a neutral quality. It varies with the audience, as even Supreme Court acknowledges in enforcing community standards of decency. Furthermore, the very novelty that constitutes offence is an essential aesthetic ingredient.

There is no escape from politics. Some messages should be encouraged and others discouraged for what they say, not how they say it. The task is made acutely painful by millenia of religious intolerance, philistine censorship and political and sexual repression. My goal is to reduce subordination based on gender, race, ethnicity, religion and sexual orientation. But that amorphous ideal leaves difficult questions, unanswered. If feminists campaign against pomography because it subordinates women, why should not the religion attack sexual permissiveness as subordinating believers? If Salman Rushdie is a blasphemer, Luther, Galileo, Darwin and Freud. so are Moses, Socrates, Jesus,

Because all cultural phenomena are associated with particular status groups, expression is inescapably partisan. The creators of symbolic goods may rationalise their behaviour as the response to market forces; but some consumers always are more equal than others, and supply shapes consumer demand while purporting to satisfy it. Those who produce or sponsor records concerts, plays, exhibitions, movies, televisions, radio, and printed matter also have a moral responsibility for their constant, if not the same as the creative artist's audiences are accountable for what they partonise, which makes the boycott of creators, producer and sponsors not just legitimate but obligatory. Invoking market failure, the state and private philanthropy subsidise cultural production. School teachers and University instructors consciously shape the minds of future generations.

The success of publishing houses magazines and newspaper for subordinated groups encourages mainstream competitors to appeal to those audiences. Public platforms welcome new speakers. The U.S. House of Representatives asked Imam Siraj Wahaj to give the invocation, in 1991; the Senate heard Imam Wallace D. Mohammed do so the following year. The Brooklyn Historical Society has organised exhibitions about black churches and black women, hispanic culture, and the Italian festival in Williamsburg. Entrepreneurs have redesigned prosaic artifacts that powerfully shape consciousness of relative worth. When Yin Eason's 3 year old son cried because he could not grew up to be master of the universe since, he was black, she began manufacturing dolls and action figures with ethnically, authentic features: Imani (a high fashion model) and Sun-Man (a Star Trek character). Although major toy-makers initially rebuffed her approaches, they soon became interested in reaching the 34 percent of children under 10 who are Black or Hispanic. As these (and earlier) examples show, attacks on racial subordination may perpetuate or even intensify gender stereo-type. To counter these, Cathy Meredig designed an anatomically correct doll, with a shorter neck, higher waist, and larger feet than Bargis. Little girls did not notice the difference, but mother exclaimed "Wow! a doll with hips and waist!"

At the same time that the hegemonic culture/moulds what is said and heard profoundly affecting collective reputation, particular exchanges enact/status inequalities. In response, the struggle against subordination seeks to sensitise speakers to the harm they cause. Speakers could be "free" of their social environment only if the audiences were absent or indifferent- which would render speech pointless. Speakers always engage in dialogue with their audiences, even when the latter are silent. In intimate settings, couples choose their words who care, thinking and feeling much they never verbalise; marriages counselling often focuses, on problems of communication. Parents and teachers socialise children to address siblings and friends without inflicting unnecessary hurt. All performers especially the most successful cultivate their audience. While writing the last chronicle of Barset in the drawing room of Athenaeum, Anthony Trollope heard two clergymen disparaging his characters, with particular animus towards Mrs. Proudie. He declared "I will go home and kill her before the week is over" and promptly did so. When 500 million people in 27 countries saw the premiere of Michael Jackson's video "Black or White", many protested a scene showing him rubbing his pelvis and unzipping his fly and another in which he smashed up cars. Although he had already edited the type of violence, Jackson immediately agreed to cuts. "I have always tried to be a good role model" a strange claim given his deliberately ambiguous sexual and social identity. Because the effect of speech on status is contextually specific, we need a framework for analysing its harms in order to calibrate the response by reference to motive target and speaker identity.

Successful community efforts to redress the harms of speech will broaden and deepen that consensus allowing the state to extend the expectation of equality, as it has been done since the Enlightenment. The second problem-harmful speech that escapes communal regulation seems less troubling. Each nation will have to decide whether to tolerate it on the margins-in Ramiila Grounds, for instance, or the Marina Beach. An essential virtue of pluralistic regulation by partial overlapping communities is that it allows everyone to hear many messages and speak in several fora; those discontent with one community can join another. As the regulatory jurisdiction expands, the consequences of silencing dissent become more mementous. The case for suppression of speech strengthens with its danger where the harm to subordinated groups is greatest, the audience receptive and growing, the message least ambiguous, and the motive clearly evil. I support laws against such harmful speech, if mainly because their mere enactment elevates the status of those protected, but I would not expect the inevitably compromised enforcement to play a major role in redressing inequality. The real answer to both questions- bad communities and communal interstices is that there is no safe place, no escape from politics to

persuade communities and of their error and prudence to guide communities and states in exercising power. There is no one best solution to the tension between freedom and authority. If communal efforts to redress status inequality are limited by pluralism, their success also generates risks backlash and trivialisation, the self-indulgence of identity politics, revolutionary excess, and damage to civil liberation bulwarks. Conservatives denigrate the struggle for respect with the epithet "political correctness"-a redundant tautology, since politicians are omnipresent and all actors believe theirs are correct. Dominant groups confound challenges by concocting reverse atrocity stories that ridicule victims or transmute them into oppressors. Identity, however, is neither necessary nor sufficient for authenticity.

Like any political conflict, the struggle for equal status will foster excesses. Some feminist critics of pornography have entered unholy alliance with conservative moralists and religious prudes, threatening valuable art and literature as well as mispgynise trash and inhibiting sexual expression by women as well as men, homosexuals as well as heterosexuals. As long as gendered power inequalities persist, complaints against real sexual harassment may also inhibit love. The fatwa against Salman Rushdie is a grave injustice to him and a terrible blot on the reputation of Islam. Suspicion contaminates discourse across status boundaries. Fear of inclucating harm may discourage research on genetic and biological differences, or investigation of the darker history of subordinated groups. Propaganda may displace art. The unity necessary to struggle for enhanced status may breed internal intolerance, painful separatism, and external distrust.

Abandonment of an absolutist civil libertinism may deprive citizens of weapons valuable in resisting state oppression. Yet efforts to evade political responsibility by seeking refuge in illusory principle violate intellectual integrity and it is unclear that communal or even state regulation of speech that reproduces status inequality encourages the suppression of religious or political dissent, intellectual or artistic creativity. There is little evidence that either the public or their official tolerate speech they abhor because speech they value is tolerated by those who abhor it.

Some of the perspectives I have attempted to focus your attention are-
"Expression subject to market forces saleable/commercial commodity/advertisements; a

(2) Expression subject to public/social/individual interests;

(3) Expression subject to class conflicts,

(a)Racism/Ethinic

(b)Religion/Fandamentalism

(c)Feminism

(4) Expression subject to social manner/culture

(a)Obscenity;

(b)Religion;

(c)Fashion/beauty parades

(5) Expression subject to privacy;

Conflict with individual or class right Aborton/Contraception/AIDS/Privacy of information;

(6) Expression subject to Dignity of Individuals

Individuals privacy affected; Right to be left alone interference by investigative journalism In exercise of the right of freedom of Press As part of freedom of expression;

Let me conclude on a more positive note by stressing how far we have come, how many forms of status degradation once taken for granted have lost their legitimacy. Racist, anti-semitic and sexist slur that pervaded polite discourse has been banished to the margins of defiance. Crude media stereotypes now startle and shock by their rarity. Hegemony of religion is yielding to pluralistic tolerance. Public disapproval is curtailing sexual harassment. The differently abled, long forced to beg or display their differences at 'freaks.' have greater access to public life. Even homophobia is in retreat. Communal regulation of harmful speech builds on these small victories in the unending struggle for a more human society.

Challenges, Expectations and Resolutions

(Delivered on 25-01-2004)

Justice R.C. Lahoti, Judge, Supreme Court of India

Introductory

On the eve of Republic Day, I offer my joyous greetings and felicitations to everyone present here as free citizens of a great nation.

I feel honoured to have been asked to deliver this lecture in the memory of late Chiranji Lalji Agrawal. I could not have declined the invitation. The qualities of brother Justice Suresh Chandji Agrawal as a Judge, as a jurist and above all as a gentleman, have always impressed and inspired me. His command was conveyed to me by the august body, the Bar Council of India through Shri S.K. Gupta, whose capacity of persuasion is invincible and difficult to resist.

Indeed, today is a unique day. Having bidden a good-bye to the year 2003, we have launched ourselves into the year 2004 exchanging the greetings of happy, prosperous New Year. Tomorrow, we would be celebrating the 55th Republic Day. Just four days beyond we would be remembering Mahatma Gandhi, the father of the Nation who laid his life for redeeming the country from the shackles of a foreign rule. While Republic Day is a day of celebration, the Martyrs day is an occasion for remembering the martyrs. A day shadowed by such two eventful days is a befitting occasion for reflections and introspection.

Late Shri C.L. Aragwal

We all know late Chiranji Lalji Agrawal. He lived a life of little less than three quarters of a century before bidding us a good-bye with a sense of satisfaction and fulfilment. He served the humanity to his best. A combination of versatility, he was a lawyer, an academician, a Rotarian, a freedom-fighter and above all a gentleman. From his life-sketch we can gather he was a visionary and a missionary-both. A scholar and a speaker, a lawyer and a jurist, great and good, sagacious and farsighted, not only he maintained the rich traditions of his family but laid down such high standards in life which only a real 'Kramayogi can.

I recall with pleasure a few precious moments of life, which by God's grace I got the opportunity of spending with him. He was a devoted Rotarian. The fragrance generated by his deeds in the field of service knew no bounds and that is how I too as a Rotarian came to know about him. Once, in Jodhpur, I called on him. in the very first meeting, though I was a stranger to him, he showered so much of affection on me as if we had known each other for long. I recall my last meeting with him. It was somewhere around 1979 when he contested an election for Governorship in Rotary. I know he would not have contested an election but he was told that Rotary needed him as a leader, and therefore, there would be no contest. However, the human nature being what it is, late Chlranji Lalji Agrawal was forced into a contest. When the result of the election was about to be announced in the hall, I was sitting by his side with a bouquet in my hands to be presented to him on his being declared successful. But, he lost by a very narrow margin. Totally unruffled he stood up calm, cool and collected, as if nothing had happened and cheerfully greeted his opponent who had won the election. Then he silently left the his pater, I went to see him. The obvious purpose of my visit hall to show my concern about his defeat. I asked him how wat he feeling having lost the election. He smiled and recited a couplet to me. That couplet I would like to share, with you today. The couplet is full of wisdom and carries a message originating from the philosophy of 'Gita'. He had no regrets for having lost the election; what pained him was how he was dragged into election and how his friends and apparent well-wishers had betrayed him, assuring him of their support but then crossing the floor. The couplet is:

Safina ho gaya gark-e-aab apna Is ka to kise gam tha Magar afsos ye hai us jagah Pani bahut kam tha.

Ladies and Gentlemen, you all know the oft-quoted English

Poem:

-Lives of great men all remind us We can make our own lives sublime, And, departing, leave behind us Footprints on the sand of time.

To sum up the life-sketch of late Chiranji Lalji Agrawal, to sum up his great qualities endeared to his heart as I see and to deliver the message of his life I would borrow these four lines and say-

Chal woh chaal ke khushi se kate zindagi teri, Kar woh kaam ke log tujhe yaad kiya karen. Jahan bhi tera zikra ho who zikr-e-kher ho Jab bhi tera naam len, adab se liya karen.

I offer my heartfelt felicitation to the great man and a great lawyer late Chiranji Lalji Agrawal.

