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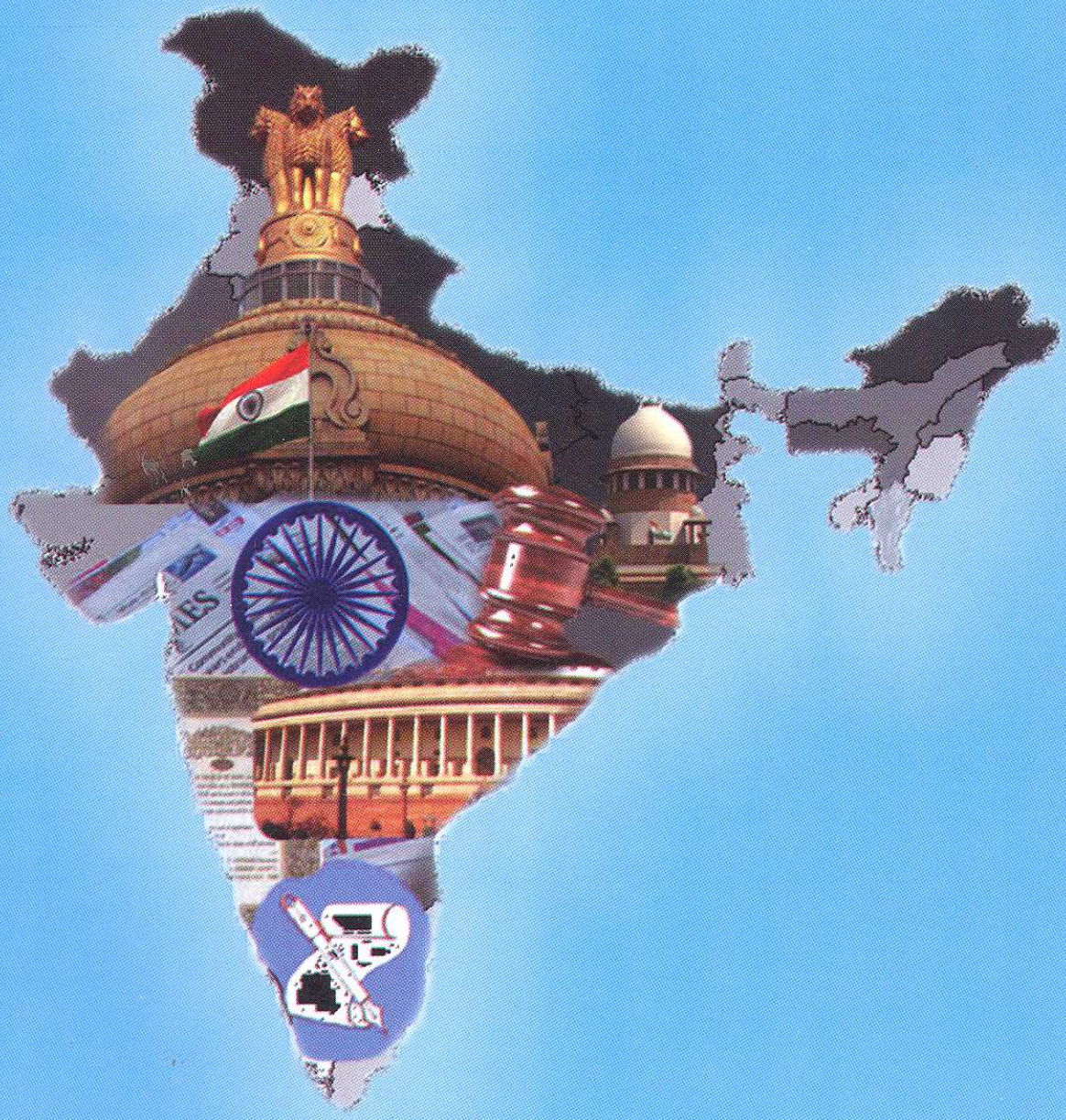

Arundhati Vashishtha Anusandhan Peeth
Allahabad

We shall have to examine the reasons why the state was established. No one will dispute that the state must have some specific aim, some ideal. Then this aim or ideal must be consider of highest importance rather then the state which is created to fulfill this ideal. A watchman is not deemed greater than the treasure he supposed to protect, nor is a treasure. The state is brought into existence to protect the nation: produce and maintain conditions in which the ideals of the nation can be translated into reality. The ideals of the nation constitute "Chiti", which is analogous to the soul of an individual. It requires some effort to comprehend Chiti. The laws that help manifest and maintain Chiti of a Nation are termed Dharma of that nation. Hence it is this "Dharma" that is supreme. Dharma is the repository of the nation's soul. If Dharma is destroyed. the Nation perishes. Anyone who abandons Dharma betrays the nation.

Dharma is not confined to temples or mosques. Worship of God is only a part of Dharma. Dharma is much wider. In the past, temples have served as effective medium to educate people in their Dharma. However just as schools themselves do not constitute knowledge, so also temples do not constitute Dharma. A child may attend school regularly and yet may remain uneducated. So also, it is possible that a person may visit temple or mosque without break and yet he may not know his Dharma. To attend temple or mosque constitutes a part of religion, sect. creed, but not necessarily "Dharma". Many misconceptions that originated from faulty English translations include this most harmful confusion of Dharma with religion.

....."Let us understand very clearly that 'Dharma' is not necessarily with the majority or with the people. 'Dharma' is eternal. Therefore, it is not enough to say, while defining democracy, that it is the Government of the people. It has to be a Government for the good of the people. What constitutes the good of the people? It is 'Dharma alone which can decide. Therefore, a democratic Government ('Jana Rajya') must also be rooted in 'Dharma', i.e. a 'Dharma Rajya'. In the definition of Democracy viz. "Government of the People by the People and for the people, 'of' stands for independence, 'by' stands for democracy and 'for' indicates 'Dharma'.

— Pt. Deendayal Upadhya

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Editorial Address: Arundhati Vashishtha Anusandhan Peeth 21/16 Mahaveer Bhavan, Hashimpur Road Tagore Town, Allahabad- 211002 U.P. E-mail : nationalthought@gmail.com Tel. & Fax – 0532-2466563

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Editorial

"If ever the history of 20th century would be written, it would be written not for the stupendous scientific achievements…… but for the democratization process that got over in this century", so said Einstein, and I add, "if ever the history of 21st century would be written, if would be written not for the stupendous economic progress that this country or the world would record in this century, but for the democratic consolidation that is now in the making. The point that I am trying to make is that the great democratic movement that we saw in the last century and which continues to make newspaper headlines due to the uprising of the people in the Arab world today, has but been established only in the name; what we have done in the name of democracy is that we have created democratic structures for which periodic elections happen, but when it comes to the availability of democratic rights to the poorest of the poor or the lowliest and the lost, which was considered to be the touchstone of democratic process by none else than Mahatma Gandhi himself, the democratic system of the country appears to be failing the nation. We must note this that ours is a democratic age and it is unfashionable for anyone, anywhere in the world to proclaim them to be anything but a democrat[1]. Francis Fukuyama puts it beautifully, "we have arrived at the 'end of history', where there are no plausible competitors to the basic ideology of liberal democracy in a capitalist economic context".[2] Even military dictators take pains to argue that they are just stabilizing the situation so that the system can usher into more substantial democracy. So what can we do to make our democracy more substantial, more responsive, and more beneficial to the man standing last in the queue?

The democratic paradigm that we follow has three basic structures of the State system, legislature, executive and the judiciary. The health of all the three institutions appears to be far from satisfactory. Media is considered the fourth pillar of the State system, with its vital role of overseeing the functioning of the institutional system of the three State structures. When these state structures exercise power on behalf of the people, deciding the destiny of the people, spending the hard earned money of the taxpayer, they should do it with a sense of trust in their hands and with a sense of purpose of benefiting the beneficiary of the trust. That's not all, any kind of a state action shall have its final justification in the face of goals of democratic consolidation, in the increasing participation of the people in the democratic process. Only then the inclusive development, which has become a watchword these days, would have any meaning for the teeming billions of this country. For Robert Dahl, justification for public interest theories lies in participatory democracy, wherein a *demos* is fully inclusive and where it exercises final control over the agenda and decisions.[3] As a result of which, a high priority is accorded to direct participation in civil society by the citizenry, which operates not only through the constricted medium of political parties but also through a plurality of interest groups.

It was with this goal of inclusive development, participatory democracy and democratic consolidation in mind that the team at Arundhati Vashistha Anusandhan Peeth, came up with a decision to devote one of the issues of its bi-annual journal to the cause of

[1] Jane Holder and Maria Lee, Environmental Protection: Law and Policy, Cambridge University Press, 2007.
[2] Francis Fukuyama, The end of History and the Last man, (Free Press 1992)

'Democracy', wherein eminent people from across the country and across the ideological spectrum have contributed with great enthuse and gusto. Dr. Subramaniam Swamy talked about 'Constitution and Constitutionality' in the current paradigm from Hindu tradition point of view and explained that the Constitution of a nation is a framework of principles, values, and canons on which the society's governance is rooted. Constitutionality consists of the *quality* of the statutes, of enforcement procedures of rights and the performance of duties, defined in conformity with the provisions and principles of the Constitution. Rule of Law, federalism, judicial review, fundamental rights, principles evolved by the Supreme Court for protection against preventive detention laws, right to information and theory of basic structure of the Constitution, which are pillars of democratic governance and cornerstones of constitutionality in this country have their origin in Hindu tradition and have been cultivated by generations of political leaders of this country in pre and post independence India. With all its limitations democracy has got to be deepened for ultimately democracy has to be home grown. There cannot be a green house, transplant of democracy.

Dr. Rama Jois, who writes on 'Constitution of India and Role of the Judiciary' attempts an analysis of the provisions of the Constitution showing that the distribution of power among the three organs is made in such a way that each organ functions effectively but without exceeding its limit. The duties assigned to the judiciary are to maintain the balance between the rights of the individuals and the powers of the legislature and the executive, who are empowered to regulate and curtail those rights in the interest of the general public. A reading of these provisions indicates that they are intended to provide a powerful and independent judiciary for enforcement of the rights of citizens. The whole object and purpose of establishing such an independent judicial system is that however weak an individual may be and however powerful the opponent who has deprived his right or who has inflicted injury may be, the law shall function without fear and favour on the time tested principles of "however high you may be, the law is above you". Shri Subhash Kashyap, who attempts an analysis of 'Independence, activism and limitations of judiciary' is of the view that quality of democratic governance has been under severe strain for quite sometime now. Questions pertaining to the independence and accountability of the judiciary, administration of justice, judicial delays, appointment and removal of judges, judicial review, contempt of court, hyper-activism of the judiciary, Public Interest Litigation and high costs of judicial process have been the issues hogging the public mind for a very long time. While the executive and legislative wings of the state system have their own failings in the post independence phase, the judicial system too has moved on a path, which is neither envisaged nor warranted by the Constitution. Courts would do well to remember that they too would have to take care of the Constitutional proprieties and limitations that they have been trying to enforce with reference to other wings of the state system.

Another contribution by Justice (Retired) Kamleshwar Nath on 'Ombudsman for Subordinate Judiciary' discusses the heavy delays in the dispensation of the justice, which has made the administration of justice very tardy and cumbersome. His assertion is that in a democratic system the expectation of accountability from judiciary is as much as is from other wings of the governance system. After all, judiciary decides issues of 'life', 'liberty'

[3] Robert Dahl, Dilemmas of Democracy, Autonomy versus control, Yale University Press 1982.

and 'property' of any person who is aggrieved by any wrong. However the independence of judiciary ensured under the Constitution has not been utilized by the judiciary discretely, rather the ground of independence of judiciary often serves as an excuse for non-transparency and non-accountability in dispensation of justice and Contempt of Court is utilized as a shield by the Judges. Western democracies who have successfully adopted the institution of Judicial Ombudsman have largely confined Ombudsman's investigative process to procedural and administrative aspects of justice delivery system. There is no sound reason why it should not be adopted in India. Dr. Anand Kumar Tripathi who makes his contribution on 'Media & Public Interest Litigation' reminds us that Public interest litigation has played a unique role in providing justice to the oppressed, poorer, vulnerable and marginalized sections of society. Asserting that social change is the life-line of any society and that this task of social change has been affected through the process of public interest litigation, he seeks to assess the impact of media vis-à-vis PIL on Indian Society.

In my contribution, I stuck to the contradictions of our democratic process, where the hiatus between the poor and the rich appears to be growing every single day, confusing an impartial observer if the system meant only for the privileged ones? An attempt in this contribution 'Social Justice & Indian Constitution : Consolidating Democracy for the Underprivileged', has been made to remind ourselves that social justice component has been one of the most dominant elements of Indian Constitution, so much so that Granville Austin called Indian constitution, first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement. Dr. Rajiv Khare and Dr. Yogendra Kumar Shrivastava, in their joint contribution talk about the stark realities facing the nation on food front. Their study reveals the fact that during six decades of our republican experience, despite the promise of equality and justice in the preamble of the Constitution and lot of other promises made in the Directive Principles of State Policy, the country has failed to take care of the basic right of food for millions of the people. The very fact that after six decades of independent existence we are now talking of right to food speaks volumes about our failure to provide basic necessities of life to the majority of our population. The paper makes an attempt to bring together the data from across the country and ends up in presenting some valuable suggestions to ensure right to food. Dr. J P Mishra, in his contribution 'Taking Paid News Seriously', talks about the functioning of Media the fourth pillar of our democratic system, which is expected to guard the democratic fabric of the system in a proper shape. However when the media is guided by extraneous and ulterior motives, trying to protect the interest of the few at the cost of the welfare of the common man, the real sovereign, it strikes at the very root of our existence as a democratic system. Paid news is doing precisely this.

In Hindi section of the Journal, Dr. Harbans Dikshit talks about the Code of Conduct for Media in his contribution and asserts that though the role of the Media in a democratic system is something which cannot be overemphasized, nevertheless the media on its part has to rise above partisan and commercial mindset so that the independence and responsible media may evolve as one of the strongest signposts of democratic movement in this country. This is possible only when media evolves its own code of conduct and ensures its proper

implementation by self discipline. Shri Ashok Mehta raises the question of 'Inexplicables of the Constittuion' underscoring the silence of the Constitution on issues like, parliamentary privileges, questions of the propriety of a foreign national holding constitutional positions, right to property and the questions of minorities and minority educational institutions. Extensively quoting the principles evolved by the Supreme Court (vide Justice Lohoti, CJI) in Pai Foundation case, Shri Mehta exhorts for a consensus to be evolved on these constitutional inexplicables.

In his contribution on 'Constitution and Reservations', Shri Virendra Kumar Singh Chaudhary, seeks to evaluate the purpose of reservation provisions in the Constitution. Accordingly he asserts that the purpose of provisions relating to reservations in the constitution was to ameliorate the conditions of the backward classes, to ensure their contribution in the nation building process. Ultimately the justification of these provisions in the constitution lies in the self annihilation process of these provisions themselves. Their continuance for such a long time raises the questions as to the constitutional propriety of these provisions. And therefore he makes an exhortation for the purpose of evolving a national consensus on these issues to remove the poison that has gone in to the body politic in the name of caste and community due to the provisions relation to reservations.

Prof. Brijkishore Kuthiala, makes his contribution on the 'Diversity, Plurality and Integrity of Media'. Explaining that these three principles are the inherent strengths and bedrock principles of creation of the natural world, he asserts that creation of a long lasting social structure is possible only if these principles are kept in view. Similarly, the structuring of media too, in terms of its ownership, control, collection and presentation of material has to be based on these inherent virtues of the natural world to make it useful for the social system in the long run. In his contribution on "Right to Information Includes Right to Inspection', Prof. Omprakash Singh observes that for a successful democratic experiment, right to information is a necessary tool. The journey of right to information, that started from Sweden in mid 18^{th} century, manifesting itself in the right to information of individual citizens in India, has become an important milestone of democratic experiment in this country. Prof. Raghuvir Singh Tomar talks about the 'Role of Judiciary in Indian Political system'. He seeks to elucidate the role played by the Supreme Court under its powers of judicial review. By interpreting parliamentary legislations and use of public interest litigation, Supreme Court has contributed immensely in making the political system people friendly. Dr. Rajendra Singh in his contribution on 'Mindset of Governors : The Context of Govts and the Media' seeks to trace the history of media evolution during pre-independence and post independence phases.

All said and done, the purport of the whole argument appears to be that though the democratic system in this country apparently is well in place, the components of this democratic structure seem to be falling in dysfunctionality and the rot seems to be setting in due to variety of reasons. We have a vibrant civil society that exists in India, and also the structures in terms of Panchayati Raj Institutions which can be used by civil society organizations to make effective interventions and meaningful contributions in the process of governance. We have a very encouraging social terrain, with vigilant public opinion, vigorous press and vibrant non-governmental organization sector, which can be used for

consolidating the democratic process. We also have unutilized and under utilized potential of millions of youth which can be used for making effective improvements in the developmental administration. However, what we lack is the political will and a democratic spirit to make use of opportunities available.

There was a time when the torchbearers of this country would take the message of “vasundhaiva kutumbakam’ to far of places in the world, the living together of every kind of people, walking together of all kinds of people was the credo of the system, where the ruler could sacrifice everything for the wellbeing of the people, where the moneyed people would give up all their earnings of the lifetime for the upkeep and security of the people. That was probably the best kind of a mindset of democratic system to flourish. But somehow during last one thousand years of thralldom we lost touch with that kind of a democratic spirit and started emulating the west. The mix up that took place as a result of this entire process has moved us into a situation where we have all kinds of structures of democratic governance, but not the democratic spirit of living together, of helping everybody around. Instead what we cherish today is a competitive kind of an economic modeling where the invisible hand of Adam Smith would help us in sorting out our economic travails. The result is for all to see and we end up in a system of contradictions. What is needed is a kind of new dynamic of developmental politics to grow in this country and there we have the challenge well chalked out for all of us who care, to make use of and improve governance process at all levels of our democratic process.

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THE CONSTITUTION AND CONSTITUTIONALITY

Subramanian Swamy*

Abstract

The Constitution of a nation is a framework of principles, values, and canons on which the society's governance is rooted. Constitutionality consists of the *quality* of the statutes, of enforcement procedures of rights and the performance of duties, defined in conformity with the provisions and principles of the Constitution. Rule of Law, federalism, judicial review, fundamental rights, principles evolved by the Supreme Court for protection against preventive detention laws, right to information and theory of basic structure of the Constitution, which are pillars of democratic governance and cornerstones of constitutionality in this country have their origin in Hindu tradition and have been cultivated by generations of political leaders of this country in pre and post independence India. With all its limitations democracy has got to be deepened for ultimately democracy has to be home grown. There cannot be a green house, transplant of democracy.

1. INTRODUCTION

We are here today exactly 60 years since the adoption by the Constituent Assembly of the Constitution of India. India became free of colonial control in 1947. The usurped power of the Imperialists was transferred to the Constituent Assembly of free India by the Indian Independence Act enacted in June 1947 by the British Parliament.

India is, according to the Constitution, a Union of States not a Federation of Provinces. Hence no state can secede from the Union, and no territory however small can be amputated out of India henceforth. States can be temporarily or partly administered by the Centre. Article 356 of the Constitution allows the Centre to take over the administration of any State for a temporary period. Articles 247 to 253 empower Parliament to enact laws and establish courts to enable the central Executive to supersede the state's Executive in administering law and order. There is a central civil service and a central police force positioned in the states. Thus, the essence or quality of the modern Indian Constitution is unitary. *We must safeguard this quality.*

That essence is the Hindu tradition. Ancient Bharat or Hindustan was of *janapadas* and monarchs. But it was unitary in the sense that the concept of *chakravartin* [propounded by Chanakya], i.e., of a *sarvocch pramukh or chakravarti* prevailed in emergencies and war, while in normal times the regional kings always deferred to a national class of sages and *sanyasis* for making laws and policies, and acted according to their advice.

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* Ph.D (Harvard), The author is a former Union Cabinet Minister of Law and Justice. This article is based on the lecture delivered by the author at a function organized under joint auspices of Arundhati Vashishtha Anusandhan Peeth and Adhivakta Parishad on 26th Nov 2009, at Prayag U. P.

In that fundamental sense, while Hindu India may have been a union of kingdoms, it was not a monarchy but a Republic. In a monarchy, the King made the laws and rendered justice but in Hindu tradition the king acted much as the President does in today's Indian Republic. He acted always on advice of sages and sanyasis. Hindustan therefore was always a Republic, except in the reign of Ashoka, i.e., never a monarchy.

Because India's Constitution today is unitary with subsidiary federal principles for regional aspirations and the judiciary and courts are national, therefore the Constitution is a continuation of the hoary Hindu tradition. *That is the first essential constitutionality for us.*

The Constitution of a nation is a framework of principles, values, and canons on which the society's governance is rooted. It is either codified as a written document as in India and US, or unwritten and based on precedents as in UK. From the Constitution flow the criminal and civil statutes which lay down the laws which the citizen have to obey, and the failure to do so invites sanctions and punishments that include imprisonment and/or penalties such as a fine. Enforcement of these statutes is the Rule of Law.

The Constitution also prescribes the rights and duties of a citizen and it is the responsibility of the State to ensure the citizen gets his rights, as also encouraged to perform his duties as a part of the soft infrastructure *of* good governance. These aspects have been known to us as *Smritis*

Rule of Law is thus governance based on citizens' rights & duties, while the enforcement mechanisms are based on procedures set out in the Constitution [e.g., Article 226 and 32 on Writs] and the interpretations of, and direction to the State of the same is given by an independent judiciary.

In Hindu tradition, there is a highly sophisticated body of rules of interpretation and procedures prescribed in Jaimini's *Mimamsa* which sums up the general rules of *Nyaya*. Recently, a Supreme Court judge Markandeya Katju in open court suggested the use of Mimamsa rules over the traditional western Maxwell procedures in our courts.

Thus, Constitutionality consists of the *quality* of the statutes, of enforcement procedures of rights and the performance of duties, defined in conformity with the provisions and principles of the Constitution. This quality can be imbibed by us by studying the glorious Hindu texts of Mimansa and Vedanta.

The broad rights of citizens of India are given in the Preamble to the Constitution, viz, justice, liberty and equality and fraternity, which were further elaborated as ideals to be targeted by the State in the Directive Principles of State Policy[1].

By the Forty-Second Amendment to the Constitution, the Parliament also inserted Article 51-A in the Constitution on duties of the citizens[2]. The rights of the citizens thus enshrined in the Constitution of India are codified and defined in various Articles of the Constitution.

The concept of 'Rule of Law' in any society although structured in a Constitution, has to be based on universal principles. In particular, Rule of Law implies that life, liberty, property and reputation will not be damaged or impaired except for a purpose stated in constitutional law and in the manner so stated. An independent judiciary therefore is the corner-stone of any democratic constitutionality. Destruction of this corner-stone implies the structure will come down; it will in fact collapse. If it collapses we shall be plunged into the darkness and the chaos of a totalitarian and dictatorial regime. Why do we need the Rule of Law and codified citizen's rights? Because humans unlike non-human have cognitive intelligence to conceptualize, invent and articulate which non-humans cannot do. Hence, this enormous power should be used creatively; otherwise it can be misused for cruelty as Hitler did. We could reduce ourselves thereby to non-human levels. Human creativity can flourish therefore only in an ambience of individual freedom, non-violence, and complying with law.

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[1] **WE, THE PEOPLE OF INDIA**, having solemnly resolved to constitute India into a **SOVEREIGN [SOCIALIST SECULAR**-by later amendment] **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 AND, **FRATERNITY** assuring the dignity of the individual and the unity and integrity of the nation;

[2] **51-A**. **FUNDAMENTAL DUTIES**.- It shall be the duty of every citizen of India to (a) abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem; (b) cherish and follow the noble ideals which inspired our national struggle for freedom; [c] uphold and protect the sovereignty, unity and integrity of India' (d) defend country and render national service when called upon to do so; (e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women; (f) value and preserve the rich heritage of our composite culture; (g) protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures; (h) develop the scientific temper, humanism and the spirit of inquiry and reform; (i) safeguard public property and to abjure violence; (j) strive towards excellence in all spheres of individuals and collective activity so that the nation constantly rises to higher levels of endeavor and achievement."

For this, the intelligentsia of a nation must be ready to struggle and make sacrifices. We Indians have done so twice already: First in the Freedom Struggle (1906-1947), and the second in the Struggle against the Emergency (1975-77) in which struggle this author had played a major part. *An independent judiciary therefore is the corner-stone of any democratic constitutionality.* Destruction of this corner-stone implies the structure will come down; it will in fact collapse. If it collapses we shall be plunged into the darkness and the chaos of a totalitarian and dictatorial regime. What mechanisms need to be in place to achieve this great goal of constitutionality? For this, in India, Part III of the Constitution is the bedrock which Part includes Articles that guarantee to all Indians freedom of life, liberty and property, and the seven freedoms of speech, assembly, association, movement, residence, acquisition of property and the right to practice any profession. These rights known as 'Fundamental' if sought to be abrogated or violated have to be enforced by an independent judiciary.

The Constitution of India being supreme law, hence every other law must conform to the Constitution. Any law which runs counter to the Constitution can be struck down after a judicial review by Courts, as ultra vires. *Judicial review thus is one of the essential pillars of constitutionality for an impartial and independent judiciary.*

That is, while citizen rights are defined by the Constitution, it is to be enforced and given content by the judiciary. The judiciary is neither subservient to the Government on the one hand nor to the people on the other. The judiciary therefore stands above the popular frenzy and the Government might.

Just as Parliament and Legislatures represent the Will of the sovereign people, the *judiciary must represent the conscience of the sovereign people.* The former is secured by periodical elections, while the other is ensured by life-long training, character, and experience. These uphold the constitutionality in the rule of law.

In order that the spirit of justice may prevail in the society, therefore a well defined Constitution and independent minded judges are as essential as the structure of Institutions in the Constitution, so that laws are understood and well-administered. Strong, impartial and capable judiciary is the greatest need of the hour today as we are passing through testing times globally. But everything is being done to undermine it. Our Hindu legacy is being squandered

The concept of Fundamental Rights {Part III of the Indian Constitution} was not a legacy of allegedly 'humane' British Colonialists, as British historians claim. In fact they blocked as best as they could. The demand for constitutional guarantees of human rights by Indians was made as far back as in 1895 in the Constitution of India Bill, popularly called the

Swaraj Bill, which was inspired by Lokmanya Tilak, one of the great freedom fighters and architects of India's independence.

This Bill envisaged for India a Constitution guaranteeing to every one of its citizens freedom of expression, inviolability of one's house, right to property, equality before the law, equal opportunity of admission to public offices, right to present claims, petitions and complaints and right to personal liberty. This, the British rejected. In the Madras Session of the Indian National Congress in 1927 it was laid down that the basis of a future Constitution must be a declaration of fundamental rights. But the British Government's Simon Commission in 1927 turned down the demand for fundamental rights on the ground that "abstract declarations are useless, unless there exist the will and the means to make them effective". So much for the British claim of the legacy left behind by them.

In 1931, in its Karachi Session, the Indian National Congress reiterated its resolve to regard a written guarantee of fundamental rights as essential to any future constitutional set up in India. This demand was reiterated by the Indian leaders at the Round Table Conference with the British held in London in 1932.

The Joint Select Committee of the British Parliament on the Government of India Bill of 1934 again rejected those demands. The Committee, however, conceded that there were some legal principles which could be appropriately incorporated in the new Constitution envisaged under the Government of India Act, 1935. Can we therefore countenance that these elementary basic rights, sanctified by the blood and sacrifice of the Indian people, be taken away from them by any ruling party majority in Parliament, if it chose to amend the Constitution by availing of its two-thirds majority in both Houses of Parliament? Obviously not!

2. BASIC STRUCTURE AS CONSTITUTIONALITY

In 1952, the Supreme Court had held that fundamental rights were within the power of amendment granted under Article 368 of the Constitution. In 1965, though the question did not directly arise, the Supreme Court by a majority of three to two *reaffirmed* the view that the amending power could reach fundamental rights. Strong doubts were however expressed by two Judges, namely, Mr. Justice Hidayatullah and Mr. Justice Mudholkar about the amendability of fundamental rights.

But in 1967, the Supreme Court in the Golaknath case, by a thin majority of six to five, held that Parliament had *no power* to amend any of the provisions of Part III of the

Constitution so as to take away or abridge fundamental right[3]. The Supreme Court held that a constitutional amendment had to conform to the provisions of fundamental rights just like any other ordinary law. Accordingly, if the constitutional amendment violated any fundamental right, it was unconstitutional.

Some in executive authority thought that this judgment was harmful to economic development and an audacious negation of Parliamentary supremacy. In fact in Parliament, Left-leaning Congress Ministers attacked the Supreme Court acting as a "Third Chamber" of Parliament. The Constitution (Twenty-fourth Amendment) Act, 1971 was therefore passed to nullify the effect of this judgment. This amendment was promptly challenged in Supreme Court. A full Bench of thirteen Judges of the Supreme Court was constituted to consider the question of the validity of the Constitution (Twenty-fourth Amendment) Act. The case directly raised the issue of amendability of fundamental rights.

On April 24, 1973, the Supreme Court delivered its historic judgment in Kesavananda Bharati v. State of Kerala case[4]. Six judges held that the power of amendment was plenary and was not subject to any implied and inherent limitations in respect of any matter, including fundamental rights. Six other judges and the CJI held that Parliament could not, in exercise of its amending power, destroy or damage the basic structure of the Constitution by altering the essential features of the Constitution and that fundamental rights were essential features of the Indian Constitution.

Accordingly, a constitutional amendment which merely abridged a fundamental right with 'reasonable restrictions' was not unconstitutional, but if it abrogated a fundamental right, the Supreme Court would strike it down as unconstitutional. Hence, by a majority of one, the concept of an unamendable basic structure of the Constitution came into vogue. *This is the third pillar of Constitutionality.*

Thus Part III consisting of Fundamental Rights became unamendable and hence beyond any Parliamentary majority. Unless a revolution scraps the Constitution, it is now a permanent given in Indian affairs. Every law and each of the Constitutional amendments proposed must pass this test of constitutionality.

In 1975, India experienced a threat to fundamental rights from a new angle-it's complete suspension. Prime Minister Mrs. Indira Gandhi claimed that the nation was threatened by internal disturbance. Part XVIII of the Indian Constitution deals with Emergency provisions that enable temporary suspension of fundamental rights. Article 352

[3] AIR 1967 SC 1641
[4] AIR 1973 SC 1461

had empowered the President to issue a Proclamation of Emergency if he was satisfied that a grave emergency existed whereby the security of India was threatened by war or external aggression or internal disturbance.

Since this last expression was vague and liable to misuse as was in 1975-77, therefore by the Constitution (Forty-fourth Amendment) Act, 1978 during the Janata Party rule, the expression 'armed rebellion' was substituted for the expression "internal disturbance". While a Proclamation of Emergency is in operation, Article 359 empowers the President to suspend the right to move any court for the enforcement of fundamental rights. The Supreme Court in its judgment in ADM Jabalpur v. S. Shukla[5] held that right to life and personal liberty was suspended during the operation of the Proclamation of Emergency and during that period, the writ of *habeas corpus* is not available.

By reason of the amendment of Article 359 of the Constitution by the Constitution (Forty-fourth Amendment) Act to meet requirements of constitutionality, the provisions of Article 21 *cannot now be suspended or derogated from even during an emergency*. No court can hereafter rule that habeas corpus is not available during an emergency.

The relationship of fundamental rights with the Directive Principles of State Policy in part IV of the Constitution has been a subject of considerable and continuing debate. A division of fundamental rights into two categories – justiciable and non-justiciable – was recommended by the Sapru Committee as early as 1945. At the time of framing the Constitution, the Advisory Committee on Fundamental Rights recommended: "*We have come to the conclusion that in addition to these fundamental rights, the Constitution should include certain directives of State Policy which, though not cognizable in any court of law, should be regarded as fundamental in the governance of the country*".

Directive principles are not enforceable by any court but the principles laid down are, nevertheless, fundamental to the governance of the country and it is the duty of the State to apply these principles in making laws (Article 37). Part IV prescribes the goals or the ideals to be achieved by India as a Welfare State. Fundamental rights are the means for realizing these goals.

At one stage there was a sharp controversy regarding the role of fundamental rights vis-à-vis directive principles. Early judicial thinking took the view that directive principles were subsidiary or subordinate to fundamental rights.

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[5] AIR 1976 SC 1207

Subsequent decisions of the Supreme Court have ruled that there is no conflict on the whole between provisions contained in Part III and Part IV. They are complementary and supplementary to each other. In keeping with the principles of harmonious construction, *a Mimamsa Nyaya principle*, the court must wisely read collectively Directive Principles of Part IV into the individual fundamental rights of Part III, neither part being superior to the other. Together, they form the core and conscience of the Constitution to guide our democratic nation.

Article 19 of the Constitution which guarantees the six freedoms as it now stands, is however, confined to citizens. It provides that subject to certain reasonable restrictions, citizens shall have the rights for example: (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; and (g) to practice any profession, or to carry on any occupation, trade or business. Reasonable restrictions concept has been clarified by the Supreme Court in a number of judgments. The Constitutionality of these restrictions is tested against public interest.

Article 25 states: "Subject to public order, morality and health and subject to the other provisions of the part dealing with fundamental rights, all persons are equally entitled to freedom of conscience and have the right freely to profess, practice and propagate religion". This too has been interpreted by the courts to hold that it is reasonable to hold that there is no fundamental right to convert anyone to another religion. In another Constitution Bench judgment[6], the Supreme Court laid down that total ban on cow slaughter was a reasonable restriction on Article 25.

To enforce these fundamental citizens rights, the Indian Constitution has provided the right to constitutional remedies e.g., the right to move the Supreme Court directly by appropriate proceedings for the enforcement of the rights conferred by Part III of the Constitution, the Supreme Court having power to issue directions, orders or writs appropriate for such enforcement.

Many case laws have come on the books over the last six decades which have enlarged the scope of Fundamental Rights itself. For example, prior to the decision of the Supreme Court in Satwant Singh Sawhney v. The Union of India {(1967) 3 SCR 525}, passports were issued by the Government of India in exercise of its executive power to conduct foreign relations. The Government had therefore claimed an absolute discretion in the matter of issuance of passports. The majority decision of the Supreme Court in

[6] 1959 SCR 378

Sawhney's case denied any such absolute power. The Court held, *inter alia*, that the right to travel abroad is a part of a person's personal liberty of which he could not be deprived *except according to procedure established by law* in terms of Article 21 of the Constitution and as there was no law establishing such procedure, the Government had no right to refuse a passport to any person who might have applied for the same.

In compliance with the above decision of the Supreme Court, the Passports Act, 1967 was passed by Parliament. Later in Maneka Gandhi v. Union of India[7] the Supreme Court has held that the procedure for granting or for impounding a passport should be "reasonable and fair" as otherwise the fundamental freedom guaranteed under Article 14 and Article 21 of the Constitution would be infringed. Therefore, the Passports Act (1967) now contains provisions for grant or refusal of passports, renewal of passports and variation, impounding and revocation of passports. All those provisions have to be construed harmoniously with Article 14, 19 and 21 of the Constitution of India as Mimansa Nyaya can teach us.

3. THE RIGHT TO INFORMATION

For rule of law to take root, however, there must be awareness of the people of their rights and avenues of enforcement. For which a Right to Information (RTI) law is essential. I can say with great pride that as a Lok Sabha MP I moved the first Private Member's Bill in 1982 on Freedom of Information. It was not taken up and it lapsed after the House was dissolved in 1985.

Besides information, the people should also have the knowledge, under the Constitution, of the procedure to enforce their rights of citizenship through courts. Also to be able to assemble, pool information, and to struggle non-violently to seek compliance of the State agencies with the provisions of the Constitution. For success in these efforts, there should be a firm commitment to truth of the people, and respect for healthy dissent.

One method mechanism of enforcing the citizen rights effectively is to enact a law to make it a right for citizens to know, and also a duty of the State to inform the citizens. This has now become possible through case laws. The Sriram Gas leak case for example had given the Supreme Court an opportunity to conclusively lay down the law with regard to right of a citizen to have access to information. Ultimately, a series of cases led to Parliament enacting a Right to Information Act (2005).

The Supreme Court recognized this right to know and gave this right a concrete shape. The result is that the Government can no more decline even if delay giving

[7] (1978) 2 SCR 621

information to a citizen. The procedure laid down is quite easy. When a request is made by a citizen, the Government cannot simply file the request. It has to say yes or no to the request, and defend the decision to say 'no'. A citizen could normally approach a court of law to exercise his right to know. But, of course, the Government can then claim privilege, or the Government can always try and seek the protection of the Official Secrets Act to deny information.

The Supreme Court in several judgments appreciated that not only does a citizen have the right to know, but that the Government also had a duty to inform. The right to know and the duty to inform are really two sides of the same coin. In Raj Narain vs. Indira Gandhi case[8], the famous Justice Mathew expressed the view that the people had a right to know every public act, everything that is done in a public way, by their public functionaries and further that the right to know is derived from the concept of freedom of speech, i.e. a Fundamental Right under Article 19 of the Constitution.

What information should be included in the right to know? There are essentially two kinds of right to know information. Firstly, information in which an individual is personally interested and secondly, information in which the public at large is interested.

As regards information of individual importance it seems quite obvious that a person has the right to know everything that personally affects him. For example, an employee must know whether his employment is hazardous and if so, the reason why. He or she must also know what are the consequences that he may have to face and what steps be taken to prevent a disaster, or if a disaster does strike, what curative action can be taken. The employee must have immediate knowledge of these facts, or at least time-frame within which he must act so that damage is minimized. The employee must also know where the effects of the disaster or hazard will be felt; will he be personally affected or will the other workers also be affected or will the entire locality be affected. A housewife must know whether the drinking water in the house is safe and if not, the reason why. She must also know the consequences of drinking unfit water so that she can immediately warn her family, and if necessary, her neighbours.

Immediate availability of such information will enable her to take appropriate remedial action and safety precautions, such as boiling the water before drinking it. Similarly, the public at large must be told that they are residing in areas which are environmentally hazardous so that they can take necessary safety precautions. For example, it is believed that in 1984 before the Bhopal Gas Leak, not many people in Bhopal knew that Union Carbide was dealing in toxic substances. Of those who did know, not many were aware that merely

[8] AIR 1975 SC 2279

putting a wet towel on one's nose could substantially minimize the effects of toxic gases. Because of a lack of such basic information, hundreds of people unnecessarily died. The residents of Bhopal were not only deprived of their right to life, but also their right of safe residence guaranteed by Article 19(1)(e) of the Constitution.

Another reason why disclosure is essential is because the availability of information can lead to cure, in the event that prevention is not possible. In the event of a war, the people must know where they can find air-raid shelters or what precautions to take in the event of an air raid. If such information is withheld, lives, which could otherwise be saved, will be needlessly lost.

Why should there not be a duty to inform? Everyday the courts give reasoned judgments so that a litigant may know why he has not succeeded in his case before the courts. The courts also strike down orders if the aggrieved party has not been informed of the case against him to be met, that is to say, that he has not been given any 'show case' notice (*audi alteram partem*). Similarly, in matter of preventive detention, the courts set detenues at liberty because they have not been informed of the grounds of detention or because all the documents before the detaining authority were not disclosed to him, or even in the language he knows.

These instances indicate that the courts have implicity already recognized the duty to inform especially in matters concerning justice, fair play and personal liberty. Surely, the courts can explicitly also recognize the duty to inform in cases where the right to life is threatened, more so in cases where the right to life has actually been extinguished. This recognition is all the more imperative, when it is realized that in matters concerning the environment, it is not as if only one life is threatened, but as we saw in Bhopal Gas Leak Case, in thousands.