The Subject:

The subject which I have chosen in consultation with Shri Suresh Chandji and Shri S.K. Gupta is 'Law as Profession- Expectations, Challenges and Resolutions'. Late Chiranji Lalji Agrawal was a lawyer par excellence. It would be more appropriate to say that he was an enlightened lawyer. We thought that the most befitting tribute to the personality of late Chiranji Lalji Agrawal and to his memory would be to discuss the law as profession which was dearest to his heart. in the words of national poet Maithlisharan Gupt-

Ham kon the, kya ho gaye, aur kya honge abhi, Aao vicharen baith kar, mil Kar ise hum sabhi.

Let us reflect on our profession. Let us have some introspection. For this purpose, in legal profession, in its wider sense, I include the judges, the lawyers, the law teachers, the law students and those who are in legal services. But I would concentrate more on judges and lawyers.

The Glory of Past:

Search for truth is the noblest of all the professions. No other profession on the earth Indulges into and embarks upon such intense and intermittent search for truth as the legal profession does. A judge decides what is just in the facts and circumstances of a case and thus he accomplishes his journey in search for truth. A lawyer's mind is trained to indulge into reasoning so as to enable the grains of truth being separated from the chaff of untruth and it is this propagation of reasons which enables a judge delivering justice. Thus the lawyer by his articulated reasoning helps in accomplishing the journey in search for truth.

The profession of law, said Justice McCardie, has two aspects. It may be regarded as a pursuit which yields, if success be gained, a reward of fees and emoluments. But it may also be looked upon as a vocation which offers the joy of intellectual achievement, which claims the allegiance of unswerving honour, which asks for the guardianship of high tradition, and which affords a wide field for royal and generous service to the community.

(Selected Writings, Nani Palkhivala, p.115)

There are three base instincts:

The instinct for justice-the belief that right and not might is the true basis of society.

The instinct for liberty-that free will and not force is the true basis of government.

The instinct for balancing rights and duties with safeguards that neither the rights nor power shall be exceeded or abused.

These instincts are best brought out in a judicial mind. That is why separation of powers and rule of law are enshrined in the Constitution. in the words of Lord Devlin, "The judicial function is not just to render a decision. It is also to explain it, wherever explanation is possible, in words, which will carry the conviction of its rightness to the reasonable man, whom in his mind the judge would always be addressing... This is justice but without the lawyer it is not justice according to law. What the lawyer is uniquely trained to do is to produce the just decision out of the law and to expound the reasons for it in terms that conform to the law and add to it. This is justice according to law." (Corrupting the Constitution, Shri K.R. Ramamani Memorial Lecture, Justice Those who fought the freedom struggle and made India a free nation were all men of law. Constitution of India, one of the greatest written legal documents of the world, was drafted by a Committee the members whereof were all lawyers. To name a few-Dr. Rajendra Prasad, the Chairman, Dr. Bhimrao Ambedkar, K.M. Munshi, Ailadi Krishnaswami Aiyer, Muhammed Saiduila, Vallab Bhai Patel, Jawahar Lal Nehru, Gopi Nath Bardoli and S. Vorda Chari, were all lawyers.

The Constitution is the foundation of a civilized democratic society. The strength of the foundation depends not on the book of the Constitution but the character of the people who hold and administer the Constitution. The legal profession entrusted with the obligation of acting as a watch-dog of that foundation consists of learned intellectuals. The learning will be futile, if it is not accompanied by fearlessness. No citizen can be safe and citizen's rights would have no real value unless there be a courageous Bar and an independent and fearless judiciary. It is the learning associated with courage gives righteousness to a man of law.

Human history is full of examples how the legal profession has been guarding against onslaughts on basic human rights, natural rights and fundamental rights of the citizen and thereby contributing to the maintenance of peace and order in the society. Let me recall a few notable examples, just one or two, of such righteousness when men of law have stood like a rock and became legends whose gratitude the civilization shall never forget. I feel inclined to narrate these stories, small in narrating but tall in their morals and which can make us feel legitimately proud of our heritage and inspire us for future.

The first story relates back to the 18th Century. Sir Edward West had become the Chief Justice of the newly established Supreme Court in Bombay in 1824. He was survived by two Judges Sir Charles Chambers and Sir John Peter Grant. Sir Chambers and Sir Grant in 1828 issued a writ of Habeas Corpus to the Poona Court for the production before them of one Moro, a boy of 14 years, allegedly taken away from lawful custody of a guardian. Then the Governor Malcolm thought that the Court at Bombay had no jurisdiction to issue a writ for the production of a boy from Poona. He instructed the Poona Court to ignore the writ. The writ remained unserved. This was direct and calculated challenge to the authority of the Supreme Court. On this being communicated to the Court, the Judges strongly and rightly resented and declared that "the court would not allow any individual, be his rank ever so distinguished, or his powers ever so predominant, to address it in any other way respecting its judicial and public functions, than as the humblest suitor, who applies for its protection"; and adding, "within these walls, we know no equal and no superior but God and the King". They warned the Government against instigating any person to disobey the writs of the King issued by his Judges.

Before the matter could come up before hearing in the next sitting Sir Chambers died. Sir Grant, sitting alone, said that the Government had killed his brother Judge but he shall not be killed and that he was prepared to fight single handed for the rights and privileges of his office. Finding that no return to the writ of Habeas Corpus was forthcoming, owing to the obstruction of the Government, Grant issued a fresh writ returnable immediately, with a penalty of Rs. 10,000/- in case of disobedience. A special constable was sent to Poona with authority to seek military aid, if the civil authorities obstructed him in the discharge of his duty. The Commander of the Bombay force, Sir Thomas Bradford, who was at first disposed to support the Government, now veered round to the side of the judiciary, declaring that to oppose the writ was to oppose the King, and he would call out the military to enforce his Majesty's writ. Governor Malcolm retorted by declaring that, if the Commander interfered, he would "deport him with bag and baggage" out of India, regardless of all consequences. Sir Grant then took the extreme measure of abstaining with his entire staff with the Court. He locked up the Court, suspending its functions for a period of about five months. He would break but would not bend, was writ large.

In the rift between the judiciary and the executive the Prime Minister in England, the Duke of Wellington, who was a friend of Malcolm, supported the executive. The Board of Control appointed two Judges in the High Court of Bombay to sit on the two sides of Sir Grant with the hope that "these appointments will prevent all mischief in future; as Grant will now be like a wild elephant between two tame elephants." but Grant was a "wild elephant" with a very tough hide, and made of sterner stuff than either West or Chambers. He survived these shocks for twenty years; and closed his stormy and valiant judicial career in 1848 as a Judge of the Supreme Court of Calcutta. Grant forfeited the favour of the authorities, but gained immensely in popularity with the Bombay public. On his departure from Bombay, his carriage was pulled by people of Bombay up to the port. A scroll of honour signed by hundreds of Indians commending his valour and independence was also presented to Grant on his departure from Bombay. (Famous Judges, Lawyers and Cases of Bombay by P.B. Vachha, pp 196-199).

The gold of the bravery and courage and determination to stand by what is right and just did not fade its colour and about one and a half century later the story was repeated with different actors in a different context but with the same moral. in the famous or rather infamous case of A.D.M. Jabalpur, during the emergency period, four out of five learned Judges of the Supreme Court laid down the monstrous proposition that once an emergency was imposed under Article 359(1) of the Constitution, even Article 21 was suspended and the right of the citizen to life and liberty ceased to exist. It was the lone dissenting voice of Justice H.R. Khanna who declared that the right to life and liberty which is the basic who deright of any human-being in a civilised society, and the human postulate and basic assumption of existence in every civilised society was not depended on the existence of Article 21 of the Constitution. Even in emergency the State does not have a right to deprive people of their life and liberty except by due process of law. The proclamation of emergency by President could not take away the power of constitutional courts to Issue writ of habeas corpus. Justice Khanna paid the price of his independence and courage and was deprived of the opportunity of being appointed Chief Justice of India. He knew that he would have to pay the price but he did not compromise with his conscience, the principles and his oath which he had taken for upholding the Constitution and the laws. Justice Khanna in his historic and noble dissent declared

"I am aware of the desirability of unanimity if possible. Unanimity obtained without sacrifice of conviction commends the decision to public confidence.... A dissent in a Court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision

may possibly correct the error into which the dissenting judge believes the court to have been betrayed."

In the independence and courage of Justice Khanna is written the guarantee of citizens' civil liberties, safe in the hand of judiciary even in the absence of any cast-iron guarantee in the Constitution. The only reward for Justice Khanna was his own satisfaction that he has served the cause of public good over his own interest. One of the highest tributes paid to him was by the New York Times which remarked that surely a statue would be erected to him some day in an Indian city. Indeed his monument came to be erected by his life size portrait being installed in a court hall of the Supreme Court of India. as Profession Challenges, Expectations and Resolutions

Just four days before, on this 21st January, His Excellency Dr. A.P.J. Abdul Kalam came to the lawns of the Supreme Court for delivering Nani Ardeshir Paikhivala Memorial Lecture. He spoke on the need for righteousness and enlightenment in the legal profession that is in the Judges and the lawyers. Justice H.R. Khanna was one of the persons sitting in the audience. When the Memorial Lecture was over and the National Anthem had been sung, the President of India, departing from the protocol and defying the security came down from the dias, moved to reach Justice H.R. Khanna where he was, and complemented him and presented to him the good wishes of the nation. What a great honour!

We all know the historic pronouncement of the Supreme Court by a Bench of 13 Judges in Keshavananda Bharti's case which is known as the fundamental right's ease, wherein the Supreme Court propounded the basic structure doctrine. On 1st September 1975, the Attorney General for India made an application for constituting a Bench of 13 Judges to reconsider the power of the parliament to amend the Constitution. Chief Justice A.N. Ray constituted a Bench of 13 Judges to reconsider the correctness of the Judgment in Kesavananda Bharti. On 10th November 1975 the Attorney General Niren Dey opened the case by saying that the concept of basic structure of the Constitution being unamendable was creating "a considerable difficulty in the way of Government and Parliament". It was suggested that the Government was committed to bring about large measure of socio- economic upliftment of the people and the decision in Kesavananda Bharti was an obstacle. The questions which Justice Khanna put to Attorney General made him dumbfounded and then came the eloquent address by N.A. Palkhivala to the Bench raising the question how a Bench could be constituted for reconsidering an earlier ruling of the Court except in pursuance of a judicial order. Soon the Chief Justice realised that he would not be able to carry with him the dedicated Judges committed to the Constitution sitting on the Bench and the eloquent reasoning from the strong bar. The Chief Justice, unceremoniously "dissolved the Bench, as unceremoniously as it was constituted, without passing any order in writing and the Bench never assembled again.

Each decision of the Supreme Court which has struck down any amendment in the Constitution or any other law as ultra vires of the Constitution is the story of rich traditions and bravery of legal fraternity.

The stories can be multiplied but the time may not allow me to do so. I would close this topic simply by wishing that the dark 19 months in the history of Indian Independence may not repeat themselves. It is my perception that there is a marked difference in the standards of Indian legal profession whether it is the Bench or the Bar, pre-1975 and post-1975.

The Features of the preceding Century:

Before we deal with the challenges before the legal profession and the solutions, It would be useful to notice in brief the peculiar developments of the preceding century, of significance for law as profession.

Globalisation, With the advancement in the fields of Science and Technology the world has shrunk into global village.

The natural barriers such as sea, hills, rivers and extremely differing weather conditions, are no impediment to the movement of the people and goods from one part of the world to the other. Any achievement in one part of the world has to the shared by the others. And no man in the world howsoever remotely situated he may be, can afford to say that he is immune from the disturbances or catastrophes taking place thousands of miles away. For example, the outbreak of SARS in China is as dangerous to us in India as it is to any Chinese. The question of entry of foreign lawyers in the profession has arisen. While the lawyers in India are apprehensive of tough competition, the youth in law takes it as an opportunity for spreading their wings into the doors of immense opportunities within and without the country.

To take care of all development and progress in the society, new laws enacted on subjects hitherto unknown are upcoming. Look at the subjects. Cyber Laws, Money Laundering, Diplomatic Protection of Person and Property, Feministic Jurisprudence, Water Resources Law, International Commercial Arbitration, Refugee procedures, Sustainable Development, Cultural heritage Law, Environmental Laws, Terrorism and so on. Look at the issues which are being posed for resolution before the legal fraternity. For example (i) Theft of time and intellect. Both have become precious and saleable commodities. You pay for your telephone bills as per the time consumed in talking. You can purchase time for surfing on internet and the time you purchase can be stolen away by someone else. (ii) The womb of a mother can be hired and then arise intricate question of paternity and maternity of the child and fine questions relating to ethics, morality and confidentiality arise. (iii) Right to privacy and right to information. The person suffering from H.I.V. positive or AIDS, is he bound to disclose and suffer a disqualification or run down in the eyes of people? (iv) computer generated document though not signed or thumb-marked, what evidential value it has? (v) Can software be treated as goods so as to be liable to sales or purchase tax and liable to payment of custom duty on being imported? How will it be valued?

Introduction of information technology has become indispensable in all walks of life. We are heading towards bookless libraries, paperless offices and wireless communications. Court management, case management and judge management are being discussed as topics of litigation engineering. The traditional courts are becoming backbenchers. Several tribunals, commissions and alternative dispute resolution system are trying to occupy front seats. Arbitration, mediation, conciliation and pre-suit evaluation systems are catching up, also gaining popularity.

In spite of mounting backlog of arrears, the justice delivery system through Courts of Law enjoys the faith of the people. The Usth Courts working with 1/6 of man-power (according to an estimate made by Law Commission of India), starved for funds and lagging behind in modernization, are being accused of delay and disposal of cases both in civil branch and the criminal branch of justice.

Advent of public interest litigation and letter petition have aroused the expectation of the people from Law Courts. Several issues which deserve to be handled and resolved by the Legislature or the Executive are being brought to the Court of Law because the people feel that though there will be delay but one day the justice would be done.

The law education system has been revolutionized by the introduction of five years full time law course and advent of national law schools.

All said and done, and howsoever noble we may claim ourselves to be, it cannot be denied that the credibility of legal profession has suffered a setback at the meeting point of the two millenniums. Some unfortunate incidences have happened. Question marks have been raised on the credibility, competence and character of some of the judges as also of the legal profession as a whole. It is said that the lawyers have ceased to be accountable to their clients; they are accused or being instrumental in delaying disposal of the cases by taking adjournment and by playing every card in their deck of skills if their client stands to gain by delay.

And last but not the least, parting gift of the previous century to the humanity in general and legal profession in particular, has been the crisis of character. The gulf between the words and the deeds has widened. There is no dearth of precepts and sermons but the examples are missing.

Resolution

How do we solve these problems? Who would hold the beacon light and guide our path? As a concerned citizen and a responsible member of legal fraternity I have spent several hours sitting in silence and thinking and thinking what can I or anyone else do to restore the dignity and credibility of the legal system. I find the solution lies in our Constitution. And this is what I wish to share with you at this moment as a central theme of C.L. Agrawal Memorial Lecture. I would invite your kind attention to three parts of the Constitution-its preamble, the chapter on fundamental duties and the oath of a Judge. In fact these aspects can by themselves be the subject matter of a self--contained memorial lecture but I propose to touch them very briefly and insofar as necessary for the day.

Preamble to the Constitution of India states:

PREAMBLE

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; And to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."

It is a solemn resolution of every citizen of this country including every member of legal profession to develop India into a sovereign, socialist, secular, democratic republic. Every member of legal profession, if a lawyer, must strive to secure to his client justice, liberty, equality and fraternity. And every judgment by a Judge must aim at securing to the citizens of India justice, liberty, equality and fraternity.

Clause (j) of Article 51A of the Constitution dealing with fundamental duties provides it as a duty of every Judge and every lawyer to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.

As a Judge, many a times a question has been arising in my mind until I found out the answer. Why the learned people who drafted the Constitution of India did not provide for an accountable judiciary? And soon I realized it was not necessary. Wise men believe more in understanding than in saying. The form of oath prescribed in Third Schedule to the Constitution of India to be made by the Judges of the Supreme Court and the High Court provides for oath being taken by a judge in the name of God or solemnly affirming and then to say that I will bear true faith and allegiance to the Constitution of India as by law established; That I will uphold the sovereignty and integrity of India; That I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or ill will and that I will uphold the Constitution and the laws. What more is needed for an accountable judiciary. A complete Code of conduct and behaviour expected of a judge is written in his oath and a Judge who cannot come up truly and fully to his oath, does not deserve to continue as a Judge.

There are other protections in-built in the very system which make the Judges accountable. What are those in-built guarantees? Firstly, every judgment or order of a Court has to be written. What a Judge pronounces goes on record. He cannot back out from what he has said or done. Secondly, be must hear before he decides. The churning of reasoning at the Bar clears the vision of the Judge and enables him in reaching the truth. Thirdly, his decision has to be accompanied by reasons; else his judgment is liable to be struck down as unreasonable, whimsical and arbitrary. Fourthly, he sits in open Court. Whatever he does, it is done under the gaze of the lawyers and litigants watching him from two sides. The watchful eyes of the Bar and the public keep the Judge on right track. Fifthly, every decision by a Judge is open to scrutiny by a superior Court in appeal or revision. This is apart from the fact that every decision by a Judge is also open to public criticism, subject to objectivity, by the press and jurists. Sixthly, not only in appeal or revision, the judgment by a Judge continues to be tested time and again whenever cited as a precedent. Whenever the Judge is found to have erred, his judgment will be reversed or overruled. And lastly, the Judge is subject to rules of conduct. A member of subordinate judiciary can be punished under the service rules and a member of higher judiciary can be impeached for his misconduct. If these in-built safeguards are available, who says that Indian judiciary is not accountable.

To the Judges, I would like to say that they are accountable and they must continue to be accountable in the times to come. Remember, a Judge remains a Judge for 24 hours. It is futile to say that a Judge is a Judge only from 10 to 5 when he sits in a Court and the rest is his personal life. There is no distinction between the official and private life of a Judge. Once appointed a judge the time and talent of a judge ceases to be his own; they are then the property of nation held in trust by him. He cannot afford to waste or misuse his time or talent. A Judge is under public gaze not only when he is sitting in a Court but also when he is shopping, taking an evening stroll or sitting in the drawing room of his house.

Who is a lawyer? In my humble opinion, a lawyer is not a professional and certainly not a businessman. He is a social servant and an officer of the Court. He is assigned an important role in assisting the administration of justice. The Roman concept of a lawyer was that he would neither tell nor demand his fee. Once he has rendered service to his client and assisted him in seeking justice, the client would make an assessment of the service rendered by the lawyer to him and put a reasonable amount of compensation for the service so rendered in the back pocket of his

gown. Therefore, the gown does not have any front pocket. I am reminded of a story. I do not know how correct it is but I have high regards for the person who narrated this story to me. Moreover the underlying message or moral of the story has so much appealed to me that I believe it and hence I share it with you.

Once upon a time there was a King. One night he had a dream that he was God. He believed it when he rose up the next morning. He said, 'I am God'. He proclaimed throughout his kingdom that he is God and he should be worshipped. It was King's mandate and nobody could afford to disobey as the penalty for disobeying the command of the King was death. There was a citizen who refused to recognize the King as God. The King's police arrested the man and put him behind the bars only to be executed soon on the pronouncement of sentence of death by the King. His friend, when he learned of this man having been incarcerated, rushed to his aid. This friend knew that defending person who has disobeyed the royal mandate may itself invite the penalty of death. He did not worry as he was convinced of the justness of his cause. He decided to plead for his friend by appearing before the King. He put on black clothes which revealed his preparedness to encounter the deadly King. He appeared before the King and by sheer logic and forceful reasoning he convinced the King that God is God and King is King; King can never be God. His friend was released from the prison. This was the first advocate. The black coat put on by advocates of today is symbolic of that man's black clothes who had fought for truth at the cost of his life. The advocate is one who has conviction for pleading the cause of truth till the end of his last breath.

We shall have to exert ourselves for restoring the lost glory of law as profession. We shall have to re-open and read the closed chapters of professional ethics and morals. Our nation is suffering because we are law literate and not law educated. There is a difference between learning the letters and learning the education. Shiv Khera, the educator and motivator of world fame says 'educating the mind without morals creates maniacs in society'.

Quickly, I would sum up my message in a few tips;

(1) Every lawyer, though busy he is, must find time for social service. It may be for one hour a day or for a few hours in a week and If not then for a day in a month. It will boost his morale and make his approach humane. Remember, God helps those who really serve the children of God.

(2) A. definite percentage of your income, whether 10% or 1% It does not matter, must be set apart for charity. (3) To upgrade yourself with latest developments in the field of law you must think of introducing some programme of continuing legal education. If you are fortunate enough as Jaipur is to have a Law College and a good number of retired Judges settled in Jaipur, you must often interact with academicians and brush your knowledge and experience. Spending time in close contact with academicians sharpens the wits of practicing lawyers.

(4) The junior lawyers must spend their maximum time in the company of senior lawyers. The seniors are selfish. They are not prepared to part with and share the pearls of wisdom and experience gathered by them. During an informal conversation or chitchat, a quick-witted junior can easily derive from a senior a few tips without his knowledge. The great poet Tulsidas says in his epic--Ramayana

"Bin Satsang, vivek no hoye,.

Ram kripa bin sulabh no soye."

By God's grace juniors obtain satsang of seniors and consequently vivek-the offspring of satseng. If juniors do not sit in the company of seniors, it is very difficult to obtain vivek-the science of discerning, essential to success in profession. And without vivek it is tough to deal satisfactorily with all the ups and downs in life or in profession.

The following verse in the Bhaja Govindam Srotra explains this concept "Satsaagatva nissn qatvam/ Nissan gatve nirmohatvam/Nirmohatve nishchalatattvam/ Nischalatattve jivanmuktih". From satsang comes non-attachment, from non-attachment comes freedom from delusion, which leads to self-settledness. From this state comes jeevan mukti or true freedom.

(5) Periodically the members of Bench, the members of Bar, the academicians, the law students and other citizens should sit together, understand each others problem, familiarise with each other's view points and set down certain goals. Such gathering can be utilized for sorting out issues of common interest, for introspection and for defining and redefining the goals.

Friends, the community of lawyers is a vast community with powerful force in numbers and in intelligence. As on March 31, 2002 there were 7,33,063 lawyers on the Rolls of Bar Councils. If they come together and decide to achieve a goal they can do wonders. But I must warn, coming together is not necessarily forming a union. There is difference between a lawyers association and a trade union. I do not propose to delve any further on this. But I am reminded of a story and let me tell it to you.

"King Hieron asked Archimedes to invent new weapons when the Romans were threatening to invade his native city Syracuse. On discovering that a Roman fleet had set sail under Marcellus, the feared Roman Commander, Archimedes turned to the king and said, "I believe I can destroy the fleet:" "By what means?" asked the king. 'By means of a burning mirror," replied Archimedes.

Archimedes trained a battery of specially constructed concave mirrors that reflected the blazing rays of the Sun directly onto the ships. And to and behold, the fleet was destroyed'

The legendary Marcellus, on seeing the devastation wrought upon his fleet, is said to have exclaimed: "Let us stop fighting this geometrical monster, who uses our ships like cups to ladle water from the sea, and has whipped our most efficient engines and driven them off in disgrace, and with uncanny jugglery of his mind, has outrivaled the exploits of the hundred-handed giants of mythology."