The task of collecting such information vital for public knowledge, is not beyond the means of the Government. The infrastructure is already available and provided time to time to Parliament. This can be suitably adapted to the needs and requirements of the general public. For example, motor vehicles are registered every year for road tax. While applying for registration, the owner of the vehicle can be required to give a test report on auto-emissions. Similarly, while issuing industrial licenses, the Government can direct the applicant to give information with regard to the raw materials used, the environmental impact of the manufacturing processes, whether any hazardous substances are stored or manufactured and the measures that the applicant proposes to take for the safety of workers and nearby residents.

Even the Government has collected the relevant information, it should be obliged to disseminate it in public interest. The dissemination of information is also relatively simple. The government can use the electronic media such as TV and Internet, and disseminate information. The literate people can also be informed through newspaper advertisements, brochures and leaflets. There are other avenues too: smokers are told by a warning on cigarette packets itself that smoking is injurious to health. For the uneducated but literate, picture posters can also be used for conveying information. The help of communication experts such as NGOs can also be taken to disseminate information in remote and backward areas.

All these requirements have finally been codified in a 2005 law, the Right to Information Act. The proper application of law to its needs as the society today realizes more than ever before its rights and obligations requires the judiciary to mould and shape the law to deal with such rights and obligations. The mere existence of a particular piece of beneficial legislation cannot solve the problems of the society at large unless the judges interpret and apply the law to ensure its benefit to the right quarters. Initially the Indian Supreme Court followed a narrow doctrine and to shy away from development and enlarging the scope.

4. ARREST AND DETENTION

For example, soon after the Constitution came into force in 1950 in A.K. Gopalan's case[9], the Supreme Court placed a narrow and restrictive interpretation upon Article 21 of the Constitution. By a majority, it was held in that case that "the procedure established by law means procedure established by a law made by the State" and the court refused to infuse in that procedure the principles of natural justice. The court also arrived at the conclusion that Article 21 excluded enjoyment of the freedoms guaranteed under Article 19. The doctrine of exclusivity of fundamental rights as evolved in Gopalan's case was thrown overboard by the same Supreme Court about two decades later in Bank Nationalization case[10] and four years later in Hardhan Saha's case[11] the Supreme Court judged the constitutionality of preventive detention with reference to Article 19 also.

Twenty eight years after the judgment in Gopalan's case, in 1978 the Supreme Court in Maneka Gandhi's case[12] pronounced that the procedure contemplated by Article 21 must be 'right, just and fair' and must pass the test of reasonableness. The procedure should be in conformity with the principles of natural justice and unless it was so, it would be no

[9] AIR 1950 SC 27
[10] AIR 1970 SC 564
[11] AIR 1974 SC 2154
[12] AIR 1978 SC 592

procedure at all and the requirement of Article 21 would not be satisfied. In 1994 in the Joginder Singh case, the Supreme Court laid down as a constitutionality that just because the police have the power to arrest in a registered case that discloses a cognizable offence, *it is not necessary to do so.*

An enforceable right to compensation in case of 'torture' including 'mental torture' inflicted by the state or its agencies is now a part of the public law regime in India. In many of its decisions, the Supreme Court of India started a new era of compensatory jurisprudence in Indian legal history. This newly forged weapon to help the torture victims has been sharpened in many of its decisions.

In the famous D.K. Basu's 1997 Supreme Court case, the court went to the extent of saying that since compensation was being directed by the courts to be paid by the State, which has been held vicariously liable for the illegal acts of its officials, the reservation to Article 9(5) of ICCPR[13] by the Government of India had lost its relevance. In fact, the sentencing policy of the judiciary in torture related cases, against erring officials in India, has become very strict. For an established breach of fundamental rights, compensation can now be awarded in the exercise of public law jurisdiction by the Supreme Court and high courts, in addition to private law remedy for tortuous action and punishment to wrongdoer under criminal law.

In Nilabati Behera's case[14], the Supreme Court went even further: "The Court, where the infringement of fundamental right is established, therefore, cannot stop by giving a mere declaration. It must proceed further and give compensatory relief, not by way of damages as in a civil action by way of compensation under the public law jurisdiction for the wrong done, due to breach of public duty by the State of not protecting the fundamental right to life of citizen. To repair the wrong done and give judicial redress for legal injury is a judicial conscience."

What has been and is being done by the higher judiciary in India within sixty years of Independence is something which can be said to be extraordinary. The Supreme Court of the United States took a hundred and twenty one years to rectify its abhorrent judgment on slavery. The Dred Scott v. Sandford[15], that court held that a 'Negro' was the property of his master and not a 'citizen' thereby legitimizing 'slavery' and discrimination on the grounds of 'colour and creed'. This doctrine was cast away in 1978 by the same court, when it said that slavery is a de-humanising despicable institution denying human dignity to

[13] International Covenant on Civil and Political Rights
[14] (1993) 2 SCC 466

such an extent that no court of law can uphold it and gave it a decent burial in Bakke's case[16]. We abolished untouchability in the Constitution itself. This has been backed by a catena of judgments.

The judiciary has, thus, been rendering judgments which are in tune and temper with the legislative intent while keeping pace with time and jealously protecting and developing the dimensions of the fundamental human rights of the citizens so as to make them meaningful and realistic.

5. PUBLIC INTEREST LITIGATION

In view of the operations by the courts on a wider canvass of judicial review, a potent weapon was forged by the Supreme Court by way of public interest litigation (PIL) also known as social or class action litigation. The Supreme Court has ruled that where judicial redress is sought in respect of a legal injury or a legal wrong suffered by persons, who by reason of their poverty or disability are unable to approach the court for enforcement of their fundamental rights, any member of the public, acting bona fide, can maintain an action for judicial redress.

Thus, the underprivileged and the downtrodden have secured access to court through the agency of a public-spirited person or organization. This weapon was effectively used by the Supreme Court and the high courts, being Constitutional courts, to a large extent from 1980 onwards. The decisions of the Supreme Court in several decisions thereafter, more particularly in the decision of the Supreme Court in S.P. Gupta's case[17] represent a watershed in the development of PIL and liberalization of the concept of locus standi to make access to the courts easy.

The principle underlying Order 1 Rule 8, Code of Civil Procedure has been applied in public interest litigation to entertain class action and at the same time to check misuse of PIL. The appointment of amicus curiae in these matters if necessary can ensure objectivity in the proceedings. Judicial creativity of this kind has enabled realization of the promise of socio-economic justice made in the preamble to the Constitution of India, thus furthering the enforcement of citizenship rights.

The expanded concept of *locus standi* in connection with PIL, by judicial interpretation from time to time, has expanded the jurisdictional limits of the courts exercising judicial review. This expanded role has been given the title of 'judicial activism'

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[15] 15 L Ed 69(1857)
[16] 438 YS 265; 57 L Ed 2d 750 1978
[17] AIR 1982 SC 149

by those who are critical of this expanded role of the judiciary. The main thrust of the criticism is that the judiciary by its directives to the administration is usurping the functions of the legislatures and of the executive and is running the country and, according to some ruining it.

What these critics of the judiciary overlook is that it is the tardiness of legislatures and the indifference of the executive to address itself to the complaints of the citizens about violation of their human rights which provides the necessity for judicial intervention. In cases where the executive refuses to carry out the legislative will or ignores or thwarts it or fails to perform its statutory duties, it is surely legitimate for courts to step in and ensure compliance. When the court is apprised of and is satisfied about gross violations of basic human rights it cannot fold its hands in despair and look the other way.

If the judiciary were to shut its door to the citizens who finds the legislature as not responding executive indifferent, the citizen would ultimately take to the streets and that would be disastrous both for the rule of law and democratic functioning of the state. Courts have come to realize and accept that judicial response to human rights cannot be blunted by legal bigotry. Courts in India no longer feel bound by the rigid rule of locus standi where the question involved is injury to public interest. Judiciary in India thus has been the most vigilant defender of democracy, democratic values and constitutionalism. It has been a sound enforcement mechanism of citizenship rights.

It must always be remembered however that the judges in exercise of their power of judicial review are not expected to decide a dispute or controversy for which there are no 'judicially manageable standards' available with them. Usually that means standards regarding arbitrariness, or unreasonableness or vitiated by bias. The court therefore do not interfere with the policy matters of the executive unless the policy is either against the Constitution or some statute or is actuated by mala fides. Policy matters otherwise, are thus best left to the judgment of the executive. Also the danger of judiciary creating a right without the possibility of adequate enforcement will undermine the credibility of the institution. Courts cannot 'create rights' where none exist nor can they go on making orders which are incapable of enforcement or violative of other laws or settled legal principles.

When people's rights are trampled upon by dominant elements, PIL emerges as a medium of struggle for protection of their human rights. The legitimacy which PIL enjoys in the Indian legal system today is unprecedented. PIL activism interrogates power and thus makes the courts as people's court. A fairly free media acts adds to this ambience as a

catalyst to ensure implementation of rights and punishment of its infringement, but focusing on unattended events and criminal acts.

6. CONCLUSION

The Rule of Law and Citizen Rights enforcement mechanisms are part of the soft infrastructure essential for humane and good governance. In India, thanks to a Written Constitution and a reasonably independent judiciary, the Rule of Law is largely followed, safeguarded by case law and a compliant civil society. Citizenship rights and constitutionality are protected by recourse to judicial review by courts, by the Right to Information Act, and with the weapon of Public Interest Litigation (PIL). The greatest contribution of PIL has been to enhance the accountability of the governments towards the human rights of the poor. The judges acting alone cannot provide effective responses to state lawlessness but they can surely seek a formation of norms where political power becomes increasingly sensitive to human rights.

Thus, the enforcement mechanisms have been functioning reasonably well in democratic India, and could serve as a model for other countries in Asia. In a nutshell, democracy as practiced may not ensure rule of law and citizenship rights, but there is no other alternative system which can. We must therefore deepen democracy rather than despair with what we have. Ultimately democracy has to be home grown. There cannot be a green house, transplant of democracy. The world is however moving towards a consensus that human rights are least insecure in a democracy.

Besides intra-national mechanisms to enforce citizenship rights, there is now a growing possibility of international mechanism to exert substantial moral pressure through the United Nations. This pressure is not only to safeguard individual rights but also to help assist the deepening of democracy within nations. For example, the increasing democratic liberalization in the world is making transfer of power more civil. One of the more remarkable transitions was in Senegal. President Abdou Diouf’s loss in an open election in February 2000 ended four decades of one-party rule. Senegal became part of the refreshing trend in Africa of leaders leaving office through the ballot, a rare occurrence until recently. Yet despite undoubted benefits, the transition to democracy in many countries remains imperiled, insecure, and fragile. The spread of democracy is important, but we must not overlook the challenges and dangers.

We must remember that Democracy is the only form of political regime compatible with human rights.. However, it is not enough to establish electoral democracy. Several policy interventions are required to realize a range of rights under democratic government.

Some rights require mechanisms that ensure protection from the state. Others need active promotion by the state. In this context, four defining features of a democracy based on human rights are to be taken note of, *holding free and fair elections contributes to fulfillment of the right to political participation, *allowing free and independent media contributes to fulfillment of the right to freedom of expression, thought, information, and conscience, *separating powers among branches of government helps protect citizens from abuses of their civil and political rights and * encouraging an open civil society contributes to fulfillment of the right to peaceful assembly and association. An open civil society adds an important participatory dimension, along with the separation of powers, for the promotion of rights.

These rights are mutually reinforcing, with progress in one typically linked with advances in others. Openness of the media, for example, is usually correlated with the development of civil society institutions. But democracy is not homogeneous. From the several forms of democracy, countries choose different institutional mixes depending on their circumstances and needs. For simplicity, it helps to distinguish two broad categories of democracies – majoritarian and inclusive. In a majoritarian democracy, government is by the majority, and the role of political minorities is to oppose. The danger is that many minorities in plural societies may be permanently excluded, discriminated against and marginalized – since this would not affect the electoral prospects of majority-based political parties, which can lead to violence. Hence we should strive for an inclusive society. Before the retrogressions were imposed, Hindu theology with its dictum ***"Ayam Nijah Paroveti; Ganana Laghuchetasaam; Udaar Charita-nam tu; Vasundhaiva Kutumbakkam"*** eminently qualifies for being called an inclusive theology on which such society was structured for centuries. The Mimamsa Nyaya adds substance for the search for harmonization of Hindu theology.

In the liberal democratic model all individuals are autonomous in displaying public loyalty to the state, while their various private loyalties –religious, ethnic or regional – are ignored. This puts the emphasis on a majority's right to decide. But when collectives of unequal size live together in a democracy and do not have identical or cross-cutting interests, conflicts become likely such as in Nigeria. Hence a Constitution and Constitutionality become the imperative for conflict resolution.

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CONSTITUTION OF INDIA AND ROLE OF JUDICIARY

Dr. M. Rama Jois*

Abstract

An analysis of the provisions of the Constitution shows that the distribution of power among the three organs is made in such a way that each organ functions effectively but without exceeding its limit. The duties assigned to the judiciary are to maintain the balance between the rights of the individuals and the powers of the legislature and the executive, who are empowered to regulate and curtail those rights in the interest of the general public. A reading of these provisions indicates that they are intended to provide a powerful and independent judiciary for enforcement of the rights of citizens. The whole object and purpose of establishing such an independent judicial system is that however weak an individual may be and however powerful the opponent who has deprived his right or who has inflicted injury may be, the law shall function without fear and favour on the time tested principles of "however high you may be, the law is above you".

The Legislature, the Executive and the Judiciary are the three organs of our Democratic structure of Government brought into existence, under our Constitution, among whom the sovereign powers of the Union of India and of the States are distributed. Under the provisions of the Constitution they are invested with the power and duty of implementing the noble objectives set out in the preamble. The degree of achievement of these objectives depends upon the degree of effective functioning of each of the three organs. An analysis of the provisions of the Constitution shows that the distribution of power among the three organs is made in such a way that each organ functions effectively but without exceeding its limit. The power to ensure that the legislature and/or the executive do not exceed the limits of their power and thereby encroach upon or curtail the right conferred on the citizens who is aggrieved by the unconstitutional and/or unlawful actions of the legislature and/or the executive, is conferred on the Judiciary. Thus the judiciary is given the pride of place in the Constitution, as it should be; for, it is necessary for the fulfillment of the objectives of the constitution. Exercise of such power is possible only by an independent impartial and fearless judiciary. The constitutional provisions are designed to provide such a judiciary.

The preamble, which is the constitutional manifesto, declares that object and purpose of the constitution is *inter alia* to ensure equality in every respect and social, economic and political justice to all the citizens. The Preamble to our Constitution is not an ordinary preamble as found in any other statute. It has a great historical background, and was adopted by the Constituent Assembly after enacting the main provisions so as to ensure that the ideals for the achievement

* M.P. Rajya Sabha, former Chief Justice of Punjab and Haryana High Court and former Governor of Bihar and Jharkhand.

of which our people fought for centuries and for which purpose several provisions are incorporated in it, are correctly summed up. The preamble discloses the basic structure or foundation on which our grand mansion of Democratic Republic is founded. The spirit of the preamble pervades and manifests itself in every important provision of the Constitution. Chief Justice Sikri, in the case of *Keshavananda*[1] pointed out this in the following words:

> "It seems to me that the preamble of our Constitution is of importance and the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the preamble."

One of the most important aspects which flows from the preamble and which the Constitution has ushered in, is the Rule of Law and to ensure justice to every person through an independent judiciary. Because it is by Rule of Law coupled with independent judiciary, who can be approached when law is violated, the right of the humblest of the citizens could be protected whenever he suffers from its unjust encroachment. The important aspect of the rule of law is that no executive action to the prejudice of an individual can be taken except with the authority of law. It is needless to mention that such law must be in conformity with the provisions of the Constitution**,** i.e., law must be valid. In fact, this is the essence of the constitutional scheme of checks and balances. This principle was enunciated by the Supreme Court in *State of Madhya Pradesh* v. *Bharat Singh,* in the following words:

> "Our federal structure is founded on certain fundamental principles, (1) The sovereignty of the people with limited Government authority, i.e., the Government must be conducted in accordance with the will of the majority of the people. The people govern themselves through their representatives whereas the official agencies of the executive Government possess only such powers as have been conferred upon them by the people; (2) There is distribution of powers between the three organs of the State-Legislative, Executive and Judicial, each organ having some check direct or indirect on the other; and (3) the rule of law which includes judicial review of arbitrary executive action."

The duties assigned to the judiciary are to maintain the balance between the rights of the individuals and the powers of the legislature and the executive, who are empowered to regulate and curtail those rights in the interest of the general public. Therefore the judiciary is given the power to adjudicate upon the rights of the citizens and to ensure that the balance required to be maintained by the constitution as between the rights of the individuals and the interests of the

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[1] A.I.R. 1973 S.C. 1461

society is not broken. It is also the duty of the judiciary to enforce the rights of any individual who approaches it, against another individual.

In order to secure justice for all, the Constitutional Provisions not only confer various rights on individuals but also provide constitutional remedy for enforcement of fundamental rights against the State and its instrumentalities, through the highest court — the Supreme Court, under Article 32, and for enforcement of all the Constitutional and legal rights against the State and its instrumentalities before the High Court established for each of the States. In the Constitution itself important provisions relating to Constitution and Organization and also jurisdiction and powers of Supreme Court and the High Courts have been incorporated. Further qualification and procedure for appointment of judges, their age of retirement and security of tenure are all prescribed in the Constitution. A reading of these provisions indicates that they are intended to provide a powerful and independent judiciary for enforcement of the rights of citizens.

The founding fathers of the Constitution have also taken care to incorporate provisions in the Constitution itself to ensure the independence of the judiciary to the people upto the lowest level. Some of them are:

1. The qualification for appointment of District judges is prescribed and the appointment has to be made only on the recommendation of the High Court (vide Article 233);
2. The appointment of persons to all the cadres of judges below the cadre of District judges should be made in accordance with the rules framed by the Governor in consultation with the High Court (vide Article 234); and
3. Administrative control overall the lower courts is vested in the High Court of the State concerned (vide Article 235)

By these provisions the independence of the subordinate judiciary and the security of tenure (including security in the matter of their postings, transfer and the like), are assured as by Article 235 the entire administrative control over the subordinate courts is entrusted to the Judges of the High Court, whose security of tenure is ensured by Article 218. The necessity of these provisions to place subordinate judiciary beyond executive interference was felt as early as in the year 1933-34 when the Joint Parliamentary Committee made the following observations:

> "It is the subordinate judiciary in India who are brought most closely into contact with the people and it is no less important, perhaps indeed even more important, that their independence should be placed beyond question than in the case of the superior judges."

The intention of incorporating the special provisions relating to the entire judiciary, in the Constitution itself was to secure to the people an independent and fearless judiciary. Therefore, the distribution of power among the three organs of the State has been declared by the Supreme Court as one of the basic structures of the Constitution.

Under the scheme of the Constitution the people have the right to secure justice through an independent and impartial judiciary whenever it is infringed by the state or by any of its instrumentalities or by other individuals. It is through an order of the Court alone an individual who is deprived or denied of his right by the State or by any other person secures relief which he is entitled to. The whole object and purpose of establishing a judicial system is that however weak an individual may be and however powerful the opponent who has deprived his right or who has inflicted injury may be, even if it were to be the Legislature or the executive itself, so long as law is on his side he is entitled to secure an order in his favour, from the judiciary and once such an order is made by the competent Court, he can also get it enforced or executed against his opponent, with the aid of the power of the State. It means, no individual not even the Government is superior to law.

This is the concept of supremacy of law, under a democratic form of Government whose powers are regulated and/or controlled by a written Constitution. This concept was evolved in this country from times immemorial even when the system of Government provided for was it should be headed by a King. We can certainly be proud of our ancestors for, under *Rajadharma,* the law which laid down the powers and duties of a King — which was the Constitutional law of ancient India, "Supremacy of law" and the duty of the State to dispense justice according to law and impartially had been laid down in clearest terms. This has been forcefully brought forth in the following way,

तदेतत्–क्षत्रस्य क्षत्रं यद्धर्मः। तस्माद्धर्मात्परं नास्ति।

अथो अबलीयान् बलीयांसमाशंसते धर्मेण। यथा राज्ञा एवम्।।[2]

> "Law (Dharma) is the king of kings. No one is superior to law. The law aided by the power of the king (State) enables the weak to prevail over (establish his right against) the strong."

The verse firmly declares that the law is supreme and the political ruler is not above the law. He is subordinate to law and is under a duty to enforce the law and give relief to any person who has suffered legal injury at the hands of the another however weak the former and however strong the latter. The doctrine that 'King can do no wrong' which was prevailing elsewhere was

[2] Brihadaranyaka Upanishad (1-4-14)

never accepted in this Country is amply made clear in the above declaration. The position given to the King was that of a penultimate authority functioning within the four corners of "Dharma" the ultimate authority.

The above verse was quoted in the Constitutional Assembly by the former President Dr. S. Radhakrishnan in the course of his speech supporting the resolution for the adoption of the Constitution. He said that our ancient principle of "Supremacy of Law" was sought to be established by the Constitution. Dr. Shankar Dayal Sharma quoted the above verse in his convocation address at the National Law School of India University, Bangalore on 25-9-1993 to make out that from times immemorial in this Country, we recognized only supremacy of the law and not of the ruler. The Law Commission presided over by Justice Gajendragadkar, former Chief Justice of India, in its 46th report expressed similar views:

> "The Commission believes that, in a democratic country like India which is governed by a written constitution, supremacy can be legitimately claimed only by the Constitution. It is the Constitution which is paramount, which is the law of laws, which confers on Parliament and the State Legislatures, the Executive and the Judiciary their respective powers, assigns to them their respective functions and prescribes limitations within which the said power and functions can be legitimately discharged.

Thus we gave ourselves a system of governance which can aptly be described as a System based on the Constitutional Supremacy. Under our present democratic system, the Constitution is supreme. All the three limbs of the State namely Legislature, Executive and the Judiciary have to function within the four corners of the powers conferred on them under the Constitution. In the nature of things, there has to be some forum or authority to declare what actions of the legislature or the executive are constitutional or unconstitutional. It is this power of declaring what action of legislature or the executive are constitutional or unconstitutional which is conferred on the Judiciary. Therefore, when the judiciary declares that the law made by the legislature is valid or invalid, judiciary only declares the supremacy of the constitution and not the supremacy of the judiciary. Even the highest judiciary is only the penultimate authority under the Constitution which is the ultimate authority. However, the fact remains that the judiciary occupies the most important position under the constitution. In fact extraordinary powers, status and immunity enjoyed by the judges, itself make it clear that the conduct of the judges must be such as would maintain the dignity and authority of the Courts as also the faith and confidence of the people in the judiciary. However, there can be no doubt that the judges cannot claim to be unaccountable to the Nation.

The clear position under the Constitution is that the executive is accountable / answerable to the legislature and the judiciary. The legislature is answerable to the judiciary and legislators are answerable to the people who are the sovereign, at the time of election and the Ruling party is answerable to the opposition in the legislature and to the people. There can also be no doubt that the judiciary must also be accountable though the manner and method must differ in view of its composition and manner of functioning. Greater part of accountability stand fulfilled because they function in open court, hear arguments openly and decide after hearing by rendering a reasoned judgment unlike the manner in which the executive pass its orders.

In order to ensure proper functioning of judiciary, the Constitution has provisions to ensure that persons who are fit and capable of discharging the onerous duties in an appropriate manner are appointed as judges which include the qualifications, as well as the procedure for appointment of judges of the High Courts and of the Supreme Court. They are also required to take oath to the effect that they will discharge the functions as Judges without fear or favour or affection or ill-will, which constitutes an internal check. These Constitutional provisions were incorporated by the founding fathers of the Constitution so that the persons of high standard alone are appointed as Judges of the High Courts and of the Supreme Court and there would be no necessity for any outside authority to regulate or control the functioning of the Judges of the High Court and the Supreme Court. *If the Judges function in accordance with the oath they had taken while entering office, nothing further need to be done regarding their accountability.*

It is a matter of great satisfaction that by and large the manner in which the judiciary has functioned after the commencement of the Constitution has been exemplary. There have been great galaxies of judges of the Supreme Court and the High Courts who were erudite jurists and who have exhibited exemplary conduct in performing their judicial functions. They earned highest reputation for judicial independence and in rendering land mark decisions without fear or favour. In the earliest case of V.G. Row[3] Justice Patanjali Shastri speaking for the Supreme Court declared that the Judges of Supreme court are the *sentinel on the qui vive* and that they are the watch and wards of the rights and liberties of the people. The credit for protecting and preserving our Constitution and Democracy established under it goes to all these Judges. It is well known that but for the judgment of the Supreme court in the case of Keshavananda Bharathi[4] holding that the Parliament had no power to alter the elements of the basic structures of the Constitution, there was every possibility of our democratic system replaced by a dictatorial regime during 1975.

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[3] A.I.R. *1952* S.C. l96
[4] A.I.R. 1973 S.C. 146l

Again there have been attempts on the part of Parliament to secure immunity to a few laws by adding them in the Ninth Schedule. In the case of I.R. Coelho, the Supreme Court referred the question as to whether a law which affects the elements of the basic structure of the Constitution is beyond challenge on the ground of violation of basic structure, if the Parliament chose to include it in the Ninth Schedule to the Constitution in view of Article 31-B of the Constitution, to a nine judge bench. The nine judge Bench considered the matter thoroughly and in depth and answered it in the negative in I.R. Coelho's case.[5]

Thus, the Constitutional position is that a Parliament elected to rule for five years has no power to alter the elements of basic structure of the Constitution. Consequently, notwithstanding the inclusion of any law which violates the basic structure of the Constitution, in the ninth schedule to the Constitution, it is liable to be struck down. Thus, Supremacy of the Constitution and Sovereignty of the people stood reiterated.

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[5] 2007 (2) SCC 1.

INDEPENDENCE, ACTIVISM AND LIMITATIONS OF THE JUDICIARY

Subhash C. Kashyap*

Abstract

Quality of democratic governance has been under severe strain for quite sometime now. Questions pertaining to the independence and accountability of the judiciary, administration of justice, judicial delays, appointment and removal of judges, judicial review, contempt of court, hyper-activism of the judiciary, Public Interest Litigation and high costs of judicial process have been the issues hogging the public mind for a very long time. While the executive and legislative wings of the state system have their own failings in the post independence phase, the judicial system too has moved on a path, which is neither envisaged nor warranted by the Constitution. Courts would do well to remember that they too would have to take care of the Constitutional proprieties and limitations that they have been trying to enforce with reference to other wings of the state system.

The system under which we are governed is under severe strain. Faith of the people in the quality, integrity and efficiency of governmental institutions stands seriously eroded. They turn to the judiciary as the last bastion of hope. But, of late, even here things are getting increasingly disturbing and one is, unfortunately no more in a position to say that all is well with the Judiciary.

In a democracy, sovereignty vests in the people. Ultimately, no institution, however supreme, is above the people. Neither of the three - executive, legislature and judiciary - can arrogate to itself a position superior to the collective sovereign will of the people to which they are and must at all times remain totally responsible and accountable for the discharge of their duties. No power within or outside the country - not even the Supreme Court - can prevent the people of India from bringing about any desirable reforms if at any time, in exercise of their sovereign powers, they decide to do so. The only question will be of the mechanism for the expression of the popular will.

Arbitrary power in any hand is bad. Some checks and balances are therefore embedded in the scheme and text of the Constitution. There are serious limitations on the legislative powers of Parliament as well as on the Supreme Court's power of judicial review. Unchecked by the other, either of them may go wrong. After all, the judges come from the same social milleu as ministers and legislators. They too are human, all-too-human. Also, it needs to be remembered that the Constitution is what it is. It is not what the Parliament or the Supreme Court may say from time to time it is or what either of them may wish it to be. Parliament, within certain parameters, has the power to amend the Constitution. But, as the Supreme Court has held, the amending power under Article 368 is essentially a limited power

* Former Secretary General of Lok Sabha and an eminent constitutionalist.

only to amend and cannot extend to abrogate or annul the Constitution or to violate its basic structure or features. Similarly, whenever it becomes necessary to adjudicate in any dispute before it or when its advice is sought under Article 143 of the Constitution, the Supreme Court has the power to interpret the Constitution and even invalidate a law passed by Parliament on the ground of its being *ultra vires* the Constitution. The word of the Supreme Court is the final law of the land binding on all lower courts unless its interpretation is reviewed or reversed by the Supreme Court itself or the law or the Constitution is suitably amended by Parliament. But, the power to interpret also has natural limitations. It is power only to interpret. It cannot extend to changing or amending the Constitution. In the garb of interpreting the provisions of the Constitution, the Court cannot rewrite the Constitution.

Currently, various constitutional reforms are being talked about. There is considerable stress on suggestions directed towards bringing about probity in public life and in administration, stability and accountability of the executive, electoral and parliamentary reforms, better quality of legislation and conduct of legislators etc. Unfortunately, there is tremendous reluctance to touch the judiciary and consider reforming the system of judicial administration. On an objective analysis, however the case for some far-reaching judicial reforms may be found to be deserving of as much importance and urgency as reforms in any other area.

There is every need to review the working of the judiciary during the last 60 years, to assess how far our justice delivery system has been able to provide equal “Justice, social, economic and political” to all the people as ordained by the Preamble and the basic scheme of the Constitution. And, if we have failed or there are shortcomings in the system, what can be done to remedy the situation.

Questions pertaining to the independence and accountability of the judiciary, administration of justice, judicial delays, appointment and removal of judges, judicial review, contempt of court, hyper-activism of the judiciary, Public Interest Litigation and high costs of judicial process have got to be raised with an objective to find out possible remedies and reforms, with focus throughout being on the citizen, on 'We, the People' who gave to ourselves the Constitution.

JUDICIAL REVIEW AND DUE PROCESS:

In India, the Constitution has arrived at a middle course and a compromise between the British sovereignty of Parliament and American judicial supremacy. Courts in India are also endowed with powers of judicial review of legislation. But, judicial review in India is conceived by the founding fathers as limited. If an Act of Parliament is set aside by the judiciary as *ultra vires* or violative of the Constitution, Parliament can re-enact it after

removing the defects for which it was set aside. Also, Parliament may, within the limits of its constituent powers, amend the Constitution in such a manner that the law no longer remains unconstitutional.

In the Constituent Assembly, there was considerable discussion on the desirability or otherwise of incorporating in the Constitution the 'due process of law' clause. The founding fathers, after due deliberation, decided against adopting the American precedent and opted in favour of the formulation "in accordance with procedure established by law." However, the Supreme Court by its verdicts has practically brought the due process clause back into the Constitution. This goes against the basic scheme of the Constitution under which judiciary cannot make laws or amend the Constitution through any innovative or creative interpretation.

INDEPENDENCE OF THE JUDICIARY:

In a representative democracy, administration of justice assumes special significance in view of the rights of individuals which need protection against executive or legislative interference. This protection is given by making the judiciary independent of the other two organs of the government and supreme in its own sphere. *The* Constitution attaches great value to the independence of the judiciary which is essential to rule of law and constitutionalism and for the effective functioning of judicial administration. An independent judiciary is also an essential requisite of a federal polity, wherein there is a constitutional division of powers between the federal government and governments of the constituent units \and a functional division of powers between the executive, legislature and judiciary. Also, an independent and impartial judiciary is an essential requisite for ensuring human rights and protecting democracy. Only an independent judiciary can act effectively as the guardian of the rights of the individual and that of the Constitution. There are many devices in the Indian Constitution which ensure the independence of the Courts, for example, the constitutional provisions in regard to the appointment and removal of judges, security of tenure, salaries and service conditions, salaries and allowances of judges being a charge on the Consolidated Fund, recruitment and appointment of their own staff by the Supreme Court, debarring the judges of the Supreme Court from practising before any Court in India after retirement, the power to punish for contempt etc. But, even judiciary has to act within its constitutionally ordained domain and within the limits of its jurisdiction. Judges also are not above the law. Rule of law and laws of the land apply to them as to any other citizen. If anything, they have added responsibilities because of the position they occupy and they are also fully accountable to the people for what they do or do not do.

CONTEMPT OF COURT:

A sensitive and controversial issue is that of the power of the courts to punish for their contempt. Articles 129 and 215 of the Constitution provide for the Supreme Court and the High Courts being courts of record and having all the powers of such courts including the power to punish for their own contempt. The Contempt of Courts Act, 1971 had codified the law in the matter. Contempt was defined to mean wilful disobedience of the court, in any manner lowering the authority of the court or interfering with or obstructing the administration of justice. It did inhibit genuine and well-intentioned criticism of courts or their functioning. Also, fair and reasonable criticism of a judicial act in the interest of public good could not constitute contempt.

However, the law as it emerged from judicial decisions did not allow even truth to be a valid defence against charge of contempt of court. Also, the court had sought to make a distinction between criticism made by a former judge and law minister which was held permissible and criticism by other citizens which must be "checked". This was anti-democratic and violative of the freedom of expression, right to equality and non-discrimination clauses. It was necessary that the contempt law and more particularly the exercise of powers under it are reviewed objectively and in an ordinary-citizen-friendly perspective.

The Constitution Commission (NCRWC) had suggested that it be laid down by constitutional amendment that "it shall be open to the court on satisfaction of the *bona fides* of the plea and of the requirements of public interest to permit a defence of justification by truth." The Commission had also suggested that no court other than the Supreme Court and the High Courts should be allowed to exercise any power to punish for contempt of itself.

TRUTH AS A VALID DEFENCE:

At last, in February 2006, the Contempt of Courts (Amendment) Bill, 2004 was passed to make truth a valid defence in Contempt of Court cases. The 1971 Contempt law has been amended by the insertion of section 13 B which reads:

> "The Court may permit, in any proceeding for Contempt of Court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is *bona fide"*.

The amended law maintains the earlier standard as well: "No Court shall impose a sentence under this Act for a Contempt of Court, unless it is satisfied that Contempt is of such a nature that it substantially interferes or tends substantially to interfere with the course of justice."

APPOINTMENT OF JUDGES:

Under article 124 (2), the Supreme Court judges are to be appointed by the President "after consultation with such of the judges of the Supreme Court and of the High Courts as the President may deem necessary." The proviso to the article says that "in the case of appointment of a judge other than the Chief Justice, the Chief Justice of India shall always be consulted." Significantly, the appointment was not required to be made "in consultation" but only "after consultation". In the *S.P. Gupta vs Union of India* case, the court held that the consultation must be effective and involve exchange of views and examination of merits but it did not mean concurrence and ultimately the executive had the last word in the matter inasmuch as the power of appointment vested in the President as advised by the Council of Ministers.

It is known that when the executive enjoyed a decisive voice in the matter of appointment of judges, it bungled. Appointments were made on considerations other than merit and seniority. Political, partisan and other extraneous factors were said to have determined some selections. The question was considered by a nine-judge Bench in *Supreme Court Advocates-on-Record Association vs. Union of India,* (1993). Mr. Justice Verma, delivering the majority judgment, stressed the constitutional purpose of selecting the best available persons as judges. The result of the landmark judgment was that the wings of the political executive were clipped and its arbitrary powers curbed. The appointments had still to be made by the President on the advice of the Council of Ministers. But the Chief Justice, in consultation with other senior judges was supposed to be in the best position to decide upon the best persons to don the Bench. While the executive could exercise the necessary check before forwarding the advice to the President, it was not expected to substitute its own judgment for that of the CJ in regard to the suitability of those to be appointed. Thus the Supreme Court practically took over the power of appointment of Judges in its own hands, notwithstanding the clear words in article 124(2) of the Constitution. As a safeguard, it mandated the Chief Justice associating two of his senior most colleagues in the selection process. The procedure for appointment was revised in the light of this judgment in 1994 to the effect that the decisive view in the matter of the appointment of judges shall be that of the Chief Justice of India and in case of a vacancy in the office of the Chief Justice of India, the senior most judge shall be appointed unless the retiring Chief Justice reported that he was unfit.

But then, even a Chief Justice could get arbitrary and the pendulum of misuse of discretionary powers could swing to the other extreme. The Chief Justice could recommend

names without consulting his senior brother judges. When there was intense lobbying among and by judges on who were the most deserving to be appointed and certain names were suggested which seemed to violate the norms set by the Supreme Court itself in regard to seniority and merit of the recommendees and the need to consult senior brother judges, the executive had to step in again. Instead of clearing the names of persons recommended for appointment, the President (as advised by the Council of Ministers) on 27 July 1998 made a reference to the Supreme Court under article 143 to seek its opinion.

The reference did not question the Verma judgment and the nine-judge advisory opinion of October 28, 1998, only reaffirmed the basic guidelines given there. Some clarifications and safeguards were provided. The Chief Justice had to consult four senior most judges of the Supreme Court and if two of the four disagreed on some name, it should not be recommended. In effect, decisions were to be taken by consensus where under the Chief Justice and at least three of the other four must agree. The word ‘consultation’ used in the Constitution had come to mean by judicial diktat 'concurrence'. It would be pertinent to recall that in the Constituent Assembly an amendment seeking to provide for 'concurrence' was specifically negatived. Dr. Ambedkar had said:

> “….after all, the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day... This is a dangerous proposition.”

In the meantime, one Chief Justice retired and another took over. Fresh recommendations were made and accepted. While clearing the latest recommendations for the appointment of four Judges, President Narayanan was reported to have suggested giving “due consideration” to “persons belonging to the weaker sections of society like the SCs and STs” and “women”. He reportedly added that “eligible persons from the SC/ST categories are available.” This unleashed a media furore. All sorts of hidden meanings were sought to be given to the President's remarks. A serious conflict of views between the Council of Ministers and the President or between the Chief Justice and the President was talked about and some went so far as to allege that the President was insisting on a quota or reservation for the SCs/STs in the appointment of judges and for that reason appointments were being delayed.

It would be seen that the President was saying nothing contrary to the Constitution or the Supreme Court's own judgments. In fact, it was also in consonance with the actual practice generally followed in the process of appointments to the High Courts and the apex court. In the 1993 Judgment, Mr. Justice Verma himself categorically spoke of the need for

giving representation to "*all sections of the people and from all parts of the country*" in keeping with the norms of seniority and merit. The President echoed the same principles when he said at a seminar that "it is a matter of importance that all the major regions and sections of society are represented" in the judiciary "consistent with the requirements of merit." In actual practice also, while keeping seniority and merit in view, it was normal to try to provide representation to all the regions/States/High Courts and to look for at least one Muslim, one Sikh, one woman, one from Northeast and one SC/ST for being on the Bench. Other consideration that seemed to always weigh with the selectors was the likelihood of someone becoming the Chief Justice and of ensuring that no one was CJ for too long.

To resolve the problems in the area of appointment of judges, some persons have been suggesting for several years the device of a National Judicial Commission. But, its success and credibility would inevitably depend upon its composition and upon the judiciary giving up the unbecoming scramble for primacy and supremacy in the matter of selection and appointment of judges.

According to one former C.J.I. (Justice E.S. Venkataramaiah), in the interpretation placed by the majority of judges on article 124, the "text of the Constitution seems to have been departed from. …….. The interpretation now given neutralises the position of the President and makes article 74 which requires the President to act on the aid and advice of the Council of Ministers irrelevant. . . . . .. The construction now placed by the court makes the Supreme Court and the High Courts totally undemocratic. While in a parliamentary democracy the President may be a mere constitutional head when the power is exercised by him on the advice of the Council of Ministers, he cannot be asked to play the same limited role where the Chief Justice of India who is not an elected representative advises him. One cannot ignore that this may lead on a future occasion to tyranny in another unexpected place… The new meaning given by the Supreme Court appears to be beyond the scope of mere interpretation and virtually amounts to rewriting the relevant constitutional provisions."