Its devastating power is only one manifestation of the Sun's awesome energy. Its true manifestation is in the form of life force."

(The Speaking Tree, Surya the Sun God)

The community of law professionals can act as a concave mirror and destroy the evils in society by burning them. The question is, are you prepared to be an enlightened lawyer?

Before parting, as the quintessence of late Chiranji Lal Law Memorial Lecture of today I pose this question to you and to myself as well-Are you and I proposed to be an enlightened lawyer, an enlightened judge-as enlightened as the Constitution of India desires us to be? Can each one of us be a Chiranjilal or at least try to be? Several memorial lectures have been delivered. The success of a memorial lecture does not depend on what transpires at the lecture. The success of the memorial lecture depends on what transpires between one lecture and the next lecture.

Friends, those lawyers who have had an occasion of appearing before me as a Judge know I give a very patient hearing to every lawyer whether a senior or a junior. You have obliged me today by giving a very patient hearing to me. I am beholden to you.

Thank you and good bye.

Supreme Court and Amending Powers of The Constitution of India: Trends and Perspectives

(Delivered on 05-02-2005)

Justice N. Santosh Hegde Judge, Supreme Court of India

I deem it an honour and privilege to be called upon to deliver the memorial lecture in honour of late Shri C.L. Agrawal, a doyen of the Jaipur Bar but his practice was not confined only to Jaipur and he was often called upon to represent his clients in the Apex Court of the country.

It is to be noted that he did not confine his activities solely to the legal profession. Despite the pressure of his lucrative practice, he took active interest in the field of education, social work and charity. His endeavour to encourage education amongst the people in the State of Rajasthan is very well known so also his generosity in donating large areas of agricultural land for Bhudan Movement.

Being a person from legal profession what impresses me about Shri Agrawal is his special interest in the field of legal education. Recently I came to know from a contemporary of his in the Bar Council of Rajasthan that he was one of the first person to recommend a 5 year integrated LL.B. course as far back as 1950 itself. He wanted to upgrade the legal education and make it equivalent to other professional careers like medicine and engineering. A dream, which has since been achieved, though belatedly. His activities as a Member of the Jaipur State Laws Codification Committee, Constitutional Reforms Committee and Municipal Reforms Committee, indicates the varying interest he had apart from his legal career.

I have another special reason to consider this event as my privilege that is, I am today delivering the memorial lecture of a great father of a great son. Justice S C. Agrawal a former Judge, of the Supreme Court who has etched a place of honour amongst the great Judges of the Supreme Court. I have the highest regard for him both as a Judge and as a gentleman. Therefore, I have an additional reason to be present here today.

Now coming to the topic of the lecture many of you may wonder why I have chosen a topic which today is more academic than current and for a mixed audience like the one present today it might even be boring. I chose this subject because the topic of amendment of the Constitution has remained an enigma to me and as a layman I am still not sure whether the Parliament is justified in its claim to amend the Constitution in any manner it thinks fit or whether the Supreme Court is justified in restricting such power of the Parliament by a process of interpretation. As a Judge I had no occasion to look at it from a juristic point of view and with the short tenure left I think I will not get an opportunity to look at this subject judicially. Frankly, I hope such occasion will not arise before I retire. The subject definitely is of some importance to students of Constitutional Law. Therefore in this enigmatic background I present this paper Supreme Court and the Amending Power of the Constitution; Trends and Perspective in the memory of late Shri C.L. Agrawal.

The Constitution of a country is often described as the basic law of the country. In fact many a times it has also been likened to Kelsen's 'grundnorm'. It is normally drafted in the Supreme Court and Amending Powers of The Constitution of India: Trends And Perspectives background of a struggle for independence from a pre-existing

regime, its values, culture and ethos. For instance in India the Constitution was drafted by the Constituent Assembly in the backdrop of the freedom struggle similarly in South Africa the new Constitution was dred in the context of the ushering in independence which was to mark an end of the oppressive and inhuman apartheid regime, more recently in Sri Lanka the new Constitution

was to herald a change in the manner of governance of the country and to broker peace with the insurgent groups. Thus the events or the changes, which give rise to the need to bring in a new Constitution are of a drastic nature, which by itself is not a regular feature. However, in addition to such drastic changes that require the ushering in of an altogether new Constitution there are other changes which occur in the life of a nation which though not drastic enough to warrant a change in the Constitution do require a change in some of the provisions of the Constitution. It is to provide for such changes that every Constitution also provides for the power of amendment of the Constitution. This is done with a view to ensure that the Constitution as drafted by the founding fathers does not continue to govern the future generations even in the light of the changes that occur over the several years.

The Indian Constitution is no exception to the above practice. Thus even when it was being drafted it was felt that the Constitution must provide for the power of amendment of the Constitution to the Parliament. Thus was incorporated Article 368 of the Indian Constitution which to quote from the marginal note of the Article 368 which provided for the "procedure for the amendment of the constitution". However, it was this power of amendment and its description as the procedure for amendment, which led to a series of controversies, which ended up in litigation and several landmark judgments of the Supreme Court. Today it will be my endeavour to look at these developments, which have taken place over the years during the life of our nation. Once Justice Krishna Iyer's had observed that:

"The Indian Constitution is a great social document, almost revolutionary in its aim of transforming a medieval hierarchical society into a modern egalitarian democracy. Its provisions can be comprehended only by a spacious, social-science approach, and not by pedantic, traditional legalism" (See State of Kerala v. N.M Thomas & Ors. (1976 1 SCR 906))

Although this observation came in 1976 and was far away in time from the framing of the Constitution, from the study of the history of the life and times of pre independence India, there can be no doubt that most certainly this must have been the object behind the thoughts of the framers of the Constitution when they drafted this great document. It was due to their eagerness to provide for a Constitution that could always be in tune with the changing socio-economic circumstances of the times that the Constituent Assembly decided to agree to make provisions for the power of amendment of the Constitution. However, this led the Constituent Assembly to another major concern, regarding which institution should be empowered to amend the Constitution. Should it be left to the Parliament of the day or would a new Constituent Assembly have to be constituted to make any changes to the Constitution? Both options had their own merits and demerits. The Parliament of the day though elected by the people of the Republic may still be governed by their partisan interests and aspirations whereas to constitute a new Constituent Assembly every time an amendment had to be made to the Constitution was a cumbersome process. The via media was to empower the Parliament to amend the Constitution and make the power amenable to judicial review of the superior courts.

However, a perusal of the Constituent Assembly Debates indicates that even this via media was not easy to achieve, as there existed two schools of thought on the Judiciary's exercise of the power of judicial review. While one strongly supported the right of judicial review the other looked at the Judiciary with suspicion.

For instance Pt. Thakur Dass Bhargava subscribing to the first school of thought ad proposed a wider role for the Judiciary in interpreting the rights of the citizens even during the debates on draft Article 15 and stated: -

"In fact we want two bulwarks for our liberties. One is the Legislature and the other is the judiciary. But even if the legislature is carried away by party spirit and is sometimes panicky the judiciary will save us from the tyranny of the legislature and the executive. I want the judiciary to be exalted to its right position of palladium of justice and the people to be secure in their rights and liberties under its protective wings".

On the other hand Mr. Alladi Krishnaswami Ayyar, a great lawyer himself, had his own reservations as to the likely role that may be played by the judiciary. This gets reflected in his speech during the course of the discussion on draft Article 15.

"It is just possible, some ardent democrats may have a greater faith in the judiciary than in the conscious will expressed through the enactment of a popular legislature. Three gentlemen or five gentlemen sitting as a court of law, and stating what exactly is due process according to them in any particular case, after listening to long discourses and arguments of briefed counsel on either side, may appeal to certain democrats more than the expressed wishes of the legislature or the action of an executive responsible to the legislature".

While these opinions depict the two extremes, Dr. Ambedkar presented a third alternative:

"There are two views on this point. One view is this: that the legislature may be trusted not to make any law which would abrogate the fundamental rights of man, so to say the fundamental rights which apply to every individual, and consequently, there is no danger arising from the introduction of the phrase due process. Another view is this: that it is not possible to trust the legislature; the legislature is likely to err, is likely to be led away by passion, by party prejudice, by party considerations, and the legislature may make a law which may abrogate what may be regarded as the fundamental principles which safeguard the individual rights of a citizen. We are therefore placed in two difficult positions. One is to give the judiciary the authority to sit in judgment over the will of the legislature and to question the law made by the legislature on the ground that it is not good law, in consonance with fundamental principles. Is that a desirable principle? The second position is that the legislature ought to be trusted not to make bad laws. It is very difficult to come to any definite conclusion. There are dangers on both sides. For myself I cannot altogether omit the possibility of a Legislature packed by party men making laws, which may abrogate or violate what we regard as certain fundamental principles affecting the life and liberty of an individual. At the same time, I do not see how five or six gentlemen sitting in the Federal or Supreme Court examining laws made by the Legislature and by dint of their own individual conscience or their bias or their prejudice be trusted to determine which law is good and which law is bad. It is rather a case where a man has to sail between Charybdis and Scylla and I therefore would not say anything. I would leave it to the House to decide in any way it likes."

The above is indicative of the sharp divisions within the Constituent Assembly with regard the question of which institution should be trusted with the final power to interpret and/or amend the Constitution. However finally it was decided that Parliament may be entrusted with the power of amendment but this was to be subject to the judicial review of the Superior Courts under Article 32, 131-137, 145 and 226.

At this stage it would be pertinent to highlight the views of the Judiciary in regard to how it perceived its role in relation to upholding the constitutional values. Here I quote from the Speech made by the First Chief Justice of India, Justice Hiralal Kania, on the occasion of the inaugural sitting of the Supreme Court on 28th January 1950. He observed that:

"In a democratic country people make the law through their Legislature. It is not the function of the court to supervise or correct the laws passed by the legislature as an overriding authority. It is its function and duty to point out when examining the acts of the individuals or of the executive authority purporting to be done under some Act of the legislature, the lacuna or loopholes only with the object that if so desired, the legislative authority may put matters right. As it is often stated in a case of hardship, the court tries its best to do justice between the parties but if a clear provision of law exists it has to administer the law and not make one. The Court is thus working always in cooperation with the legislature and at no time can its work be considered as obstructive or its attitude antagonistic."

Thus it can be safely said that in 1950 the Judiciary was clear with regard to the role that it was expected to play in relation to the interpretation of the Constitution and of its role as being an institution working in tandem with the Legislature to ensure that the Constitutional objectives are attained. However, despite this clarity of the initial days constitutional history of our country indicates that both the Parliament and the Judiciary came in confrontation with each other over the question regarding the supremacy of the two institutions regarding the power of amendment of the Constitution.

The entire controversy surrounding the amendment of the Constitution began with the case of Shankari Parsad v. Union of India, (1952 SCR 89). Soon after the Constitution was drafted and adopted in the year 1950 it was felt that there were circumstances which the Constitution did not provide for and therefore it was felt that the amendment power had to be exercised. Thus the 1st Amendment to the Constitution introduced Articles 31 A and 31 B and inserted in the Ninth Schedule to the Constitution. Article 31 A protected the estate laws from the challenges based on the violation of the Fundamental Rights. Article 31 B provided that without prejudice to the generality of the provisions of Article 31 A, any law once placed in the Ninth Schedule would be immune from the attack based on the violation of Fundamental Rights.