The Judiciary, the Legislature and the Executive are the creatures of the Constitution and it is the Constitution, which is supreme. The Constitution is what it says and there should not be any attempt to alter it by an interpretative process by any of the limbs of the state. Power to interpret or declare the law does not include any power to change or make the law. It is *a fortiori* when a question arises as to in which of the limbs, the Constitution has vested the power of appointment. When it involves questions as to whether the power is in the Judiciary or Legislature or Executive, the Supreme Court's approach has to be in' the

following manner as observed by the Supreme Court. *In Re Special Reference* 1 of 1964 [1]"... Legislators, Ministers and Judges all take oath of allegiance to the Constitution for it is by the relevant provisions of the Constitution that they derive their authority and jurisdiction and it is to the provisions of the Constitution that they owe allegiance……...".

REMOVAL OF JUDGES

A judge of the Supreme Court or any High, Court can be removed from his office by the President, only if a joint address passed by both Houses of Parliament with a special majority (*i.e.*, by a majority of the total membership of the House and by a majority of not less than two-thirds of the members of each House present and voting) is presented to him[2].

Parliament is not empowered to discuss the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties except in the case of a motion for presenting an address to the President praying for the removal of a Judge[3].

Incidentally, it may be very emphatically clarified here that contrary to the common belief, there is no provision for impeachment of a judge in the Constitution. There are several fundamental differences between the concept and consequence of impeachment and the procedure for removal provided in the Constitution.

JUDICIAL ACTIVISM

What came to be called "Judicial Activism" or Judicial overreach was born as a corrective to inaction or failure of the executive and the legislature to provide clean, competent and citizen-friendly governance. The Supreme Court had issued directions to control pollution, to check the evil of child prostitution, to revive a sick company to protect the livelihood of 10,000 employees, to look into the danger as to the safety in building a dam, to segregate the children of prostitutes from their mothers, to provide insurance to workers in match factories, to protect the Taj Mahal from environmental pollution etc.

Thus, the innovative judicial approach to "Public Interest Litigation" came handy in case of acute social injustice, economic exploitation, denial of human rights, corruption and other offences against public interest. Even hyper-activism of judiciary was justified under the powers of judicial review. It drew its strength, relevance and legitimacy from the support it elicited from the people because of their total disenchantment with the other organs of the State run by the politicians and the bureaucrats.

It had come to be believed widely that in the name of public interest, judiciary had

[1] 1965(1) SCR 413 at 446
[2] Article 124(4) and 218.

begun to invade the exclusive legislative and executive domains, to exceed its legitimate, jurisdictional limits and arrogate to itself more powers than what the founding fathers gave. Questions were sometimes raised about the practical' viability, feasibility and implementability of some of the, court verdicts. Fears were expressed of the courts being misused for vested political group interests and of the courts giving in to populism, craze for publicity and hogging headlines, overstepping the limits of judicial discretion, not exercising the essential judicial restraint and causing judicial excesses.

Reading into the Constitution what was *non est* and in effect legislating or even making the Constitution *e.g.* in the matter of the appointment of judges, misinterpreting parliamentary privileges and immunities as in the JMM bribery case and allowing protection to M.P.s taking bribe of crores for casting their vote, holding even truth not to be a defence in contempt of court cases, laying down public policy or issuing executive orders to public bodies and State authorities in different areas, In any case, judicial activism could not be a solution of our problems. At best it could act as a temporary measure or as an emergency medication inasmuch as the Judiciary could not take over the functions of either the executive or the legislature.

In the area of judicial activism, the courts sometimes knowingly or unknowingly become victims of human, all too human, weaknesses of craze for populism, publicity, playing to the media and hogging the headlines. They try to expand their areas of jurisdiction and arrogate to themselves more functions and powers than legitimately belong to them. The judiciary had to remember that in the ultimate analysis orders of the courts were also to be given effect to only the by administration which functioned under the political Executive. Judiciary had to be very cautious and ensure that a situation was not reached where its orders or directives were no more fully respected or obeyed or were found to be just un implementable. The courts, of late, had begun to ensure that in the name of public interest litigation, false, frivolous, fraudulent or private interest motivated issues were not entertained. The Chief Justice of India warned public interest litigants of heavy costs for frivolous petitions and most recently (19 July 2010), a Delhi NGO was asked to pay Rs. 1 lakh as fine for espousing as public interest the private cause of two disgruntled district judges.

There is also evidence of Supreme Court judges having become alive to the need for greater judicial self-restraint and for not transgressing their jurisdictional limits by taking over any executive or legislative functions. Certain eventualities may be conceived where the judiciary may overstep its normal jurisdiction and intervene in areas otherwise in the realm of the legislature:

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[3] Article 121.

(i) when the legislature fails to discharge its responsibilities; (ii) in case of a hung legislature when the Government it throws up is weak, insecure and busy only in the struggle for self-survival and therefore unable to take any decision which displeases any caste, community or other group; (iii) those in power may be afraid of taking honest hard decisions for fear of losing power and for that reason may have political issues referred to courts as issues of law in order to mark time and delay decisions or to pass on the odium of strong decision making to the courts; (iv) where the legislature and the executive fail to protect the basic rights of the citizens like the right to live a decent life in healthy surroundings or to provide an honest, efficient and just system of laws and administration.

Sometimes, the courts of law may be misused by a strong authoritarian parliamentary party government for ulterior motives as was sought to be done during the emergency aberration. The courts may also sometimes, knowingly or unknowingly, become victims of human, all-too-human, weaknesses of craze for populism, publicity, playing to the media and hogging the headlines. They may try to expand their areas of jurisdiction and arrogate to themselves more functions and powers than legitimately belong to them. It may be said that where an (individual or) institution finds conditions congenial to expanding its powers and jurisdiction; it will almost certainly do so. However, the Court would do well to remember that in the ultimate analysis orders of the courts have also to be given effect to only by the administration which functions under the political Executive. Judiciary has to be very cautious and must ensure that a situation is not reached where its orders or directives are no more fully respected or obeyed or are found to be un-implementable.

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JUDICIAL OMBUDSMAN FOR SUBORDINATE JUDICIARY

Kamleshwar Nath*

Abstract

In the face of heavy delays, the dispensation of justice has become tardy and cumbersome. In a democratic system the expectation of accountability from judiciary is as much as is from other wings of the governance system. After all, judiciary decides issues of 'life', 'liberty' and 'property' of any person who is aggrieved by any wrong. However the independence of judiciary ensured under the Constitution has not been utilized by the judiciary discretely, rather the ground of independence of judiciary often serves as an excuse for non-transparency and non-accountability in dispensation of justice and Contempt of Court is utilized as a shield by the Judge. Western democracies who have successfully adopted the institution of Judicial Ombudsman have largely confined Ombudsman's investigative process to procedural and administrative aspects of justice delivery system. There is no sound reason why it should not be adopted in India.

Dispensation of justice is undoubted responsibility of State and Judiciary is the most important pillar of our democracy. The Constitution of India has ensured its independence from all other wings of governance[1]. Nevertheless, our democracy demands as much 'Accountability' from Judiciary as from any other wing[2]. After all, Judiciary decides issues of 'life', 'liberty' and 'property' of any person who is aggrieved by any wrong.

Heaviest burden of dispensation of justice is borne by subordinate courts. In 2007, as many as 2, 55, 04,926 cases were pending in subordinate courts compared with 39,57,015 in High Courts and 43,728 in Supreme Court[3]. Delays in disposal of cases are chronic at all levels; it is contributory to corruption with questionable conduct of the components of the system – the Judges, Staff, Lawyers and investigative/prosecuting agencies. 'India Corruption Study, 2005' by Transparency International India revealed that 79% of respondents for Survey said that there was corruption in Judiciary. Of those who had paid bribes, 61% had paid money to a lawyer, 29% to Court officials 5% to judges and the rest to middlemen to get their work done.

Two instances are enough to illustrate. The case of Ahmedabad Metropolitan Magistrate signing/issuing bailable warrants of arrest on 15.1.2004 against A.P.J. Abdul Kalam (President of India), V.N.Khare (CJI), B.P.Singh (Judge Supreme Court) and R.K.Jain (leading lawyer), allegedly for a bribe of Rs 40,000/- collected for him by 3 lawyers

* Former Judge of Allahabad High Court.

1 Articles 124-47 (SC), 214-31 (HC), 233-37(District Courts).

2 *Daulatmal Jain's case*, (1997) 1 SCC 35; CJI A.S.Anand in Hindustan Times LKO dt. 7.12.99

3 Times of India dt. 18.8.2007

resounded in the Supreme Court in a PIL filed by Advocate Vijay Shankar where CJI V.N.Khare is reported to have observed : " By giving Rs 40,000/- you can get a judicial order, and if this is the state of affairs, only God knows what will happen to the Country ..... time has come to take strict action, otherwise nothing will remain[4].

At a later hearing, the SC Bench is reported to have remarked that there *was a complete nexus* between the Metropolitan Magistrate and the lawyers and that such incidents were *happening all over the country*. CJI also emphasized the need of finding out ways to weed out *corruption in lower judiciary and evolve a system to keep vigil on Judicial Officer*[5].

Ghaziabad (UP) Civil Court Provident Fund scam involved embezzlement of about Rs 23 crore from Provident Fund Account of grade 3 and 4 employees of Ghaziabad civil court between 2001 and 2008 in which a number of judges (besides others) were implicated. The case is still pending.

It is needless to multiply instances. The question is how the malaise should be remedied. For higher judiciary, the "Judicial Standards and Accountability Bill 2010" has conceived 'Oversight Committees' and 'Scrutiny Panels' to inquire into misconduct and incapacity of Supreme Court and High Court Judges. It is time to have a monitoring mechanism for subordinate courts which handle over 82% of total litigation in the country.

Subordinate courts function under the control of High Court under Article 235 of the Constitution. Registrar (Vigilance) of the High Court has to look into complaints against judicial officers. Some of the High Court judges are designated also as administrative judges to make annual inspection of courts to address mal-administration in districts allotted to them. District Judges too are expected to make annual inspections of all courts/departmental offices. Each judicial officer has to inspect his own court/office and departmental office of which he is 'Officer-in-charge', once every three months. This machinery has not been able to check the growing menace of corruption in district courts as the above mentioned Ghaziabad PF embezzlement over 8 years has remained undetected. The basic reason is that as none of these authorities has adequate time to handle the volume of work associated with thousands of courts/judges. Remedies suggested by Supreme Court, High Courts and certain Commissions like *Malimath Commission* and First National Judicial Pay Commission for subordinate judiciary under chairmanship of Justice K.J.Shetty of Supreme Court have not been implemented. It has been pointed out that ratio of judges to population is abysmally low at 12 for one million as compared to 107 in USA, 75 in Canada, 51 in UK. In *All India*

[4] Hindustan Times LKO dt. 24.2.'04

Judges Association case[6] Supreme Court had recommended to raise judges' strength to 50 per million of population. Vacancies remain unfilled over years.

Chief Justice of India emphasised need for creating 5000 more ourts[7.] In 1977, creation of *All India Judicial Service* was stipulated by 42nd Amendment to the Constitution[8.] In *All India Judges Case*[9] Supreme Court reiterated implementation of Article 342. Justice K.J.Shetty Commission also pressed for creation of All India Judicial Service in *Report of First National Judicial Pay Commission* (Vol. III Chapter 26). Nothing substantial has been done.

Lawyers strikes, which has become quite frequent, remains unchecked because High Courts have lost control over them by virtue of Advocates Act 1961; quite often Bar Councils call for strike. For transparency and accountability in governance, Right to Information Act 2005 was enacted which covers judiciary too; by and large a fee of Rs 10/- has been prescribed by competent authorities to accompany an application for information[10], but certain High Courts have prescribed prohibitive[11] fees. There can be absolutely no doubt about the need of evolving a suitable system for vigil over subordinate judiciary.

Over 60 years have passed since independence, but corruption continues to grow. All governmental institutions are accountable to "We The People" who framed the Constitution for governance. In order to give effect to this accountability, it appears necessary to have an institution with a public image to monitor the working of subordinate judiciary. This institution goes by the nomenclature of Judicial Ombudsman or other names in the developed western countries. According to corruption perception index 2010 by Transparency International (Berlin), countries with noticeably little corruption having index between 9.7 and 7 (on scale of 0 to 10, where 0 is most corrupt) have a system of judicial Ombudsman, e.g. Finland, Denmark, Sweden, USA, while India stood at the low index of 3.3 in 2010 (further falling from 3.5 in 2007, and 3.4 in 2008 & 2009); it is bracketed with countries like Albania, Jamaica and Liberia (all at 3.3)! This corruption index rests on surveys made by 10 internationally reputed independent institutions like World Bank & IBRD, Global Insight, Bertelsman Foundation, IMD World Competitiveness Year Book on 'Institutional Frame Work', World Economic Forum.

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[5] Page 437 of Special Number on "Ethics in Public Life", of Indian Journal of Public Administration (July-Sept 1995 Part)
[6] (2002) 4 SCC 247
[7] K.G.Balakrishnan CJI in Times of India dt. 5.11.2007
[8] Article 312 of the Constitution
[9] (1992(1 SCC 119 (para 58)
[10] Section 6(1) of Right to Information Act 2005, Rule 4 U.P. RTI (Regulation of Fees & Costs) Rules

At purely office level, there are innumerable acts of mal-administration: non-submission of file to court on listed date, court orders not implemented speedily, execution of decrees deliberately delayed on frivolous & flimsy office objections, refund vouchers for repayment of money not prepared/issued, certified copies of court records not issued without bribe etc. etc. Where listing of cases is not done by the judge himself, the office has hey-day! Transparency International India at New Delhi has published and distributed free, a "Citzens Charter for Subordinate Judiciary" for educating masses about rules and practices which provide service to the people in UP.

The ground of independence of judiciary often serves as an excuse for non-transparency and non-accountability in dispensation of justice and contempt of court is utilized as a shield by the Judge. 'Judicial independence' is certainly of paramount importance; it is part of 'basic structure' of our Constitution; but it must not be permitted to deteriorate into 'judicial license'. In *Kartar Singh's case,* the Court held: "Judicial independence means total liberty of the presiding judge to try, hear and decide the cases that have come before him *according to the set procedure* and decide the cases and give binding decision on *merits* without fear or favour, affection or ill-will". The fine point to be noticed here is that the Judge, is *bound* by prescribed *procedure,* although is at full liberty to decide on merits. *Procedure* is *absolute*; *merit* is influenced by facts peculiar to a particular case. Hence not 'merits', but the 'procedure' adopted, violated or ignored can be a valid field for the Ombudsman to investigate and take action.

A decision dt. 12.1.2010 of full bench of Delhi High Court in the case of Registrar General, Supreme Court of India Vs. Subhas Chandra Agarwal (on duty of Supreme Court Judges to disclose their assets & liabilities under Right to Information Act) emphasises the accountability angle of judiciary as follows:

> "It was Edmund Burke who observed that 'all persons possessing a portion of power ought to be strongly and awfully impressed with an idea that they act in trust and that they are to account for their conduct in that trust'. Accountability of Judiciary cannot be seen in isolation. It must be viewed in the context of general trend to render governors answerable to the people in ways that are transparent, accessible and effective. Behind this notion is a concept that the wielders of power – Legislative, Executive and Judicial – are entrusted to perform their functions on condition that they account for their stewardship to the People who authorise them to exercise such power. Well-defined and publicly known standards and procedures complement, rather than diminish, the notion of judicial independence."

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[11] Rule 4 of Allahabad High Court (RTI) Rules 2006 fixing application fee of Rs. 500/-

Western democracies who have successfully adopted the institution of Judicial Ombudsman have largely confined ombudsman's investigative process to procedural and administrative aspects of justice delivery system. There is no sound reason why it should not be adopted in India.

The Institution of "Commission on Judicial Performance" adopted by several States of *USA* (Index 7.1) on the model of Commission on Judicial Performance in *California* for investigating the conduct of judges for judicial supervision as part of State Court System on complaints of judicial incapacity or wilful misconduct, a federal "*Canadian* Judicial Council" with power to receive and investigate complaints to improve the quality of the Judiciary, are in place.

Sweden (Index 9.3) has been the pioneer (1809) in establishing the institution of Ombudsman for monitoring administration of justice, including work of Judges, Prosecutor, Police and Jailors. The important features of Swedish Judicial Ombudsman are as follows :

(i) The supervision is by an outsider, so that there can be no accusation of Judges 'protecting their own'. At the same time, the Ombudsman are themselves nearly always Judges, so the Judiciary cannot accuse them of not being experts on proper judicial procedure.

(ii) The Ombudsman cannot interfere with the independence of Judiciary in making decisions because they do not have power to overturn or alter court decisions.

(iii) They review only procedural matters, and have no power to review the content of judicial decisions.

(iv) Regarding the behaviour of Judges, the ombudsman mainly issues only reprimands or criticisms. They can also prosecute Judges for serious misbehaviour.

In *Finland* (Index 9.2), the Constitution adopted an ombudsman of Swedish model. The ombudsman is required to oversee the *observance of laws* in the functioning of courts and other Authorities. He even inspects the Courts, and if he finds that the Judge has committed an unquestionable error or negligence in performance of his functions, he may issue a critical warning or even initiate process in Court against the Judge for abuse of power. Even so, he does not interfere in judicial processes *pending* in a Court, nor does it intervene in cases in which regular appeal channels remain open.

In *Spain* (Index 6.1), ombudsman has been given constitutional status in the name of defender of people. The organic law of judicial power lays down that although the ombudsman will not carry out individual study of a complaint in respect of which a judicial

ruling is pending, and if after its action has begun, an appeal is filed before the concerned tribunal, it will suspend its action; but that would not prevent investigation on the general problem set forth in the complaint, and will see to it that administration issues a speedy ruling on the petitions and appeals filed. The ombudsman may act *on its own initiative.* Nothing prevents him from investigating why no court order has yet been issued when the stipulated time there for has expired, or looking into the causes of delay like lack of material means, or overload of cases, or functional responsibility of its head, or other officials, and making recommendations for correcting the situation.

Under the ancient Indian law, a judge who passed unjust orders had to be banished; he was liable to be punished with fine if he failed to inquire into relevant matters, or if he made unnecessary delay in discharge of his duty, including malafide postponement of cases etc. For imposing unjust fine, he was to be fined the double of the amount.

The above brief narration should be enough to show that the institution of judicial ombudsman has been well received around the world. An important field for extension of its activities would be the bar which is an inalienable wing of our justice delivery system. If the lawyer does not perform his duty, the result obviously would be disastrous. The bar in India has been traditionally learned, highly respected, and served as king-pin in freedom movement; it shaped our Constitution. Mr. H. R. Bhardwaj, former Law Minister, Govt. of India quoted Sir Anthony Mason, former Chief Justice of Australia on lawyers role[14]: "Unless the bar dedicates itself to the ideals of public service, it forfeits its claim to treatment as profession in the true sense of the term. Dedication to public service demands not only attainment of high standard of professional skill but also faithful performance of duty to client and court, and willingness to make professional service available to public". Bhardwaj acknowledged that *strikes and other unethical behaviour* have become common in law courts. Unruly and indecorous behaviour with presiding officer, raising frivolous, prolix or even concocted pleadings and, no less important, failing to prepare the clients' brief properly are not uncommon.

Today the public perception is that corruption prevailing at bench and its establishment has its origin at the bar! The nexus between bar and court via court staff was remarked by Supreme Court too in the context of Ahmedabad Metropolitan Magistrate's case. Supreme Court has held[15] that *it is the duty of every advocate who accepts brief to attend the trial from day to day, otherwise he would be committing a breach of his professional duty.* In *Mahabir Singh's case*[16], a *strike call given by Bar Association* came up for consideration, and Supreme Court ruled that the conduct of an advocate who retains the brief of his client and at

the same time abstains from appearing in Court is unprofessional and unbecoming of the status of an advocate. Instances of advocates extracting money from their client for bribing judge, or withdrawing client's money in court deposit and misappropriating it, or making gain for themselves by improper means in the name of the client, and the like are all acts of misconduct by an advocate[17].

Misconduct by an advocate is subject to action by disciplinary committee of the concerned bar council under Advocates Act 1961. Bar councils are elected and manned by advocates; hence there can be an accusation of advocates “protecting their own”. In the event of a bar council supporting lawyers strike – or even calling a strike – the council cannot be expected to inquire fairly into advocate’s misconduct for not attending the court. It would be appropriate to authorise the judicial ombudsman, as an independent expert body, to investigate into lawyers' misconduct and recommend to state bar council, or to the bar council of India a suitable punishment.

Judicial Ombudsman's machinery would be the main subject of intense controversy in view of Article 235 of the Constitution. My view is that Judicial Ombudsman should be independent of High Court for making inquiry in matters of misconduct, misbehaviour, incapacity, maladministration and the like of subordinate judiciary because it is impossible for any High Court or the local machinery for administration of offices of subordinate judiciary to keep regular vigil over malfunctioning of the setup. Sufficient number of judges can never be appointed, sufficient number of new court buildings with adequate infra-structure for the purpose can never be erected because of constantly increasing workload of courts and mounting arrears and because of lack of financial autonomy of judiciary. 'Justice delayed is justice denied'; 'justice hurried is justice buried'. It is of greater public interest to increase the number of Judges and have them to decide more cases than to engage them in mere monitoring functions. An establishment of judicial ombudsman with far lesser manpower can oversee/monitor the working of Courts and their Offices. Such an ombudsman will also have peoples' image in our form of constitutional democracy. Innumerable people have complaints against the functioning of Courts, but they dare not complain because they are afraid of action under Contempt of Court Act, even though 'truth', now, is valid defence; “discretion is better part of valour”.

In manning the personnel of judicial ombudsman, the High Court should undoubtedly have the paramount say because the 'divinity' of Justice has its own 'aura'. It needs expertise not only in the field of law but also human behaviour. Thus we cannot have, say, a Director

General of Police or Chief Engineer of PWD or a Medical Secretary to be a Judicial Ombudsman: he does not possess the requisite ethos. The essential features can be as follows:

(i) All appointments shall be made by or with the concurrence of the High Court by a selection Committee in which some eminent persons from the public learned in law shall also be members.

(ii) There shall be one ombudsman being a person who retired as a chief justice of the High Court or as a judge of Supreme Court.

(iii) There shall be as many additional ombudsmen as the High Court may determine. Additional ombudsman shall be a person who retired as a judge of any High Court.

(iv) There shall be a deputy ombudsman in every district; he shall be a person who retired as a district judge.

(v) Ombudsman shall have jurisdiction over all courts and offices of civil or criminal jurisdiction in the state. Additional ombudsman shall exercise jurisdiction over like courts/offices of such districts as may be allotted to him by ombudsman. The ombudsman shall have power to reshuffle/re-allot the functional areas among additional ombudsman from time to time. Deputy ombudsman shall exercise jurisdiction over the staff of all the civil and criminal courts in the judgeship.

(vi) Ombudsman, Additional Ombudsman and Deputy Ombudsman shall be competent to initiate investigation into any complaint made to him in writing, supported by affidavit, or on his own motion (*suo motu*) in matters of which complaint could be made.

(vii) 'Complaint' shall be of 2 classes : (a) 'grievance' by the complainant that he sustained injustice or undue hardship in consequence of mal-administration; (b) 'Allegation' by the complainant that the presiding officer of a court or any member of the staff of any court or lawyer has acted or is going to act in a corrupt manner in discharge of his duties.

(viii) 'Mal-administration' means (a) doing an act in violation of any rule of procedure or practice or direction of the Court or of a Superior Court, or (b) wilful negligence or undue delay in doing an act in performance of a duty.

(ix) 'Corrupt manner' means (a) doing an act by abuse of position as a presiding officer of a court or as staff of any court or lawyer to obtain any gain or favour to himself or to any other person or to cause undue harm or hardship to any person; (b) acting in a manner actuated by favouritism; or (c) failure to act in accordance with the norms of integrity

and conduct which ought to be followed by a presiding officer of a Court or by a member of the staff or by a lawyer.

(x) Complaint may be made, as the case may be, to an Ombudsman, Additional Ombudsman or Deputy Ombudsman who is competent to exercise jurisdiction therein. Complaint shall be accompanied by an affidavit and documents, if any. A preliminary inquiry may be made into the complaint. If a *prima facie* case is not made out, the complaint will be rejected; if it is made out, a copy of the complaint along with annexure, if any, shall be sent to the person complained against giving him an opportunity to explain the contents of the complaint. Evidence may be recorded. Other documents may be summoned from office or elsewhere. An inspection, where necessary may be made. After consideration of all the material, if the complaint is not made out, the case may be closed; if the facts stated in the complaint are established, recommendation for specific action (in the light of discipline and appeal rules/ conduct rules, Prevention of Corruption Act and the like applicable provisions) against the presiding officer or official complained against may be made to the High Court for action under Article 235 of the Constitution of India. If the High Court does not agree with the recommendation of the Ombudsman, Additional/Deputy Ombudsman, reasons for such disagreement shall be forwarded to the Ombudsman who, on a consideration thereof, may close the case in the light of the reasons or else report back to the High Court who, thereupon, shall pass orders as recommended by ombudsman.

(xi) The Ombudsman, Additional or Deputy Ombudsman shall have power to make general inspection of the offices of courts (including infra-structure) within his jurisdiction, examine any record to ascertain whether due procedure and practice is followed in administration of justice, and performance of duty by all concerned is prompt. He shall report the result of such inspection to the High Court; and the High Court may issue necessary instructions with a view towards improvement in administration of justice.

(xii) The Ombudsman, Additional or Deputy Ombudsman may take notice of any act of a lawyer which constitutes professional misconduct or unethical behaviour by the lawyer in a case with reference to performance of duties towards his client or towards the court or otherwise. In case he finds that the lawyer has committed misconduct or has acted unethically, he may prepare a brief thereof and give an opportunity to the lawyer to show cause in respect of act complained of. If sufficient cause is shown, the case may be closed; if sufficient cause is not shown, the Ombudsman shall make recommendation to the bar council or High Court (in matters involving contempt of court), as to what action ought to be taken against the lawyer. The orders of High Court would be final,

but if the bar council does not agree with the recommendation of ombudsman, it shall forward its view to ombudsman for consideration. The final view of the ombudsmen in the matter shall be binding on all concerned.

(xiii) The proceedings of, and information gathered by ombudsman will remain confidential till recommendation on the case is made to High Court or bar council. After the making of the recommendation, they shall no longer be confidential.

(xiv) The Ombudsman shall have independent machinery for discharging his functions.

Article 235 of the Constitution shall have to be amended for establishing the institution of a Judicial Ombudsman; likewise the Advocates Act 1961 shall also have to be amended to extend the jurisdiction of judicial ombudsman to lawyers. Prevailing massive corruption in the executive and political fields has inspired the people to draft a *Jan Lokpal Bill* for establishing a Lok Pal totally independent of the executive and political element. In *Prakash Singh's case* the Supreme Court had directed the government to establish police organisations free from executive influence in investigation of crimes. *Times of India* Mumbai dt. 18.1.2011 reported that the recommendation of second Administrative Reforms Commission headed by the present law minister, Dr. Moily to cut down protections to bureaucrats under Article 311 Constitution of India is under consideration of Govt. of India. Change is the law of nature. Tennyson wrote: 'Old order changeth yielding place to new, lest one good custom should corrupt the World.' So, let appropriate changes be made in the laws to make subordinate judiciary really serve the cause of justice free from corruption. If Registrar (Vigilance) can be appointed for investigating, complaints against judicial officers, why not an Ombudsman? High Courts/Supreme Court has been appointing Special Investigating Teams (SIT) in individual matters. It is high time that the concerned authorities agree to constitute Judicial Ombudsman in the interests of the system. Where malady has persisted for more than 60 years and continues to grow despite existing constitutional provisions, some drastic remedy has to be evolved. There is nothing sacrosanct about the Constitution which has been amended more than a hundred times; it can be amended again (like Article 235 & allied provisions) for accommodating a Judicial Ombudsman. What needs to be protected more? Independence of judiciary or Integrity of judicial system, unfettered exercise of power or controlled service to the people? Regretfully, lack of political will, compounded with lack of will at the top echelons of judiciary stands in the way.

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MEDIA AND PUBLIC INTEREST LITIGATION

Dr. Anand Kumar Tripathi*

Abstract

Public interest litigation has played unique role in providing justice to the oppressed, poorer, vulnerable and marginalized sections of society. It is well known that social change is the life-line of any society. In India it is done through Public Interest Litigation. In this article an attempt is made to assess the impact of media vis-à-vis PIL on Indian Society.

1. INTRODUCTION

Public Interest Litigation is a new type of litigation, initiated by the judiciary to enable the poor and vulnerable sections of society to approach the Court to enforce their fundamental rights. But the rule of law does not mean that the protection of the law must be available only to a fortunate few or that the law should be allowed to be misused by the vested interests for protecting and upholding the status quo under the guise of enforcement of their political rights.

The poor too have political and civil rights and the rule of law is meant for them also, though today it exists only on paper and not in reality. Mere initiation of social and economic rescue programmes by the executive and legislature would not be enough and it is only through multi-dimensional strategies including public interest litigation that these social and economic rescue programmes can be made effective.

As we know, the public interest litigation is of non-adversarial nature. It is different from the traditional litigation where two parties make claims and counter-claims about their rights and the courts adjudicate to determine there rights inter se. The PIL has been developed as a tool by the judiciary, often ignoring the traditional requirements like that of locus standi, in an effort to make justice a reality for those who stand most in the need of it but who could not have realised it except through a PIL.

This all could be possible due to liberal interpretation of the notion of locus standi. Earlier, it was an established principle of procedure that an individual would have no 'locus standi' to file a suit in a matter if he could not prove to the satisfaction of the court that one or the other of his interests was directly and substantially being affected by the matter at hand. Needless to say, this requirement was enough to snatch the chances of justice away from someone who tried to seek a remedy for others who were unable to come to the court. In a

* Assistant Professor (Law), Gujrat National Law University, Gandhi Nagar.

country where millions of people were, and still are, suffering from poverty, illiteracy, social neglect and deprivation, the strict application of the rule of locus standi would have meant depriving such hapless lot of justice for ever. This would be simply inhuman, felt a few judges of the apex court who got the honour of being the pathbreakers on the road to justice. Although the rule is still applicable in normal cases, yet in matters of public interest it is given a go by and the matter is heard and disposed of by the Court as public interest litigation (PIL).

On *locus standi* Mr. Justice Krishna Iyer in *Fertilizer Corporation Kamagar Union vs. Union of India*[1] stated as follows:

> "Law, as I conceive it, is a social auditor and this audit function can be put into action only when someone with real public interest invites the jurisdiction. We cannot be scared by the fear that all and sundry will be litigation happy and waste their time and money and the time of the Court through false and frivolous cases. In a society where freedoms suffer from atrophy and activism is essential for participative public justice, some risks have to be taken and more opportunities opened for the pubic minded citizen to rely on the legal process and not be repelled from it by narrow pedantry now surrounding *locus standi."*

Sometimes it seems that media is loosing its credibility producing false news and imposing wild allegation upon the victims. Kuldip Nayar has lamented that media is losing its credibility as the public has stopped taking the media seriously.[2]He said that it was most unfortunate that news was measured with money.[3]

Our Constitution guarantees civil liberties[4] such that all Indians can lead their lives in peace and harmony as citizens of India. These include individual rights common to most liberal democracies, such as equality before law, freedom of speech and expression, freedom of association and peaceful assembly, freedom to practice religion, and the right to constitutional remedies for the protection of civil rights by means of writs.

But the process of filing a writ is not an easy task. It can be said that justice must be accessible to those who are not in a position to protect their fundamental rights. How this objective may be achieved is, however, a big question. J S Mill in the 19th century advocated

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1. AIR 1981 SC 344 at p. 354.
[2] A three-day seminar on "Challenges and Opportunities before the Indian Media" at Punjabi University:March,24 2009
[3] ibid
[4] Article 19 of the Constitution. Clause (f) was committed by the constitution 44th amendment Act 1978

that a responsible press, as controller of power, was a free press, best guaranteed by a free market place of idea.[5]

The existence of fundamental rights which provide all securities and rights is not sufficient; because, owing to factors like, say, laxities in implementation of such rights on the part of the government, and the backwardness, poverty, illiteracy of a large portion of our population it becomes very difficult to achieve the lofty ideals in actual sense.

The judicial endeavour that made PIL a real weapon for the hapless and the deprived sections of society may be traced into innovative judicial approach which became the hallmark of judgements delivered by judges Krishna Iyer and P N Bhagwati[6]. Of course this concept of Public Interest Litigation is very pious, efficacious and up to the expectation of millions starved people. It is now well settled that a public interest litigation can be maintained by a person or group of persons, who have no personal interest in the matter and for the benefit of those under privileged and helpless, who cannot come up to the Court of law for the redress of their grievances.

The public interest litigation is an off-shoot of the judicial dynamism for a good cause. The Court has acted very boldly in many of the cases even at the cost of encroaching upon the reserved domains of the Legislature and the Executive. The Court has freely, resorted to judicial legislation, judicial policy making and judicial administration in a number of cases. The judicial activism, in this area can be justified on the ground that the law which helps and takes care of the greatest happiness of the greatest number of people is the good law. This principle is squarely applicable to the concept of public interest litigation.

This new vista of PIL has given birth to a new hope for the people of India to maintain their fundamental rights as enshrined in Part-III of our Constitution. Day by day a new chapter is being added through PIL in our legal system. Some scholars consider that judiciary is intervening by the excessive activism but it is nothing less than a blunder to entertain such an opinion, because without judicial vigil the pillar of democracy would have become baseless and executive function arbitrary.

It can be easily seen in Aravali Golf Club Case[7] wherein Justice Katju has restricted to judiciary not to intervene in domain of executive. He added “jobs could not be created by judges.” This is a landmark judgment where judiciary has alarmed judiciary itself. Therefore this decision should be welcomed by one and all. Also, the higher judiciary in India has, by

[5] D.Mequail,(1997) “ Accountability of media to society :principles and means:12 European journal of communication,525.
[6] Mumbai Kamgar Sabha vs. Abdulla Bhai, AIR 1976 SC 1455
[7] 2008 1 SCC 683

judicial innovation and creativity, filled up the legal vacuum, created or un-entertained by Legislature, for the redress of public grievances. PIL has played a unique role by which people belonging to different walks of life and especially the downtrodden are getting social justice from the Supreme Court as well as the High Courts. The PIL is now recognized as an effective instrument of social change. It is because of this new strategy of pro bono litigation that the poor and the downtrodden have been able to seek justice from courts[8].

PIL is a process of creating awareness whereby the weaker sections become conscious of their legal rights, along with their socio-economic and political rights and take recourse against all forms of injustice and exploitation. The Supreme Court has widely enlarged the scope of public interest litigation by relaxing and liberalizing the rule of standing by treating letters or petitions sent by any person or association complaining violation of any fundamental rights. In nutshell it is to be viewed that scope of PIL is very wide and bristling with issues which need constant deliberation by judicial and legal luminaries.

2. ROLE OF MEDIA

In this context it is expedient to discuss the role of media in achieving the faith of people in democracy. Democracy is more a way of life than a form of government and media is a part and parcel of our life as we are informed only through such means of mass communication i.e. print and electronic, media. In our Constitution, Right to freedom is a vital part of the fundamental rights enshrined therein. And there is no other way of expressing oneself than through the written word. The media uses this freedom for the interest of society. The role of media is, therefore, an essential instrument for ensuring openness in society, as also for reforming it. In a society, where overwhelming millions are mute, the access to a forum that reaches them must be viewed as a trust to be operated on their behalf and for their larger good.

However, it should not be lost sight of that journalism has its limitations. The realm of philosophy and literature is trends and processes. That of journalism is events and accidents. That straightway locks journalists into tunnel vision. A newspaper is invariably human-centric in its view of the cosmos; obsessed with the power play of a single nation, and only the inimical actions of its enemies. Like a surgeon’s incision gone stray, it slashes and subordinates a 5000 year civilization into many nations, each bent on self-aggrandisement to the other’s detriment. It ignores the fact that these nations have been around for barely one percent of the civilization’s span; that individuals increasingly outlive nations (a person born

[8] Vindicating Public Interest through judicial process: Emerging trend and issues" Parma Nand Singh 19, India Bar Review (1983) at 689.

in East Bengal before 1947 would by now have been successively Indian, Pakistani and Bangladeshi, to cite just one example).[9]

It is unfortunate for Indian democracy that media has been commercialized and reporting news without authenticity. In Arushi Talwar murder case media made wild allegation on the victims. By the way of public interest litigation in Arushi case an advocate Surat Singh rightly asked, "Can freedom of press be allowed to degenerate into a license to malign the character of a dead person? Does our constitution not guarantee the right to privacy even to the dead. He had sought a direction to restrain the media from publishing any story relating to Arushi case till investigation into the crime was complete.[10]

Here it may be noted that media has at times been found misusing its power reporting fake news for increasing T R Ps[11] and for the sake of personal interest. The Court has in its various pronouncement made it amply clear that a person who approaches the Court for relief in public interest must come not only with clean hands but also with clean mind, clean heart and with clean objectives.[12]

Therefore, there must be real and genuine public interest involved in the litigation and it cannot be invoked by a person or a body of persons to further his or their personal causes or satisfy his or their personal grudge and enmity. Courts of justice should not be allowed to be polluted by unscrupulous litigants by resorting to the extraordinary jurisdiction.

A person acting bona fide and having sufficient interest in the proceedings of public interest litigation will alone have a *locus standi* and can approach the Court to wipe out instances of violation of fundamental rights and genuine infraction of statutory provisions, but not for personal gain or private profit or political motive or any oblique consideration[13]

The freedom of speech and expression is indispensable in a democracy .It is expedient to mention the leading case Romesh Thopar v.State of Maharashtra[14] wherein the Court held that freedom of speech of press lay at the root of all democratic organizations, for without political discussion no public education, so essential for the proper functioning of the process of popular government, is possible.

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[9] The Best of Speaking Tree, Vol. 2, p. 33

[10] Trial by media or trial by police through media?a case study of investigation and media reporting of Arushi murder:Prof.M Sridhar,NALSAR,Hyderabad.

[11] Television Rating Points

[12] Ramjas Foundation vs. Union of India, AIR 1993 SC 852 and K.R. Sriniwas vs. R.M. Premchandra (1994)6 SCC 620.

[13]. Dr. Ambedkar Basti Vikas Sabha vs. Delhi Vidyut Board AIR 2001, Delhi at, 224.

It is well known that PIL is non-adversarial litigation and by this device if some body is approaching the court he must think of the consequences for public good. Sometimes, the courts take suo motu cognizance of a report published in a section of the press; while at other times some public spirited individuals come forward to champion the cause of the affected people through the medium of PIL. In either instance, the responsibility of the media becomes multiplied. It is not very difficult to see how harmful the impact of such media reports may be in tarnishing the image of PIL.

In this regard the only source is media which can bridge the gap and provide justice to them. By investigative journalism media can also expose gory scenes of governmental lawlessness, repression, custodial violence, drawing attention of lawyers, judges, and social activists[15]. Being the fourth estate, media must know and perform its duties without misusing PIL.

In the last few years, there have been serious concerns about the use and misuse of public interest litigations and these concerns have been expressed at various levels. The time has come for a serious re-examination of the misuse of public interest litigation. In this regard we should see the observations of Justice Pasayat in *Ashok Kumar Pandey v. State of W.B.*[16] that "busybodies, meddlesome interlopers, wayfarers or officious interveners who approach the court with extraneous motivation or for glare of publicity" must be discouraged. Such litigation is described as "publicity interest litigation" and the courts have been fraught with such litigation.

But we must careful to see that an individual, who approaches the court in a case of this kind, is acting bona fide and not for personal gain, or private profit or political motivation or other oblique consideration. The court must not allow its process to be abused by politicians and others….[17]

As far as the Arushi Talwar murder, the apex court on February 09, 2011 has treated the 'Closure Report' filed by the Central Bureau of Investigation as charge-sheet and has decided to prosecute the parents of the girl for, inter alia, murdering their daughter. Prima facie, the Court has ordered their prosecution under sections 34 (common intention/common object), 120(criminal conspiracy), 201(destroying the evidence etc), and 302 (murder). This judicial turn in the much high-profile murder mystery should prove an eye-opener for various sections of the press who had so far been blissfully beating their drums so loud that no voice

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[14] AIR 1974 SC 259;
[15] http://www.legalserviceindia.com/article/l171-Public-Interest-Litigation.html
[16] Ashok Kumar Pandey v. State of W. B., (2004) 3 SCC 349
[17] Bhagwati J(as he then was).

but theirs could be heard. The majority of the media should now make a review of style of its reporting sooner rather than later.[18]

The role of media in society often eludes the trust. A combination of attack journalism, undermining public interest in the news, and neglecting the public interest in general, is said to create a sense of cynicism and distrust about media in public.[19]The gist is that media has to maintain its credibility in the society, because the role of media affects the course of justice by highlighting selected parts of a given incident.

3. CONCLUSION/SUGGESTIONS

Nobody can deny the role of media in highlighting the cause of the people whenever the same has been represented by a public spirited individual or organisation. Minus the media reports which brought them to limelight, several PILs could not have been filed at or admitted by the Court; thus depriving the nation and its people of a number of landmark judgements that came thereby. However, the impact of media coverage of an incident may prove to be quite destructive if the Court has taken cognizance of the matter or some inquiry is in progress.

Because, doing so by the media amounts to deliberately affect the course of justice. The freedom of expression which the media enjoys today is largely due to fair play of the judicial machinery that has so nicely and effectively read between the lines to declare the freedom of the press is included in the right to freedom of speech and expression guaranteed under Article 19(1) (a) of the Constitution of India.

Therefore, whether the matter relates to some individual interest or public interest, media should exercise abundant caution to ensure that its coverage of an event does not help those who are out to sabotage the system of administration of justice to serve their own ends. In particular, media must thoroughly examine the issue at hand before going too far in propagating the same at the public interest litigation; otherwise a day may come when somebody will file a PIL praying the Court to restrain the media from distorting the facts and misleading the public.

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[18] Azera Rahman New Delhi, May 14, 2009(IANS) Reams of newsprint.
[19] S.E.Benet,S.Rhine.R.Flickinger,(1999):Media malaise Revisited public trust in the media and government,4(4) The Harvard International Journal of Press politics,13.

SOCIAL JUSTICE & INDIAN CONSTITUTION: CONSODLIDATING DEMOCRACY FOR THE UNDERPRIVILEGED

Dr. A. P. Singh*

Abstract

One of the most glaring contradictions of our democratic process is that the hiatus between the poor and the rich appears to be growing every single day, confusing an impartial observer if the system meant only for the privileged ones? An attempt has been made here to remind ourselves that social justice component has been one of the most dominant elements of Indian Constitution, so much so that Granville Austin called Indian constitution, first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement.

INTRODUCTION:

At a time when we keep watch over the annual economic growth rate, expecting the same to be in double digit in the days to come and half of population still scurrying for two meals a day, when India is home to largest number of poor and illiterate, largest number of malnourished children dying before attaining the age of 5 years, there appears to be something missing in the democratic process. We look back at the institutional structure if there is something wrong with the same? Social Justice component of Indian Constitution which is said to be the signature tune of Indian constitution, where does it figure in the entirety of the scheme of things of Indian Republic? Come election time and the whole scene would reverberate with the promises to improve the lot of these teeming millions, nay billions and the cries of the helplessness gets drowned in the din of political sloganeering. An attempt has been made here to remind ourselves of those elements of our system which aim at consolidating democracy for these very people.

* M.A.English, (Meerut Univ), LL.B. (Poona Univ), LL.M. (Constitution), M.D.S.University, Ajmer, Ph.D. (Rajasthan Univ), LL.M. (Legal Theory), European Academy of Legal Theory, Brussels (Belgium), Associate Professor (Law), University School of Law and Legal studies, Guru Gobind Singh Indraprastha University, Dwarka, New Delhi.

Social Justice Component has been one of the most dominant elements of Indian Constitution, so much so that Granville Austin called Indian constitution, first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement[1]. In contrast to this the transformation of the political systems in the western paradigm, i.e. from medieval to modern democratic systems has been dominated by a thought process hovering around the concepts of life, liberty and property. If we look at the objectives set out by the Indian Constitution in the very preambulatory statement itself, one can notice that social justice and equality has been given the place of pride in the scheme of things under the Indian Constitution. Indeed equality has been accepted as the basic organizing principle and a cardinal value of India's socio-political system. And this has been done against the background of elaborate, valued and clearly perceived in-equalities inherited from India's ancient past. It was with the lofty aim of alleviating the sufferings of the underprivileged and exploited sections of Indian society, and for reconstruction and transformation of hierarchically organized social system emphasizing inequality, into a modern egalitarian society that equality and social justice were put as the touchstones of India's socio-political order in the middle of 20th century, when the "equal but separate" kind of doctrine still ruled the roost in those systems who claimed the leadership of the process of democratizing the world.

SOCIAL JUSTICE: THE PLANK OF CONSTITUTIONAL EVOLUTION

It must be understood at the very outset that India as a country of teeming millions was involved in two revolutions simultaneously right since the days of first war of independence in 1857, the national struggle for freedom and social struggle for the upliftment of the downtrodden and removal of age old social prejudices against them. These two revolutions have been running parallel in India, right since the days of onset of freedom struggle. With independence the national revolution was to be completed but the social revolution was to go on. Freedom, as Nehruji put it was not an end in itself, but only a means to an end. The end being the raising of the people to higher levels and hence the general advancement of humanity. K Shanthanam, a prominent member of Constituent assembly put it in terms of three revolutions. The

[1] Granville Austin, "The Indian Constitution, Cornerstone of a Nation", Oxford University Press, 2004, p.50.

political revolution would end with independence; the social revolution meant to get India out of the medievalism based on birth, religion, custom and community and reconstruct her social structure on modern foundations of law, individual merit and secular education[1]. The third revolution was to be the economic revolution, which meant a transition from primitive economy to scientific and planned agriculture and industry.

Nehruji warned that on the achievement of this great social change depended India's survival and he added that if we could not solve this problem all our paper constitutions will become useless and purposeless. The constituent assembly's task was therefore cut out, i.e. to draft a constitution that would serve the ultimate goal of social revolution and of national renaissance.

Dr. Ambedkar, addressing the Constituent Assembly on the eve of adoption of the Constitution, made it clear that political democracy designed under the new Constitution is not the end of the journey. He emphasized that "we have to make our political democracy a social democracy …..political democracy cannot last unless there lies at the base of it social democracy"[2]. Social democracy means a way of life which recognizes liberty, equality and fraternity as the principles of life. He went on to add, "we must begin by acknowledging the fact that there is complete absence of two things in Indian Society. One of these is equality. On the social plane, we have in India a society based on the principle of graded inequality which means elevation for some and degradation for others. On the economic plane we have a society in which there are some who have immense wealth as against many who live in abject poverty. On 26th of January we are going to enter into a life of contradictions. In Politics we will have equality and social and economic life we have inequality". It was this inequality and absence of social justice that the Indian Constitution was designed to address.

The main plank for this social justice programme was designed in the form of distributive justice system elaborately provided for under the Indian Constitution. Distributive Justice consists in proper allocation of reward to each person according to his worth and desert. It thus looks beyond equality in purely formal sense. Its central

[1] Granville Austin, "The Indian Constitution, Cornerstone of a Nation", Oxford University Press, 2004, p.26.
[2] Constituent Assembly Debate, Vol. VII, p.38

concern is to redress the bias of contingencies in the direction of equality. In a democratic world it is taken for granted that policies for the redress of severe social and economic disadvantages are in themselves desirable. Such policies of distributive justice aim at different sectors of society and at the widest possible base. Either we call such policies as protective discrimination, benign discrimination or preferential policies; they are the means for achieving the ideals of distributive justice. Justifications for policy frame lies in the needs either to remove the grossly unjust inequalities in the system or to raise particular sections of the society to the level of human existence and assure them their due dignity.

Going back to Indian Constitution, it adopts justice and equality as the basic organising principles of India,s socio-political system. The equality has come to be embraced as a cardinal value against the background of elaborate, valued and clearly perceived inequalities[1]. What is laid down in terms of equality is a twin concept, i.e. equality before law and equal protection of laws, while the former ensures equal status to everybody, from a prince to a pauper, the later concept, is aimed at achieving substantial equality by classifying the advantaged and disadvantaged and provide the disadvantaged ones with affirmative action programmes. The result has been an array of programmes that are termed here as policy of affirmative action or protective or compensatory discrimination. In fact the measures for ensuring equal protection of laws involve the element of protection as well as that of compensation or reparation to offset the systematic and cumulative deprivations suffered by lower castes in the past. These protective discrimination policies are authorised by constitutional provisions that permit departures from norms of equality, such as merit, even-handedness and indifference to ascriptive characteristics.[2]

DISTRIBUTIVE JUSTICE: THE AFFIRMATIVE ACTION

The array of social justice policies, call them affirmative action, protective or compensatory discrimination or preferential policies, are all aimed at removing the inequalities of the past. These policies can roughly be divided into three broad categories under the Indian Constitution. First are Reservations which allot or facilitate access to valued positions or resources; such as reservations in legislatures, including the reservations for Scheduled castes and scheduled tribes in Lok Sabha (

[1] Marc Gallanter, Law and Society in Modern India, Oxford University Press, New Delhi, 1990, P.185.
[2] Ibid.

House of the People; the lower house of Indian Parliament),[1] reservations in government services and reservations in educational institutions. Second type of protective measures are employed though less frequently in land allotment, housing and other scarce resources like, scholarships, grants loans and health care etc. Third types of protective measures are specific kinds of action plans for removal of untouchability, prohibition of forced labour etc.

For the purpose of providing protection in terms of political representation, article 330 of Indian Constitution provides that seats in proportions to the population of scheduled castes and scheduled tribes in particular states are reserved in the Lok Sabha. The states which are predominantly tribal are excluded from the operation of article 330. Earlier section 2 of 23rd amendment of the constitution 1969, excluded the operation of article 330 to the tribal areas of Nagaland, but the exclusion has now been extended in respect of the state of Meghalaya, Mizoram and Arunachal Pradesh by 31rst amendment Act as these states are predominantly tribal in nature.[2] Similarly under article 332, seats are reserved in the legislative assemblies of the states in favour of scheduled castes and scheduled tribes in proportion of their population in that particular state. Once again the state of Meghalaya, Nagaland, Mizoram and Arunachal Pradesh are excluded from the operation of article 332, simply because of the predominant tribal population in those states. Article 331 and 333 does the same in favour of members of Anglo-Indian Community.

It may be noted that initially these reservations were provided for only 10 years from the commencement of the Constitution under article 334. But this duration has been extended continuously since then by 10 years each time. Now the period of reservations in Lok Sabha and State legislative assemblies stands for 60 years from the commencement of the constitution. [3] It is felt that the handicaps and disabilities under which these people live have not yet been removed and that they need this reservation for some time more so that their condition may be ameliorated and they may catch up with the rest of the nation. The number of Lok Sabha seats reserved in a state of Union territory for such castes and tribes is to bear as nearly as possible the

[1] Indian Parliament is a Bicameral Legislature. Rajya Sabha is the upper chamber of the Parliament having 250 members elected indirectly for 6 years. Lok Sabha is the lower chamber, consisting of 544 members elected directly for five years.
[2] V.N.Shukla, Constitutional law of India, Eastern Book Company Lucknow, 1990.
[3] This has been effected vide, 79th Constitutional Amendment Act 1999, brought into force wef.25.1.2000.

same proportion to the total number of seats allotted to that state or Union Territory in the Lok Sabha as the population of the scheduled castes and scheduled tribes in the concerned state or Union Territory bears to the total population of the state or the union territory.[1]

The fact that reservation of seats for scheduled castes and scheduled tribes in the legislatures is not on a permanent basis, but is at present provided for 10 years period at a time, shows that it is envisaged that the scheduled castes and scheduled tribes would ultimately assimilate themselves fully in the political and national life of the country so much so that there would be no need for any special safeguards for them and there would be no need to draw a distinction between one citizen and another. Their condition would improve so much that they would feel their interests secure without any kind of reservations.

> Reservation in government services as a measure of protective discrimination has been incorporated under article 16 (4) of the Indian Constitution. This particular provision falls under the head of "Right to Equality". In order to give effect to general right to equality under article 14, the constitution secures to all citizens a freedom from discrimination on grounds of religion, race and caste. In the specific application of this equality guarantee; the State is further forbidden to discriminate against any citizen on grounds of place of birth, residence, descent, class, language and sex.[2] Untouchability has been abolished and the citizens are protected against discrimination even on the part of the private persons and institutions.[3] The constitution after guaranteeing the general right of equality under article 14 defines equality in terms of justice by non discrimination provisions contained in article 15 (1) and 16 (1) and proceeds to incorporate provisions of preferential treatment so as to permit the State to achieve equality to disadvantaged sections by giving them preferential treatment in all its dealings and particularly in the area of public employment. While article 16 (1) guarantee equality of opportunity for all citizens in matters of employment or appointment to any office under the State, article 16 (2) provides that no citizen shall on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for or

[1] Article 330 and 332 of Indian Constitution.
[2] Article 15 (1), and 15 (2) of Indian Constitution.
[3] Article 17 of the Indian Constitution, also see the Protection of Civil Rights Act 1957.

> discriminated against in respect of any employment or office under the State. And article 16 (4) which provides for protective measure of reservations of seats in government employment lays down, that nothing in this article shall prevent the state from making any provision for reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the state is not adequately represented in the services under the state.

Provisions for reservations in educational institutions to deprived sections of scheduled castes and scheduled tribes have been secured under article 15(4). Article 15 (1) specifically bars the state from discriminating against any citizen, race, caste, sex, place of birth or any of them. Article 15 (4) on the other hand lays down that the state is not prevented from making any special provision for the advancement of any socially and educationally backward classes. The expression "making any special provision" is evidently an open ended provision and government can really go on providing a whole array of facilities for promoting the interests of socially and educationally backward classes, for example waiver of fees, waiver of age requirements, special coaching, scholarships, grants, loans etc. Interestingly, however, the use of article 15 (4) has exclusively been made so far for providing reservations in educational institutions.

It cannot be said that there are no other methods to consider by which that status can be improved because to say this is to overlook the wide scope of article 15 (4). The language of article 15 (4) shows first that reservations as such are not expressly mentioned in article 15 (4), but fall within the wide expression "special provisions for the advancement of…" It is overlooked that special provisions include every kind of assistance which can be given to backward classes and scheduled castes and scheduled tribes to make them stand on their feet or as is commonly said to bring them into the mainstream of Indian life. Illustratively those measures would include grant of land either free or on nominal rent the supply of seeds and agricultural implements, the supply of expert advice as to how to improve the yield of land, provisions for marketing the produce and the like[1]. Those measures would also include schemes for training the backward classes to pursue trades or small business which would fetch a reasonable income. In relation to education itself, under article 15 (4) the state can give free education, free text books free uniforms and subsistence

[1] Dr. Parmanand Singh, Equality, reservations and discrimination in India, Deep & Deep Publications New Delhi, 1985.

allowance, merit scholarships and the like, starting from the stage of primary education and going right up to University and post graduate education. Once this is realized, how vast and varied are the powers at the disposal of the state if it really takes care to improve the lot of scheduled castes and scheduled tribes, and backward classes. The controversies of reservations, of preferring less meritorious to the more meritorious one, or of impairing the efficiency of administration for the purpose of providing protective discrimination, which more often than not are accused to be governed by political considerations shall lose much of their shine.

Second types of affirmative action programmes that can be constructed out of the Directive Principles of State Policy represent a clearer statement of social revolution. It has been noted above that Indian constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement. Yet despite the permeation of entire constitution by the aim of national renaissance, the core of the commitment to the social revolution lies in part-III and part IV of the Constitution. These are the conscience of the Constitution. Part IV, the directive principles, however, represents the clearer statement of social revolution. They aim at making the Indian masses free in the positive sense, free from the passivity engendered by centuries of coercion by society and by nature, free from abject physical conditions that had prevented them from realizing and fulfilling their best selves.

It may be noted that the Preamble to the Indian Constitution of India, has enjoined the "sovereign, socialist, secular[1], democratic Republic of India, to secure to all its citizens, social economic and political justice". Reserving seats and ensuring a minimum representation to deprived and exploited sections of society in the legislatures and other political bodies ensure political justice.[2] Social and economic justice is intended to be achieved by the state in pursuance of the Directive Principles of state policy contained in chapter IV of the Constitution, which command the state to remove existing socio-economic inequalities by special measures. All these provisions are intended to promote the constitutional scheme to secure equality. These provisions set forth a programme for the reconstruction and transformation of Indian

[1] The word Secular was added in to the Preamble by 42nd Amendment, 1975.
[2] See Articles 330 to 334 of Indian Constitution.

Society by a firm commitment to raise the sunken status of the pathetically neglected and disadvantaged sections of our society. Before we note how the reconstruction and transformation of Indian society is intended to be realized, it must be noted that the provisions included in Directive Principles of State policy are not enforceable in the courts; however the principles laid down in this part of the Constitution are fundamental in the governance of the country.

These provisions may better be described as the active obligations of the state[1]. The State shall secure a social order in which social, economic and political justice shall inform all the institutions of national life.[2] Wealth and its source of production shall not be concentrated in the hands of the few but shall be distributed so as to sub-serve the common good. And there shall be adequate means of livelihood for all and equal pay for equal work. [3]The state shall endeavour to secure the health and strength of workers, the right to work, to education and to assistance in cases of want, just and humane conditions of work and living wage for workers [4]a uniform civil code[5], and free and compulsory education for children.[6] The state shall take steps to organise village panchayats,[7] promote the educational and economic interests of the weaker sections of the people, raise the level of nutrition and standards of living, improve public health, organise agricultural and animal husbandry,[8] separate the judiciary from executive [9]and promote international peace and security.[10] Article 46 which specifically refers to the obligation of the state towards the weaker sections and scheduled castes and scheduled tribes etc provides that “The state shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular of the scheduled castes and scheduled tribes and shall protect them from social injustices and all forms of exploitation”.

In pursuance of these directives, various land re-distribution and allotment programmes have been initiated. In fact so great was the enthusiasm of the government in this particular respect that hundreds of land reform laws were passed in

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[1] V.N. Shukla, Constitutional Law of India, Easern Book Company, Lucknow, 1990.
[2] Article 38 of Indian Constitution.
[3] Article 39 of Indian Constitution.
[4] Article 41, 42 and 43 of the Constitution.
[5] Article 44 .
[6] Article 45.
[7] Article 40.
[8] Article 47 and 48.
[9] Article 50.
[10] Article 51.

the first five years of Indian Republic. This ensued a spate of litigation in the courts, as the land reforms laws infringed the right to property of the land owners.[1] However the government was so determined to affect land reforms that the right to property which was provided under article 31 of the constitution was modified six times and finally was done away with, for the purpose of avoiding litigation in land reform measures of the government[2].

For the purpose of providing legal aid to the poor and indigent a vast network of legal aid programmes involving judicial officers, Bar Councils and law Schools, have been established all over the country. Legal Services Authority Act, 1987 which was meant to provide legal aid to all those who cannot afford access to legal services either due to poverty indigence or illiteracy or backwardness, has been a big success and apart from legal services authorities at the central and state level various legal aid committees have been successfully and effectively working at the district and taluka level.

Apart from this various health care programmes such as primary health centres all over the country have been established and various scholarships grants, loans etc for the deprived sections of the population have been contributing their bit towards the socio-economic transformation of the country. These distributive schemes are accompanied by efforts to protect the backward classes from exploitation and victimisation.

In the **third** group of affirmative action policies, the aim is at protective discrimination in various action plans for the removal of in-capabilities on the part of the underprivileged groups. Constitution itself talks about prohibitions of forced labour under article 23, in pursuance of which Bonded Labour Abolition Act was passed in 1976. In recent years there have been strenuous efforts to release the victims of debt bondage, who are mostly from scheduled castes and scheduled tribes. Anti-untouchability programme is another area of governmental concern. Constitution itself abolished untouchability vide article 17 which lays down that "Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of untouchability shall be an offence, punishable in accordance with law. It

[1] See Kameshwar Singh v. State of Bihar, AIR, 1962, SC 1116.
[2] 44rth Constitutional Amendment Act of 1978 abolished the Right to Property from Indian Constitution.

is noticeable that the word “Untouchability” is not to be construed in its literal sense which would include persons who are treated as untouchables either temporarily or otherwise for various reasons, such as their suffering from an epidemic contagious disease or on account of social observance such as are associated with birth or death etc. On the other hand Untouchability is to be understood in the sense of a practice as it has developed historically in India. The word refers to those regarded as untouchables in the course of historical developments in this country.

Anti-untouchability propaganda and Protection of Civil Rights Act 1956, attempts to relieve untouchables from the social disabilities under which they have suffered. These measures may not strictly be called compensatory discrimination in the formal sense of the term, but in substance it is a special undertaking to remedy the disadvantaged position of the untouchables and certainly be designated as affirmative action programmes as part of state’s larger obligation of ushering into socially egalitarian order.

JUSTICE TO LABOUR CLASS:

Exploitation of labour class has always been a major problem in efforts at industrial growth and rapid economic development. Our national movement recognized that if India has to regain its true place in the comity of nations, if we have to become an economic powerhouse, if we have to once again stand tall on our own feet, then we must ensure that all social groups come together and build this new India of our dreams. The importance attached by our national leadership to the working classes was due to the fact that our national movement recognized, from the very inception, the central role of the working class in national development. The working class is like the blood that flows through our veins. It is worth emphasizing that our economy, society and the nation functions because of the toil and energy of the working people of our country. Unless democratic ideals are realized in favour of these underprivileged classes, the consolidation of democracy happens in their favour, democracy shall remain a half truth for majority of our countryman, with no dream of inclusive democracy ever becoming the reality of the day.

CONCLUDING OBSERVATIONS:

It may be observed by way of concluding the discussion that a very comprehensive affirmative action programme, the emphasis on the concepts of

equality and social justice that runs through the entire Indian Constitution and which Supreme Court considers as the signature tune of Indian Constitution, is a definite step in consolidating democracy for the underprivileged sections of Indian society. A very important point that needs highlighting is that the dignity of individual, the cherished ideals that we have put in the very preamble of the Constitution, continues to be a chimera for the common man in general and scheduled castes, scheduled tribes and rural communities in particular. And this constitutes a huge deficit in democratic governance of India. The governmental administration powered and prompted by the ideals of the Constitution has not been able to remove the adversarial pattern between the general public and the administration which is a characteristic feature of a colonial system of governance. Obviously this was instituted, nurtured and maintained for the purpose of keeping the colonized people in awe and wonder so as to perpetuate the almighty image of the imperial class and to keep his majesty's rule intact in a foreign territory. Continuance of this adversarial pattern in the system of democratic governance constitutes one of an obdurate stumbling block in the establishment of an egalitarian social order. In fact this is a contradiction in terms for the largest democracy of the world. This is important for the purpose of harnessing the immense energies of the youth, the common man on the street, the tribals and dalits who constitute the majority of the population. Appreciable efforts in the direction of fulfilling the dignity of the individual as it is promised in the preamble of the Constitution would go a long way in realizing the ideals and a definite step in consolidating democracy so that a confident India moves ahead to occupy its rightful place in the comity of nations in the 21st Century world.

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CONSTITUTIONAL MANDATE ON RIGHT TO FOOD-WHITHER AWAY OR FULFILLED?: A CRITIQUE

Dr. Rajiv Khare[*]

Dr.Yogendra Kumar Srivastava[**]

Abstract

During six decades of our republican experience, despite the promise of equality and justice in the preamble of the Constitution and lot of other promises made in the Directive Principles of State Policy, the country has failed to take care of the basic right of food for millions of the people. The very fact that after six decades of independent existence we are now talking of right to food speaks volumes about our failure to provide basic necessities of life to the majority of our population. The paper makes an attempt to bring together the data from across the country and ends up in presenting some valuable suggestions to ensure right to food.

BACKDROP:

The last six decades of India's independence have witnessed unexpected growth and development, achieved several milestones for promotion of social welfare. Guided by the mandate of the Preamble – the soul, of the Constitution of India read with Part-IV Directive Principles of State Policy (the DPSPs) of the Constitution, various steps have been taken by Central and State Governments which have brought in remarkable changes in the standards of living, food availability, and safety and health care etc but it has also been noted that it remains an unfulfilled dream of our Father of the Nation, Mahatma Gandhi, i.e. to wipe tears from every eye. In this context it is relevant to mention that deaths due to hunger and malnutrition continue to haunt the minds of policymakers and governments. The data given in succeeding paragraphs indicates that there has been alarming rise in the number of deaths due to malnutrition and hunger in the country, Needless to mention that such instances are not only violative of the human rights regime but also result in denial of the same which in the 21st

[*] **Associate Professor of Law, National Law Institute University**, Bhopal (M.P.), e-mail: rajiv_khare@rediffmail.com

[**] **Assistant Professor of Law, National Law Institute University**, Bhopal (M.P.), e-mail: yks_26@hotmail.com.

century, cannot be tolerated as every nation of the world is striving to achieve zero tolerance in cases of deaths due to hunger and malnutrition.

The recent data published in The Hindustan Times[1] paints a very gloomy picture. The report points out that hunger still continues to kill children in Mumbai , wherein 16 children under the age of six have died due to starvation in Govandi (Mumbai) alone. Out of 1.38 crore population of greater Mumbai 82.8 lakhs are the slum dwellers amongst which 7.3 lakhs are children below the four years of age out of them 25,550 die of malnutrition and related illness every year. Asian Human Rights Commission (AHRC) Report, says that "Nahargada village(in Pohri Block of Shivpuri district of M.P.) is notorious for children's death from malnutrition and other sickness". The report further pointed out that just in a span of two months five children died of malnutrition and ten children are severely malnourished in the Village. It was also reported that 23 children died of malnutrition in five months from December 2009 to April 2010.

Also between March and May in 2004, the Right to Food Campaign Madhya Pradesh discovered that about 50 children died of malnutrition in Shivpuri.[2] As per the survey conducted by an NGO called SPANDAN with the support of Action Aid-India in the five districts of State of Madhya Pradesh, it was found that 72 children died due to under nourishment in less than six month in Madhya Pradesh[3].The report also pointed out that 30% of the 216 children surveyed in Burhanpur, 23% of 116 children in Khandwa and 30% of 177 children in Khargone were severly malnourished. Further that the percentage of underweight children in Madhya Pradesh has increased from 54 in 1998-99 to 60.3 at present and the percentage of extremely malnourished children has gone up from 20 to 33 despite UNICEF involvement.[4]

In light of the above facts, it becomes important to examine the significance of Constitutional mandate enshrined in the Preamble read with Part-

[1] (Bhopal Edition,dated:13-12-2010,p.1)
[2] The Hindustan Times (HT Live Bhopal), dated:6-12-2010
[3] www.thaindian.com/newsportal/uncategorised/malnutrition-in-Madhya-Pradesh-50c....
[4] Ibid.

IV of our Constitution in the wake of the International Human Rights law developments along with other relevant data available, legislative reforms, executive endeavours and judicial directions on the issue, so as to find who, if at all, is to be held accountable for the prevailing scenario.

Thus this paper seeks to highlight the constitutional mandate; present a bird's eye view of International Humanitarian Law developments; gives the data on deaths due to hunger, malnutrition, lack of health care; and bring out the legislative steps taken, executive endeavours made and judicial contributions so as to eliminate such cases of deaths and improve the scenario. The paper is accordingly divided in four parts - Part I gives a bird's eye view of the International human rights law developments; Part II examines the Constitutional mandate enshrined in the preamble, the Directive Principles of State Policy and other provisions of the Constitution along with the legislative steps initiated. Part III gives the data and makes its analysis in the touchstones of International Humanitarian Law developments and constitutional mandate; Part IV is devoted to study the steps taken by executive and judiciary; and the last part, i.e. Part V brings out the emerging scenario as findings of the study, provides certain suggestions and make recommendations to combat the evils of malnutrition, hunger, starvation and the root cause of all, — the poverty.

PART-I

INTERNATIONAL HUMAN RIGHTS LAW DEVELOPMENTS

The social evil like poverty, malnutrition , ill health have been the core concern of the International community since 1948. As the Universal Declaration of Human Rights (UDHR), proclaimed that:

"Everyone has the right to stand and of living adequate for the health and well being of himself and of his family, **including adequate food,** clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

Article 11(1) of the International Covenant of Economic, Social and Cultural Rights provides that the State Parties to the Covenant recognized :

"The States parties to the present covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food**,** clothing and housing, and to the continuous improvement of living conditions. The state parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent."

It may be pointed out here that Article 11(1) merely recognizes the fact that everyone has the inherent right to an adequate standard of living for himself and for his families including adequate food and continuous improvement of living conditions. But the mandate of Article 11(2) is more fundamental in its nature which enumerates that;

"The State parties to the present covenant, recognizing the fundamental right of everyone to be free from hunger, *shall take individually and through international co-operation, the measures including specific programmes.*"

This directive of the international community makes it a fundamental right of everyone to be free from hunger in more concrete and unequivocal terms and in turn imposes an obligation to the parties to the Covenant to take measures to ensure realization of this right which have been enumerated in the Covenant under Clause (a) and (b) of Article 11(2):

These measures exhorts the parties to the Covenant: 'to improve methods of production, conservation, and distribution of good by making full use of technical and scientific knowledge by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian system in such a way as to achieve the most efficient development and utilization of natural resources' and further to ensure an equitable distribution of world food supplies in relation to need albit taking into account the problems of both food - importing and exporting countries.

Thus the wider concept of *adequate food* given under Article 11(1) encompasses several important elements like; (i) the food supply should be adequate, which means that the types of food stuffs commonly available (nationally, in local markets and ultimately

at the household level) should be culturally acceptable, i.e. fit in with the prevailing food or dietary culture); (ii) the available supply should cover all nutrition's needs in terms of quality (energy) and quality, i.e. it should provide all the essential nutrients, including micro-nutrients (such as vitamins and iodine) ; and (iii) last but not the least, food should be safe, i.e. free of toxic elements and contaminates and of good quality, in items of e.g. taste and texture).

Article 11(2) gave express recognition and made it a fundamental right to be free from hunger and measures to ensure effective exercise of the right has also been enumerated in clauses (a) & (b) of Article 11(2). Thus what remains was to find net outcomes of such international endeavours.

But the worst situation of food scarcity and famine experienced in the early 1970s gave a new momentum to the international community and made to revisit the situation of food safety and security and suggest new measures to counter the evils of poverty, malnutrition and ill health. It led to organizing World Food Conference in the year 1974 which was convened to analyze various causes of food crisis and to identify viable remedies.

The resolutions of this Conference were adopted by the United General Assembly in the same year, known as Universal Declaration on Eradication of Hunger and Malnutrition wherein it has been clearly provided that - "Everyone has the right to adequate food and the fundamental right to freedom from hunger[5]."

The International Community did not become complascent to the cause of food safety and security but further took the agenda forward in the World Food Summit 1996 which aimed to reduce under nourishment by the year 2015 wherein several commitments of seminal importance have been made[6]

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[5] World Food Summit, 1974

[6] The Right to food in Theory and Practice, FAO, United Nations Publication, Rome, pp. 24-27

The Commitments given therein include : **(i)** "We will ensure an enabling political, social and economic environment designed to create the best condition for the eradication of poverty and for durable peace, based on full and equal participation of common and men which is most conclusive for achieving food security for all."; **(ii)** "We will implement policies aimed at eradicating poverty and inequality and improving physical and economic access by all, at all times, to sufficient, nutritionally adequate and safe and its effective utilization."; **(iii)**"We will pursue participatory and sustainable development policies and practices in high and low potential areas, which are essential to adequate and reliable food supplies at the

The Summit organized by FAO in November , 1996 reaffirmed that “it is the right of every one to have safe and nutritious food consistent with the right to adequate food the fundamental right of everyone to be free from hunger.” It was further noted that it is intolerable for the world community that more than 800 million people throughout the world and particularly in developing countries, do not have enough food to meet their nutritional needs and pledged their political will and their common and national commitment to achieve food security for all and an on-going efforts to eradicate hunger from all countries. The right to freedom from hunger is fundamental, which means that the state has an obligation to ensure, as a minimum that people do not starve. This right is closely linked to the right to life itself. It is the duty of all States to take all necessary steps possible towards the goal of full enjoyment of the right to adequate food. This means every must have physical and economic access at all times to food which is adequate in quantity and quality to allow for a healthy and dignified life as a human being.

It may be further noted that the World Summit on Sustainable Development held at Johannesburg in the year 2002 laid a great emphasis on elimination of poverty, improvement of living conditions and removal of mal-nutrition including under nourishment. It may be pointed out that the World Summit not only reiterated its commitment but also fixed the timeline for the achieving these enumerated goals[7].

Thus from the above it is reflected that the international community has made several endeavours to protect people against mal-nutrition, ill health and food security from time to time. However these endeavours remain a pious homilies in absence of concrete steps initiated at the domestic level by every nation of the world. Therefore it is

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household, national, regional and global levels and combat pests, drought, and desertification, considering the multi functional character of agriculture."; **(iv)**"We will strive to ensure that food, agriculture trade and overall trade policies are conducive to fastening food security for all through a fair market convened works trade system."; **(v)**"We will endeavor to prevent and be prepared for natural disaster and men-made emergency and to meet dormitory and emergency food requirements in way that encourage recovery, rehabilitation, development and a capacity to satisfy future needs."; **(vi)**"We will promote optimal allocation and use of public and private investments to foster human resources, sustainable food agriculture, fisheries and forestry systems and rural development, in high and low potential areas."; **(vii)**"We will implement, monitor and follow-up this plan of Action at all levels in co-operation with the international community."

[7] See, for details, World Summit on Sustainable Development, 2002, key commitments, targets and time tables from the Johannesburg plan of Implementation, in particulars, the poverty eradication. (www.Johannesburgsummit.org)

important to examine endeavours undertaken by India for elimination of poverty, malnutrition and improving the living condition of the masses.

PART-II

THE CONSTITUTIONAL MANDATE AND LEGISLATIVE EXERCISES

The Preamble to the Constitution of India assures to every citizen: socio – economic justice; equality of status and opportunity; and dignity of persons so as to fasten fraternity among all sections of society in an integrated 'Bharat' i.e. India[8]. The social justice obliges removal of economic inequalities; provide descent standards of living to the working people and to protect the interests of the weaker sections of the society.

The Constitution is not merely a law but a dynamic document which has to be responsive to the cause of ensuring social welfare and justice to the people. Further a glimpse at the Part-IV of the Constitution, as a supplement to the fundamental rights in making India a Welfare State, makes it clear that it is the duty of the state to raise level of nutrition and standards of living of its people and to strive to improve public health amongst its primary duties. Article - 47 of the Indian Constitution reads as;

"The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall Endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of doings which are injurious to health. "

Also Article 21 guarantees the Right to Life and Liberty which is considered to be residuary fundamental rights whose scope may always be enlarged to protect people against any violations of rights which are not covered expressly in Part III of the Constitution. Needless to emphasize that in any civilised society right to live as a human being is not ensured by meeting only the animal needs of a man. However the situation mentioned at the backdrop raises the question that whether mal-nutrition, starvation, and

[8] See for example,
(i) *Lingappa V. State of Maharashtra*, AIR 1985 SC 389
(ii) *Nakara V. Union of India*, AIR 1983 SC 130
(iii) *Sadhurian V. Polin*, AIR 1984 SC 1471)

poverty allow people to even animal existence. Although it has been observed by Hon'ble Apex Court that 'right to live is secured only when one is assured of all facilities to develop himself.' It was further observed that 'all human rights are designed to achieved this object. Right to live guaranteed in any civilized society implies right to food, water, medical care besides shelter ,descent environment and education.' (Emphasis Added)

Also Article 39(b) enjoins the state that the ownership and control of material resources of the community are so distributed as to promote welfare of the people by securing the social and economic justice to the weaker section of the society. (Emphasis Added)

Further Article 46 obliges the State to promote with special care social and economic and educational interest of the weaker section of the society, in particular, of the SC and ST. Thus the right to social and economic justice conjointly co-mingles with right to food, as an in seprable component for meaningful right to life .As also has been reiterated by Hon'ble Apex Court that the basic needs of man have traditionally been accepted to be three-food,clothing and shelter.Which takes within its sweep the right to food[9].In *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*[10] (1981) 1 SCC 608) the court held that right to life includes right to live with human dignity with all that goes alongwith it, namely the bare necessities of life such as 'adequate nutrition'.

Thus it may be safely concluded that the Constitution of India adequately provides for taking steps to ensure welfare of the people. Taking the agenda forward, the National Food Security Bill(Draft), 2010 has been moved in the Parliament. The object & Reasons clause of a Bill reiterates existence of several schemes for augumenting agricultural production and ensuring adequate availability of food for different segments and aims 'to provide a statutory framework to entitle families living below poverty line to certain minimum quantities of food grains per month through targeted public distribution system.' The Bill envisages to set up Central Food Security Fund to compensate states under Section6(2) of the Bill. Section 6(2) provides that, 'The Central Government shall allocate wheat and rice in accordance with the accepted number of families for each

[9] *Shantistar Builder v. Narayan Khimalal Totame*,(1990) 1 SCC 520+

[10] (1981, 1 SCC 608)

state'. It further provides that 'The Central Government, in an event of inability to deliver the required allocation for any state, shall compensate by funds to the State equivalent to the shortfall'. For the purpose a dedicated Central Food Security Fund will be set up for this purpose. The Bill also provides for specific responsibilities of state and local authorities under sections 7 & 8 respectively. The Bill may be seen as a progressive document with welfare flare but it has to see the light of the day. Its results would be of far reaching significance, if implemented in letters and spirit otherwise it would also be enriching the armony of legislation without firing abilities.

Part-III

NATIONAL AND INTERNATIONAL DATA ON MAL-NUTRITION NATIONAL SCENARIO

(1) NATIONWIDE DATA ON MALNUTRITION

As per the National Family Health Survey -3 2005-2006, the percentage of underweight children below 5 years among scheduled tribes is 54.5% as against the national average of 2.5 % for all category of children. Madhya Pradesh happens to be the worst affected state and Sikkim is placed at the best place with only 19.7 per cent of underweight children compared to the National average of 42.5 per cent.

As per report on causes of deaths in India 2001-03 by Registrar General of India, deaths due nutritional deficiencies in women in different age groups are as below :-

Age (Years)	Percentage of deaths
15 - 24	1.5
25 - 34	1.4
35 - 44	1.1
45 - 54	1.0
55 - 69	0.6

Malnutrition is defined as any nutritional disorder caused by on insufficient, unbalance or by the impaired absorption or assimilation of nutrients by the body. The National Health Survey findings show that[11]

- 47% of children under 3 are under weight, of which 18% are severally underweight.
- 46% of children under 3 are stunted which occurs due to chronic under nourishment.
- 16% of children under 3 are wasted.
- 36% of women aged 15-49 years suffer from chronic energy deficiency.
- 52% of women suffer from anemia (insufficient from intake)
- Malnutrition is widespread and is serious phenomenon in both rural and urban areas.
- Only 58% of mothers received from foliate supplements during their pregnancy.
- Only 15% of children are breast fed within 1 hour of birth and only 37% on the first day.
- Caloric consumption per capita in rural areas has gone down from 2.266 in 1972/73 to 2.221 in 1983 and then to 2,153 in 1993/94.