The petitioner in Shankari Prasad's case challenged this amendment inter alia on the grounds that the amendment made by the Parliament was law within the definition of Article 13 and Article 13(2) prohibited the State from taking away or abridging the fundamental rights of the citizens. The Supreme Court negatived the contention of the petitioner therein. The argument was based on the language of Article 13 (2) which in specific terms enjoined the legislature from making laws which abridges the right conferred by Part III of the Constitution. But the Constitution Bench which decided the said case, came to the conclusion that the definition of the term "Law" as defined in Article 13 was confined only to ordinary laws made in exercise of legislative powers and did not include laws made under by the Parliament under the exercise of its constituent power. However, at this stage it must be noted that even while coming to this conclusion in Sankari Prasad's case, Justice Patanjali Sastri who spoke for the Bench noticed the fact that the Indian Constitution followed the American model by incorporating certain fundamental rights in Part III and in that process it had made those rights immune from interference by laws made by the State. Despite this observation of the learned judge the Court proceeded to up hold the validity of the impugned Amendment on the ground that the Constitution did not by clear expression limit the power of the Parliament to amend any part of the Constitution and therefore in the absence of any express limits being placed on the power it was open for the Parliament to amend the Constitution. This decision of the Supreme Court removed all doubt with regard to constitutionalism taking root in the country. The Supreme Court was indeed co-operating with the Legislature to achieve the objectives of economic and social justice and had upheld the Parliament's power to amend the constitution.

Although this so called 'co-operation' was not to last long as in 1954 the Supreme Court while deciding the cases of State of West Ben gal v. Bela Banerjee, (1954) SCR 558; State of West Bengal v. Subodh Gopal (1954) SCR 587 and Dwarkadass Srinivas v. Sholapur Spinning Cpmpany AIR 1954 SC 119 interpreted 'compensation' to mean 'fair and adequate' compensation. This was not to the liking of the Parliament and was perceived as Judiciary's interference in the socio-economic reforms being undertaken by the Legislature. Encouraged by the view taken by the Supreme Court in Shankari Prasad the Parliament brought in the Fourth Amendment in 1955 which clearly drew the distinction between the requisitioning of private property and compulsory acquisition, and deprivation of property by the operation of the prohibitory or regulatory legislation. It clarified that the amount of compensation to be paid was totally non-justiciable. The protection of Art. 31 A which was until then available only to the zamindari abolition laws was now extended to welfare and regulatory legislation also. In addition to this the Amendment also inserted seven Acts into the Ninth Schedule. However, despite such drastic changes the amendment was not challenged.

However, it was only with the introduction of the Seventeenth Amendment in 1964 that the matter once again reached the Supreme Court. The Seventeenth Amendment added forty four Acts to the Ninth Schedule and was challenged in Sajjan Singh v. State of Rajasthan (1965 1 SCR 932) The challenge to this Amendment was once again based on the ground that the amendment violated the prohibition of Article 13(2). It was pleaded by the petitioner that the law laid down in Shankari Prasad's case (supra) should be reconsidered. Further the impugned Amendment was also challenged on the grounds that by curtailing the power of the courts it had the effect of taking away the power of judicial review by the courts under Articles 32 and 226 of the Constitution. In addition to this the amendment also had the effect of setting aside decisions of the courts of competent jurisdiction.

Once again the Court rejected the above arguments of the petitioner and by a majority of 3:2 held that the term law as defined in Article 13 (2) does not include a law passed by the Parliament in exercise of its constituent power. It also held that if the founding fathers of the Constitution had intended that any future amendment of the provisions in regard to the fundamental rights should be subjected to Article 13(2). They would have taken the precaution of making a clear provision in that regard. The majority judgment went on to clarify that the Constitution framers must have anticipated that in dealing with the socio--economic problems which the legislature may have to face from time to time, the concepts of public interest and other important considerations itself may change and/or expand, and so, it is legitimate to assume that the Constitution-makers knew that the Parliament should be competent to make amendments to the rights so as to meet the challenges which may arise.

Thus to sum up the majority view of the in Sajjan Singh's case was that the fundamental rights guaranteed by Part III could not have been intended to be eternal, inviolable and beyond the reach of Article 368 for even if the power 'to amend the fundamental rights was not included in the Article 368, the Parliament could by a suitable amendment of Article 368 confer upon itself such powers. Effect of this judgment could even be construed as empowering the Parliament to take away even the powers of judicial review conferred on the superior courts under Articles 32 and 226 of the Constitution.

However it must be noted that even though this judgment upheld the ratio laid down in Sankari Prasad's case it was a divided opinion and the validity of the judgment in Sankari Prasad case was upheld by a majority of 3:2. The Judges who formed the minority upheld the validity of the Constitution (Seventeenth Amendment) Act, for reasons other than those given by the majority. While the majority in Sajjan Sin gh's case upheld the validity solely based on the reasoning in

Sankari Prasad's case, the other two Judges disagreed with the law as laid down in Sankari Prasad's case and expressed their doubts about it.

Justice Hidayatullah, as he then was, in specific terms, held that he found some difficulty in accepting the reasoning in Sankari Prasads case in its entirety. He opined that the Articles in Part III of the Constitution use the language of permanency and hence concluded that there are indications in the Constitution to show that at least those Articles are beyond the scope of the amendment by the Parliament. Further he also did not agree with the view of the majority in Sajjan Singh's case as well as the law laid down in Sankari Prasad's case in so far as these decisions held that the term 'law' found in Article 13(2) did not include a law made by the Parliament in exercise of its constituent power. To buttress this opinion he compared the language of Article 13 (2) with the language used in Article 5 of the American Federal Constitution and came to the conclusion when the Constituent Assembly used the expression 'fundamental right' then like in the Japanese Constitution it meant the said right to be 'eternal and inviolate'.

Justice Mudholkar, who gave the other minority view in the Sajjan Singh's case agreed with Justice Hidayatullah and expressed his difficulty about forming an opinion in the matter in the following words:

"I feel reluctant to express a definite opinion on whether the word law in Article 13 (2) of the Constitution excludes an Act of the Parliament amending the Constitution and also whether it is competent to the Parliament to make any amendment at all to Part Ill of the Constitution."

But in all fairness, I must note here that even while expressing their doubts about the correctness the law as laid down by the apex court in Sankari Prasad case both the Judges agreed that Sajjan Singh's case could not be the last word on the matter and that the issue required further investigation.

Another interesting feature about the minority view in Sajjan Singh's case was the fact that for the very first time the two Hon'ble judges noticed that the Indian Constitution apart from creating certain fundamental rights had embedded in it certain features which they termed as its 'basic features' This was later on popularly referred to as the doctrine of basic structure of the constitution. A doctrine, which subsequently went on to become a bone of contention among the Judiciary, the elected representatives and the academicians.

Justice Mudholkar had traced the foundation of the basic features in the following words:

"We may also have to bear in mind the fact that ours is a written Constitution. The Constituent Assembly which was the repository of sovereignty could well have created a sovereign Parliament on the British Model. But instead it enacted a written Constitution... Above all, it formulated a solemn and dignified preamble which appears to be an epitome of the basic features of the Constitution. Can it not be said that these are indicia of the intention of the Constituent Assembly to give a permanency to the basic features of the Constitution?"

Having noted the indicia pointing towards the possible existence of 'certain basic features this doctrine was then used by the Judges in minority in Sajjan Singh's case in the context of testing the nature of fundamental rights conferred in Part III of the Constitution. The opinion in regard to "basic features" in the minority judgment in Sajjan Singh's case proceeds thus: -

"It is also a matter for consideration whether making a change in the basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution; and if the latter, would it be within the purview of Article 368?"

Although the views expressed by Hidayatullah and Mudholkar, JJ. were by themselves termed as doubts expressed with reference to the judgment in Sankari Prasad's case, subsequent judicial history was to notice that this expression of doubt itself went on to become the foundation of the later judgments of the apex court.

While in the judgment in Sankari Prasad's case as well as the majority view in Sajjan Singh was in accordance with the role that Chief Justice Kania had envisaged for the judiciary in his inaugural address on the establishment of the Supreme Court in the year 1950, 15 years later at least two Judges of the apex Court had raised doubts about the judiciary's tacit co-operation with the Legislature.

Before proceeding further with reference to other decided cases on the subject at hand, to contextually locate this analysis it will be appropriate to make a reference to the prevailing situation in the country which might have compelled the Parliament to bring about the impugned constitutional amendments and which conditions, of course, might have had a considerable influence on the conclusions arrived at by the Court in the above two cases. At about the time when the First Constitutional Amendment was enacted by the Parliament, India had just attained independence with a new Constitution of its own. It had inherited an agrarian system which was nothing but feudalistic. About 90 per cent of the Indian rural populace was dependent on agriculture for their existence. Since the gap between the owner and the tiller of the soil was yawning, there was urgent need for agrarian reforms on a war footing. The Parliament of the day consisted of a large number of members of the Constituent Assembly, hence it was reasonable to believe that these members would act in consonance with the thrust behind the Constitution. In this background, it is possible that the judicial thinking too must have been influenced to hold that the Parliament was acting with a view to ensure greater socio-economic justice and therefore it did not interfere with the amendments introduced by the Parliament despite some of them affecting the Fundamental Rights of the Citizens.

Hardly two years after the judgment in Sajjan Singh's case, validity of Constitutional (Seventeenth Amendment) Act, 1964 came up for reconsideration by the Supreme Court before a Bench of 11 Judges in the case of I. C. Golak Nath & Ors vs. State of Punjab. (1967 (2) SCR 762). In the said case, the Court by a majority of 6:5 overruled the law laid down by the apex Court in the earlier two cases (supra) and the majority held that constitutional amendment was also law within the meaning of Article 13 and, therefore, an amendment which took away or abridged any right in Part III of the Constitution was void. It held even the Constitution (1st Amendment) Act, 1954 as also the St (Seventeenth Amendment) Act, 1964 which had abridged the scope of fundamental rights, were ultra vires the Constitution. However, in order to avoid a chaotic situation resulting from the above declaration of law, the apex Court resorted to a new doctrine of prospective overruling and held that the law laid down by them in Golak Nath's case would- operate prospectively. It declared that the Parliament had no power from the date of the said judgment to amend any of the provisions of Part Ill of the Constitution so as to take away or abridge the fundamental rights enshrined therein. The foundation for this opinion of the Supreme Court was that there was no difference between the ordinary statutory law made by the legislature and the law in the form of a Constitutional Amendment made under Article 368. The majority were of the opinion that be it a statutory law or an amendment made under the constitutional power, both come squarely under the term 'law' as found in Article 13 of the Constitution. According to the majority, the founding fathers of the Constitution gave fundamental rights a

transcendental position under the Constitution and they were kept beyond the pail of the Parliament's amendment power. They further said that the Constitution has given a place of preference to the fundamental freedoms, hence, if the Parliament wanted to enforce the Directive Principles it has an obligation to enforce them without infringing upon the fundamental rights.

The majority judgment in Golak Nath's case disturbed a hornet's nest both inside and outside the judicial circles. Shri H.M Seervai in his book Constitutional Law of India (1967) said: "The Majority judgment is clearly wrong, is a product of the greatest public mischief and should be overruled at the earlilest opportunity. Dr. Gajendragadkar, former Chief Justice, who was the author of the judgment in Sajjan Singh's case, in his Tagore Law Lecture in 1972 pointed out that the majority view in Golak Nath's case would lead to absurd consequences rendering Article 368 otiose. Cranville Austin a leading authority on Indian Constitution opined that the judgment as a political argument of fear. Mr. M.C. Setalvad, the first Attorney General of India, said "The majority decision clearly appears to be a political decision not based on the true interpretation of the Constitution, but on the apprehension that Parliament, left free to exercise its powers would, in course of time, take away the citizen's fundamental rights, including his freedom."