(II) STATUS OF MAL-NUTRITION CASES IN THE STATE OF MAHARASHTRA AND MADHYA PRADESH

As per the health statistics compiled by the Government of Maharahtra in the year 2004 reflected that the chronic problem of mal-nutrition is alive in the state.

Over 9,000 tribal children below the age of six have died in malnutrition in 15 districts of Maharashtra between April, 2008 and May, 2004. As per state government sources 7, 970 children died between April 2003 and May, 2004 and out of which 807, came from the five districts of Thane, Nashik, Amravati, Nandwibar and Gadchiroli alone.[12] State officials defended themselves that not all of the deaths could be attributed

[11] Food & Nutrition Security, ""Food for All" an Indian Context, Vani p. 29
[12] Times of India, Mumbai Edition , Tuesday, July 6, 2004 pg.1

to malnutrition but that a "variety of factors" including low birth weight, Jaundice, convulsions, hypothermia, and premature delivery were responsible. [13]

*	Premature birth -	11%
*	Low birth weight -	16%
*	Birth injuries -	1.6%
*	Jaundice -	2.72%
*	Hypothermia -	2.91%
*	Convulsion -	8.71%
	Total =	100%

(B) International Scenario: The data given below on malnutrition and under nourishment cases reflects the opposite picture at the grassroot level specifically in the developing and under developing country of the world.

Although the international community has shown deep concern and taken several steps to eradicate deaths due to hunger, malnutrition and ill health data presented here paints a gloomy picture of the existing scenario.

PART-IV

EXECUTIVE ENDEAVOURS AND JUDICIAL RESPONSE

EXECUTIVE ENDEAVOURS

In order to meet the above challenges as a Constitutional obligation, the Government of India and State governments have taken several measures to prevent and control situations of hunger, mal-nutrition, under-nourishment besides ensuring food safety, security and availability to its people. Some of these measures include the commencement of Public Distribution System (PDS), a revamping and rejuvenating it as Targeted Distribution System (TDS), Mid-Day Meal Scheme for Children, Mahatma Gandhi NAREGA, Work for Food etc. However the situation remains uncontrolled due to inaction, mis-action and complascency on part of executive officials. On one hand

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[13] Ibid

above 25,000 Crore is spent annually on food safety yet four hundred million individuals go hungry everyday. Despite the fact that over 60 million metric tonnes of food grains lie rotten in the food graineris. Further under the Targeted PDS 36% of wheat, 31% of rice and 23% of sugar is diverted from the system but does not reach the targeted group.[14]

The shift from PDS for all to Targeted PDS was justified on ground of reducing government expenditure. However, with trade liberalization, the PDS cost to government has risen from 51166 crores in the mid 90's to Rs 9300 crores in 1999-2000.[15] Today states pick up just around 47.4% of their quota for rice and 33.3% of their quota for wheat. In fault, off take for wheat for the PDS has declined from 8.53 million tones in 1996-97 to 4.99 million tones in 2000. [16]

JUDICIAL RESPONSE

India's judiciary, one of the finest, sensitive and responsive judiciary has been seriously engaged in ensuring welfare of the people through its directions. As and when any social problem, like the one under scrutiny is brought for its consideration and directions, it has left no stone unturned to ensure that necessary steps are taken to overcome the social problems. A letter was written by two social and political workers of the State of Orissa to the Chief Justice of India(CJI) in the year 1985 bringing to the kind attention of the CJI the miserable condition of the inhabitants of the district of Kalahandi on account of extreme poverty. The letter was treated as a writ petition (Civil) No.12847 of 1985. It was alleged in the letter that the people of Kalahandi, in order to save themselves from the situation, are forced to 'distrers of sale of labour' on a large scale resulting in exploitation of labours. At times people are forced to sell their children[17]. The Advocate General of the State did inform the court about several measures taken by the State including setting up of district level National Calamities Committee wherein the district collector is the nodal officer to make proper assessment of the situation. The apex court, accepting the stand of the State Government observed that, "there is no reason not to accept the statements made on behalf of the State of Orrisa that the measures are being

[14] Report of National Consultation on "Food and Nutritional Security, New Delhi
[15] V. Shiva, Yoked to Death 2000, RESTE
[16] V. Shiva. Yoked to Death 2000 RESTE.
[17] *Kishen v. state of Orissa*, AIR 1989 sc 677(Paragraph 1)

taken for the purpose of mitigating hunger, poverty, starvation deaths etc of the people of Kalahandi". The court appeared to be very optimistic when it observed that, "If such measures are taken, there can be no doubt that it will alleviate to a great extent the miseries of the people of kalahandi, The Hon'ble court further directed that the National Calamities Committee shall also keep a watch over the working of the social welfare measures which are being taken and may be taken in future."

When Famine had returned to Orissa and other parts of the country including Rajasthan, Madhya Pradesh, Gujrat and Andhra Pradesh, between July 27, and August 28, 2001, 20 deaths were reported from Kashipur district in Orissa, 11 children were reported dead in Udaipur (Rajasthan) over a week. Earlier 800 tribal children had died of starvation in Maharashtra.[18] The Rajasthan PUCL (People's Union for Civil Liberties) filed a writ petition in the Supreme Court pointing out that while on one hand the stocks of the food grains in the country are more than three times appx. the capacity of storage facilities, but on the other there are reports from various states alleging starvation deaths. The petitioners sought the court's intervention to give remedial direction to the government on grounds that the 'right to life' guaranteed by Article 21 of the Constitution includes the 'right to food' which is being violated by the deliberate dismantling of the Public Distribution System (PDS) The following questions of law of public importance were raised[19];

(A) That the starvation death is a natural phenomenon while there is a surplus stock of food grains in the Governments go-downs. Does the right to life means that people who are starving and who are too poor to buy food grains ought to be given food grains free of cost by the State from the surplus stock lying with the States, particularly when it is reported that a large part of it is lying unused and rotting ?

(B) Whether the Right to Life under Art. 21 of the Constitution of India does not include the right to food ?

[18] Voluntary Action Pulse, 'Starvation Deaths, Overflowing Go diowns' by Dr. V. Shiva, March, 2002, p.14
[19] PUCL Bulletin, November, 2001, p. 11 at http://www.righttofoodindia.org/case/case.html

(C) Does the right to food, which has been upheld by the Hon'ble Court, imply that the state has a duty to provide food especially in situations of drought, to people who are drought affected and not in a position to purchase food ?

The apex Court expressing serious concern over the starvation deaths in some states observed that, " *the Central and State Governments had the primary responsibility to ensure the food grains over flowing in the Food Corporation of India godowns reach starving people and are not wasted.*" The court further held that was the poor, destitute and weaker sections of the society should not suffer from hunger and die of starvation as according to court, mere schemes without implementation were of no use. The court, thus directed that "even if the food grains had to be be given free, it should be done as no person should be deprived of food merely because he had no money.[20]

On July 23, 2001, the Court directed Orissa, Rajasthan, Chhatisgarh, Maharashtra, Gujrat and Himachal Pradesh to take immediate steps to make dysfunctional public distribution system outlets functional. The court was informed about the ineffective implementation of the "food for work" scheme. The Petitioners alleged that hardly 10% of the total number of those who approached for work under this scheme, 50% of wages were paid in kind, i.e. food grains and the remaining in cash.[21] The Supreme Court was shocked by the Union of India's affidavit as on one page of affidavit it says that a family of 5 members would require 75 Kilograms of good grains to survive, on another page it says that the PDS is providing only 10 Kilograms. In other words, hunger and starvation is getting perpetuated.

In next date of hearing, the Supreme Court took strong exception to the failure of the most of the State Governments to comply with its earlier orders relating to the identification of poor families. The Court also passed new orders for proper and effective implementation of nutrition related schemes like Employment Assurance Scheme, Mid Day Meal Scheme, Integrated Child Development Scheme, the Antyodaya Programme, Old age pension scheme and the public distribution system, among others. The court ordered the Chief Secretaries of all States to send a report on the implementation of these

[20] Ibid, P. 18
[21] Ibid .P. 18

schemes to the Continent Secretary within three weeks and to give reasons for inadequate implementation, if applicable. The Central Government, was directed to "take necessary action in order to ensure the implementation of the said schemes"[22]. This case is still pending in the Supreme Court for final orders but apart from all those directions issued earlier by the Court in different stages seems to be mere paper tigers.

What Emerges Now? – The Conclusions

The journey of right to food has witnessed lots of contradictions, achieved several milestone and attempted to mitigate, if not eliminate, the cases of deaths due to malnutrition, hunger and poverty. The International community has very seriously engaged in deliberations and development of food availability, accessibility and in express recognition of the fundamental right to food. Several commitments have been made, resolutions have been passed at different conferences and summits but they remain pious homilies in absence of effective internalisation in domestic laws and forceful implementation . Some of the international organizations like FAO & WEP are doing appreciable work in different parts of the world including India to protect the people's from hunger and malnutrition. They are spending crores of rupees in Mid Day Meal Scheme for children which serve two folds objective of the government. They are continuously increasing their budgets for India but due to lack of proper administration, corruption and proper co-ordination between the role players starvation deaths are still a reality in World's largest democracy. On the national front, it is noted with satisfaction that the guiding principles contained in part IV of our Constitution read in light of the soul of the Constitution, the Preamble, make adequate provisions for ensuring food security as welfare of the people is supreme reflected from Article 39(b) of the Constitution. The legislature has been complascent in not giving statutory recognition to the right to food, food security. Although almost after six decades, it has introduced a Bill on National Food Security in the year 2010 which is yet to see the light of the day. The executive endeavours are praiseworthy as different schemes have been launched, modified from time to time to meet the situation both at the National and State Government levels. District level Committees have been set up in different states.

[22] Ibid P.19

However, the data given in this paper tells a different story and brings out the contradictory scenario. The number of deaths due to malnutrition, hunger and poverty are on increase specially in cases of marginalized class of society. Poverty continues to haunt and ruin lives of tribal and other scheduled caste people.

Even after 60 years of independence, it has not been possible for us to ensure access to productive livelihoods and food for all. Those dependent upon low wage income and casual employment do not hope to eat enough throughout the year. Things get worst when droughts and other such transitory problems occur. There are problems of discrimination by caste and gender which are ingrained in society and which have a bearding upon livelihood and food access. However, we are not a food secure nation and there are major concerns about the ability of the country to feed itself in the future. The fears arose out of the decelerating rates of growth in food grain production and in the per capita availability of staple foods. Land degradation and declining rainfall have increased these concerns. Availability of food is adversely affected by disasters such as droughts, floods, cyclones and earthquake that disrupt normal life. The voluntary groups have substantially contributed in fighting and mitigating this evil of food insecurity, especially in times of disasters and calamities, like famines, droughts, floods and others.

SUGGESTIONS :

The Central Government as well as State Governments take help of these specialized voluntary organizations working in most affected areas and doing a lot of its own for the poorer people of these areas. A co-ordination between government, local administration and voluntary organization are a need of time to protect & save the people from starvation deaths. There is an immediate and urgent need to improve faulty Public Distribution System (PDS) because this is one of the strongest tools in the hands of the government.

As the problem of malnutrition is acute. There has to be a synergy between all ministries like; health, rural development, education and WCD to ensure that are met targets", which would be a very good strategy to combat malnutrition related deaths in different parts of the country.

The National Food Security Bill 2010 be passed and implemented in letters and spirit as early as possible. The welfare schemes launched be revamped, strengthened and be enforced effectively. The foodgrain be preserved and protected properly so as to save it from getting rotten.

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TAKING PAID NEWS SERIOUSLY

Dr J P Mishra*

Abstract

Media the fourth pillar of our democratic system, is expected to guard the democratic fabric of the system, however when it is guided by extraneous and ulterior motives, trying to protect the interest of the few at the cost of the welfare of the common man, the real sovereign, it strikes at the very root of our existence as a democratic system. Paid news is doing precisely this.

1. FOR THE SAKE OF LAW

We live in and by the law, said Ronald Dworkin, a great jurist of the preceding century.[1]It is almost as good as to say that 'we live in and by the oxygen'. Law thus has become the life line for the human beings. Minus law, one may argue, even one's life is likely to be rendered meaningless.

With so much at stake with law, it becomes singularly important for us to not only obey the law but also to have trust in others that they might be obeying it likewise. This is so because the law presumes that we, the humans have a natural tendency to live in accordance with reason; and as the naturalists rightly felt, law is but a dictate of reason.[2]

Therefore one who does not conduct himself in a manner akin to reason is one who is committing the breach of law. Extending the argument a little further we can say that if the person happens to be one in whom the people have faith and expectations of lawful behaviour, as the Press (or entire Media for that matter) is, the said breach becomes the breach of public trust as well.

The Freedom of the Press or the Media in general has been read into the Constitution itself by the Judiciary and the people have a right to reasonably expect that this freedom is being exercised by the Media in the true sense of the term. By displaying, by whatever means, the expressions guided by extraneous and ulterior motives, the media is trying to protect the interest of few at the cost of the welfare of the common man, the real

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* Rader in Law, Faculty of Law, University of Allahabad, Allahabad (India). This is the text of the paper presented by the author at a one day national symposium on 'Democracy and Responsible Journalism' on 28 Aug, 2010 by AVAP at Allahabad, Uttar Pradesh (India).

[1] See, the preface to his book 'Law's Empire', First Indian Reprint 2002 by Universal Law Publishing Co. Pvt. Ltd.

[2] Thomas Aquinas, the great naturalist.

sovereign. And in so doing, it is making a mockery of the Constitution as well as the courts.

2. MEDIA AND THE JUDICIARY

Under the Indian Constitution, Article 19, which gives us six freedoms, happens to be the most powerful of the fundamental rights, and the most widespread in its impact. As it stands presently, the first clause of the Article enumerates these freedoms whereas the clauses (2) talks of reasonable restrictions which may be imposed on the exercise of the right to freedom of speech and expression for the sake of maintenance of certain things.[3]

The first of the aforementioned freedoms is the freedom of speech and expression the right whereto has been guaranteed by the Constitution. It has been suggested that this right caps all the rest mentioned in Article 19 (1).

As we all know, there is no express provision in the Constitution regarding the freedom of the press and it has been read by the judiciary[4] and the jurists both as being latent in Article 19 (1) (a) itself. This is not to suggest that the freedom of the press is any less protected in India; because even in the United States of America, where through the first amendment the freedom of the press has been expressly guaranteed, it is not shorn of restrictions.[5] In fact no civilized society and hence no democratic constitution can afford to provide for absolute rights to the individuals (though it would have very much liked to do so) for the simple reason that it is most likely to lead to chaos and conflict rather than cohesion and harmony.

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[3] **Article19: Protection of certain rights regarding freedom of speech etc**.- (1) All citizens shall have the right-
(a) to freedom of speech and assembly;
(b) to assemble peaceably and without arms;
(c) to form association or unions;
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India; and
(f) (repealed)
(g) to practice any profession, or to carry on any occupation, trade or business.
(2)Nothing in sub-clause of clause (1) shall affect the operation of any law existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign States, public order, decency or morality, or in relation to the contempt of court, defamation or incitement to an offence. Clauses 3-6 deal with the restriction as regard the rest of the freedoms enumerated in clause (1).

[4] Ramesh Thapar v. State of Maddras: AIR 1950 SC 124.

[5] The First Amendment (1791) reads: 'Congress shall make no law….abridging the freedom…of the press.'

The Indian Constitution is no exception either. It talks of imposing reasonable restriction on the exercise of right to freedom of expression in certain situations. The right to freedom of expression has been enriched in its meaning owing to the enlightening interpretations put to it by the judiciary where by it includes even the right to freedom of silence.[6] This is one extreme, one can say. On the other extreme, as has been submitted already, fetters may be put and it can be said that a citizen and hence the press has the right to freedom of expressing any thing and everything that is not expressly prohibited under the law.

The Press has been so far known as the fourth state implying that for a healthy democracy it is as important as the three wings of the Government, namely, the Legislature, the Judiciary, and the Executive. Now it is sarcastically being dubbed as the 'first state' which hints at the newly earned reputation that hinges on practices neither honest nor ethical.[7]

We have heard that the corruption follows the power almost inevitably. The powerful press in India should not meet the same fate, one must argue; but such a wish does not seem long lasting unless of course steps are taken in the right earnest to salvage the sagging image of the print and electronic media.

The Judiciary has always championed the cause of the Press and has struck down the legislations that tried to impose limits on the circulation of a paper[8], content[9], volume of circulation or the price of the paper[10], number of pages or periodicity[11], etc which in the view of the Court had the inherent tendency to adversely affect the freedom of the press.

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[6] See, the JMM Bribery Case.

[7] A report by the special correspondent of the Telegraph, Kolkata, published on March 6, 2010,, **entitled 'Powers to edit 'paid news', which runs as follows:**

New Delhi, March 5, 2010: The Centre is considering proposals to fortify the Press Council of India to fight the "paid news" phenomenon, information and broadcasting minister Ambika Soni told the Rajya Sabha today……. **"The media is not the fourth estate any more, it's the first estate. The media has now become all-powerful."B.G. Verghese, Former editor.**

[8] See, Romesh Thapar v. State of Madras, supra.

[9] Express Newspapwes v. Union of India: (1959) SCR 12.

[10] Sakal Papers v. Union of India: (1962) 3 SCR 842.

[11] Bennet Coeman V. Union of Inida : 1973 AIR SC 106.

Further, the Court has always kept a vigil on the government measures to ensure that the Freedom of the Press is not impaired; because like the Court, the Press also stands as a sentinel of people's rights. Now, the practice of the paid news is nothing less than a design by the vested interests to corrupt the sentinel and thereby interfere with the rights of the common man viz, the right to have a true and impartial account of the state of affairs so that he is well informed and better equipped to make decisions.[12] It needs no magnifying lenses to see that those who deprive the common man from having a true and impartial account of things are eating in to the vitals of the democratic fabric that he cherishes so dearly, particularly because it also amounts to gross violation of right to information.[13] That this should be done by the press itself makes the matters more lamentable for the people of India who on November 26, 1949, gave the Constitution to themselves: the Constitution which among other things guarantees, the liberty of thought and expression.

3. PAID NEWS

The 2009 General Elections brought to the fore like never before a new syndrome plaguing Indian journalism: the paid news. Working under the garb of constitutional guaranty to the right to freedom of speech and expression the media-print as well as electronic- tried to make the most of it. It cashed on the frenzy of the contestants who were out to ensure by any which means that their opponents were down and out at the hustings.[14]

The concern over this blatant misuse of the constitutional guaranty by those who were supposed to observe the highest norms of professional ethics led to the setting up of a subcommittee to look in to this menace of paid news, to trace the factors lying at its

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[12] See, Paid news is just not on: Govt, Opposition agree, HT Correspondent, Hindustan Times, Email Author, New Delhi, March 06, 2010

The government said on Friday "paid news" was a serious matter, as it influenced the functioning of a free Press and there was an urgent need to protect the people's right to "unbiased information". "…when paid information is presented as news content, it could mislead the public and hamper their judgment to form a correct opinion," Information and Broadcasting Minister Ambika Soni said in response to a calling attention motion in the Rajya Sabha.

Paid news is broadly publishing/broadcasting advertisements masquerading as news.

[13] First recognized in the SP Gupta v. Union of India (1981 Supp SCC 87), it is now a statutory right under Right to Information Act, 2005.

[14] For a detailed discussion, see, story by Anuadharaman entitled 'The news we can abuse' published by thye Outlook on Dec 21, 2009.

root, to identify those who had been involved in this unhealthy practice, and to suggest remedial measures.[15]

Mr Paranjoy Guha Thakurata, the chief architect of the report on paid news, hints at the low ebb the press appears to have reached at:

> **"We have complaints against some of the leading newspapers in the country,". "… this is a cancer afflicting media as a whole, including television. It is undermining … the very process of democracy." [16]**

"The papers even have rate cards for election candidates," "These are rates for different types of news coverage – for interviews, for reporting rallies, even for trashing political opponents."

The Press Council of India has invited criticism from journalists and others for not doing justice with the report as the official report released by the PCI does not name any names who may have perpetrated this practice in the past.[17]What else, the Indian Legislature itself has asked the PCI to come out with the full report on paid news.[18] It has been reported in a section of the press that the chairman of the PCI could not have his say in the light of the pressure exerted by the publisher's guild who did not favour the publication of names involved in this unethical practice.[19]

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[15] See, the report on paid news released by the press council of India on 30.07.2010.

[16] See, Maseeh Rahman in Delhi, The Guardian, Monday 4 January 2010: India: **'Paid news' scandal hits major newspapers.'**

[17] See, report by P Sainath in The Hindu, infra.

[18] See, New Delhi, **Aug 19, 2010 (**PTI): **RS concerned over paid news items:**

Rajya Sabha on Thursday expressed concern over publication of paid news and demanded that the Press Council of India (PCI) should make public its report on the issue.

The matter was raised by Brinda Karat (CPI-M) during Zero Hour and was supported by members cutting across party lines. Karat said PCI is suppressing vital information of paid news "scandal".

She said a sub-committee of PCI had produced a 72-page report on the menace. But instead of making the report public, efforts are being made to remove the names big media houses, which indulged in cash for news.

"It would be tragic if a watchdog is reduced to lapdog of big corporate houses," she said.

[19] See, India's "Paid News" Scandal Blotted Out by Press Lords By P. Sainath 09 August, 2010, The Hindu, which runs as follows:

Presented with a chance to make history, the Press Council of India has made a mess instead. The PCI has simply buckled at the knees before the challenge of 'Paid News.'… The chairperson of the Press Council who firmly supported the exposure of the paid news offenders was outgunned by a very powerful publishers' lobby. The latter had its way by a slim majority. Justice G. N. Ray was all along for the sub-committee report (which named and shamed the guilty) being annexed to the 'final' one. He now finds himself saddled with an 'official' position that was not his but which he must defend as his own.

4. AND, HERE WE ARE

The paid news syndrome is an example of how even the most pious of the sentiments of the framers of our constitution can be taken advantage of by the vested interests. It is nothing less than making a mockery of the constitutional mandate.

It is no secret that the two institutions that are held in high esteem by the common man today are the Judiciary and the Press. The Press-by which term we mean all means of mass communication, whether print or electronic- has therefore to have a cautious treading where it is dealing with matters of grave social or national concern. The syndrome of the paid news has proved to be the most unwarranted presence in the scenario; not so much due to the money making involved as due to the orientation it is likely to give to the public opinion.

It may not be inappropriate to mention here that even if the surrogate advertisement have the names of their sponsors mentioned in the news item itself, the fact can hardly be ignored that the aura that a newspaper or the news channel has induces an amount of credibility to the paid news item in question. The news item gains credence first of all by virtue of the fact that, say, it has been published of flashed by such and such newspaper or news channel; everything else, like, whether it is paid or unpaid, follows later.

Finally, the paid news syndrome is an offshoot of the widespread corruption in public life which prompts a man to indulge in to what may be termed as unfair competitions. That the desperate ‘souls’ try to use the press for their own interest is evident from the very fact of their choosing these papers/channels to publish/flash their version of things rather than let the media do its job and come out with a version of its own to serve the larger public interest.

5. THE WAY OUT

Putting a blanket ban on the practice of the paid news is, however, not what is required to take us out of the present mesh. This is so for two reasons: first, the paid news may not always be bad because sometimes putting things in proper perspective may require, whether on the part of the individual or the institution, the help of paid news; and second, even where the practice of paid news is supposed to be an evil it requires amendment of some laws and development of certain mechanisms to evolve a

comprehensive solution to the problem. The PCI's latest report on the Paid News has hinted at such areas.[20] But as long as we keep on pressing for the disclosure of the names of the big fish only not appreciating the urgency of the legal reforms the solution will continue to elude us. This is so because, in law, a man can be punished only for the breach of it and nothing else.

In this regard the observations of the Editor's Guild of India are very apt:

'Both the media organisations and editors who indulge in it, and the customers who offer payment for such "paid news" are guilty of undermining the free and fair press, for which every citizen of India is entitled to'.[21]

Let me sum up by saying that the press will be performing its duty the best when the common man discovers that what the press says is nothing but the voice of his conscience.

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[20] Like, amendment to representation of peoples Act, 1951, Indian Penal Code, 1860 and sundry other measures. See, the copy of the report on paid news released by the PCI on July 30, 2010.

[21] See, Editors Guild of India condemns 'paid news': CNN-IBN

Posted on Dec 23, 2009 at 18:26 | Updated Dec 23, 2009 at 20:50, New Delhi which begins as: 'The Editors Guild of India is deeply shocked and seriously concerned at the increasing number of reports detailing the pernicious practice of publishing "paid news" by some newspapers and television channels, especially during recent elections.'

पत्रकारिता की आचार संहिता

डा. हरबंश दीक्षित*

"लोकतंत्र में पत्रकारिता के महत्व को समझते हुए इस बात की नितांत आवश्यकता है कि छल, छद्म एवं व्यापारिक मनोवृत्ति से ऊपर उठकर स्वतंत्र, निष्पक्ष एवं उत्तरदायी पत्रकारिता का विकास किया जाये। यह तभी सम्भव है जब पत्रकारिता जगत अपनी आचारसंहिता तय करने के साथ ही आत्मनियमन के द्वारा उसका पालन भी सुनिश्चित करे"

लोकतंत्र में जिस तरह इस बात पर आम सहमति रहती है कि स्वतंत्र व निष्पक्ष न्यायपालिका लोकशाही की नींव स्तम्भ है उसी तरह इस तथ्य में भी कोई मतभेद नहीं रहता कि स्वतंत्र और निष्पक्ष मीडिया ('पत्रकारिता') जनतंत्र की प्राणवायु है। अब इस बात में असहमति की गुंजाइश नहीं रह गयी है कि मीडिया (पत्रकारिता) अभिव्यक्ति का सबसे ताकतवर माध्यम है इसलिए इसके दुरूपयोग की सम्भावना रहती है और यही कारण है कि विश्व के हर कोने में यह अनुभवसिद्ध मान्यता है कि लोकहित में इसका नियमन करते रहने की आवश्यकता रहती है। पत्रकारिता के कार्यक्षेत्र और उपयोग में लाये जाने वाले साधनों का नियमन इसलिए भी जरूरी है ताकि उसकी साख बनी रहे, लोग उस पर भरोसा करते रहें और वह अपनी भूमिका को प्रभावी तरीके से निभा सके। सबसे अच्छी स्थिति तो आत्मनियमन की होती है और यदि किसी कारण ऐसा नहीं हो पाता तो सरकारी नियमन को अन्तिम विकल्प के रूप में स्वीकार किया जाना चाहिए।

पिछले डेढ़ सौ वर्षों में प्रिंट मीडिया ने अपनी नैतिक सर्वोच्चता के बल पर अपने सामने आने वाली सभी बाधाओं का मुकाबला किया है, उन्हें पराजित किया है, और अपना वर्चस्व स्थापित किया है। बीते कुछ दशकों में इलेक्ट्रानिक मीडिया का क्षेत्र बहुत अधिक व्यापक हो गया और जब वह प्रिंट मीडिया के डेढ़ सौ वर्षों की सुकीर्ति के संवेग के साथ जुड़ गया तो उसके वर्चस्व के विस्तार को अनन्तता मिल गयी। वर्चस्व विस्तार के अपने अलग गुण–दोष होते हैं। इससे समाज में अधिक से अधिक लोगों से संवाद स्थापित होता है तथा भौतिक आभामण्डल में वृद्धि होती है,

* डा०हरबंश दीक्षित, प्रधानचार्य/प्रोफेसर, एम॰एच॰पी॰जी॰ कालेज, मुरादाबाद

किन्तु इसके साथ ही इससे सर्वशक्तिमान होने की गलतफहमी की सम्भावना भी रहती है। प्रिंट और इलेक्ट्रानिक मीडिया (पत्रकारिता) के साथ भी कुछ ऐसा घटित होने लगा है। वे सर्वशक्तिमान होने की अहमन्यता से ग्रसित होते जा रहे हैं।

पत्रकारिता के लिए 'समाचार' की पवित्रता' के मायने अब लुप्त होते जा रहे हैं। उनमें अपने विचार को अदालती निर्णय के रूप में पेश करने की प्रवृत्ति बढ़ी है। कई बार तो वे विवेचक, अभियोजक और न्यायधीश की भूमिकाओं को एक साथ निभाने लगते हैं। ऐसे मामलों की कमी नहीं है जब मुकदमा शुरू होने से पहले ही लोगों को समाज की नजरों में दोषी साबित कर दिया गया। कई बार लोग अदालत से ससम्मान बरी भी हो जाते हैं किन्तु वे चूंकि मीडिया के माध्यम से समाज की निगाह में पहले ही दण्डित किए जा चुके होते हैं, इसलिए अदालती दोषमुक्ति उनकी प्रतिष्ठा को वापस लाने में भूमिका नहीं निभा पाती।

खबरों से जुड़े तकरीबन सभी चैनल इस वक्त अपराध से जुड़ी खबरों पर खास कार्यक्रम पेश कर रहे हैं। टी.आर.पी. बढ़ाने की अन्धी दौड़ उनके लिए विवेक को अप्रसांगिक कर दिया है। कानून के प्रति भी वे बहुत संवेदनशील प्रतीत नहीं होते। जज्बाती और ओछी भाषा का प्रचलन बढ़ गया है। आत्मनियमन के लिए जरूरी परिपक्वता से वे कोसों दूर हैं। दूसरी खबरों के प्रस्तुतीकरण का भी कोई पुरसाहाल नहीं है। अतिशयोक्ति अलंकार उनका स्थायी भाव होता जा रहा है। साक्षात्कार लेते समय शिष्टाचार की जगह पुलिस थाने की पूछताछ की शैली हावी होती जा रही है। रिपोर्टिंग के समय वे शोक और उत्सव के बीच के नाजुक अन्तर को नहीं समझना चाहते। उन्माद फैलाने वाली खबरों के प्रसारण में सावधानी की आवश्यकता नहीं महसूस करते। इसी बीच खोजी पत्रकारिता का नया स्वरूप 'स्टिंग पत्रकारिता' काफी लोकप्रिय होता जा रहा है। बाहरी तौर पर तो यह भ्रष्टाचार के विरुद्ध शंखनाद जैसा निरूपित किया जाता है, किन्तु इसको लेकर भी कई सवाल उठने शुरू हो गये हैं।

मीडिया धीरे–धीरे अदालत की भूमिका को अपनाता जा रहा है। यह समाज और मीडिया दोनों के लिए ठीक नहीं है। मद्रास उच्च न्यायालय के मुख्य न्यायमूर्ति ए.पी.शाह ने 22 अप्रैल 2006 को चेन्नई में आयोजित एक विचार गोष्ठी में मत व्यक्त किया कि मीडिया द्वारा मुकदमों का विचारण न्याय हत्या के तुल्य है। इसी

तरह का विचार ब्रिटेन के स्वनामधन्य न्यायाधीश लार्ड डेनिंग ने 'शेरिंग केमिकल्स बनाम् फाकमैन'' नामक मुकदमें में व्यक्त किया था। लार्ड डेनिंग ने अपने निर्णय में कहा था कि इसमें कोई सन्देह नहीं कि प्रेस की आजादी स्वतंत्रता की आधारशिला है किन्तु इसके महत्व को लेकर अक्सर गलतफहमी होती रहती है। लार्ड डेनिंग ने आगे कहा कि प्रेस की आजादी का मतलब यह नहीं होता कि प्रेस को किसी की प्रतिष्ठा नष्ट करने, भरोसा तोड़ने या न्याय की धारा को दूषित करने की आजादी दी जा सकती है।

स्वतंत्र न्याय प्रशासन और स्वतंत्र प्रेस दोनों में ही जनता के हित निहित हैं किन्तु प्रेस को न्यायिक व्यवस्था में दखलन्दाजी की अनुमति नहीं दी जा सकती। अदालत की जिम्मेदारी है, और यह अभियुक्त का कानूनी अधिकार भी है कि उसके मुकदमें का स्वतंत्र व निष्पक्ष विचारण हो। अभियुक्त का यह भी कानूनी अधिकार है कि जब तक उसके मुकदमे की अन्तिम सुनवाई न हो जाय तब तक जनता या अदालत के मन में उसके प्रति पूर्वाग्रह न पैदा किया जाय। यही कारण है कि भारत, अमेरिका और ब्रिटेन जैसे देशों में अभियुक्त को तब तक निर्दोष माना जाता है जब तक कि वह दोषी साबित न हो जाय। न्यायालय अवमानना अधिनियम 1971 के अनुसार ऐसा कोई प्रकाशन जो किसी मामले के निष्पक्ष विचारण में बाधा पैदा करने वाला हो या बाधा पैदा करने की प्रवृत्ति रखता हो तो उसे अदालत की अवमानना माना जाएगा। प्रिंट मीडिया और इलेक्ट्रानिक मीडिया में मुकदमों की रिपोर्टिंग में आम तौर पर ऐसी भाषा इस्तेमाल की जाती है जिसमें निर्णय जैसी भाषा का इस्तेमाल करते हुए अभियुक्त को दोषी कर दिया जाता है जो न्यायालय के निष्पक्ष विचारण में बाधा पैदा करने योग्य या बाधा पैदा करने की प्रवृत्ति वाला है। इसलिए न्यायालय के सामने लम्बित मामलों की रिपोर्टिंग के लिए व्यापक आचार संहिता की आवश्यकता है।

न्यायालय के सामने लम्बित मामलों की रिपोर्टिंग करने वाले संवाद्दाता को कानून के तकनीकी पहलुओं के बारे में जानकारी होना चाहिए। 18 वर्ष से कम आयु के अभियुक्त बच्चों या यौन अपराध की शिकार महिला के बारे में जानकारी देना कानूनी अपराध है। इसलिए रिपोर्टिंग के समय इस सम्बन्ध में सावधानी बरती जानी चाहिए। उन्हें इस बात का भी ख्याल रखना चाहिए कि आरोपी के अभियोग

के बारे में निश्चायत्मक भाषा का इस्तेमाल न करें। यदि तथ्यों को प्रस्तुत करना जरूरी हो तो उसे पेश करने से पहले यह स्पष्ट कर दें कि वे पुलिस रिपोर्ट विवेचना या लोगों की बातचीत के आधार पर प्राप्त तथ्यों को प्रस्तुत कर रहे हैं। इसके लिए 'पुलिस रिपोर्ट के अनुसार', रिकार्ड के अनुसार' या 'अदालत में दिये गये बयान के अनुसार' जैसी शब्दावली का प्रयोग किया जाना चाहिए। इसके साथ ही अभियुक्त के पक्ष को भी उतनी ही प्रमुखता दी जानी चाहिए जितनी अभियोजन के पक्ष को दी गयी हो। रिपोर्टर को तथ्यों को तोड़–मरोड़कर पेश करने से बचना चाहिए। उन्हें यह बात सदैव ध्यान में रखनी चाहिए कि उनका काम मुकदमों की सुनवायी करना या उसका निर्णय देना नहीं है। उन्हें तथ्यों को उसके मूल रूप में निष्पक्षता पूर्वक प्रस्तुत करना है।

खोजी पत्रकारिता ने कई रहस्यों से पर्दा उठाकर समाज को महत्त्वपूर्ण सूचनाएं दी हैं। स्टिंग पत्रकारिता के रूप में उसका एक नया रूप सामने आया है। यह एक तरह की गुप्त कार्यवाही होती है जिसमें रिपोर्टर भ्रष्टाचार के दुष्चक्र में छद्म रूप से शामिल होने का दिखावा करके गैर कानूनी गतिविधियों को उजागर करता है। तहलका डाट काम से लेकर सांसद निधि के उपयोग में व्याप्त भ्रष्टाचार तक, अब तक इसके कई अलग–अलग संस्करण आ चुके हैं। इसके कानूनी और नैतिक पहलुओं पर बहस अभी भी जारी है। ब्रिटेन इस तरह के अनुभवों से गुजर चुका है तथा उनके अनुभव हमारे लिए प्रासंगिक हो सकते हैं। ऐसा ही एक मामला 'द संडे टाइम्स' से जुड़ा हुआ है।

ब्रिटेन के एक अखबार 'द संडे टाइम्स' ने 10 जुलाई 1994 के अंक में कुछ सांसदों के बारे में एक खबर प्रकाशित की जिसमें स्टिंग कार्यवाही के माध्यम से यह साबित किया गया था कि कई सांसदों ने संसद में प्रश्न पूछने हेतु एक हजार पौंड रिश्वत के रूप में लिया था। दो कंजरवेटिव सांसदों को तुरन्त निलम्बित कर दिया गया। 13 जुलाई को इस विषय पर जब हाउस आफ कामन्स में बहस हुयी तो कई सांसदों ने मीडिया के नैतिक और कानूनी अधिकार पर प्रश्न खड़े किये। मामला 'प्रेस शिकायत आयोग' के सामने पहुंचा, जहां अखबार के ऊपर आचार संहिता तोड़ने की शिकायत की गयी।

ब्रिटेन का 'प्रेस शिकायत आयोग' कानून द्वारा स्थापित संस्था नहीं है, किन्तु अपने निष्पक्ष कार्यों से उसने बहुत प्रतिष्ठा हासिल की है। यह पत्रकारिता द्वारा आत्मनियमन के लिए स्थापित की गयी संस्था है। समाचार पत्रों के सम्पादक इसके सदस्य हैं तथा सबकी सहमति से आचार संहिता बनाई गयी है। इस संहिता के पैरा 7 में कहा गया है कि कोई भी पत्रकार दुर्व्यपदेशन या छल से किसी खबर या फोटो को हासिल नहीं करेगा। जब तक लोकहित में ऐसा करना आवश्यक नहीं हो, किसी दस्तावेज या चित्र को उसके मालिक की अनुमति के बिना नहीं हटाया जाना चाहिए तथा खबर हासिल करने के लिए छल–कपट का प्रयोग तभी अनुमन्य है जब लोकहित में ऐसा करना जरूरी हो या दूसरी किसी अन्य साधन के प्रयोग द्वारा उसे हासिल करना सम्भव नहीं हो। इसी तरह पैरा 5 में पत्रकारों से अपेक्षा की गयी है कि जब तक लोकहित में ऐसा करना जरूरी नही हो वे छद्म और गोपनीय तौर–तरीकों से खबर हासिल न करें ओर न ही इस तरह से प्राप्त की गयी किसी खबर को प्रकाशित करें। पैरा 5 से 7 में छल–कपट को केवल तभी मान्यता दी गयी है जब वह लोकहित में हो। लोकहित में पैरा 18 में परिभाषित किया गया है।

पैरा–18 में लोकहित के अर्थ को स्पष्ट करते हुए कहा गया है कि जब समाचार का संकलन इसलिए किया जा रहा हो कि किसी अपराध का सुराग लगाना हो या उसे उजागर करना हो या जब जन स्वास्थ्य या सुरक्षा के हित में ऐसा करना जरूरी हो या जब जनता के किसी व्यक्ति या संगठन द्वारा गुमराह किए जाने से बचाने के लिए सूचना हासिल करना जरूरी हो तो इन उद्देश्यों के लिए प्राप्त की गयी सूचना को लोकहित में हासिल की गयी सूचना माना जाएगा। प्रेस शिकायत आयोग ने सभी पक्षों पर गौर करते हुए 17 जुलाई, 1994 को अपने निर्णय में कहा कि 'द संडे टाइम्स' ने खबर को हासिल करने के लिए जो छद्म तरीका अपनाया था वह आचार संहिता का उल्लंघन नहीं था, क्योंकि हासिल की गयी सूचना पैरा–18 में परिभाषित लोकहित की अपेक्षाओं के अनुरूप थी तथा उसे अन्य किसी दूसरी तरह से हासिल नहीं किया जा सकता था। अब चूंकि हमारे इलेक्ट्रानिक मीडिया के स्टिंग आपरेशनों पर भी अंगुली उठनी शुरू हो गयी है, अतः हमें भी ब्रिटिश प्रेस कौंसिल के पैरा–5 तथा पैरा–7 को अपनी आचार संहिता में शामिल कर लेना चाहिए। पैरा–18 के लोकहित की परिभाषा में एक शर्त यह

जोड़ने की आवश्यकता है कि स्टिंग आपरेशन करने वाले का कोई आर्थिक या लौकिक हित नहीं होना चाहिए। भारत में इलेक्ट्रानिक मीडिया पर आरोप लगने लगा है कि वे स्टिंग कार्यवाहियों को लोकहित में नहीं बल्कि अपने हित में टी.आर. पी. बढ़ाने के लिए करते हैं और उनकी नजर उसके माध्यम से होने वाली करोड़ों रूपये की कमाई पर रहती है। अतः लोकहित में किए जाने वाले स्टिंग आपरेशनों को केवल तभी न्यायानुमत माना जाए, जब उसे अंजाम देने वाले लोगों के आर्थिक या अन्य हित न जुड़े हों।

भारतीय मीडिया समाचारों तथा चित्रों के प्रकाशन के मामले में भी परिपक्व नहीं हो पाया है। ऐसे समाचार जो सामाजिक द्वेष फैलाते हों या जिनसे समाज में भय और आतंक का माहौल बनता हो, उन्हें दिखाने या प्रकाशित करने में आत्मानुशासन की आवश्यकता होती है। उनसे समाज का कोई हित नहीं होता बल्कि कई बार उससे सामाजिक हितों को ठेस पहुंचती है। उदाहरण के लिए गोधरा और उसके बाद के दंगों के बारे में जो छापा या दिखाया गया वह कई बार अतिरेक की सीमा तक पहुंच गया। उसके ठीक उलट अमेरिका में 11 सितम्बर को हुए आतंकी हमले में या डिस्कवरीयान के दुर्घटनाग्रस्त होने के बाद शायद ही किसी व्यक्ति के शव को मीडिया में प्रकाशित किया गया हो। हमें ऐसे मामलों में आत्मनियमन करने की जरूरत है तथा शोक और दुर्घटना तथा सामाजिक हिंसा की खबरों को यथासम्भव संक्षेप में तथा केवल शोक और दुःख के परिवेश में दिखाए जाने की संस्कृति विकसित करने की आवश्यकता है, ताकि समाज को जानकारी देने का उद्देश्य भी पूरा हो जाए और समाज पर उसका प्रतिकूल प्रभाव भी न पड़े।

हमारे देश में प्रेस कौंसिल ऑफ इंडिया का कानूनी ढांचा है। प्रेस परिषद अधिनियम[1] के अन्तर्गत उसे आचार संहिता तैयार करने का अधिकार दिया गया है। अपने इस अधिकार का प्रयोग करते हुए परिषद ने आचार संहिता तैयार की है। एडीटर्स गिल्ड ऑफ इंडिया ने भी 20 दिसम्बर 2002 को एक आचार संहिता जारी की। इसके अलावा प्रेस कौंसिल ने समय–समय पर जरूरी दिशा–निर्देश जारी किये

[1] 1978 की धारा 13(2) (ख)

हैं। सभी जगह मोटे तौर पर एक जैसी बातें कहीं गयी हैं। जैसे गलत, आधारहीन, अशोभनीय, दिग्भ्रमित करने वाले एक पक्षीय, मानहानिकारक या अश्लील समाचार न प्रकाशित किए जाएं। समाचार संकलन में धोखे का सहारा नहीं लिया जाय। साम्प्रदायिक तनाव महामारी या प्राकृतिक प्रकोप से जुड़ी हुई खबरों के प्रकाशन में सावधानी बरती जाय। हिंसक गतिविधियों को महिमामंडित न किया जाए तथा सतीप्रथा और दूसरी अन्य सामाजिक कुरीतियों व अन्धविश्वासों को बढ़ावा न दिया जाय। दुःख और विषाद के क्षणों में फोटोग्राफरों द्वारा घुसपैठ से हर हालत में परहेज किया जाय और अपनी चूक के लिए क्षमा मांगी जाय। दूसरे देशों जैसे स्वीडन, इंग्लैंड, अमेरिका तथा फ्रांस में भी मीडियाकर्मी के लिए कमोवेश इसी तरह की आचार संहिताएं हैं।

आचार संहिता की सबसे बड़ी कमजोरी और कभी–कभी सबसे बड़ी ताकत यह होती है कि वे आत्मनियमन के नैतिक मार्ग निर्देश होते हैं। वे अदालतों के माध्यम से लागू करने के लिए आशयित नहीं होते। इसकी अपनी सीमा यह होती है कि परिपक्व सोच के लोगों के लिए बनायी जाती है। नैतिकता, प्रतिष्ठावान व्यक्ति की सबसे बड़ी ताकत होती है। यह उसे अजेय बना देती है। पत्रकारिता राज्य व्यवस्था की तरह ही प्रतिष्ठित है। इसलिए आचार संहिता को तय करने, उसमें संशोधन करने तथा उसे अद्यतन बनाने के साथ ही साथ आचार संहिता का ईमानदारी पूर्वक पालन करने वाला चरित्र विकसित करने की आवश्यकता है, ताकि माखनलाल चतुर्वेदी और विष्णु पराड़कर जैसे लोगों द्वारा अर्जित लोक विश्वास बरकरार रह सके तथा उनके द्वारा हासिल सम्मान कालजयी हो। आचार संहिता तथा उसका कठोरतापूर्वक पालन इसलिए भी जरूरी है कि मीडिया पर अंकुश लगाने के लिए अन्तिम विकल्प के रूप में समाज को कानून का सहारा न लेना पड़े।

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''संवैधानिक अव्याकृतानि''

अशोक मेहता*

"भारत के संविधान के अंतर्गत संसदीय विशेषाधिकार एवं उन्मुक्तियाँ, संवैधानिक पद धारक व्यक्ति की नागरिकता, सम्पदा का अधिकार, अल्पसंख्यक कौन है, और कौन सी संस्था अल्पसंख्यक शिक्षा संस्था है आदि कुछ ऐसे विषय हैं जिन पर सुस्पष्टता के साथ संविधान का मनतव्य प्रकट नहीं होता अर्थात् वे अव्याकृत (अस्पष्ट) हैं।"

विश्व इतिहास में जिन महापुरुषों के वैचारिक आन्दोलनों का सर्वाधिक प्रभाव पड़ा उनमें महात्मा बुद्ध का मुर्धन्य स्थान है। हजारों वर्ष पश्चात् भी विश्व में बौद्ध संख्या में तीसरे स्थान पर हैं तथा प्राच्य भूमण्डल में सर्वाधिक हैं। तथागत बुद्ध ने कुछ प्रश्नों के उत्तर अपने जीवन काल में कभी नहीं दिये जिन्हें अव्याकृत के रूप में जाना जाता है। बाद में उनके अनुयायियों ने अपने–अपने ढंग से इन प्रश्नों पर उनके मौन को परिभाषित करने का प्रयास किया। बौद्ध मतावलम्बियों एवं सम्पूर्ण दार्शनिक जगत के लिए महात्मा बुद्ध का यह मौन आज भी शास्त्रार्थ एवं वाद–विवाद का विषय बना हुआ है।

भारतीय संविधान के सिंहावलोकन द्वारा भी कुछ ऐसे प्रश्न सामने आते हैं जो अव्याकृतानि के रूप में गहन मीमांसा एवं स्पष्टता की मांग करते हैं।

भारतीय समाज, हम भारत के लोग, जब भी इन प्रश्नो को पूँछते हैं तो भारतीय संविधान के विभिन्न स्तम्भ व संगठन मौन धारण कर लेते हैं, और कोई स्पष्ट उत्तर प्राप्त नहीं होता। इनका कोई स्पष्टीकरण भी नही है। प्रश्नों को अनदेखा करना, उत्तर टाल देना या स्पष्ट मत देने से कतराना समाज के आन्तरिक जिज्ञासा की शान्ति नहीं कर सकता।

आइये, इन संवैधानिक अव्याकृतानि का अवलोकन करें।

संसदीय विशेषाधिकार एवं उन्मुक्तियाँ :–

* अधिवक्ता उच्च न्यायालय, इलाहाबाद, पूर्व मुख्य स्थायी अधिवक्ता, उत्तर प्रदेश

अनुच्छेद 105, संसद एवं उसके सदस्यों को विशेषाधिकार, उन्मुक्तियाँ एवं शक्ति प्रदान करता है, जिनके अनुसार आज भी भारत में संविधान के प्रारम्भ में ब्रिटिश पार्लियामेन्ट के हाउस आफ कामन्स के विशेषाधिकार के प्रति निर्देश है तथा भारत में सांसदो को वही विशेषाधिकार और शक्तियॉ दी गयी हैं जो ब्रिटीश पार्लियामेन्ट के सदस्यों की 26 फरवरी 1950 के तुरन्त पश्चात थी।[1] सर्वप्रथम सर्चलाइट केस में सम्पादक शर्मा को विशेषाधिकार भंग करने के लिये दण्डित किया गया तब उच्चतम न्यायालय ने निर्णय दिया कि सदन को अपनी कार्यवाही प्रकाशन निषेध करने का विशेषाधिकार है।[2] करंजिया को ब्लिट्ज् में सदन के सदस्य की गरिमा के प्रतिकूल लिखने का दण्ड दिया गया, सुब्रमण्यम स्वामी को इमर्जेन्सी मे राज्य सभा से निष्कासित किया गया, उसके पश्चात् इन्दिरा गाँधी को 1979 मे निष्कासित किया गया। राजाराम पाल सहित ग्यारह सदस्यों को निष्कासित करने का भी मामला है जो टी0वी0 स्टिंग आपरेशन ''द्रोण'' की परिणति थी।

वैसे तो राष्ट्रपति के द्वारा केशव सिंह के वाद में निर्देश संख्या 1 में दिये गये निर्णय से यह स्पष्ट हो गया है कि मूलाधिकार एवं विशेषाधिकार मे संघर्ष होने पर समन्वित अर्थान्वयन किया जाना चाहिये।[3] लेकिन, विषय यह है कि क्या संसदीय विशेषाधिकार संसद के सदस्यों को रिश्वत लेने तथा संसद मे गैर कानूनी कार्य करने की छूट देता है। दूरदर्शन पर पूरी दुनिया ने देखा कि सांसदों को करोड़ों रूपये की रिश्वत दी गयी। संसद में हल्ला हुआ, लेकिन कही किसी भी संवैधानिक स्तम्भ, या संस्था ने एकमत मे विरोध नही किया। लोकसभा अध्यक्ष मौन स्वीकृति के द्योतक बने। संसदीय समिति ने कहा, कोई दोषी नही और सबको छोड़ दिया। दूरदर्शन चैनलों ने भी सच छिपाने मे योगदान किया। कहीं कोई आवाज नहीं, कहीं कोई कानून नही। सभी अपने–अपने दायित्वों से कतरा रहे हैं। अपने कर्त्तव्यों से विमुख हैं। सर्वत्र एक अजीब सा मौन है, कोई उत्तर देने के लिये तैयार नही है।

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[1] राजाराम पाल बनाम स्पीकर ;2007 III SCC P-184)
[2] (AIR 1959 SC 395)
[3] (AIR 1965 SC 745) A

यहाँ तक कि उच्चतम न्यायालय ने झारखण्ड मुक्ति मोर्चा रिश्वत काण्ड में निर्णय दिया कि संसद सदस्य को रिश्वत देने का काम संसद मे होता है तो उसे न्यायालय अभियोजित भी नही करेगा।[4]

संसद के किसी भी अनुच्छेद का उद्देश्य भ्रष्टाचार फैलाना नही हो सकता। कोई भी सांसद/विधायक अगर किसी आपराधिक गतिविधि या षड्यन्त्र मे भाग लेता है तो विशेषाधिकार का हकदार कदापि नही हो सकता। वह संरक्षण दिये जाने योग्य नहीं है, यह पाप है, जिसका कोई प्रायश्चित नहीं। फिर क्यों यह संवैधानिक अव्याकृतानि, यह मौन क्यों ?

संवैधानिक पद धारक केवल भारतीय मूल का नागरिक :–

अभारतीय नागरिक जिन्होंने बाद में भारत की नागरिकता ले ली हो या विदेशों में उत्पन्न नागरिक जिनके माता–पिता या दादा–दादी भारत के नागरिक हों कि भारत में उच्च पदों, यथा राष्ट्रपति, उपराष्ट्रपति, प्रधानमंत्री या भारत के मुख्य न्यायाधीश, को धारण करने की योग्यता का मुद्दा राष्ट्रीय परिचर्चा के उपरांत गहन राजनैतिक प्रक्रिया द्वारा परीक्षित किया जाना चाहिये।[5]

राज्य के दो तत्व है – एक भौगोलिक क्षेत्र, दूसरा उस क्षेत्र मे निवास करने वाला मानव समुदाय। उसमे तीन प्रकार के व्यक्ति होते हैं – नागरिक वे व्यक्ति होते हैं जो राज्य के पूर्ण सदस्य हैं और राज्य के प्रति निष्ठा रखते है। नागरिकों को सभी सिविल एवं राजनैतिक अधिकार होते हैं। दूसरा प्रकार उन व्यक्तियों का होता है जो किसी अन्य राज्य के नागरिक होते हैं लेकिन यहाँ निवास करते हैं। इस प्रकार के निवासियों के संवैधानिक अधिकार सीमित होते हैं। उदाहरण के लिये भारत में सभी को प्राण एवं दैहिक स्वतन्त्रता का अधिकार है, लेकिन अनुच्छेद 19 में उल्लिखित स्वतन्त्रता का अधिकार केवल नागरिको को है।

प्रश्न उठता है कि क्या ऐसे अन्यदेशीय व्यक्ति को जो जन्म से तो भारत का नागरिक न हो, लेकिन परिस्थितिजन्य कारणों से राज्य के प्रति निष्ठा दिखाकर

[4] (AIR 1998 SC 2120)
[5] 4.21 of Report of NCRWC Volume (1) P- 141).

भारत की नागरिकता प्राप्त की हो तो ऐसे व्यक्ति को सभी सिविल तथा राजनैतिक अधिकार के साथ–साथ भारतीय सर्वोच्च संवैधानिक पदो पर आसीन होने का अधिकार भी मिलना चाहिये। ऐसा प्रवर्ग भारत मे बहुत छोटा है, लेकिन प्रश्न राष्ट्रीय परिचर्चा हेतु महत्वपूर्ण है।

22 फरवरी 2000 को भारतीय संविधान के कार्य की समीक्षा हेतु एक राष्ट्रीय आयोग बनाया गया, जिसके अध्यक्ष भारत के पूर्व मुख्य न्यायाधीश वैंकट चेलैया नामित किये गये, साथ ही दस अन्य गणमान्य आयोग के सदस्य भी नामित हुये।

इस आयोग के सम्मुख उपरोक्त प्रश्न भी संदर्भित था। आयोग के सदस्य श्री पी0ए0 संगमा स्पष्ट रूप से उपरोक्त विषय पर भी आयोग का मत चाहते थे। वैसे तो इस प्रश्न पर आयोग के अन्य सदस्य भी विचार–विमर्श हेतु सहमत थे, लेकिन केवल प्रतिक्रिया के भय से आयोग मौन रह गया। आयोग के एक सदस्य स्वयं रिपोर्ट मे ही कहते हैं – '' हमें इस विषय पर आयोग का मत अवश्य देना चाहिये था न कि '' फ्यूजीमोरी'' जैसी दुर्घटना का इन्तजार करना चाहिये।[6] जब आयोग यह स्वीकारता है कि सर्वोच्च संवैधानिक पदों पर मूल भारतीय नागरिकों के आसीन होने का प्रश्न एक महत्वपूर्ण गहन राष्ट्रीय चिन्तन का विषय है तब वह इस प्रश्न पर राष्ट्रीय स्तर पर विचार–विमर्श कर अपना मत देने के दायित्व से क्यों पीछे हटा ? क्यों आयोग के एक सदस्य संगमा को त्यागपत्र देना पड़ा। राष्ट्रीय संवैधानिक आयोग किन कारणों से केवल आह्वान करता है कि – " The issue of eligibility of non indian born citizen or those whose parents or grand parents were citizen of India to hold high officers in the real in such as President, Vice-President, Prime Minister and Chief Justice of India should be examined in depth through a political process after a national debate "[7]

क्यों राष्ट्र की संवैधानिक संस्थायें उपरोक्त प्रश्न को अव्याकृतानि मानती हैं।

सम्पदा का अधिकार

[6] Additional Note to Report Valume (I) P- 386)
[7] 4.21 of Report of NCRWC Volume (1) P- 141).

भारतीय संविधान मे Right to Property सभी नागरिकों को दिया गया है। 44 वें संशोधन से पूर्व यह अनुच्छेद 31 में मूलाधिकार था, तत्पश्चात् अनुच्छेद 300 (ए) मे संवैधानिक अधिकार है।

अनुच्छेद 31, 14, 19 के अपवाद में धारा 31 (A) (B) (C) (D) जोड़ी गयी। ये अनुच्छेद केवल दस पन्द्रह पंक्तियों के हैं, लेकिन इन धाराओ पर विचार विमर्श में उच्चतम न्यायालय का अधिकतम समय लगा होगा। उच्च न्यायालयो में लगे समय की गणना नही की जा सकती। उच्चतम न्यायालय की सबसे विशाल तेरह न्यायाधीशों की न्यायपीठ ने इस पर विचार किया।[8] तत्पश्चात कई प्रमुख निर्णय आये, लेकिन केशवानन्द एवं अन्य निर्णेयों में क्या निर्धारित हुआ, उसका क्या अर्थ है, क्या प्रभाव है, इस पर मतभेद अभी भी समाप्त नही हुआ है।

अनुच्छेद 19 (A) (6) मे सभी नागरिको को "To acquire hold and dispos property" था, जिसे 44वें संशोधन से 1978 मे अनुच्छेद 31 के साथ–साथ निरसित किया गया।

उल्लेखनीय है कि उच्चतम न्यायालय की ग्यारह सदस्यीय पीठ ने अभिनिर्णित किया है कि अनुच्छेद 14, 19 एवं 21 एक स्वर्ण त्रिकोण बनाते हैं, जिनकी कसौटी पर संवैधानिक संशोधनों को भी परीक्षित किया जाना चाहिये।[9]

अगर ऐसा है तो क्या उपरोक्त परिप्रेक्ष्य मे सम्पत्ति का अधिकार अपने आप में एक महत्वपूर्ण संवैधानिक अधिकार नही बन जाता।

लेकिन आज स्वयं उच्चतम न्यायालय अपने पहले के सभी निर्णयों का पुनरीक्षण कर विचार कर रहा है कि Right to Property एक मानव अधिकार है तब तो यह मूल अधिकार से भी ऊपर है।

जब यह हर नागरिक का दायित्व है कि अपनी समृद्ध परम्परा तथा साझा संस्कृति का सम्मान व संरक्षण करे तथा जन सम्पत्ति को सुरक्षित रखे तथा

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[8] AIR 1973 SC 1461)

[9] ओ0एल0 कोल्हा।

प्राकृतिक वातावरण, वन, झील, नदी, वन्य जीव क रक्षा करे और प्राकृतिक सम्पदा का संवर्धन करे, तब क्या Right to Property का अर्थ केवल भौतिक सम्पत्ति है या उसक भावार्थ समस्त सम्पदा से है।

हम सभी भारतीय संवैधानिक सर्वोच्च संगठन क्यों भारतीय सम्पदा के संरक्षण, संवर्धन एवं समुचित, सम्यक् दोहन के प्रति मौन हैं ? सभी नागरिकों को संवर्धन व संरक्षण के साथ–साथ सम्पदा का संवैधानिक मूल अधिकार प्रदान किया जाना आज की आवश्कता है।

धर्म व संस्कृति

अनुच्छेद 29 और 30 अल्पसंख्यकों को कुछ अधिकार प्रदान करते हैं। अनुच्छेद 30 विशेष रूप से यह उल्लेख करता है कि अल्पसंख्यकों को अपनी रूचि की शिक्षा संस्थाओ की स्थापना और प्रशासन का अधिकार होगा। ऐसी संस्थाओ को सामान्यतया अल्पसंख्यक शिक्षा संस्था कहा जाता है। किन्तु ऐसा प्रतीत होता है कि अल्पसंख्यक कौन है, और कौन सी संस्था अल्पसंख्यक शिक्षा संस्था है, इन प्रश्नों का कोई स्पष्ट उत्तर नही है।

इस विषय पर केरल शिक्षा विधेयक[10] से लेकर सेंट स्टीफन्स कालेज''[11] तक बहुत से निर्णय हुये जिन पर विधिवेत्ताओं का ध्यान आकर्षित हुआ है। फिर भी इन दो अभिव्यक्तियों की कोई स्पष्ट परिभाषा सामने नही आयी है। इन विनिश्चयों का एक दुखद प्रभाव यह है कि अल्पसंख्यकों को बहुसंख्यकों की तुलना मे अधिक अधिकार दिये जा रहे हैं। अंग्रेजी के प्रसिद्ध लेखक जार्ज ओरविल के मुहावरे मे कहें तो अल्पसंख्यकों को अधिक समान बना दिया गया है। इससे अल्पसंख्यकवाद का जन्म हुआ। यही नहीं हिंदू समाज के कुछ संप्रदायो ने भी विवश होकर यह मांग की कि उन्हे अल्पसंख्यक का दर्जा दिया जाये।[12] उच्चतम न्यायालय ने रामकृष्ण मिशन के अल्पसंख्यक होने के दावे को अस्वीकार करते हुये यह कहा कि

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[10] AIR 1957 SC 956 -
[11] AIR 1992 SC 1630
[12] AIR 1995 SC 2089; (1995) 4 SCC

स्वामी रामकृष्ण और उनके शिष्य स्वामी विवेकानंद ने जो उपदेश दिया था वह हिंदू धर्म से भिन्न कोई धर्म नही था, वह हिंदू धर्म ही था। उद्देशिका में राष्ट्र की एकता और अखंडता का उद्घोष है। अनुच्छेद 14 में समता की प्रत्याभूति है। अनुच्छेद 15 धर्म के आधार पर विभेद को प्रतिषिद्ध करता है। फिर भी हमारे देश मे यह स्थिति है कि अल्पसंख्यकों का अलग बने रहने और राष्ट्र की मुख्यधारा में न जुड़ने में निहित स्वार्थ है। अल्पसंख्यकों को कुछ विशेषाधिकार हैं जो बहुमत वाले हिंदू समाज को नही। विभाजन के मार्ग से एकता की प्राप्ति नही होती। अल्पसंख्यकों के प्रति न्याय करने का अर्थ बहुसंख्यकों के प्रति अन्याय करना नही है।

उच्चतम न्यायालय नें[13] (5 न्यायाधीशो की पीठ) 1993 में निम्नलिखित प्रश्न विशालतर न्यायपीठ को निर्दिष्ट किए :

1. अनुच्छेद 30 में अल्पसंख्यक अभिव्यक्ति से क्या अभिप्रेत है और उसकी अंतर्वस्तु क्या है ?
2. अल्पसंख्यक शिक्षा संस्था से क्या अभिप्रेत है और कोई संस्था अल्पसंख्यक है या नही इसको जाँचने की कसौटी क्या है ?
3. क्या सेंट स्टीफेन्स का निर्णय सही है ?

सेंट स्टीफेन्स में यह अभिनिर्धारित हुआ कि राज्य या विश्वविद्यालय यह उपबंध नही कर सकता है कि अल्पसंख्यक शिक्षा संस्था में प्रवेश गुणागुण के आधार पर दिया जाएगा। न्यायपीठ को ऐसा प्रतीत हुआ कि वह निर्णय गलत था। न्यायपीठ को यह निर्देश उचित नही जान पड़ा कि अल्पसंख्यक संस्थायें कुल स्थानों के 50 प्रतिशत तक अपने समुदाय के व्यक्तियों को प्रवेश दे सकती है।

तदनुसार मार्च 1994 में सात न्यायाधीशों की एक पीठ गठित की गयी थी। इस पीठ ने सात प्रश्न बनाए। 1997 में कुछ अन्य पक्षकार भी न्यायालय के समक्ष प्रस्तुत हुए। उस न्यायपीठ ने मामले को 11 न्यायाधीशों की विशालतर पीठ को निर्दिष्ट किया। 1995 मे यह मामला 11 न्यायाधीशों के की पीठ के समक्ष रखा

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[13] टी0एम0ए0 पाई फाउंडेशन बनाम कर्नाटक राज्य (1993) 4 एस0सी0सी0 286

गया। किंतु कुछ सप्ताह बाद न्यायपीठ विघटित कर दी गयी।[14] लंबी प्रतिक्षा के बाद उच्चतम न्यायालय की 11 न्यायाधीशों की पीठ ने इस विषय की सुनवाई करके सन् 2002 में निर्णय दिया[15]। जिसमें यह अभिनिर्धारित हुआ :

1. शिक्षा संस्थाओ की स्थापना करने और उन्हे प्रशासित करने का अधिकार प्रत्येक नागरिक का है।[16] यह अधिकार अल्पसंख्यकों को विनिर्दिष्ट रूप से अनुच्छेद 30 के अधीन दिया गया है। ये अधिकार केवल अल्पसंख्यकों के नही हैं। ये सबको उपलब्ध हैं।

2. ''भाषिक अल्पसंख्यक'' और '' धार्मिक अल्पसंख्यक '' कौन हैं इसकी अवधारणा करने के लिये राज्य को इकाई मानना होगा।

3. अनु0 30 के अधीन अल्पसंख्यकों के अधिकार मे वृत्तिक संस्थाएं (इंजीनियरी, आयुर्विज्ञान आदि) भी आती हैं।

4. जिन अल्पसंख्यक संस्थाओं को राज्य से वित्तीय सहायता नही मिलती है उनमें छात्रों के प्रवेश को राज्य या विश्वविद्यालय विनियमित नहीं कर सकता है, किन्तु वह अर्हता और पात्रता की न्यूनतम शर्तें विहित कर सकता है, क्योंकि यह विद्या के स्तर के हित में है।

5. राज्य से सहायता प्राप्त अल्पसंख्यक शिक्षा संस्था को अल्पसंख्यक वर्ग के छात्रों को प्रवेश देने का अधिकार है, किन्तु राज्य सरकार उससे यह अपेक्षा कर सकती है कि युक्तियुक्त संख्या में अन्य छात्रों को भी प्रवेश दिया जाए।

6. अल्पसंख्यक संस्था प्रवेश के लिये अपनी स्वयं की प्रक्रिया या पद्धति अपना सकती है, किन्तु यह प्रक्रिया ऋजु और पारदर्शी होनी चाहिए। व्यावसायिक और उच्च शिक्षा संस्थाओं में प्रवेश गुणागुण के आधार पर ही होना चाहिए।

7. राज्य यह उपबंध कर सकता है कि सहायता प्राप्त संस्थाओं में समाज के दुर्बल वर्गों का ध्यान रखा जाए।

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[14] के0एन0 गोयल, मेजारिटीज़ राइट टू एस्टाब्लिश एंड एडमिनिस्टर एजुकेशनल इंस्टिट्यूशन्स, 38 जे0आई0एल0आई0 283 (1996)

[15] टी0एम0ए0 पाई फाउंडेशन बनाम कर्नाटक राज्य (2002) 8 एस0सी0सी0 712

[16] (अनु0 19 (1) (छ) और 26)

8. जिन संस्थाओं को सहायता नही दी जाती है उन पर नियंत्रण न्यूनतम होना चाहिए।

9. बिना सहायता वाली संस्थायें कुछ भी फीस प्रभारित कर सकती हैं, किन्तु कोई भी संस्था प्रतिव्यक्ति (केपिटेशन) फीस नही ले सकती।

10. सेंट स्टीफन महाविद्यालय के निर्णय का आधार सही है, किन्तु प्रवेश के लिये कठोर प्रतिशत संख्या नही तय की जा सकती। (इसमें 50 प्रतिशत स्थान अल्पसंख्यकों के लिये आरक्षित रखने की छूट दी गयी थी। इसे अब समाप्त कर दिया गया। इस प्रकार इसे भागतः उलट दिया गया)।

11. उन्नीकृष्णन मे जो स्कीम बनाई गई वह संविधान विरुद्ध थी, किन्तु यह सिद्धांत उचित है कि प्रतिव्यक्ति फीस नहीं हो और शिक्षा का उद्देश्य लाभ कमाना नही हो। (इस निर्णय को भी भागतः उलट दिया गया)।

टी0एम0ए0 पाई और इस्लामिक एकेडमी के पश्चात् भी यह प्रश्न कि क्या अल्पसंख्यक संस्था प्रवेश के लिये परीक्षा ले सकती है या नहीं और कुछ अन्य प्रश्नों का उत्तर भी स्पष्ट नही था। 2004 में ये प्रश्न एक वृहत्तर न्यायपीठ को निर्दिष्ट किए गए।[17]

पाई फाउंडेशन, इस्लामिक एकेडमी और अन्य निर्णयों मे जो अभिनिर्धारित किया गया था उसमें स्पष्टता नहीं थी। उनसे उत्पन्न संदेहों का निराकरण करते हुये मुख्य न्यायाधीश श्री लाहोटी ने[18] के वाद में 7 न्यायाधीशों की पीठ की ओर से अनेक बिंदुओ को स्पष्ट करते हुये निम्नलिखित सिद्धान्त प्रतिपादित किये :

1. राज्य, पारदर्शिता और गुणागुण के आधार पर प्रवेश सुनिश्चित करने के लिये हस्तक्षेप कर सकता है।

2. प्रशासन के अधिकार में कुप्रशासन का अधिकार सम्मिलित नहीं है।

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[17] इस्लामिक एकेडमी आफ एजुकेशन (II) बनाम कर्नाटक राज्य (2004) 8 एस0सी0सी0 217, माडर्न डेंटल कालेज बनाम मध्य प्रदेश राज्य (2004) 8 एस0सी0सी0 213, पी0ए0 इनामदार बनाम महाराष्ट्र (2004) 8 एस0सी0सी0 139।

[18] पी0ए0 इनामदार (II) बनाम महाराष्ट्र राज्य (2005) 6 स्केल 471

3. शिक्षा संस्था स्थापित करने का अधिकार उपजीविका का अधिकार है। इसे अनुच्छेद 19 (1) (छ) का संरक्षण है।

4. अनिवासी भारतीयों के लिये सीमित संख्या में स्थान, 15 प्रतिशत से अनधिक, उपलब्ध कराए जा सकते हैं।

5. यदि संस्था सहायता प्राप्त नही है तो वह अल्पसंख्यक हो या गैर अल्पसंख्यक राज्य उस पर आरक्षण की नीति लागू नहीं कर सकता है।

6. संस्थाओ के समूह के लिये एक ही प्रवेश परीक्षा लेना अनुचित नही है।

7. व्यावसायिक संस्थाओं में प्रतिमुंड (कैपिटेशन) फीस नही ली जा सकती। सभी संस्थाओं में प्रवेश के लिये एक ही द्वार तय किया जा सकता है।

8. फीस की संरचना युक्तियुक्त होनी चाहिए। लाभखोरी पर अंकुश होना चाहिए।

न्यायपीठ को ऐसा प्रतीत हुआ कि अब भी पाई फाउंडेशन से उठे कुछ प्रश्न अनुत्तरित है और उनका उत्तर पाई फाउंडेशन से अधिक संख्या वाली पीठ द्वारा दिया जाना चाहिए, किन्तु यह कार्य भावी पीढ़ी पर छोड़ दिया गया।

बहुल समाज में सभी संस्कृतियों और भाषाओं को प्रस्फुटित होने का अवसर मिलना चाहिए। आयुर्विज्ञान या अभियांत्रिकी के महाविद्यालय का संस्कृति के संरक्षण से कोई संबंध नही होता। जिस शिक्षा का धर्म या संस्कृति से कोई संबंध नहीं है उसे अल्पसंख्यक या बहुसंख्यक के घेरों में बांटा नहीं जा सकता। इस प्रकार का विभाजन पंथनिरपेक्ष और एकात्मक समाज के विकास में बाधा है। अल्पसंख्यक शिक्षा संस्थाओं के नाम का पर्दा उठाकर देखा जाए तो उसके पीछे ऐसे तत्वों का संसार है जो प्रति व्यक्ति फीस और अन्य अनैतिक संदाय वसूल करके धन एकत्र करने मे लगा हुआ है। जो शिक्षा उद्योग के रूप में चलाई जा रही है और जिसका एकमात्र उद्देश्य लाभ कमाना है वह अल्पसंख्यकों को दिये जाने वाले संरक्षण की पात्र नही है। **अब समय आ गया है कि इस पर्दे को उठाया जाए और देश को विभाजित करने वाली राष्ट्रविरोधी गतिविधियों को रोका जाए। अल्पसंख्यक और**

बहुसंख्यक का विभाजन केवल धर्म, संस्कृति और भाषा के क्षेत्र मे ही अनुमत हो। शेष क्षेत्रो में विधि समान होनी चाहिए। अनुच्छेद 30 की उद्देशिका का अनु0 14, 15, 51 (क) आदि के साथ समन्वय करते हुये अर्थान्वयन किया जाना चाहिए और इस तथ्य के प्रकाश में निर्वचन होना चाहिए कि शिक्षा एक मूलाधिकार और आधारभूत लक्षण है। अनुच्छेद 30 को अधिनियमित करने का उद्देश्य यह था कि अल्पसंख्यको के अधिकार पर विधान–मंडल आक्रमण न कर पाए। इसके द्वारा यह आशंका दूर की जानी थी कि बहुसंख्यक अल्पसंख्यकों को अपनी संस्कृति और भाषा बनाए रखने के अधिकार से वंचित न करें। किन्तु पाइ फाउंडेशन से यह स्पष्ट हो गया कि बहुसंख्यकों को भी समान अधिकार है। बहुसंख्यकों और अल्पसंख्यकों के साथ समान व्यवहार होना चाहिए। अल्पसंख्यकों की सभी संस्थाए अंग्रेजी के माध्यम से शिक्षा प्रदान कर रही हैं। भारत के मुसलमानों या ईसाइयों में से किसी की भी मातृभाषा अंग्रेजी नहीं है। ऐसी संस्थाओं का भारतीय भाषाओं पर अनिष्टकर प्रभाव पड़ता है। आज भारत हिंदूओं के विरुद्ध इस अवांछित और निराधार विभेद को रोकने के लिये और अखंड, एकात्म और सबल भारत के निर्माण के लिये उच्चतम न्यायालय की सहायता की प्रतीक्षा कर रहा है। विडंबना यह है कि भारत में निवास करने वाले जो व्यक्ति नागरिक नहीं हैं वह भी अनु0 30 का फायदा उठाने के हकदार है। संविधान निर्माताओं का यह आशय कदापित नही था[19]। उच्चतम न्यायालय का यह निर्णय जिसमें शिक्षा संस्थाओं को अधिकार दिये गये हैं **शिक्षा के बाजारीकरण के साधन बन गये हैं तथा शिक्षा प्रणाली शोषण आधारित अर्थव्यवस्था को पोषित करने का संसाधन बन गयी है।** इस आर्थिक भूमण्डलीकरण के समय में पश्चिमी बाजारवाद गुलामी को स्थायी बनाने के लिये भारत की जनता को अज्ञानी रखने में सफल हो रहा है। भूमण्डलीकरण धर्म एवं संस्कृति की पहचान समाप्त करना चाहता है, क्योकि ऐसे लोग बहुराष्ट्रीयवाद की गुलामी को चुनौती नही दे सकते।

[19] साभार भारत का संविधान, लेखक बृजकिशोर शर्मा, छठा संस्करण पी0–121

काल सेन्टर, इन्टरनेट उद्योग आदि के भारत मे विस्तार की स्थिति यह संकेत करती है कि भारत मे शिक्षा, विकास की नही बल्कि कुछ गिने चुने अभिजात्य की सेवा हेतु कर्मचारी बनाने का साधन रह गयी है।

सर्वोच्च न्यायालय की ग्यारह न्यायाधीशों की विशालतर पीठ ने धर्म की परिभाषा करने से इंकार कर दिया –

1. अनुच्छेद – 31 में धर्म की अभिव्यक्ति का क्या अर्थ है ?
2. जहाँ किसी धर्म के मानने वाले बहुसंख्य हैं वहाँ क्या उस धर्म की कोई शाखा या सम्प्रदाय अल्पसंख्यक की प्रास्थिति का दावा कर सकता है ?
3. उच्चतम न्यायालय ने इस प्रश्न का उत्तर भी नही दिया कि वह कसौटी क्या हो, जिस पर परीक्षा करके यह जाँचा जा सके कि कोई शिक्षा संस्थान अल्पसंख्यक संस्था है अथवा नही ?