Of all the criticisms noted above, I think Mr. Granville Austin and Mr. Setalvad perceived the judiciary's apprehension behind the majority judgment prophetically. His prophetic words stood justified by what transpired after the judgments in Golaknath, Kesavananda and the election case of Mrs. Gandhi.

The judgment in Golak Nath's case did not deter the Parliament from taking decisions, which it thought was in furtherance of the social objectives contemplated in the Constitution. Hence, it nationalised the banks and abolished the Privy Purses of the Rulers of the erstwhile Princely States. In the Banks Nationalisation case (R C. Cooper v. Union of India (1970 (3) SCR 530)] and Privy Purses case [Madhav Rao Scindia v. Union of India (AIR 1971 SC 530)]. Challenge to the said actions also succeeded before the apex Court and they were struck down on the ground of lack of just compensation in the Banks Nationalisation case and on the ground of violation of right to property in the case of Privy Purses.

This obviously, led to a line of confrontation being clearly drawn between the Supreme Court and the Parliament. The bone of contention was regarding the supremacy over the Constitution as interpreted by the Supreme Court on the one hand and the power of the Parliament to amend the said Constitution on the other. Hence, came to Constitution (Twenty Fourth Amendment) Act, 1971 which brought about changes both in Articles 13 and 368. The newly introduced Article 13 (4) made it clear that the amendments to the Constitution were not "law" for the purpose of Article 13(2) and the marginal note to Article 368 which earlier read "Procedure for amendment of the Constitution" was amended procedure thereof' Article 368 (1) was amended to provide that "Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article". By the Constitution (Twenty-fifth) Amendment Act, 1972, the Parliament further substituted the word "amount" for "compensation" in Article 31 and clarified that the right to hold, acquire, and dispose of property under Article 19 (1) (f) would not apply to laws concerning acquisition under Article 31 (2). It also introduced Article 31C which gave primacy to the Directive Principles in Article 39 (b) and (C) over the fundamental rights contained in Articles 14, 19 and 31. It also provided that no law contained a declaration that it was enacted to give effect to the Directive Principles under Article 39 (b) and (c) could be called in question in any court on the ground that it did not give effect to such principles. The drastic changes brought about through these two Constitutional Amendment Acts

clearly indicated that the object was to neutralise the effect of the judgment delivered by the apex Court in Golak Nath's case and to establish legislative supremacy over power of judicial review.

Not surprisingly, these Amendments and all consequential laws based on these Amendments by various Legislatures came to be challenged in what is now famously referred to as the landmark decision in Kesavananda Bharati's case. The challenge in that case was that the above Amendments were outside the scope of the constituent power of the Parliament under Article 368. The case came to be heard by a Bench of 13 Judges and the Court heard the arguments for 68 working days and delivered its judgment on 25.4.1977. There were as many as 11 opinions rendered by a Bench of 13 Judges and by a majority of 7:6, the Court upheld the constitutional validity of Constitution (Twenty-fourth Amendment) Act, 1971 as also the Constitution (Twenty-ninth Amendment) Act, 1971 and inter alia held that:

a. the law laid down in Golak Nath's case did not depict the correct legal position;

b. Parliament has no power to alter the basic structure of the Constitution; and;

c. the second part of Section 3 of the Constitution; and (Twenty-fifth Amendment) Act, 1971, namely, 'no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to policy' is invalid.

Two things which clearly emanate from the judgment of the majority in Kesavananda Bharti's case are that the term 'law' as found in Article 13(1) did not include the constitutional amendments made by the Parliament in exercise of its constituent power, a step backwards from the decision in Golak Naths case which distinction was clearly brought out in the judgment of Chandrachud J. (as he then was) which reflected the views of nine of the Judges on the Bench which says:

"the fundamental distinction between Constitutional law and ordinary law lies in the criterion of validity. In the case of a constitutional law, its validity is inherent whereas in the case of an ordinary law its validity has to be decided on the touchstone of the Constitution. With great respect, the majority view in Golak Nath's case (supra) did not on the construction of Article 13(2) accord due importance to this essential distinction between the legislative power and the constituent power."

The second principle, which the Court emphatically propounded in the Kesavananda's case, was the existence of basic structure of the Constitution. The majority in that case held that there are certain features of the Constitution, which can be termed as either basic structure, or fundamental features of our Constitution though the Judges who subscribed to this doctrine of basic structure did not specify or enumerate all the basic features of the Constitution. Some of them pointed a few of those features to include the supremy of the Constitution, Republican and democratic form of Government, secular character of the Constitution, separation of powers between the Legislature, the Executive and the Judiciary, federal character of the Constitution; while others included sovereignty of the country, unity and integrity of the nation, dignity of the individual secured 'by various basic rights enshrined in Part III of the Constitution, mandate to form a welfare State contained in Part IV as some other basic features of the Constitution-an affirmation of the views of the minority Judges in Sajjan Singh's case and acceptance of the doctrine of "basic structure". In reality, in Kesavananda Bharati, the apex Court apart from overruling the majority judgment in Golak Nath also held that the Parliament had the power to amend the Constitution including certain rights conferred in Part III of the Constitution. However by enunciating the

doctrine of basic structure it clearly stated that while doing so the Parliament could not destroy the basic structure even by an expanded power of amendment in Article 368.

Despite the fact that the decision in Kesavananda was a step down from Golak Nath the judgment in Kesavananda became more controversial than the judgment in Golak Nath. Consequent to the judgment in Kesavananda there was structural change brought about in the composition of the Supreme Court.

All the economic ills of the country were blamed on a pro- rich and anti-poor judiciary which sitting in ivory tower was oblivious to the problems & the common man. This perception of the judiciary by the Executive could not but compel the Parliament to bring about more changes in the Constitution and clip the wings of the judiciary. And drastic steps were taken in this regard. In this prevailing situation, another historic event intervened which accelerated the happenings of the time. This was the judgment of the Allahabad High Court unseating the then Prime Minister of India in an election case which became the proverbial last straw for the camel's back.

The Parliament of the day decided to retaliate and even when the appeal in the said election case was pending before the Supreme Court, certain electoral laws were amended retrospectively to take away the basis on which the election was declared to be invalid by the High Court. The Constitution was further amended by Constitution (Thirty-ninth Amendment) Act, 1975. This amendment had 3 principal features. First, it substituted the existing Article 71 with a new Article, which stated that the Parliament may by law regulate any matter relating to or connected with the election of the President or Vice-President including the grounds on which such elections may be questioned. The second feature was the exercise of Article 329-A which purported to apply to the Prime Minister and the Speaker but was clearly intended to apply to the case that was being heard against the judgment of the Allahabad High Court and which had the effect of wiping out all judicial proceedings concerning the said election. The third feature of the Amendment was that the amendment of the Representation of People Act, 1951 pertaining to the expenditure incurred by a political party, which was also the basis of the High Court's judgment. These changes brought about in the electoral laws were included in the Ninth Schedule. But then the most glaring amendment in that group of amendments was introduction of Clause (Iv) to Section 329-A which provided that no law made by Parliament before the commencement of the Thirty-ninth Amendment Act insofar as it related to election petitions and the matters connected therewith shall apply or shall be deemed to have applied to or in relation to the election of the Prime Minister or the Speaker to the either House of Parliament. The said Amendment further provided that such election shall not be deemed to be void or to have ever become void on any ground on which such election could be declared to be void under any such law notwithstanding any order made by any court before such commencement declar such elections to be void, such election shall continue to be valid in all respects and any such order or any finding on which such order is based, shall be deemed always to have been void and of no effect.

When the appeal in the election case along with the amended provisions of the electoral laws and Constitutional Amendments came up before a 5-Judge Bench of the apex Court, the Court even while upholding the election of the Prime Minister, also upheld that the concept of basic structure propounded in Kesavanada Bharati's case. It is significant to note that 3 of the Judges who had not signed the decretal orders in Kesavananda Bharati's case also agreed that after the judgment in Kesavananda Bharati the existence of basic structure of the Constitution and Parliament's power not to dilute the same had come to be the law of the land. Thus based on the principle of law, four of the Judges who constituted the five Judge Bench invalidated the constitutional amendment pertaining to the election law on grounds of it being violative of free and fair election, democracy,

equality and the Rule of Law which according to the Court formed the basic structure of the Constitution.

A study of the role of the Supreme Court in relation to the power of amendment of the Constitution, the limits of judicial review and continuing uncertainty as to the existence of the basic structure of the Constitution will be incomplete if I fail to highlight the attempt on the part of the Supreme Court itself to overrule or review the judgment in Kesavananda Bharati's case which attempt became futile because of the efforts of the Bar of the day.

However considering the fact that both Golakanath and Kesavananda Bharati were decided on the basis of a wafer thin majority it indicates that two view are possible and therefore it would not be appropriate to say that the Kesavanada Bharati decision received universal approval. There were several criticisms of the same. Justice S. Ranganathan in "Dr Alladi Memorial Lecture on Four Decades of the Indian Constitution" delivered in 1988 observed:

"It does not seem likely that the Constitution-makers intended to repose in the judiciary the power to pronounce even on the validity of a Constitutional amendment (otherwise than on the ground of its not having been made in accordance with the procedure outlined in the Constitution). Time alone can tell whether the present interpretation that the 'basic structure' is beyond amendment, will endure after the 42nd Amendment or whether any future situations would arise necessitating a revision of the concepts as enunciated in the judicial decisions till today."

After the judgment in the said Prime Minister's case and.on the failure of the efforts to review the Kesavananda Bharti's case, one would have expected the doctrine of basic structure of the Constitution and the limited power of the Parliament to amend the Constitution would have come to stay as the law of the land, but one cannot be sure of its longevity. While as a precedent law it still remains to be the same and has the force of law under Article 141 of the Constitution, the lurking question still remains for how long will this be the law of the land. In 1980's, in a series of cases again this question erupted in one form or the other. The judgments in those cases, in my opinion, started sending conflicting signals. Amongst them, for the present I will confine myself only to four prominent cases, namely,

(I) Minerva Mills v. Union of India [1980 3 SCC 625);

(II) Waman Rao v. Union of India [1981 2 SCC 362]; (III) Bhim Singhji v. Union of India [1981 1 SCC 166]

and

(IV) Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd.

[1983 1 SCC 147]

because they have peculiar significance to the topic at hand.

In Minerva Mills (AIR 1980 SC 1789), the validity of Section 55 of the Constitution (Forty-second Amendment) Act came to be considered by the apex Court and by majority, once again, the Court held: "to destroy the guarantees given by Part III in order, purportedly, to achieve the goals of Part IV is plainly to subvert the Constitution by destroying its basic structure." However, the Court also further held: "Part III and Part IV are two wheels of a chariot; one no less important than the other... In other words, the Indian Constitution is founded on the bedrock

of the balance between Part III and Part IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and the Directive Principles is an essential feature of the basic structure of the Constitution." In the said judgment, a Constitution Bench in no uncertain terms upheld the basic structure doctrine as found in the case of Kesavananda Bharati.

The law laid down in Kesavananda Bharati, as reiterated in Minerva Mills case, was followed by the apex Court in Waman Rao's case and Bhim Singhji's case where again the majority took the view that a. law challenged before it will have to be tested on the anvil of the doctrine of basic structure. However, in the year 1983 in the case of Sanjeev Coke Manufacturing Co. v. BCCL (1983 1 SCC 147) without attempting to upset the finding in Kesavananda Bharati or explaining the applicability of the doctrine of basic structure, a Constitution Bench of the apex court took exception to what was decided by the earlier Constitution Bench in Minerva Mills case to which reference has already been made by me in this presentation. In Sanjeev Coke (supra), the apex court observed thus: -

"We have serious reservations on the question whether it is open to a court to answer academic or hypothetical questions on such considerations, particularly so when serious constitutional issues are involved. We (Judges) are not authorised to make disembodied pronouncement on serious and cloudy issues of constitutional policy without battle lines being properly drawn. Judicial pronouncements cannot be immaculate legal conceptions. It is but right that no important point of law should be decided without a proper lis between parties properly ranged on either side and a crossing of the swords. We think it is inexpedient for the Supreme Court to delve into problems which do no arise and express opinion therein."

Thus, leaving room for an argument as if the law laid down in Kesavananda Bharati is still open to reconsideration. But then as on date, the applicability of the doctrine of basic structure has been consistently followed by a plethora of subsequent judgments of the apex. court in SR. Sampath Kumar v. Union of India (1987) 1 SCC 124, GC. Kanungo v. State of Orissa (1995) 5 SCC 96 and L. Chandra Kumar v. Union of India (1997) 3 SCC 261 each of these cases identifying different basic features of the Constitution.

The cases cited above though followed Kesavananda have neither overruled nor distinguished the observations in Sanjeev Coke consequently those observations were raised in one form or the other. However, in two subsequent cases, the Supreme Court was compelled to seek an opinion of a larger bench as to the correctness of the observation in Sanjeev Coke. Thus in I.R. Coelho v. State of T.N. (1997) 7 SCC 580, a Constitution Bench of the apex Court after discussing its earlier judgments in Waman Rao and Minerva Mills came to the conclusion that there was an apparent conflict between the judgments of the apex Court in Minerva Mills, Waman Rao, Shri Bhim Singhji and Sanjeev Coke hence was felt the necessity of referring the matter to a larger Bench, preferably of 9 Judges to lay down the applicability of the effect of Kesavananda's judgment. This reference case was subsequently followed by another reference by another Constitution Bench in the case of Property Owners' Association & Ors. v. State of Maharashtra & Ors. (2001) 4 SCC 455 which in its referral order held: "we are of the opinion that the views expressed in Sanjeev Coke case require reconsideration. Keeping in view the importance of the point in issue, namely, the interprelation of Article 39(b) it will be appropriate if these cases are heard by a larger Bench of not less than seven Judges.'

Even though the above referred order casts doubt on Sanjeev Coke, none can say what the next Bench of the apex court which decides this reference would say.

Nearly 30 years after the judgment of the apex court in Kesavananda Bharati, the ghost of the doctrine of basic structure of the Constitution still seems to haunt the judicial mind. However, it will have to stated to the credit of the doctrine that but for this doctrine of basic structure the liberty of the individual would have been at the mercy of the elected representatives of the day who could do whatever they pleased with the Constitution which in a democratic republic should serve as the guiding beacon. Although when one looks at the manner in which the political equations in the country have changed over the last two decades it must also be recognised that today the threat of the Legislature curtailing the rights of the citizens is not as real as it was when there was practically a single party domination of the Legislature at the Central as well as at the State level. Today we have reached a stage of coalition politics where it seems that to bring in an amendment like the Thirty Ninth Amendment would be practically impossible however when it comes to politics one does not know how the turf changes and in such a circumstance the basic structure doctrine which has strengthened the Constitution itself will indeed serve the people as well. One does not know when the Supreme Court itself may decide to go back to Chief Justice Kania's philosophy of co-operation with the Legislature.

Relevance of Clinical Legal Education

(Delivered on 29-01-2006)

Justice Dalveer Bhandari Judge, Supreme Court of India

I consider it a great privilege and an honour to have been invited to deliver "Shri C. L. Agarwal Centenary Memorial Lecture" which is organized in the memory of one of the greatest sons of Mother India - Shri Chiranji Lalji Agarwal. I owe it to the kindness of his illustrious and worthy

son and my elder brother Hon'ble Mr. Justice S. C. Agarwal for giving me, an opportunity to pay my humble tribute to the great humanist.

Life is a rare and a beautiful gift of God and its fullness depends upon the inclination, opportunity and the ability of the person to touch as many points as possible during the course of its journey. While most remain content by walking on a chosen track, there are a rare few who choose the road less travelled and seek to explore the diversity of the canvass of human activity. Each new arena demands a special skill set and in return imparts to the person a different experience and a new perspective. The summation of such multi-faceted experiences and perspectives shapes the personality of an individual. While most persons are remembered for a short while, the memories of a special few become timeless primarily because of the imprint left by them in the different spheres of their endeavours.

The demands of the legal profession and judicial office are exacting, time-consuming and at times frustrating because they leave hardly any time to pursue numerous other interests such as art, music, literature and other cultural activities.

In the midst of such understandable dilemma. When a person belonging to this noble profession traverses various paths with great dignity and displays remarkable brilliance and diversity seldom seen. He immediately transcends to commanding heights and acquires an iconic proportion where succeeding generations feel privileged to have an opportunity to applaud, admire and emulate. Shri Chiranji Lal Agarwal was indeed such a person and I am delighted to be present here today to salute his memory in his centenary year.

This memorial lecture has been instituted to perpetuate the memory of one finest jurist and lawyer this Bar has ever seen. Shri Chiranji Lal Agarwal not only scaled great heights as a lawyer but also led the Rajasthan Bar with great distinction and dignity for over four decades. Apart from his scintillating advocacy, razor sharp intellect and high ethical standards, he will always be remembered for setting new bench marks for excellence which the succeeding generations will do well to simply emulate.

By common consent, Shri C.L. Agarwal was the doyen of the Rajasthan Bar for more than four decades. He was not only an outstanding lawyer and jurist, but an ardent scholar, educationist and a great visionary. He was indeed a versatile human being. He had touched the life at many points and touched the hearts of millions of people in different manifestations.

It would not be an exaggeration to say that since independence no other member of the Bar in Rajasthan had made greater impact on the legal profession for such a long period as Shri Agarwal did.

Shri Agarwal made tremendous impact on the social, cultural and educational life of the entire State of Rajasthan. He was a strong protagonist of honesty and morality in public life. Immediately after independence when the popular government was set up in Rajasthan, he made a number of speeches against the then prevailing corruption in the administration of the popular government. He was detained under the Public Security Act and ultimately had to file a Habeas Corpus Petition. His detention order was quashed. A suit for damages filed by him was decreed and from that amount he had set up Rajasthan Education Trust which is known for his educational and charitable activities in the State. He had donated 2000 acres of land to 'Bhoodan Movement' started by late Shri Vinobha Bhave. Shri Agarwal was the natural choice of every important Committee in the State, whether it is State Law Reforms Committee, Municipal Reforms Committee or State Law Codification Committee.

His popularity and eminence at the Bar can be judged by the fact that he remained President of the Jaipur Bar Association for 17 years, perhaps the only other person who surpassed his record was late Shri Moti Lal Setalvad, who remained President of the Supreme Court Bar Association continuously for 18 years. Shri Agarwal was very active and prominent member of the Rajasthan Bar Council and remained its Chairman for 5 years. He was also member of the Bar Council of India for a long period and did monumental work in various committees of the Bar Council of India, particularly, the educational trust set up by the Bar Council of India.

He also took lot of interest in the educational activities at all levels in the State. Though he was appearing for leading industrialists, businessmen, erstwhile Maharajas of princely States. He never left the touch of the common man and his heart would always bleed for the poor, down-trodden and the indigent. This can abundantly be proved by one illustration. In 1976 when the first Legal Aid Society was set up in the Rajasthan High Court at Jodhpur, on our request the then chief justice of the Rajasthan High Court, late Justice B.P. Beri provided us a list of about 300 murder appeals in which the accused were not represented. Under the auspices of the Legal Aid Society, we distributed those 300 matters amongst the leading lawyers of the Rajasthan and attached junior members of Bar to provide necessary assistance and help to the senior advocates in conducting those appeals. I remember to have requested Shri Agarwal to argue three murder appeals. Shri Agarwal gladly accepted the legal aid appeals. He never took any adjournments in those appeals and argued those appeals with tremendous preparation and displayed great erudition and learning. If I recall correctly there was acquittal in all the three matters which he argued before the Court. At that juncture I felt that legal and judicial system is alike both for the rich and the poor because even with any amount of affluence no accused could engage more learned, erudite effective and eminent counsel. In one of the judgments of legal aid cases the court observed that lawyers perhaps do their best when they appear for legal aid matters. This clearly demonstrates his deep concern and commitment for the poor, under-privileged and down-trodden. In order to establish credibility of the movement of legal-aid to the poor we need to provide this kind of legal aid.

In his multi-faceted personality, I think his most important contribution was towards improvement of the education in general and legal education in India in particular. He used to be greatly disturbed on account of poor quality of legal education imparted by Law Colleges in India. He used to tell us that the legal profession can be improved only through a good quality of legal education. He was member Secretary of the Legal Education Committee constituted under the Chairmanship of Justice K.N. Wanchoo, the then Chief Justice of Rajasthan in 1951. About 55 years ago in 1951, he conceived the idea and strongly recommended that the only way to improve the legal education in the country was by introducing a five-year degree course. In the Bar Council of India Trust, he made tremendous efforts to ensure that the five-year degree law course was introduced so that the students could be provided good quality comprehensive legal education and training. Because of his untiring efforts, the National Law School of India University was founded at Bangalore. He was the chief architect of the five-year LL.B. degree programme. His dream was translated into reality when the National Law School of India University was set up in Bangalore with five-year law degree course. He was prophetic Only within few years, the said Bangalore law school became India's leading most centre for providing high quality legal education through five-year law degree course. Where comprehensive and good quality of legal education is possible. Bangalore Law School has acquired a great stature within a short period and is recognized as a finest institution for providing legal education in India. The said law school is a true example of excellence in legal education. This is the result of the vision and untiring and enduring efforts of late Shri Agarwal.

Looking to his enormous interest in improving the quality of legal education in India, I have chosen the subject of this morning's lecture on improving the legal education by introduction of clinical legal education. I remember to have discussed the concept of clinical legal education with late Shri Agarwal and he was extremely appreciative of the same. I think it would be a fitting tribute to him to talk on a subject this morning which was so close to his heart-"How to develop the future generation of Lawyers through proper Legal education".

Relevance of Clinical Education :

Shri C. L. Agarwal was greatly concerned about the falling standards of legal education imparted in the Law Schools and Colleges in India. Unfortunately, even today, the quality of legal education imparted by majority of the Law Schools is of rather indifferent quality. The legal education in general is hardly adequate to equip law students to meet multifarious challenges thrown by the legal profession. Some National Law Schools Bangalore, Hyderabad, Jodhpur, Bhopal, Calcutta etc. are providing a more comprehensive education to these law students, which are hardly able to produce 5% of the total number of law graduates who eventually join the legal profession. At least 95% of the students who join the legal profession are totally ill-equipped to function as lawyers primarily because of indifferent quality of formal education with no exposure to the skills which lawyers require in the legal profession.

Legal education is the foundation of legal profession. In order to improve the quality of legal education, there is an urgent need to re-design and re-model our curriculum and make it relevant for the day-to-day needs. We must identify areas of major litigation and the need of rendering legal assistance in specific areas to the general public, to the government, to the industry and to trade and to devise our curriculum so that a graduate coming out of the law college is reasonably well equipped and his expertise enables him to understand the needs of different constituencies and appropriately respond.

The clinical legal education is an attempt to integrate and assimilate court oriented skills with traditional and formal legal education. The concept of Clinical Legal Education is that the law students are imparted practical training regarding how the law really functions in law courts. The entire concept of Clinical Legal Education is to expose the law students to the techniques of lawyering skills. It is, in fact, blending or integrating the components of traditional legal education with practical training of law.