भारत के प्रबुद्ध वर्ग को उपरोक्त संवैधानिक अव्याकृतानि विषयों पर महाराजा भर्तृहरि के निम्न श्लोक को आत्मसात करना होगा –

बोद्धारो मत्सरग्रस्ताः प्रभवः स्मयदूषिताः।
अबोधोपहतश्चाऽन्ये जीर्णभंगेसुभाषितम्।।

तथा अन्य ऐसे ही विषयो पर भी राष्ट्रीय चिन्तन मनन कर एक सर्वानुमति बनानी होगी।

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संविधान और आरक्षण

(वीरेन्द्र कुमार सिंह चौधरी)*

"आरक्षण का उद्देश्य जिनको भी पिछड़ा वर्ग (backward class) कहें उनको ऊपर उठाकर समकक्ष लाने में है, जिससे राष्ट्रोत्थान के कार्य में उनकी समान भागीदारी हो सके। जब आरक्षण के द्वारा उन्हें समान स्थान प्राप्त होगा, तब आरक्षण की आवश्यकता (अनुच्छेद के अनुसार) समाप्त हो जायेगी। अर्थात् आरक्षण का प्रयोजन आरक्षण की आवश्यकता समाप्त करने में है।"

आरक्षण जिसे हमने सामाजिक न्याय के यन्त्र के रूप में स्वीकार किया था वह अब तक अपने अभीष्ट तक पहुँचने में नाकाम रहा है। इतना ही नहीं समाज के विभिन्न वर्गों द्वारा अपने को पिछड़े के रूप में प्रमाणित करने एवं तदनुरूप आरक्षित होने की होड़ लगी हुई है। परिणाम स्वरूप आरक्षण आज सामाजिक विद्वेष और कटुता का एक प्रेरक तत्व बनता जा रहा है। विभिन्न राजनीतिक दलों द्वारा इसे राजनीतिक भविष्य संवारने वाले प्रसाधन के रूप में इस्तेमाल किये जाने की प्रकृति ने स्थिति को और भयावह बना दिया है।

इन स्थितियों के आलोक में आरक्षण के संवैधानिक स्वरूप पर पुनः चिन्तन आवश्यक हो गया है। 'आरक्षण' का संवैधानिक आधार किस प्रयोजन के लिए था व किन परिसीमाओं में था इसपर विचार करने की आवश्यकता है।

आरक्षण की उत्पत्ति अनुच्छेद 16 (लोक नियोजन के विषय में अवसर की समता) के चौथे उपखण्ड से सम्बन्धित है। जो इस प्रकार हैः "इस अनुच्छेद की कोई बात राज्य को पिछड़े हुए नागरिक के किसी वर्ग के पक्ष में जिनका प्रतिनिधित्व राज्य की राय में राज्य के अधीन सेवाओं में पर्याप्त नहीं है। नियुक्तियों या पद के आरक्षण के लिए उपबन्ध करने से निवारित नहीं करेगी।"[1]

यह स्पष्ट है कि यह एक अपवाद है। प्रथम व द्वितीय उपखण्ड सभी नागरिकों के लिये 'लोक नियोजन के विषय में अवसर की समता' की घोषणाएं है। जिनमें कहा गया है कि "राज्य के अधीन किसी पद का नियोजन या नियुक्ति से

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* वरिष्ठ अधिवक्ता माननीय उच्च–न्यायालय, इलाहाबाद पूर्व महाधिवक्ता, उ॰ प्र॰ सरकार

[1] अनुच्छेद 16 (4)

सम्बन्धित विषयों में सभी नागरिकों के लिए अवसर की समता होगी"[2]। द्वितीय उपखण्ड के अनुसार "राज्य के अधीन किसी नियोजन या पद के सम्बन्ध में केवल धर्म, मूलवंश, जाति लिंग, उद्‌भव, जन्मस्थान, निवास या इनमें से किसी के आधार पर न तो कोई नागरिक अपात्र होगा और न उससे विभेद किया जायेगा[3]।"

इससे कुछ बातें सामने आती हैं। प्रथम बात ये कि समता (equality) संविधान की एक मूलभूत धारणा है जो उक्त उपखण्डों से उभरती है। इसका व्यतिक्रम नहीं किया जा सकता। संविधान के संशोधन के द्वारा भी नहीं। दूसरी यह कि उपखण्ड चार में इस विषय पर एक कसौटी या मापदण्ड (objective test) है, जिसका उपयोग करके राज्य इस अपवाद का लाभ लेकर व्यवस्था कर सकता है। वह मापदण्ड है राज्य की किन्हीं सेवाओं में किसी पिछड़े वर्ग (backward class) का पर्याप्त प्रतिनिधित्व। यदि यह नापा जा सकता है तो उस वर्ग के लिए आरक्षण हो सकता है कि उनका प्रतिनिधित्व बढ़ सके। उस वर्ग की जनसंख्या का अनुपात इसका नपना नहीं है।

तीसरी बात ये है कि यह पिछड़े वर्ग (class) के लिए प्रावधान है। 'वर्ग' का अर्थ 'जाति' नहीं है। जहां तक अनूसूचित जातियों व अनुसूचित जनजातियों का सम्बन्ध है, उनको एक वर्ग (class) मानने की जो संवैधानिक कल्पना है वह हम समझ सकते हैं। उसका ऐतिहासिक कारण 'छुआछूत' (untouchability) की कुरीति है, जो एक सहस्त्र वर्षों के विदेशी शासन की देन है। कोई भी शास्त्र इस कुरीति का अनुमोदन नहीं करते। मनु ने जाति कर्मणा मानी है, जन्मना नहीं। श्रीकृष्ण ने गीता में कहा, "गुण–कर्म विभागशः" यही वर्ण है। परन्तु अन्य किसी भी तथाकथित 'जाति' को वर्ग मानने का कोई कानूनी आधार नहीं है। हर व्यक्ति, चाहे जिस 'जाति' में जन्म लिया हो, अपने योग्य कार्य कर सकता है। जब संविधान आया तो लोग जात–पांत छोड़ रहे थे। अपने नाम के आगे जाति–सूचक उपाधि लगाना छोड़ दिया था। जो नये कानून बने, वे सबके लिए थे, परन्तु आज पुनः जाति का भूत जग गया है। इसके लिए एक मात्रा में न्यायपालिका के इस सम्बन्ध में देशहित के विरुद्ध निर्णय उत्तरदायी है।

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[2] अनुच्छेद 16 (1)
[3] अनुच्छेद 16 (2)

डॉ॰ अम्बेदकर ने अनुसूचित जाति व जन–जातियों के लिए विधानसभा व लोकसभा में दस वर्ष के आरक्षण की व्यवस्था रखी थी। कहा कि इससे अधिक आरक्षण रहेगा तो जाति में निहित स्वार्थ (vested interest) पैदा होगा। उसके बाद वोट बैंक और उसके तुष्टिकरण की नीति ऐसी छायी कि अनुच्छेद 334 में, दस वर्ष के समय सीमा का विस्तार लगातार संशोधन के माध्यम से होता गया। आज आरक्षण की यह सीमा 1999 के संविधान संशोधन से साठ वर्ष (26–01–2011 तक) हो गयी है। क्या यह संविधान की मूल भावना पर कुठाराघात नहीं है?

आरक्षण के उद्देश्य क्या हैं, इस विषय पर एक बार न्यायालय में प्रश्न उठा तो मैंने कहा, "आरक्षण का उद्देश्य जिनको भी पिछड़ा वर्ग (backward class) कहें उनको ऊपर उठाकर समकक्ष लाने में है, जिससे राष्ट्रोत्थान के कार्य में उनकी समान भागीदारी हो सके। जब आरक्षण के द्वारा उन्हें समान स्थान प्राप्त होगा, तब आरक्षण की आवश्यकता (अनुच्छेद के अनुसार) समाप्त हो जायेगी। अर्थात् आरक्षण का प्रयोजन आरक्षण की आवश्यकता समाप्त करने में है।" आज स्वार्थपरता ने इस पर ऐसा परदा डाल दिया है कि कुछ राजनीतिज्ञों को इसमें अन्तर्विरोधी बात लगती है, पर हर वस्तु का मूल्यांकन मूलभूत सिद्धान्तों के अनुरूप होना चाहिए।

आज संसार के सभी विधि–शास्त्र (jurisprudence) में प्रयोजनात्मक व्याख्या (purposive interpretation) की धुन सवार है। व्याख्या का अर्थ संविधान निर्माणकर्त्ताओं के उद्देश्य को खोजना है। यदि आरक्षण अपवाद है; समता के आदर्शों की पृष्ठभूमि में यदि उसका उद्देश्य सभी विभेद दूर करना है; यदि आरक्षण का प्रयोजन आरक्षण की आवश्यकता समाप्त करने में है; तो आरक्षण केवल अल्पकालिक व्यवस्था है, यह समझना चाहिए। आरक्षण सदा सर्वदा के लिए हो सकता है या समय–समय पर इसमें कुछ जाति या वर्ग बढ़ायी जा सकती है यह प्रयोजन के ही विपरीत है। आज यह सूची सुरसा की तरह बढ़ती जा रही है। एक भी उदाहरण ऐसा मुझे ज्ञात नहीं जहां इस पिछड़े वर्ग की सूची छोटी हुई हो। आरक्षण का मूल प्रयोजन समता के आधार पर एकरस समाज जीवन का निर्माण करना था, वह आज खो गया।

आरक्षण उल्टा विभेद है। 'समता' (equality) एक दुरूह विधिक कल्पना है। यह 'एकरूपता' (uniformity) में नहीं है। आज अनुच्छेद 16(4) के आरक्षण के पीछे 'एकरूपता' सी धारणा काम करती है। यदि एक जाति के लोग किसी सरकारी नौकरियों में कम है तो जनसंख्या के अनुपात में उस तथाकथित पिछड़े वर्ग के लोग उस नौकरी में लेने चाहिए, यह भाव असंवैधानिक है। यदि 'जाति' को वर्ग माना जाये तो यह और भी अप्रासंगिक है। देश में एक कार्य या पेशा (रोजगार) करने वालों की एक 'जाति' थी। कालान्तर में जाति जन्मना मानी जाने लगी। पर उस कुटुम्ब में जो कर्म होता आया, उसमें उस कुटुम्ब के सदस्यों की पारंगत बनने की सम्भावना है। उस कार्य में उनका अनुपात अधिक होगा। अनुच्छेद 16(4) में इसीलिए आरक्षण उनको दिया जा सकता है जिनका प्रतिनिधित्व राज्य के आधीन सेवाओं में राज्य की राय में 'पर्याप्त नहीं है। इसे 'जनसंख्या के अनुपात में पूर्ण नहीं है' नहीं माना जा सकता। यदि किसी वर्ग की निपुणता किसी कार्य में है तो उस वर्ग के लोग उसमें अपनी जन–संख्या के अनुपात से कहीं अधिक होंगे, यह सामान्य बात हैं। स्मृतिकारों ने कहा है कि समता समरसता (eduanimity) में है। हाथ की सब उंगलियां, कोई छोटी कोई बड़ी, एकरूप नही होती, पर उनमें एक ही जीवनरस बहता है, इसलिए उनमें समता है। इसलिए समरस जीवन उत्पन्न होना यही 'समता' है।

'आरक्षण' की दौड़ में एक बड़े विभेद के साथ विद्वेष को भी जन्म दिया, जिससे संविधान का अनर्थ ही हुआ। 'समरस' जीवन के निर्माण के स्थान पर विद्वेष घर कर रहा है; इसने समाज को खण्डित किया; 'समता' को छोड़ विषमता को प्रश्रय दिया। ऐसा विद्रूप कैसे हो सका?

इसका प्रमुख कारण उच्चतम न्यायालय का एक निर्णय कहा जा सकता है। श्री सीरवई ने अपनी प्रसिद्ध पुस्तक "कान्सट्यूशनल लॉ आफ इंडिया"[4] में मंण्डल कमीशन केस के निर्णय[5] (इन्द्रा साहनी बनाम युनियन आफ इण्डिया), की आलोचना की है। उसके अन्त में कहा "यदि बहुमत के न्यायाधीशों को यही अभीष्ट

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[4] चतुर्थ संस्करण, द्वितीय भाग, परिशिष्ट पृष्ठ lvii से xcv

[5] ए0 आई0 आर0 1993 सु0 को0 477

था कि उच्चतम न्यायालय के अनुच्छेद 16(4) पर संवैधानिक पीठ के निर्णयों की लम्बी पांति को रद्द कर एक अधिकारिक निर्णय देना था, तो उन्हें सर्वोच्च अपीलीय न्यायालय के कर्तव्य का पालन करते हुए पूरे प्रकरण का नवीन परीक्षण करना चाहिए था। यह खेद का विषय है कि उन्होंने ऐसा नहीं किया।–– अपवाद छोड़कर उच्चतम न्यायालय के संवैधानिक प्रश्नों पर निर्णय तीव्रगति से गिरते जा रहे थे। पर अनुच्छेद 16(4) पर इन छः न्यायाधीशों की बहुमत वाले निर्णय निम्नतम स्तर पर पहुंच गये हैं। जो कारण दिये हैं उनसे कह सकता हूं कि इन छः बहुमत के न्यायधीशों ने जैसी न्यायपालिका, अधिवक्ताओं व साधारण जनता की किरकिरी की है वैसी कभी नहीं हुई।"

यह किसी राजनैतिक आन्दोलन का प्रलाप नहीं है, अपितु भारतीय संविधान के शीर्ष विशेषज्ञ की आलोचना है। क्या कभी कोई कह सकता है कि जो खण्ड प्रारम्भ होता है 'Nothing in this Article shall prevent---' ('इस अनुच्छेद में की कोई भी बात–––) वह अपवाद नहीं है। पर बहुमत का निर्णय यही कहता है। उनके हाथों में ऐसा उलट फेर हुआ कि जो अपवाद (exception) था वह मूलाधिकार (fundamental right) बन गया। यह भी ओझल हो गया कि यह समाज की शाश्वत व्यवस्था नहीं है। फिर जो मूल अधिकार था जिसका वर्णन खण्ड (1) व (2) में है, वह सदा के लिए उस समय की राज्य सरकार की कठपुतली बनकर रह गया। इसी से आज सबको पिछड़ा वर्ग कहलाने की होड़ लग गयी।

'वर्ग' (class) व 'जाति' (caste) शब्द अलग–अलग प्रयोग किये गये हैं। इससे स्पष्ट है कि जाति वर्ग नहीं है। किसी को 'वर्ग' अथवा 'पिछड़ा वर्ग,' की संज्ञा तभी दी जा सकती है जब उसके सभी लोग एक अर्थ में एक ही प्रकार के (homogeneous) हों; कोई पंचमेल (heterogeneous) लोग एक वर्ग (Class) के नहीं कहे जा सकते। वर्ग हम अनूसचित जनजाति के लिए कह सकते हैं तथा जिस समय संविधान लागू हुआ उस समय कुछ सीमा तक अनुसूचित जाति के लिए भी कहा जा सकता था, जो छुआछूत की प्रथा के कारण पिछड़ी थी। परन्तु जिन जातियों में सब प्रकार के लोग थे वह एक वर्ग के नहीं कहे जा सकते। इसी से फिर उस जाति के नवनीत (creamy layer) के निकालने की बात आई। यह संविधान वाह्य

कल्पना है, जो यह बताती है कि जिस वर्ग में एक प्रकार के पिछड़ेपन से ग्रस्त लोग नहीं हैं वह एक वर्ग नहीं कहला सकता। उसको परिभाषित करने के लिए कुछ और करना पड़ेगा। इसलिए 'जाति' को लेकर परिभाषा और फिर उसमें से कुछ को आरक्षण के अयोग्य कहना यह ठीक नहीं। उसके स्थान पर पिछड़ेपन के लिए कोई मापदण्ड होना चहिए। फिर जिस बात की वर्जना की, अर्थात् 'जाति' (caste), उसी को लेकर मापदण्ड बनाना असंगत है। इस मण्डल कमीशन केस में अल्पमत का निर्णय (न्यायमूर्ति श्री राम मनोहर सहाय द्वारा) ही तर्कसंगत और देश हित में था। 'जाति' के भूत से देश छुटकारा पा जाता जो संविधान की मूल भावना फलवती होती।

उक्त मण्डल कमीशन केस अनुच्छेद 16(4) के विषय में था, पर उसके विचारों ने अनुच्छेद 15(4) को भी ढक लिया। उसकी ओढ़नी ओढ़कर देश के जीवन में जितना अनर्थ हुआ वह सम्भवतया आपात स्थिति की बन्दी प्रत्यक्षीकरण याचिकाओं के निर्णय के बाद इसी का नम्बर आता है। ऊपरी तौर पर मण्डल कमीशन केस का अनुच्छेद 15(4) से कुछ लेना देना न था। दोनों भिन्न–भिन्न प्रकार के पिछड़े वर्ग के बारे में हैं। अनुच्छेद 16(4) उस पिछड़े वर्ग के लिए हैं जिनका प्रतिनिधित्व राज्य की सेवा में (पिछड़ेपन के कारण) पर्याप्त नहीं है। दूसरी ओर अनुच्छेद 15(4) सामाजिक व शैक्षिक दृष्टि से पिछड़े हुए नागरिकों के लिए है।

पुनः धारा 16(4) में शब्द 'आरक्षण' का प्रयोग हुआ है, जो राज्य सरकार कर सकती है। उसके लिए एक नपना भी है – राज्य सरकार की नियेाजित सेवाओं में किसी वर्ग (class) के नागरिकों का पर्याप्त संख्या में न होना। यह किस तरह की सेवा है, इस पर भी आधारित है। यह खण्ड सरकार को "सामाजिक व शैक्षिक दृष्टि से पिछड़े हुए नागरिकों के वर्ग की उन्नति के लिए विशेष व्यवस्था" करने का अधिकार देता है। कानून में या किसी अधिनियम में यदि मिलते–जुलते प्रावधानों में एक स्थान पर 'आरक्षण' करने का अधिकार हो व दूसरे समान प्रावधान में विशेष व्यवस्था करने का अधिकार हो तो यह भिन्न–भिन्न अधिकार है। आरक्षण भिन्न वस्तु है और विशेष व्यवस्था का अधिकार भिन्न है। फिर इस विशेष व्यवस्था में सामाजिक व शैक्षिक दृष्टि से पिछड़े नागरिकों की "उन्नति" के लिए अधिकार सरकार को

मिला है। अर्थात् उनकी सामाजिक दशा सुधारने के लिए व शिक्षित करने की विशेष व्यवस्था करने का अधिकार है। आरक्षण की बात वहीं आती है जहां संख्यात्मक आकलन हो सके। जैसा अनुच्छेद 16(4) में है। इन दोनों को एक सोचना संविधान के विरुद्ध है।

अनुच्छेद 15(4) केवल विधायी कार्यक्रम (positive action) के लिए है, जैसे उनको सामाजिक विषमता दूर करने के लिए मिली–जुली निवास व बस्ती व फ्लैट्स देना, जो सबके साथ इनके लिए भी हों। सामाजिक विषमता दूर करने का मार्ग संयुक्त राज्य अमेरिका के सुप्रीम कोर्ट ने बाउन बनाम बोर्ड आफ इजूकेशन आफ टोपेका[6] में सुझाया है। न्यायालय ने नीग्रो बच्चों व यूरोपियन बच्चों के लिए अलग–अलग विद्यालय को असंवैधानिक माना। आखिर पृथकता ही विभेद है। हमने सामाजिक समरसता निर्माण करने के स्थान पर जाति स्वार्थ जगाया। जाति में निहित स्वार्थ पैदा हुआ। सामाजिक विषमता दूर करने में आरक्षण विपरीत प्रयोजन है।

उस क्षेत्र में जहां शैक्षिक दृष्टि से पिछड़े लोग हैं स्कूल खुलवाना छात्रवृत्ति देना, छात्रावास में रहने तथा पुस्तकें उपलब्ध कराने की व्यवस्था करना विधायी कार्यक्रम हैं। आज सबसे बड़े आश्चर्य की बात यही है कि मण्डल कमीशन का ऐसा भूत छाया कि यह ओझल हो गया कि अनुच्छेद 16(4) व 15(4) भिन्न–भिन्न पिछले वर्ग के लिए, भिन्न उद्देश्य को लेकर है, एक में आरक्षण का अधिकार है तो अनुच्छेद 15(4) में आरक्षण करने का अधिकार नहीं दिया है। एक में उल्टा विभेद (reverse discrimination) करने का अधिकार है तो दूसरे में केवल विशेष प्रावधान उनकी उन्नति के लिए कर सकते हैं अर्थात यह उसके लिए रचनात्मक कार्य करने का अधिकार है। दोनों प्रावधानों को एक चश्में से देखना संविधान के विरुद्ध है।

सबसे बड़ा दुष्परिणाम जो सामने है वह जाति आधारित आरक्षण से आये अधिकारियों के मन में यह भावना हो सकती है कि अपनी जाति के कारण उस स्थान पर पहुँचे। उनके कार्य जाति–मूलक हो सकते हैं। वह स्वतंत्र भारत की

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[6] 99 लायर्स एडीशन 1083

सार्वजनिक सेवा के अंग होने, देश की सेवा के भाव की जगह, जाति का अभिमान लेकर चलने की मनोवृत्ति पैदा कर सकता है।

मण्डल कमीशन का प्रभाव था कि संविधान[7] में पंचायतों में अनुसूचित जाति व अनुसूचित जनजाति के विषय में तो आरक्षण जोड़ा ही, परन्तु उसके साथ सभी स्थानों पर पिछड़े वर्ग के लिए भी आरक्षण जोड़ दिया गया। यह आरक्षण पंचों के निर्वाचन के लिए है, पर उसके साथ–साथ अध्यक्ष पद पर भी आरक्षण का प्रावधान किया है[8]। अब अध्यक्ष का पद तो एक ही है। यदि उसमें आरक्षण होता है तो यह शतप्रतिशत आरक्षण है। उच्चतम न्यायालय ने इसे असंवैधानिक करार दिया है।

यह प्रश्न मैंने उच्च न्यायालय की खण्ड पीठ के समक्ष उठाया था कि यह संवैधानिक संशोधन जिसके द्वारा एकल स्थान पर आरक्षण का प्रावधान है, संविधान की मूलभूत धारणा (basic feature of the constitution) के विरुद्ध है और इसलिए संविधान (तिहत्तरवाँ) संशोधन अधिनियम 1992 जहाँ तक कि वह एकल पीठ पर संरक्षण का प्रावधान करता है, अनुच्छेद 368 के द्वारा अनुमोदित नहीं है। इस नाते यह संशोधन, संविधान की मूल धारणा के विपरीत होने के कारण अवैध व शून्य है। अब यह प्रश्न उच्चतम न्यायालय में लम्बित है।

अब आया है केन्द्रीय 'ग्राम न्यायालय अधिनियम' क्रमांक 4 सन् 2002। उसकी धारा 6(2) को देखें। यह संविधान की समता की कल्पना के लिए प्राणघातक प्रावधान सिद्ध होगा जिससे अब गांव–गांव में मुकदमेबाजी पनपेगी। इसमें सभी के द्वार तक आरक्षण का विष बो दिया गया है। क्या न्यायपालिका की अन्तरात्मा तब जगेगी जब यह विष बेल राष्ट्रजीवन को आच्छादित कर लेगी व वापस आने का रास्ता परिस्थितियों के कारण सदा के लिए अवरुद्ध हो जायेगा।

एक और विचित्र नतीजा इस आरक्षण नीति का है। अनुसूचित जाति व अनुसूचित जनजाति के लिए विधान सभा व लोक सभा में आरक्षण अनुच्छेद 334 के अनुसाद 10 वर्ष बाद समाप्त होने वाला था। अब बढ़ते–बढ़ते वह अवधि 60 वर्ष हो गयी है। इसी प्रकार उनके लिए आरक्षण अनुच्छेद 243–टी के खण्ड (5) के द्वारा

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[7] भाग IX

[8] देखें अनुच्छेद 243–डी व 243–टी

पंचायत या नगर पालिका में समाप्त होगा पर खण्ड (6) के अनुसार जाति सदा सर्वदा पिछ़डी जाति बनी रहेगी व उसके लिए आरक्षण सदा किया जा सकेगा।

आरक्षण नीति के लिए कुछ शब्द विकसित किये गये है। जिसमें एक 'सामाजिक न्याय' का सिद्धान्त प्रतिपादित किया जाता है। यह तो ईसप की कहानी "भेड़िया और मेमना" की याद दिलाता है। भेड़िया ने कहा, "क्यों रे मेमने, तूने पिछले साल मुझे गाली क्यों दी थी।" मेमना ने कहा, "मै तो तब पैदा भी नहीं हुआ था।" "तू नहीं होगा तो तेरा बाप रहा होगा," भेड़िये ने मेमने को खा लिया। यदि समाज के लिए कोई कार्य अभीष्ट हो तो करें, पर उसके लिए बाप दादों को गालियाँ क्यों?

आज आरक्षण ने समाज को अनेक भागों में बांट दिया है। वोट बैंक की राजनीति ने इस जाति के जिन्न को जो बोतल में बन्द हो दफनाए जाने के रास्ते पर था, पुनः जागृत कर खड़ा किया। मण्डल कमीशन केस के निर्णय से यह जिन्न पोषित हुआ और लम्बे डग फैलाने शुरू किये। यदि अनुच्छेद 15(4) को ठीक प्रकार से पढ़ा गया होता तो यह फल न दिखायी देता। समाज के अन्दर फैले इस विष को कौन दूर करेगा? इस विषय पर चिन्तन करने की आवश्यकता है।

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प्रजातन्त्र के लिए मीडिया में विविधता, अनेकता, व एकात्मकता अनिवार्य

प्रो. बृज किशोर कुठियाला*

"विविधता, अनेकता एवं एकता प्रकृति के मूलभूत गुण हैं इनको समझकर इसके आधार पर ही बनायी गयी कोई सामाजिक संरचना प्रकृति के अनुरूप हो सकती है। अपने उद्देश्य की सिद्धि के लिए मीडिया के क्षेत्र में उसके स्वामित्व, नियंत्रण, सामग्री संकलन, प्रस्तुति एवं प्रयोगकर्त्ताओं में भी तीनों गुणों का समावेश नितांत आवश्यक है।"

मनुष्य ने समाज को चलाने के लिए कई प्रकार के प्रयोग किये हैं। इतिहास साक्षी है कि केवल एक व्यक्ति के तानाशाही साम्राज्य से लेकर व्यवस्थाहीन प्रणाली तक–सभी प्रकार के तन्त्रों का बारम्बार प्रयोग हुआ है। परन्तु पूर्व के अनुभवों के आधार पर आज विश्व के सभी देशों व समुदायों में लगभग एकमत है कि प्रशासन की प्रणाली को कुछ भी नाम दें उसमें जनसमुदाय की व्यक्तिगत सहभागिता किसी न किसी रूप में आवश्यक है। विद्वानों ने तो यहाँ तक कहा है कि सभी प्रशासन प्रणालियाँ दोषपूर्ण हैं, परन्तु सभी दुषित व्यवस्थाओं में प्रजातंत्र सर्वश्रेष्ठ है।

साधारणतया प्रजातंत्र की अनिवार्यता को सामाजिक व आर्थिक तर्कों से न्यायसंगत सिद्ध किया जाता है। सामूहिक रूप से 'सर्व जन सुखाय, सर्व जन हिताय' का प्रयास ही प्रजातंत्र का उद्देश्य व सिद्धान्त माना जाता है। परन्तु यदि हम विषय की और गहराई में जायें व मानव निर्मित विषयों की सीमाओं को लांघें तो समाज विज्ञान व जीवन शास्त्र में मूलभूत समानताएँ उभरकर आती हैं।

प्रकृति की दो मूल रचनाएँ हैं– जड़ व चेतन। दोनों में तीन विशेषताएँ समान रूप से उपलब्ध हैं। विविधता, अनेकता व एकता। प्रकृति के इन तीनों गुणों को एक–एक कक्ष में डालकर अलग देखने से समग्रता समझा में नहीं आती। परन्तु एक दूसरे से संबंधित व पूरक होने की स्थिति में देखने से सृष्टि की सभी रचनाओं की अपनी विशोषताओं के साथ सभी में एकरूपता की भी अनुभूति होती है। प्रशासन की व्यवस्थाओं को भी यदि प्रकृतिक संतुलन की कसौटी पर कसा जाये तो उनमें

* कुलपति, माखनलाल चतुर्वेदी राष्ट्रीय पत्रकारिता विश्वविद्यालय, भोपाल

भी विविधता, अनेकता व एकता के गुण होने चाहिए। और यदि मीडिया को अपने कार्य प्राकृतिक सिद्धन्तों के अनुसार करने हैं तो मीडिया में भी इन तीनों विशेषताओं के समावेश द्वारा समाजोपयोगी मीडिया की रचना सम्भव है। इसके साथ ऐसा भी लगता है कि प्राकृतिक सिद्धान्तों पर रचित मीडिया सृष्टि में विकास का महत्वपूर्ण साधन बनता है। विषय के विस्तार में जाने के लिए आवश्यक है कि विविधता, अनेकता व एकता की सैद्धान्तिक व्याख्या की जाए।

अंग्रेजी भाषा में कहें तो विविधता– डायवर्सिटी, अनेकता– पलूरेलिटी, एकता–इंटेग्रेटी है। सृष्टि में जड़ चेतन दोनों ही रचनाओं के असंख्य रूप हैं। जड़ अवस्था को लिया जाए तो पृथ्वी पर ही इतनी विविध रचनाएं हैं जिनकी सबकी जानकारी एक मनुष्य अपने पूरे जीवनकाल में प्राप्त नहीं कर सकता। नदियाँ, पर्वत, घाटियाँ, समुद्र, झरने, झीलें, रेगिस्तान भी असंख्य हैं। पृथ्वी तो प्रकृति का एक छोटा अंश है। पूरे ब्रह्माण्ड को लें तो विविधता की कल्पना ही कल्पना से बाहर है।

प्रकृति की यह विविधता चेतन अवस्था में और भी उजागर होती है। शास्त्रों में 84 लाख योनियों का उल्लेख तो आता ही है वैज्ञानिकों ने एक करोड़ के लगभग वनस्पति और जन्तुओं की जातियों का आकलन किया है। वैज्ञानिकों ने तो यह भी सिद्ध कर दिया है कि जीवित रचनाओं में विविधता की संख्या बढ़ती जा रही है। नए–नए वायरस व बैक्टीरिया की खोज के साथ ही नए वायरस का निर्माण भी वैज्ञानिकों ने सिद्ध किया है। एक कोशीय प्राणियों की संख्या अनगिनत है जिन्हें केवल माइक्रोस्कोप से ही देखा जा सकता है तो दूसरी तरफ विशालकाय डायनासोर भी इसी पृथ्वी पर थे। वनस्पतियों की विविधता शैवाल और फफूंद से लेकर मासभक्षी पेड़ों और पौधों तक है। जीवन की विविधता का रंग इतना सुन्दर है कि व्यक्ति उसके आनन्द में पूरा जीवन व्यतीत कर दे।

प्रकृति की भिन्न–भिन्न इकाईयाँ इसके विविधता को प्रदर्शित करती हैं जबकि एक ही प्रजाति में जो विभेद दिखलाई पड़ता है उसे अनेकता कहा जाता है। बड़े आकार में लम्बी दूरी तक बहने वाली जल की धाराओं को नदी कहते हैं। नदियाँ अनेक हैं, परन्तु कोई दो नदियाँ समान नहीं हैं। ब्रह्मपुत्र व गंगा में असीम भिन्नताएँ हैं। कोई भी दो आम के पेड़ एक समान नहीं होते। कोई दो मनुष्य–शक्ल

से, आकार से, बुद्धि से या व्यवहार से एक समान नहीं होते। जुड़वा बच्चे जिनके जीन्स बेशक समान होते हैं परन्तु उनमें भी कुछ न कुछ अन्तर अवश्य ही होता है। एक ही जाति में कई प्रकार के गुणों का होना ही अनेकता है। ध्यान देने योग्य बात यह है कि विविधता व अनेकता एक ही गुण के दो नाम हैं और इन शब्दों का प्रयोग संदर्भित है, परन्तु प्रकृति के मूल को समझने के लिए इनका प्रयोग उपयोगी है। डारविन ने जीवन के विकास की प्रक्रिया को विविधताओं और अनेकताओं के आधार पर ही प्रस्तुत किया था। प्राचीन ग्रन्थ भी विविधता और अनेकता का मूल मंत्र ही पढ़ाते हैं।

शायद समस्त सृष्टि की सबसे बड़ी विशेषता यह है कि असीमित विविधताओं व असंख्य अनेकताओं के होने के बावजूद उसमें कहीं न कहीं एकरूपता भी नजर आती है। प्राचीन शास्त्रों में कहा गया है सभी रचनाओं– जड़ व चेतन– का निमार्ण जल, वायु, अग्नि, पृथ्वी, व आकाश से हुआ है। आधुनिक विज्ञान भी कहता है कि कुल मिलाकर 118 के लगभग तत्व हैं, जिनसे मिलकर सभी जीवित व जड़ रचनाएँ बनी हैं।

प्रकृति की एक और बात समझने योग्य है कि सभी रचनाएं एक दूसरे पर आधारित हैं, पूरक हैं व निर्भर हैं। पशु और वनस्पति एक दूसरे के पूरक हैं। सरोवर का जल मछलियों व पानी में रहने वाले अन्य जन्तुओं को जीवन देता है, परन्तु इनके बिना सरोवर का पानी भी सड़ जाता है। पशुओं में भी कोई पूर्णतया आत्म निर्भर नहीं है। सभी किसी न किसी प्रकार से जुड़े हुए हैं, सहायक हैं, निर्भर हैं और सहयोगी हैं। अध्यात्म की इस एकात्मता को वर्तमान वैज्ञानिक भी धीरे–धीरे मानने लगे हैं। परन्तु हर प्रकार के आध्यात्मिक दर्शन में जड़ और चेतन में एक ही सर्वनिष्ठ संज्ञान की उपस्थिति को माना गया है। मैक्सिको के लेखक की विश्व प्रसिद्ध पुस्तक 'द अल्कैमिस्ट' जिसका अनुवाद 68 भाषाओं में हुआ है में तो यहाँ तक कहा गया है कि पूरे ब्रह्माण्ड की एक ही भाषा है और व्यक्ति तभी सम्पूर्ण माना जा सकता है जब वह इस भाषा को समझकर भेड़, ऊँट, रेगिस्तान, पर्वत व वायु से संवाद स्थापित करना सीख लेता है। इसलिए विविधताओं व अनेकताओं को

साथ–साथ भौतिक व रचनात्मक स्तर पर भी पूरी दुनियाँ में एकता भी प्रकृति का दिया हुआ वरदान है।

मानव समाज में भी विचारों, आवश्यकताओं, प्रेरणाओं, उद्देश्यों व व्यवहार आदि में ये तीनों गुण विद्यमान हैं। विचारों व व्यवहार की भिन्नता का अनुभव करना कठिन नहीं है। एक ही वाद में अनेकता का होना भी स्पष्ट है। विचारधाराओं की विभिन्नता साम्यवाद, पूँजीवाद, समाजवाद, एकात्म मानववाद व अन्य कई रूप हैं, परन्तु साम्यवाद भी एक ही प्रकार का नहीं है, उसके भी अनेक रूप हैं। लेकिन सभी में भिन्नताएँ होते हुए भी सभी को एकसाथ बांधने के लिए कई सूत्र हैं। सभी को मिलाकर ही समाज की व्यवस्थाओं की सम्पूर्णता व अखण्डता प्राप्त होती है।

प्रजातंत्र सभी प्रकार की विविधताओं व अनेकताओं को एकसूत्र में बांधने की प्रणाली है। इसलिए सभी अन्य शासन व्यवस्थाओं की तुलना में प्रजातन्त्र सबसे अधिक प्राकृतिक है। क्योंकि प्रजातंत्र प्रकृति के तीन सिद्धान्तों–विविधता, अनेकता व एकता को मूर्त रूप देने की प्रक्रिया है। इसलिए यह प्रकृति की रचना मानी जा सकती है और यह भी कहा जा सकता है कि यही ईश्वरीय प्रणाली है।

अब प्रश्न उठता है कि मीडिया व प्रजातंत्र का, यदि प्रजातंत्र को वह व्यवस्था माना जाए जो प्राकृतिक है और जो प्रकृति के मूल सिद्धान्तों पर आधारित है, तो मीडिया का धर्म बनता है कि वह इसका पोषक बने और मीडिया का कोई भी कार्य ऐसा न हो जो विविधता, अनेकता व एकता के प्रतिकूल हो।

मीडिया की रचना, कार्यप्रणाली, सामग्री व प्रयोगकर्ताओं पर भी ये तीन सिद्धान्त लागू होने चाहिए। मीडिया की रचना में विविधता होना अर्थात् इसका स्वामित्व व नियंत्रण समाज के विभिन्न वर्गों के पास होना आवश्यक है। कुछ औद्योगिक व व्यापारिक संस्थाएँ ही मीडिया के मालिक व नियंत्रक हों यह प्रकृति के अनुकूल नहीं है, यह प्रजातंत्र के लिए भी घातक है। इसी कारण से पूरे विश्व में क्रास– आश्नरशिप (एक ही कम्पनी द्वारा टेलीविजन, समाचार पत्र, रेडियो, आदि पर कब्जा होना) इसको रोकने के प्रयास हो रहे हैं, परन्तु यह दुर्भाग्य है कि इस व्याधि को रोका नहीं जा सका है।

मीडिया की प्रणालियों में भी विभिन्नता व अनेकता होनी जरूरी है। समाचारों के संकलन व प्रस्तुति के लिए समाचारपत्र, टेलीविजन व रेडियो का प्रयोग विभिन्नता का उदाहरण है। टेलीविजन चैनल भी अनके हैं, समाचारपत्र व रेडियो स्टेशन भी अनेक हैं, परन्तु मीडिया की भूमिका के अनुसार अभी विभिन्नता की कमी है और इसके लिए अधिक प्रयोग होने चाहिए। मीडिया के स्वामित्व व नियंत्रण में सहभागी मीडिया व सहकारी मीडिया के उपयोग अभी न के बराबर हैं।

मूल विषय मीडिया की सामग्री का है। क्या समाज व वातावरण की समग्र विभिन्नता मीडिया की सामग्री में झलकती है? कितने ऐसे विषय हैं जिनको मीडिया छूता भी नहीं है। हर समाज में हर काल में धार्मिक व आध्यात्मिक गतिविधियाँ सामूहिक व व्यक्तिगत स्तर पर मुख्य रूप से चलती रही हैं, परन्तु भारतीय भाषाओं के मीडिया ने इनका संज्ञान हाल ही में लेना प्रारम्भ किया है और अंग्रेजी मीडिया तो अभी भी समाज के इस प्रमुख कार्य को अनदेखा करता है। ग्रामीण क्षेत्र का नागरिक किसान जो कुल जनसंख्या का लगभग साठ प्रतिशत है और जो अनाज का उत्पादन कर समाज की भूख को शान्त करता है वह किसान मीडिया की विषयवस्तु तभी बनता है जब वह आत्महत्या करता है। ऐसा अनुमान है कि समाज व वातावरण के कुल कार्यकलापों का केवल एक प्रतिशत हिस्सा ही मीडिया में स्थान प्राप्त करता है। यह अप्राकृतिक है, इसलिए यह समाजघाती होने के साथ–साथ आत्मघाती भी है।

निष्पक्षता आधुनिक पत्रकारिता का मूलमंत्र माना जाता है, जिसका पालन प्रतिदिन न्यून से न्यूनतम होता जा रहा है। निष्पक्षता अर्थात् अनेकता। किसी भी विषय के सभी पक्षों को जानना और बिना भेदभाव के उनको प्रस्तुत करना ही आदर्श पत्रकारिता का द्योतक है। यह सिद्धान्त केवल समाचारों तक ही सीमित हो ऐसा नहीं है। विश्लेषणों, लेखों, संपादकीयों व चर्चाओं में भी सभी पक्षों को समान रूप से प्रतिनिधित्व मिले यह उस पत्रकारिता का चिन्ह है जो प्रजातंत्र को दृढ़ करती है। परन्तु आज की पत्रकारिता में तो किसी एक पक्ष की वकालत करना फैशन है और ऐसे मीडियाकर्मियों को महिमामंडित किया जाता है। पक्षपातपूर्ण

मीडिया का कार्य आत्मघाती, समाजविरोधी, प्रजातंत्र का शोषक व प्रकृति का दोहन करने वाला है।

मीडिया में एकात्मता, संपूर्णता व अखण्डता का सूत्र ढूंढना भी आवश्यक है। प्रकृतिनिष्ठ सृष्टि के पोषक व समाजोपयोगी मीडिया को एक ही मंत्र एकात्म करता है वह है 'सत्यं, शिवं, सुन्दरं'। आज का मीडिया समय–समय पर सत्य का राग तो अलापता है परन्तु उसे इस बात का ध्यान नहीं रहता कि अपूर्ण जानकारी सत्य नहीं है। जिस प्रकार से एक बूंद नींबू का रस डालने से सारा का सारा दूध फट जाता है, नष्ट हो जाता है उसी प्रकार यदि समाचार में अंशभर सी भी बनावट या झूठ हो तो सारा का सारा सच मर जाता है,

पश्चिम से आए मीडिया के सिद्धान्त जिनमें माना जाता है कि सत्य की खोज व उसकी वस्तुनिष्ठ प्रस्तुति ही मीडिया का धर्म है इस पर भी चिन्तन की आवश्यकता है। सत्य में भी विभिन्नता है, हर सत्य की खोज व प्रस्तुति न तो मीडिया के लिए सम्भव है और न ही वांछनीय। किस प्रकार से सत्य की खोज व प्रस्तुति की जाए इसका बड़ा साधारण व सहज उत्तर है 'शिवं एवं सुन्दरं'। शिव का अर्थ है कल्याणकारी व सुन्दर वह होता है जो मन व आत्मा को आनन्दित करे। जो सत्य समाजोपयोगी नहीं है क्या उसकी प्रस्तुति बारम्बार प्रसारित करना आवश्यक है? क्या जिससे समाज में पीड़ा, दुख, विषमता व द्वेष बढ़े उसे बारम्बार प्रसारित करना आवश्यक है? नकारात्मकता प्रजातंत्र की पोषक नहीं हो सकती। दुख व अवसाद का प्रसार समाज में उन स्थितियों को मजबूत करेगा जो प्रजातंत्र के लिए घातक हैं। यदि कुछ शब्दों में कहा जाए तो मीडिया की रचना ऐसी है कि समाज व वातावरण की विभिन्नता को ध्यान में रखते हुए उसकी सामग्री में सम्पूर्णता नहीं हो सकती। इसलिए मीडिया को विषयों का चुनाव तो करना ही पड़ेगा। प्रजातंत्र के पोषक या घातक विषयों को चुनना है– यह निर्णय लेने का विवेक तो होना ही चाहिए। इसके साथ यह भी समझने की आवश्यकता है कि मीडिया समाज का ही भाग है इसलिए समाजघाती मीडिया आत्मघाती भी होगा।

विभिन्न संस्कृतियों में समाज में संवाद की वांछनीय प्रकृति के विषय में दिशा निर्देश किसी न किसी रूप में अवश्य मिलते हैं। पंजाब में बोलियों की एक

पारंपरिक विधा है जो आज भी प्रचलित है और प्रसिद्ध है। इसमें प्रश्न पूछा जाता है– 'बारी बरसी खटन गयासी खटके ल्याया–––––––' अर्थात् इतने वर्षों से कुछ प्राप्त करने के लिए गया था बताओं क्या प्राप्त किया––––– उत्तर में किसी वस्तु या भाव का नाम लिया जाता है और उससे संबंधित एक वाक्या बोला जाता है, जिस पर श्रोता उत्साहपूर्वक प्रतिक्रिया देते हैं। इसके बाद प्रस्तुतकर्ता तीन प्रश्न पूछता है जो कि वर्तामान मीडिया के लिए मापन मानदण्ड बन सकने की क्षमता रखते हैं। प्रश्न हैं–

कि मैं चूठ बोल्या? अर्थात् क्या मैंने झूठ बोला?