Clinical Legal Education is an attempt to really aim at equipping the law students to perform a variety of roles which the lawyers are expected to play in their day-to-day functions of the court. A leading American jurist Barry Metzger has defined Clinical Legal Education in following words:

"Clinical legal education" is a term capable of many definitions. At its narrowest definition the term denotes the involvement of law students in the representation of actual clients as part of their legal education. So defined the term encompasses student legal aid clinic and the traditional apprenticeships. More broadly, the term includes more structured methods of instruction which emphasize the learning of "Practical skills" in addition to substantive and procedural rules of law."

A well-known Law Professor and Director of the National Judicial Academy, Prof. N. R. M. Menon in his Book "Clinical Legal Education" has described Clinical Legal Education directing towards developing the perceptions, attitudes, skills and sense of responsibilities which the lawyers are expected to resume when they complete their practical training. Clinical Legal

Education is not limited to training in certain skills of advocacy. It has wider goals to enable the law students to assimilate responsibilities as a member of the service profession.

Another leading American Professor Kenneth L. Penegar summed up assessment regarding Clinical legal Education in following words:

".... it seems to me the future challenge of clinical education is not just an integration of theory with practice, as important as that idea is, it is not just service to the poor and others ill-served by lawyers and legal institutions, as important as that is; rather it is to find and develop new definitions, new conceptions of practice and professionalism in which new definitions and conceptions give proper scope, proper reflection to the complexities of our age. To put the idea differently, it seems to me the clinical educator is in a unique position, and because of that traditional conservatism on the one hand and the frankly pragmatic, spiritual idealism of many of its practitioners including the future lawyers who sit at your feet through several years of law school."

Another aim of Clinical Legal Education is to inculcate social and humanistic values in relation to law and legal profession, while strictly following the norms of the professional ethics.

Professor N.R.M. Menon aptly mentioned that Clinical Legal Education Programme and methods engage the student in a whole range of learning, which is necessary to think and act like lawyer, particularly when the student deals with real life situations in a Legal Aid Clinic. In the process, the interests of the students are cultivated, their attitudes are developed and skills are imparted. Clinical Legal Education offers to the students to learn more substantive subject-matter content than the lecture class method of instruction may provide. In Clinical Legal Education, subjects like Law Reforms, Soci Policy, Public Responsibility, Professional Ethics can be effectively addressed.

The other main advantage of Clinical Legal Education is that while in the law school, law students would exactly know the kind of work they would be called upon to do after becoming lawyers. In case they did not find the work to their interests, in that event, they may decide not to take legal profession and they would not be required to waste a few years in the legal profession, before they discover that the profession is not to their liking or aptitude.

The above discussion helps us to understand the place of clinical methodology in legal education and its prospects for making legal profession socially more relevant and professionally significant. Student involvement in real-life, law-related situations is the central element of Clinical Legal Education. The law teachers and particularly those who are involved in part-time practice of law, by sharing the experience and responsibilities for clinical projects, create a proper atmosphere for the student's learning experience.

Clinical course seeking to concentrate on principal litigation and alternative dispute resolution techniques will have impact on greater use of law tools, legal aid goals and solution satisfaction than to the course seeking to concentrate on trial and apparent advocacy. The clinical legal education has to blend practical experience within the structure setting appropriate to learning goals. It is imperative that clinical experience has to be properly supervised.

Clinical Legal Education can be effectively acquired by incorporating following facets in the traditional legal education.

These are only illustrative not exhaustive.

1. Associating the senior law students with lawyers who have standing in the legal profession of 10 years or more -They should be attached to their chambers and regularly attend the Court cases with them, subject to attending their formal lectures. It is necessary that the law graduates spend a lot of time with their senior colleagues who have experience of about 10 years or more at the bar. This internship and close inter-action with senior lawyers will impart a perspective to law graduates, which will be extremely useful for strengthening our legal system. We need to revive the traditional "Guru Shishya" relationship similar to what we see today in the field of music or dance. Why can we not have similar mentoring in law?

2. Attachment of law students with the law courts and judges at all levels-A close interaction with judges would be of immense use for the law students. We need to seriously consider how an impressionable mind be filled with visions of great advocacy with evolution of appropriate jurisprudence. Can we institutionalise and expand a system where law graduates assist courts and judges, watch judicial proceedings, make summary of proceedings and help in legal research? The Supreme Court of India and the Bombay High Court have introduced system of law clerks on American pattern.

3. Regularly visiting law courts under the supervision of law professors or advocates associated with the Law School--It would be very useful, if after initial orientation for a period of two years out of five years of law course, students were assigned to select lawyers and judges where they could spend time, in rotation in different disciplines and get deeply involved in the cases at hand. Right from the commencement of first coference up to the final presentation of a case, the involvement of a young law graduates would give him an insight which, perhaps, years of lecturing will fail to achieve. The remaining three years course could be divided in about twelve different disciplines and in each branch of law, in a given location, six to eight leading members of the Bar could be identified to whom the students could be allocated in separate batches. Each quarter, these batches could move from one discipline to another gaining practical insight into each branch of law and also watching different advocates in action from very close quarters. After passing out, it could be made mandatory for graduates to spend one year as law associates to be attached to various courts in the country where they could assist judges, prepare their summary of the cases in hand, do legal research, listen to the arguments in courts and make synopsis of these submissions and prepare a précis of the entire case. When they would prepare their own précis and compare them with the judgments delivered by the judges they would gain immense insight to the making of jurisprudence. This would also help judges in not only getting quality assistance but would also impel them to continuously refresh themselves so that they are not only doing justice to the cases in hand but also become great law teachers.

4. Visit of senior law students to police stations, jails, judicial lock-ups, forensic science laboratories. 5. Visit of law students to Mediation and Conciliation Centres, Family Courts, Office of the Marriage Councillor.

6. Organizing Moot Courts regularly-Now a days, there are Inter-law Schools Moot Court Competitions. There are State Level competitions, National level competitions and even International level Moot Court Competitions which is a good opportunity for the students to learn some of the skills of lawyers while they are in law school under the supervision of Professors and Lawyers attached to the law school.

7. Setting up of Legal Aid Clinic associated with the law school and accept cases on behalf of indigent and poor litigants of the neighbourhood and conduct those cases in law Courts under the

supervision of part-time Professors who are practicing as lawyers in court- The senior law students should be attached with those cases from the beginning to end.

These are some ways in which the law students can acquire Clinical Legal Education. In my humble view, the most important and effective manner of providing Clinical Legal Education is by setting up of a Legal Aid Clinic associated with the law school and conducting cases of indigent clients.

This experiment of Clinical Legal Education is working very satisfactorily and successfully, in more than 200 legal aid centres in the United States of America for the last several decades. In the United States senior law students are permitted to appear on behalf of the indigent clients under the supervision of the attorneys- at-law (advocates). The Bar Council of India may also consider the suggestion of permitting final year law students or at least the law trainees to appear in courts for the indigent litigants under the supervision of advocates or the faculty members. The whole concept of law college associated with legal aid clinic, has not been applied in the Indian law schools and colleges. Though some experiments were made in the 1969 when a legal clinic was set up by some teachers and the students of Delhi Law Faculty as voluntary activity, mainly to provide legal services to the poor. The clinic acted as investigating or referral agency rather than as a centre for delivering of services. Two Lok Adalats were organized by the Delhi Legal Aid Clinic in 1985-86 in collaboration with Delhi Legal Aid and Advice Board. But this clinic was not systematically planned. It was only a voluntary effort of the law students and the teachers and therefore, did not achieve any appreciable success.

A legal aid clinic was set up under the supervision of a retired judge in the Banaras Hindu University Similarly, in 1985- 86, Aligarh Muslim University organized a few legal camps and had set up a legal aid clinic in the law school.

The National Law School in India, Bangalore created by the Bar Council of India, is making serious endeavour to give good quality professional training to the law students. Clinical Legal Educational courses are compulsory and adequate credit (marks) is given as in other courses. Therefore, these courses are taken seriously by the students and the teachers.

The Bangalore Law School also has a Legal Service Clinic which is situated in the City Court Complex of the Bangalore City, which is managed by a practicing lawyer, employed as a retainer by the Law School, and under his supervision the students are exposed to the activities of the legal advice, counselling, mediation and legal training.

The National Law School of India University is offering legal aid to the undertrial prisoners housed in Bangalore Central Jail. The job entrusted to the law students was to identify the undertrial prisoners who could be possibly released on bail. Large number of students participated in interviewing, undertrial prisoners and collected relevant data in order to examine, whether they could be released on bail. The team of law students and lawyers interviewed 600 undertrial prisoners and collected the relevant data. Thereafter, the data was analyzed and sent to the Legal Aid Board recommending release of all undertrial prisoners alleged to be involved in petty offences. Out of the 600 undertrial prisoners 500 undertrial prisoners were released on bail during academic year 1995-96.

In August and September, 1995 the Legal Aid Board helped the Consumer Protection Forum in identifying the cases which could be settled by the Forum. Out of the 200 cases pending before the Forum on the assistance of the law students cases were fixed before the Lok Adalats for

settlement and out of that 50 cases were resolved. The beginning of the clinical legal educational programme is encouraging.

The programme can accomplish its desired results only when the Bar Council of India would permit the senior law students or at least the legal trainees to appear in courts on behalf of the indigent clients under the supervision of the advocates or faculty members.

The idea of legal aid clinics associated with the Indian Law Schools and Colleges is in its infancy. The Bar Council of India along with the State Bar Councils and the University associated law colleges should take the programme of the Clinical Legal Education seriously in the interest of the new entrants to the legal profession and the litigants. The legal aid clinics attached to the law schools have done extremely well in the American Law Schools and in some other countries also. The well structured and proper legal aid clinics associated with the law colleges are bound to have very encouraging results benefiting both the budding lawyers and the litigants alike. In the process, the quality of the legal education shall improve and become more meaningful.

The law students get exposure to the actual life cases, litigants and the lawyers. They learn the art of analysing the problems involved in the cases under the supervision of advocates or faculty members. They also get familiar with the intricacies of the court procedure. The law students or legal trainees also get an opportunity of watching how the witnesses are examined and cross-examined. These skills are acquired by the law students under proper supervision of experienced law teachers and advocates. Legal Aid Clinics are primarily established to educate the law students and to provide them practical training, and at the same time ensuring that the indigent clients do not suffer any disadvantage because of the inexperience of the law students or trainees.

Clinical Legal Education provided under strict supervision would not only improve the quality of legal education but can prove to be panacea for the budding lawyers and the poor litigants.

Shri Chiranji Lalji Agarwal not only contributed to the development of law and jurisprudence in the formative years of the Rajasthan High Court but also played significant role in improving the quality of Legal Education in India. Shri Agarwal in fact set bench marks of excellence, erudition, learning, vision, courtesy, humility, graciousness, and above all, a great sense of justice-We salute him today for what he achieved and also how he inspired others to achieve-As a role model, he has and will continue to inspire successive generations of lawyers and judges to be more than willing to render any service that the nation may ask of them. India has the talent. All what we need to collectively do is to harness this talent in the task of nation building. This will be a real tribute to Shri Chiranji Lalji Agarwal.

I would conclude by quoting few lines from the poem of Bassie Anderson Stanley- That man is a success Who has lived well, laughed often and loved much- Who has gained, the respect of intelligent men And the love of children who has filled his niche and accomplished his task Who leaves the world better then he Found it whether by A perfect poem Or a rescued soul Who never lacked appreciation of Earth's beauty Who looked for the best in others and gave the best he had-"

Stanley's beautiful lines apply to Shri Chiranji Lal Agarwal's life and work in a full measure.

Before, I conclude, I deem it my obligation to convey my deep sense of gratitude to the organizers of the function for giving me this opportunity to pay my humble tribute to the noble and great soul of Shri Agarwal. Today is my marriage day.

I think Justice Agarwal could not have given us a better gift on our marriage anniversary.

Ladies and gentlemen, thank you so much for giving me a patient hearing. Thank you-