कि मैं जहर कोल्या? अर्थात् क्या मैनें समाज में जहर डाला?

कि मैं कुफ्र तोल्या? अर्थात् क्या मैंने कुछ अनैतिक कहा?

हर प्रश्न के उत्तर में श्रोता झूम–झूम के बोलते हैं। 'कोई न, भी कोई ना..... तीन प्रश्न अपने से पूछे और यदि तीनों का उत्तर नहीं में आए तभी वह उस सामग्री को मीडिया में डाले तो मीडिया न केवल समाजपयोगी बनेगा परन्तु साथ–ही–साथ प्रजातन्त्र का पोषक व प्रकृति का सहयोगी भी सिद्ध होगा।

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सूचना के अधिकर में है निरीक्षण का भी अधिकार

प्रो. ओम प्रकाश सिंह*

"सूचना का अधिकार प्रजातन्त्र की सफलता का महत्वपूर्ण उपादान है। सूचना के अधिकार की यात्रा स्वीडन में प्रेस की स्वतंत्रता के पूरक के रूप में अट्ठारहवीं शताब्दी में प्रारम्भ हुई जबकि भारत में यह इक्कीसवीं शताब्दी में नागरिक अधिकार के रूप में सामने आयी।"

"सूचना का अधिकार" वर्तमान समय में लोकतन्त्र के लिए एक आवश्यक एवं अनिवार्य अंग बन गया है। राजतंत्र से लोकतंत्र तक की यात्रा के दौरान "सूचना का अधिकार" अस्तित्व में आया। जिस समय "सूचना के अधिकार" की यात्रा पश्चिम में प्रारम्भ हुई, उस समय दुनिया में लोकतन्त्र सर्वत्र नहीं था। लेकिन जैसे–जैसे दुनिया में लोकतन्त्र का प्रसार हुआ, उसी के साथ ही "सूचना के अधिकार" का भी प्रसार हुआ। आज भी दुनिया के अनेक देशों में लोकतन्त्र भले ही है, परन्तु सर्वत्र "सूचना का अधिकार" नहीं है। इस प्रकार हम कह सकते हैं कि "सूचना का अधिकार" एक श्रेष्ठ प्रजातंत्र का लक्षण है।

"सूचना के अधिकार" की यात्रा दुनिया में उस समय प्रारम्भ हुई जब भारत में पत्रकारिता का शुभारम्भ हो रहा था। 1766 में भारत में विलियम बोल्ट ने पत्रकारिता की दिशा में प्रयास प्रारम्भ करते हुए समाचार पत्र का प्रकाशन प्रारम्भ किया। दैवयोग से इसी वर्ष (1766) में ही स्वीडन में 'फ्रीडम ऑफ इन्फार्मेशन ऐक्ट' में शासनतन्त्र को पारदर्शी बनाने के लिए आम नागरिकों को सूचना की स्वतन्त्रता देने का प्रावधान किया गया। इस एक्ट में स्वीडन में 1812 एवं 1950 में संशोधन किया गया। स्वीडन में सूचना की स्वतंन्त्रता का प्रावधान वहाँ की दो राजनैतिक पार्टियों 'हैट्रस और कैप्स' के संघर्ष का परिणाम था। चुनाव में 'कैप्स' पार्टी ने घोषित किया था कि सत्ता में आने पर प्रेस को स्वतन्त्रता देगी। 1766 में 'कैप्स' सत्ता में आयी और उसने प्रेस की स्वतन्त्रता के साथ–साथ उसके लिए आवश्यक पारदर्शी तन्त्र बनाने के लिए आम नागरिकों को भी सूचना की स्वतन्त्रता देने का भी प्रावधान किया। इस प्रकार स्वीडन में सूचना की स्वतन्त्रता का अधिकार प्रेस की स्वतन्त्रता, के पूरक के रूप में आया। जबकि भारत तथा अन्य देशों में "सूचना का अधिकार"

* निदेशक महामना मालवीय पत्रकारिता संस्थान, महात्मा गांधी काशी विद्यापीठ, वाराणसी

प्रेस के पूरक अधिकार के रूप में अस्तित्व में न आकर नागरिक अधिकार के रूप में स्वतंत्र रूप में अस्तित्व में आया। भारत में भी "सूचना का अधिकार" एक नागरिक अधिकार है।

भारत में "सूचना का अधिकार" की यात्रा राज्यों से प्रारम्भ हुई। 1997 में तमिलनाडु ने सर्वप्रथम "सूचना के अधिकार" को लागू किया। तमिलनाडु के पश्चात् "सूचना के अधिकार" को लागू करने वाला गोवा दूसरा राज्य था। 1997 में ही गोवा में भी यह प्रभावी हुआ। वर्ष 2000 में कर्नाटक, महाराष्ट्र, मध्यप्रदेश एवं राजस्थान में "सूचना का अधिकार" लागू किया गया। दिल्ली में भी 2000 में "सूचना का अधिकार" दिया गया। इसके पश्चात् अन्य राज्यों में "सूचना का अधिकार" लागू किया गया।

भारत में "सूचना के अधिकार" के लिए संघर्ष राजस्थान में 1990 से 1994 के मध्य में प्रारम्भ हुआ। लेकिन यहाँ कानून बाद में बना। इस प्रकार राजस्थान ही राज्य है, जहाँ "सूचना के अधिकार" के लिए संघर्ष लम्बे समय तक चला। हम राजस्थान राज्य को भारत में "सूचना के अधिकार" के प्रेरक राज्य के रूप में देख सकते हैं।

राज्यों में सूचना की स्वतन्त्रता कानून बनने के पश्चात् राष्ट्रीय स्तर पर "सूचना के अधिकार" की मांग बढ़ी तथा 2002 में केन्द्र सरकार के "सूचना की स्वतंत्रता" अधिनियम में अनेकों कमियाँ थीं, जिसके स्थान पर केन्द्र सरकार ने "सूचना का अधिकार" अधिनियम 2005 में लागू किया।

"सूचना का अधिकार" अधिनियम 2005 :

"सूचना का अधिकार" अधिनियम 2005 में कुल 31 अनुच्छेद हैं। यह अधिनियम कश्मीर के अतिरिक्त सम्पूर्ण भारत पर लागू है। इसको राज्य स्वामित्व वाले इकाइयों एवं क्षेत्रों में लागू किया गया है। अर्थात् केन्द्र सरकार अथवा राज्य सरकार द्वारा पूर्ण और अर्धवित्त–पोषित इकाईयों पर यह प्रभावी है। निजी क्षेत्रों को इसके दायरे से बाहर रखा गया है। इसके अन्तर्गत सूचनाओं को दो भागों में विभक्त किया गया है। प्रथम कोटि में सामान्य सूचनाएं आती हैं, जिसे निःशुल्क एवं

जनसुलभ कराना आवश्यक है। जैसे संस्थाओं के अधिनियम, परिनियम, दैनिक कार्यवाही, जाँच समितियों की रिपोर्ट आदि कम्प्यूटरीकृत नेटवर्क पर रखना जरूरी है। यह प्रावधान "सूचना का अधिकार" अधिनियम के अनुच्छेद–4 में है। लेकिन इस अनुच्छेद की व्यवस्था का सम्यक रूप से पालन नहीं हो रहा है। दूसरे प्रकार की सूचना में इन सामान्य सूचनाओं के अतिरिक्त कार्यालयी टिप्पणी एवं अन्य पत्रावलियों आदि से संबन्धित सूचनाओं के लिए शुल्क आधारित सूचना की प्राप्ति की व्यवस्था है। इन सूचनाओं के लिए प्रत्येक विभाग का सूचना अधिकारी 30 दिनों में सूचना उपलब्ध कराने की व्यवस्था करेगा। लेकिन मानवाधिकार के उल्लंघन तथा बलात्कार के मामले में 48 घंटे में सूचना देना आवश्यक है। राष्ट्रीय हित, विदेश संबन्ध, गुप्तचर एवं सेना आदि इसके दायरे से मुक्त हैं। जन सूचना अधिकारी द्वारा सूचना नहीं देने पर उसके संवर्ग के ऊपर के अधिकारी के यहाँ अपील की व्यवस्था है। इस अपीलीय अधिकारी से सूचना न मिलने पर 90 दिनों के भीतर अपील के लिए केन्द्र एवं राज्य सूचना आयोगों की भी व्यवस्था है। यह संक्षिप्त विवरण "सूचना का अधिकार" अधिनियम 2005 के सन्दर्भ में है।

निरीक्षण का अधिकारः

"सूचना का अधिकार" अधिनियम के अनुच्छेद–2 (ञ) में कृति, दस्तावेजों एवं अभिलेखों के निरीक्षण की व्यवस्था है। भारत में सूचना के इस अधिकार का उपयोंग नहीं होने से अनेकों कठिनाइयाँ आ रही हैं। क्योंकि अभिलेखों एवं दस्तावेजों को बिना देखे सिर्फ कल्पना अथवा अनुमान के आधार पर सूचना लेने से कठिनाइयाँ बढ़ रहीं हैं। इसी कारण अधिकारियों को भी मांगी गयी सूचना के स्थान पर अन्य सूचनायें देकर भटकाने का अवसर भी मिल जाता है। देश में व्याप्त भ्रष्टाचार और भ्रष्टाचार की मानसिकता के कारण "सूचना के अधिकार" के अन्तर्गत सूचना पाने में कठिनाइयों का सामना करना पड़ता है। विभिन्न आयोगों के समझ संशोधन एवं न्यायधीशों सहित मानवशक्ति की कमी के कारण सूचना पाने में कई वर्षों का समय लग जाता है। देश में शिक्षा की कमी के कारण लोग स्वयं सूचना पाने के लिए आवेदन नहीं लिख पाते हैं। ऐसे लोगों को आवेदन लिखने के लिए भी रूपये खर्च

करने पड़ते हैं। यद्यपि "सूचना के अधिकार" अधिनियम में गरीबी रेखा के नीचे के लोगों के लिए निःशुल्क सूचना की व्यवस्था है।

वर्तमान समय में सूचना मांगने पर हिंसक घटनायें भी घट रही हैं। किसी संदर्भ में सूचना मांगने पर उस सूचना से जुड़े भ्रष्ट लोगों द्वारा प्राणघातक हमला कराने सहित अन्य हिंसात्मक व्यवहार भी किये जाते हैं। सूचना से सम्बन्धित अधिकारियों द्वारा भी उपेक्षित व्यवहार किया जाता है। कभी–कभी यह भी सुनाई पड़ता है कि अनावश्यक सूचनायें मांगी जाती हैं। यह समस्या दस्तावेजों एवं अभिलेखों के निरीक्षण के बिना सूचनायें मांगने के कारण उत्पन्न हुई हैं। "सूचना के अधिकार" से जुड़ी अधिक से अधिक समस्याओं के समाधान का एक सुगम मार्ग यही है कि "सूचना के अधिकार" के अन्तर्गत मांगी गयी सूचनाओं के लए दस्तावेजों एवं अभिलेखों के निरीक्षण के अधिकार का अधिक से अधिक उपयोग हो तभी इसके सार्थक परिणाम प्राप्त हो सकेगा।

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भारतीय राज व्यवस्था में न्यायपालिका की भूमिका

प्रो0 रघुवीर सिंह तोमर*

"भारत में सर्वोच्च न्यायालय ने अपने न्यायिक पुनर्विलोकन की शक्ति का उपयोग कर संसद द्वारा निर्मित कानूनों पर एवं जनहित याचिकाओं पर सुनाये गये अपने ऐतिहासिक निर्णयों के माध्यम से कार्यपालिका एवं व्यवस्थापिका को जनतंत्र के अपेक्षा के अनुकूल बनाने में महत्वपूर्ण भूमिका का निर्वाह किया है।"

एक स्वतंत्र देश की राजव्यवस्था में कार्यपालिका व व्यवस्थापिका के द्वारा निर्मित नियम व कानूनों के उल्लंघन करने वालों को दण्डित करने में न्यायपालिका की भूमिका अत्यंत महत्वपूर्ण होती है। कार्यपालिका व व्यवस्थापिका के द्वारा अपनी शक्तियों के दुरुपयोग करने पर उन्हें अवरुद्ध करने हेतु भी स्वतंत्र व सशक्त न्यायपालिका आवश्यक है। न्यायपालिका संविधान की संरक्षक होती है। कार्यपालिका व व्यवस्थयिका द्वारा संविधान विरोधी कार्य करने पर न्यायपालिका उन्हें वर्जित कर सकती है। स्वतंत्रता प्राप्ति के बाद भारत में जिस संविधान को लागू किया गया, उसमें स्वतंत्र व सशक्त न्यायपालिका का प्रावधान किया गया। भारत में संघात्मक व्यवस्था को अपनाते हुए भी एकीकृत न्याय–व्यवस्था की स्थापना की गयी। संविधान के संरक्षक होने के नाते भारत के सर्वोच्च न्यायालय को न्यायिक पुनर्विलोकन की शक्ति प्रदान की गयी। लेकिन यह शक्ति अमरीकी सर्वोच्च न्यायालय की तुलना में सीमित थी। अमरीकी संविधान में कानून की उचित प्रक्रिया (Due Process of Law) को अपनाया गया है।

यहाँ भारतीय संविधान में विधि द्वारा स्थापित प्रक्रिया (Procedure established by law) अपनाया गया है। संवैधानिक व्यवस्था के आधार पर अमरीकी सर्वोच्च न्यायालय किसी भी कानून की संवैधानिकता की जाँच दो आधार पर कर सकता है। प्रथम संघ या राज्य के विधान मण्डल द्वारा निर्मित कानून उसकी कानून निर्माण क्षमता के अन्तर्गत था या नहीं। द्वितीय वह कानून की उचित प्रक्रिया की शर्तों को पूरा करता है या नहीं। भारतीय संविधान की शब्दावली विधि द्वारा स्थापित प्रक्रिया का तात्पर्य यह है कि सर्वोच्च न्यायालय संघ या राज्य विधान मण्डल द्वारा निर्मित

* अध्यक्ष राजनीति विज्ञान विभाग महात्मा गांधी काशीविद्या पीठ वाराणसी

कानून को तभी असंवैधानिक घोषित कर सकता है, जबकि सम्बन्धित विधान मण्डल ने इस कानून के निर्माण में अपनी कानून निर्माण की क्षमता का उल्लंघन किया हो।

भारत में सर्वोच्च न्यायालय ने अपनी न्यायिक पुनर्विलोकन की शक्ति का उपयोग करते हुए संसद द्वारा निर्मित कानूनों को समय–समय पर अवैध घोषित करके अपनी संवैधानिक संरक्षक की भूमिका का निर्वाह किया है। सर्वोच्च न्यायालय ने अब तक व्यक्ति की स्वतंत्रता और नागरिक अधिकारों के रक्षक के रूप में महत्वपूर्ण भूमिका निभाई है। सन् 1950–51 में इसने जमींदारी व जागीरदारी के उन्मूलन हेतु पारित कानूनों को अवैध घोषित किया। 1953 में शोलापुर स्पिनिंग एण्ड वीविंग कम्पनी के अधिग्रहण को अवैध घोषित किया। केरल के कृषि सम्बन्धी अधिनियम को अवैध घोषित किया। मौलिक अधिकारों के संरक्षक के रूप में 1967 के गोलकनाथ विवाद में 6–5 के बहुमत से यह निर्णय किया कि संसद ऐसा कोई अधिनियम पारित नहीं कर सकती जो मौलिक अधिकारों को छीनता या सीमित करता हो।" यद्यपि कुछ विधि विशेषज्ञों संसद सदस्यों के द्वारा निर्णय की यह कह कर आलोचना की गयी कि यह राजनीति निर्णय है।

सर्वोच्च न्यायालय ने 1952 में शंकरी प्रसाद व 1965 में सज्जन सिंह मामले में यह स्वीकार किया था कि संसद मूल अधिकारों सहित संविधान के किसी भाग में संशोधन कर सकती है। लेकिन गोलकनाथ वाद 1967 में इसके विपरीत निर्णय लिया। 1969 में बैंकों के राष्ट्रीयकरण तथा 1971 में राजाओं के प्रिवीपर्स समाप्त करने के आदेशों को भी सर्वोच्च न्यायालय ने अवैध घोषित किया। इसके फल स्वरूप 1971 में 24वें संविधान संशोधन के द्वारा यह प्रावधान किया गया कि संसद को संविधान के किसी उपबन्ध को जिसमें मौलिक अधिकार भी आते हैं, संशोधित करने का अधिकार होगा। 1973 के अपने निर्णय में सर्वोच्च न्यायालय ने इस संवैधानिक संशोधन की वैधता को स्वीकार कर लिया। प्रधानमंत्री इंदिरा गांधी के कार्यकाल में किये गये 42वें संविधान संशोधन के द्वारा भारतीय संविधान में मनमाने परिवर्तन किये गये, जिससे भारतीय संविधान के संसद को यह भी अधिकार प्राप्त हुआ कि वह संविधान के किसी भाग में संशोधन कर सकती है। इस संशोधन के द्वारा राष्ट्रपति, उपराष्ट्रपति, प्रधानमंत्री तथा लोकसभा अध्यक्ष के चुनाव सम्बन्धी

मामले सुनने से न्यायालय को वंचित किया गया। इसके पश्चात उच्चतम न्यायालय ने यह निर्णय दिया कि संसद संविधान में संशोधन कर सकती है लेकिन इसके मूलभूत स्वरूप को नहीं बदल सकती है। न्यायालय इस प्रकार के निर्णयों से भारतीय राजव्यवस्था में अपनी भूमिका का महत्वपूर्ण निर्वाह किया है।

भारतीय राजव्यवस्था में न्यायपालिका की सक्रिय भूमिका जनहित सम्बन्धी याचिकाओं की सुनवाई से प्रारम्भ हुई। भारतीय न्यायपालिका ने जनहित सम्बन्धी याचिकाओं की सुनवाई करके विधिक क्षेत्र में एक नया अध्याया प्रारम्भ किया। जब किसी नागरिक द्वारा जनसमुदाय की हानि के तथ्यों की ओर उच्च न्यायालय व उच्चतम न्यायालय का ध्यान आकर्षित किया जाता है तो न्यायपालिका ऐसे प्रकरणों की सुनवाई करके परमादेश, उत्प्रेषण, बन्दीप्रत्यक्षीकरण, प्रतिषेध तथा अधिकार पृच्छा जैसी रिटों को जारी करके सम्बन्धित प्रकरण की सुनवाई करती है।

भारत में सर्वप्रथम 1976 में जनहित याचिका का आरम्भ सर्वोच्च न्यायालय के न्यायमूर्ति कृष्णा अय्यर द्वारा मुम्बई कामगार बनाम अब्दुल्ला भाई 1974 के केस की सुनवाई से हुआ, जिसमें न्यायालय ने यह सिद्धान्त प्रतिपादित किया कि 'जनहित की व्यापक व्याख्या इसलिए आवश्यक है कि इससे वैयक्तिक स्वतंत्रता के साथ–साथ अनगिनत व्यक्तियों के हितों की रक्षा भी हो जाती है। विशेषतौर पर जबकि ऐसे समुदाय को गरीबी व अज्ञान के कारण अपने अधिकारों का ज्ञान नहीं होता और आर्थिक विपन्नता के कारण वे लोग खर्चीली न्याय प्रणाली व नियमों की बाध्यता के कारण न्यायालय में जाने में असमर्थ हैं।'

न्यायधीश अय्यर ने ऐसे ही सुधारवादी निर्णय देकर न्यायिक व्यवस्था को सक्रिय बनाया। उन्होंने सुनील बत्रा बनाम दिल्ली प्रशासन[1] नगरपालिका रतलाम बनाम बरफीचन्द[2] अखिल भारतीय शोषित कर्मचारी संघ (रेल्वेज) बनाम भारत सरकार[3] आजाद रिक्शा चालक संघ अमृतसर बनाम पंजाब राज्य[4] फर्टिलाइजर

[1] ए.आई.आर. 1980
[2] ए.आई.आर. 1980
[3] ए.आई.आर. 1981
[4] ए.आई.आर. 1981

कारपोरेशन कामगार संघ बनाम भारत संघ[5] आदि में न्यायाधीश कृष्णा अय्यर ने जनहित याचिका के महत्व को प्रतिपादित कर न्यायपालिका की जनहित सम्बन्धी वादों की सुनवाई हेतु न्यायालय की भूमिका को सक्रिय बनाया।

सर्वोच्च न्यायालय के मुख्य न्यायधीश पी.एन. भगवती ने पत्रों के आधार पर याचिका की सुनवाई कर जनहित याचिका के क्षेत्र में न्यायिक सक्रियता को तेज किया। सर्वोच्च न्यायालय ने आगरा होम प्रोटेक्शन केस में 80 लड़कियों के मामले की सुनवाई हेतु कानून के दो प्रोफेसरों को स्वीकृति दी। भागलपुर (बिहार) जेल के विचाराधीन कैदियों के सम्बन्ध में इंडियन एक्सप्रेस के समाचार के आधार पर एडवोकेट श्रीमती हिंगोरानी की याचिका पर सुनवाई करके कैदियों को जेल से मुक्त कराया। बम्बई के पटरीवासियों के सम्बन्ध में एक पत्रकार ओल्गा तेलिस की याचिका पर उन्हें सुरक्षा प्रदान की। सुनील बत्रा बनाम दिल्ली प्रशासन केस में आजीवन कारावास की सजा भुगत रहे कैदी के साथ जेल अधिकारी के क्रूर व्यवहार के सम्बन्ध में एक दूसरे कैदी के पत्र को याचिका मानकर सुनवाई करके कैदी को सुरक्षा देने व अपराधी को दण्डित करने का आदेश दिया। सर्वोच्च न्यायालय ने दिल्ली के एक पुलिस ड्राइवर की याचिका को स्वीकार कर समान काम समान वेतन का आदेश दिया। आगरा के चर्मकारों के केस की सुनवाई करके न्यायालय ने राज्य सरकार को आदेश दिया कि वह अपने सहकारी संघों को निर्देश दे कि वह इन्हें सहकारी संघों में संगठित करके उनमें ठेला लाने का सामर्थ्य विकसित करे।

इसी प्रकार न्यायालय ने तिलोनिया (अजमेर) के श्रमिकों के केस, बन्धुआ मुक्ति मोर्चा बनाम भारत संघ, रूदल शाह बनाम बिहार राज्य, एशियाड श्रमिक, जैसे मामलों की सुनवाई करके जनहित सम्बन्धी कार्यों के सम्पादन में न्यायपालिका की महत्पूर्ण भूमिका का निर्वाह किया। सर्वोच्च न्यायालय व उच्च न्यायालय ने औद्योगिक प्रदूषण, गंगा जल प्रदूषण के मामलों की सुनवाई करके जनहित याचिकाओं की सुनवाई में न्यायिक सक्रियता दिखाई।

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[5] ए.आई.आर. 1981

भारतीय राज व्यवस्था में न्यायालय की सक्रिय भूमिका अन्य क्षेत्रों में भी दिखाई देती है। सर्वोच्च न्यायालय ने भ्रष्टाचार सम्बन्धी मामलों से सम्बन्धित जनहित याचिकाओं की सुनवाई करके भ्रष्टाचार को रोकने में भी सक्रिय भूमिका का निर्वाह किया है। 1993 में जैन हवाला मामले में जनहित याचिका स्वीकार की तथा सी.बी.आई. को जवाबदेह बनाया। निजी कम्पनियों को सरकारी खजाने से लाभ पहुँचाने सम्बन्धी मामलों की जनहित याचिकाओं को भी न्यायालय ने स्वीकार करके तथा सुनवाई करके महत्वपूर्ण निर्णय दिये हैं। 1992 में 3500 करोड़ रुपये का प्रतिभूति घोटाला, 300 करोड़ का दूरसंचार घोटाला, पूर्व केन्द्रीय मंत्री शील कौल द्वारा सरकारी आवासों के आवंटन का मामला, राष्ट्रमण्डल खेल में भ्रष्टाचार का मामला, 2जी स्पेक्ट्रम घोटाला तथा खाद्यान्न के सम्बन्ध में जनहित याचिका आदि की सुनवाई में न्यायालय ने भूमिका को सार्थक बनाया है। सर्वोच्च न्यायालय ने केन्द्र सरकारों को समय–समय पर जनहित सम्बन्धी मामलों की सुनवाई करते हुए चेतावनी देने का कार्य किया है। खाद्यान्न मामले में खाद्य मंत्री शरद पवार तथा कैग मामले में कपिल सिब्बल को चेतावनी देकर मर्यादित आचरण करने पर जोर दिया। यद्यपि न्यायिक सक्रियता, को सत्तारूढ़ राजनेता शासन कार्यों में अवरोध मानते हैं, लेकिन जनहित की दृष्टि से यह सक्रियता आवश्यक है। न्यायपालिका ने न केवल शासन की कमियों को उद्घाटित किया है, बल्कि न्यायपालिका में व्याप्त भ्रष्टाचार के सम्बन्ध में न्यायाधीशों को भी सचेत किया है। अतः यह स्पष्ट है कि भारतीय राजव्यवस्था में न्यायपालिका ने सृजनात्मक भूमिका का निर्वाह किया है।

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शासकों की मनोवृत्ति : सरकार और मीडिया के सन्दर्भ में

डॉ0 राजेन्द्र सिंह*

"लोकतान्त्रिक शासन प्रणाली में सरकार एवं नागरिकों के बीच परस्पर संवाद एवं समन्वय स्थापित करने का कार्य मीडिया के द्वारा होता है। स्वतंत्रता पूर्व मीडिया के विकास का इतिहास विदेशी शासकों के मनोवृत्ति एवं शासन के अहित के भय के कारण बहुत ही उतार–चढ़ाव पूर्ण रहा, परन्तु स्वतंत्रता के पश्चात् प्रेस के विकास हेतु अनेक महत्वपूर्ण प्रयास किये गये।"

सरकार और मीडिया के बीच उचित सम्बन्ध स्थापित होने से ही लोकतन्त्र सफल होगा। जो सरकार मीडिया को महत्व देती है, वही लोकहितकारी सरकार की मान्यता लोक द्वारा प्राप्त करती है। अब्राहम लिंकन ने जनता का, जनता के लिए तथा जनता द्वारा स्थापित शासन तंत्र को लोकतंत्र की संज्ञा प्रदान किया है। मीडिया के द्वारा ही जनता की लोकतांत्रिक व्यवस्था में सहभागिता सम्पन्न होती है। मीडिया जनभावनाओं की अभिव्यक्ति का सबसे सशक्त मंच है, अतः सरकार वही लोकप्रिय होती है जो मीडिया को महत्व देती है।

लोकतान्त्रिक शासन व्यवस्था वाले देशों में मीडिया की भूमिका महत्वपूर्ण होती है। भारतीय लोकतन्त्र में मीडिया के महत्व के सन्दर्भ में लूई फिशर ने कहा था – "भारत ने गणतन्त्र शासन की पद्धति को अपनाया है और चूंकि यहां कोई सुदृढ़ विरोधी दल नहीं, अतः प्रेस की स्वतंत्रता को कायम रखना नितान्त आवश्यक है। न तो सरकार को ही समाचार पत्र की गतिविधियों में हस्तक्षेप करना चाहिए और न समाचार पत्रों के मालिकों को सम्पादकीय लेखों और समाचारों के प्रकाशन आदि में किसी प्रकार का हस्तक्षेप करना चाहिए।"[1] 'इनाडू' के सम्पादक रामोजी राव ने स्वतंत्र प्रेस को लोकतन्त्र का सेफगार्ड[2] बताया है। इन्हीं प्रश्नों को जवाहर लाल नेहरू ने 1963 में 'इण्डियन फेडरेशन ऑफ वर्किंग जर्नलिस्ट' के 11वें वार्षिक सम्मेलन का उद्घाटन करते हुए उठाया था– "प्रेस की स्वतंत्रता एक अच्छी बात है। पर वह किसकी स्वतंत्रता है? मालिक की, सम्पादक की या पत्रकार की? यह सोचने की बात है, क्योंकि यह स्पष्ट है कि प्रेस की स्वतंत्रता अन्ततः मालिक की

* असिस्टेंट प्रोफेसर, मनोविज्ञान, म0गां0 काशी विद्यापीठ, वाराणसी

[1] तिवारी डॉ0 अर्जुन (2004) आधुनिक पत्रकारिता, पृ0 117 विश्वविद्यालय प्रकाशन, वाराणसी।

[2] तिवारी, डॉ0 अर्जुन, आधुनिक पत्रकारिता, पृ0 117

ही होगी, जो इस स्वतंत्रता का और कारणों के लिए भी उपयोग कर सकता है।"[3] सरकार की सुरक्षा अभिव्यक्ति की स्वतंत्रता से ही सम्भव है। "तर्क से तर्क का समाधान और बहस से बहस का जवाब होने दिया जाय तो हर अच्छी सरकार सुरक्षित रह सकती है।"[4] इसी मत का समर्थन डीन जान बनाम ओरेगन[5] के मामले में मुख्य न्यायधीश ने करते हुए कहा है कि यदि समाज को अपने संस्थानों को लोगों की बलपूर्वक अथवा हिंसा द्वारा उलट फेंकने की उत्तेजक भावनाओं से बचाकर रखना है तो बोलने और अभिव्यक्त करने की स्वतंत्रता का संवैधानिक अधिकार देकर प्रेस का व सभाएं करने की स्वतंत्रता का अतिबन्धन न होने दे, जिससे लोगों को राजनैतिक विरोध का पर्याप्त अवसर मिलता रहे।

भारत में सरकार और मीडिया के अन्तर्सम्बन्धों को ऐतिहासिक परिप्रेक्ष्य में देखना समीचीन होगा। भारत में पत्रकारिता का श्रीगणेश अंग्रेजों ने किया। सन् 1766 में ईस्ट इण्डिया कम्पनी का कर्मचारी विलियम वोल्ट ने कलकत्ता में काउंसिल हाउस के दरवाजे पर एक नोटिस चिपकाकर प्रेस की अनिवार्यता एवं वांछनीयता को बतलाया । प्रारम्भिक अंग्रेज शासक प्रेस की कल्पना से भी मानो इतने आतंकित और आशंकित थे कि वोल्ट को पत्र–प्रकाशनकी अनुमति देना तो दूर उसका भारत में रहना भी अपने लिए खतरनाक मानते हुए उसे वापस इंग्लैण्ड भेज दिया। इस घटना के तेरह–चौदह वर्ष बाद जेम्स आगस्टस हिक्की ने 29 जनवरी, 1780 को 'बंगाल गजट और कैलकटा जनरल एडवरटाइजर' प्रकाशित करके भारतीय पत्रकारिता का श्रीगणेश किया। हिक्की भी कम्पनी का असन्तुष्ट कर्मचारी था। उसने कम्पनी के अफसरों के द्वारा निजी व्यापार चलाकर और अन्य तरीकों से की जा रही लूट का भण्डाफोड़ किया। गवर्नर जनरल वारेन हेस्टिंग और उनकी पत्नी तथा तत्कालीन मुख्य न्यायधीश पर चरित्र हनन की बातें लिखा। इस पर उसे जुर्माना चुकाना पड़ा, जेल जाना पड़ा और उसके पत्र को डाक सुविधाओं से वंचित होना पड़ा। "भारत में पत्रकारिता पर शासकीय अंकुश और दबाव उसके

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[3] A free and vibrant press is the best safeguard for democracy and all the values it implies- Ramoji Rao.

[4] न्या0 मू0 बॉडीज व्हिटने बनाम कैलीफोर्निया राज्य (1972) 274 यू0एस0 357।

[5] डीन जान बनाम ओरेंगन (1937) 299 यू0एस0 353।

जन्म के साथ ही आरम्भ हो गये थे। प्रारम्भ में विदेशी शासकों के इन कृत्यों का शिकार स्वयं विदेशियों द्वारा संचालित पत्र बनें, किन्तु कालान्तर में उनका सारा कोप भारतीय पत्रों और पत्रकारों पर घनीभूत रूप में उतरा।"[6]

भारतीय पत्रकारिता के प्रारम्भिक 19 वर्षों तक कोई प्रेस कानून नहीं था। यद्यपि 1785 में एक आम आदेश (जनरल आर्डर) जारी करके परिषद् के निर्णयों और प्रस्तावों को प्रकाशित करने पर प्रतिबन्ध लगा दिया गया, किन्तु भारत में पहला औपचारिक प्रेस कानून 13 मई 1799 में बना। यह कानून तत्कालीन गवर्नर जनरल लार्ड वेलेजली ने बनाया था। अतः यह कानून वेलेजली रेगुलेशंस के नाम से चर्चित हुआ। इसके प्रावधानों के अन्तर्गत पत्रों पर प्रकाशन पूर्व सेंसरशिप लगा दिया गया और मुद्रक, सम्पादक तथा स्वामी का नाम पत्र में मुद्रित करना एवं प्रकाशित करना अनिवार्य कर दिया गया। पत्रों के प्रति उदार लार्ड हेस्टिंग ने 1818 में इस कानून को समाप्त करके पत्रों के लिए नया नियम बना दिया जो पत्र की स्वतंत्रता के बाधक नहीं थे। पुनः 1823 में पत्रों के प्रति अनुदार गवर्नर जनरल जान एडमस से 1823 में प्रेस आर्डिनेंस' जारी करके पत्रों पर लाईसेंस प्रणाली जारी कर दिया अर्थात् पत्र–प्रकाशन के लिए लाईसेंस लेना अनिवार्य कर दिया। इस अध्यादेश को 1835 में उदार गवर्नर जनलर मेटकाफ ने समाप्त करके एक नया कानून बनाया, जो मेटकाफ एक्ट' के नाम से जाना जाता है। यह कानून पत्रों के प्रति उदार था, जिससे भारतीय प्रेस का तेजी से विकास हुआ। यहाँ तक कि जब 1857 में विद्रोह हुआ तो तत्कालीन गवर्नर जनरल लार्ड केनिंग सहित प्रभावशाली अंग्रेज शासकों और पत्रकारों ने यह स्वीकार किया कि भारतीयों द्वारा संचालित प्रेस द्वारा प्रचारित विचारों का प्रतिफल यह विद्रोह है। अतः 13 जून, 1857 को लार्ड केनिंग ने एक नया कानून बनाकर पुनः पत्रों पर लाइसेंस प्रणाली लागू कर दिया। यह कानून एक वर्ष तक ही प्रभावी था। सन् 1860 में लार्ड मैकाले द्वारा तैयार की गयी भारतीय दण्ड संहिता प्रभावी हुयी, जिसमें प्रेस को प्रभावित करने वाली कुछ धाराएं थी। सन् 1867 में प्रेस और पुस्तक रजिस्ट्रीकरण कानून बनाया गया, जो

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[6] त्रिखा, डॉ0 नन्द किशोर, (1986), प्रेस विधि, पृ0 347, विश्वविद्यालय प्रकाशन, वाराणसी।

प्रेस विरोधी कानून नहीं था। 1878 में लार्ड लिटन ने भारतीय पत्रकारिता के इतिहास का सबसे कठोर कानून –वर्नाकुलर प्रेस एक्ट– जारी किया। इस कानून के अन्तर्गत सरकार भारतीय भाषा के पत्रों के सम्पादकों को यह जमानत देने को कह सकती थी कि वे उसके प्रति अप्रीति फैलाने वाली बातें नहीं छापेंगे। बिना अदालती आदेश के पत्रों और छापेखानों में घुसने और तलाशी लेने के वारंट जारी करने का अधिकार सरकार ने खुद ले लिया। पत्रों पर पूर्व संसरशिप भी लागू हो गया। सन् 1881 में लार्ड रिपन ने इस कानून को निरस्त कर दिया। सन् 1898 में भारतीय दण्ड संहिता में कुछ संशोधन हुआ और इसी वर्ष इण्ड प्रक्रिया संहिता प्रवर्तित हुई। इसकी कुछ धाराएं प्रत्यक्ष या अप्रत्यक्ष रूप से प्रेस को प्रभावित करती हैं।

बीसवीं सदी का प्रारम्भिक दो दशक बाल गंगाधर तिलक के उग्र राष्ट्रवादी विचारों से प्रभावित था। इस कालखण्ड में बंगभंग आन्दोलन और क्रान्तिकारी आन्दोलन से भारतीय जनमानस गहराई से प्रभावित हुआ। इसका प्रत्यक्ष प्रभाव भारतीय भाषा के पत्रों पर पड़ा। इन पत्रों का तेवर उग्र हो गया। उन स्थितियों से निपटने के लिए शासकों ने सन् 1908 में समाचार पत्र (अपराध उद्दीपन) अधिनियम और सन् 1910 में भारतीय प्रेस एक्ट बनाया। इन कानूनों के तहत अनेक पत्रों से जमानत मांगे एवं जब्त किए गये। पत्रों के विरुद्ध कठोर कार्रवाई की गयी। अनेक पत्रकारों एवं सम्पादकों को जेल में बन्द कर दिया गया। सप्रू की अध्यक्षता में गठित एक पुनरीक्षण समिति की रिपोर्ट पर इन कानूनों को 1922 में निरस्त कर दिया गया। गाँधी जी के नेतृत्व में संचालित राष्ट्रीय आन्दोलन से निपटने के लिए 1930 प्रेस आर्डिनेन्स जारी किया गया, जिसे 1931 में प्रेस (आपात कालीन शक्तियाँ) अधिनियम द्वारा इसे और कठोर बना दिया गया। सन् 1947 में भारत सरकार ने प्रेस जाँच समिति गठित किया, जिसके रिपोर्ट पर औपनिवेशिक काल के सभी प्रेस विरोधी कानून निरस्त कर दिए गए।

ब्रिटिश शासन के दौरान सरकार और मीडिया के अर्न्तसम्बन्धों की समीक्ष करने पर हम पाते हैं कि जब–जब अनुदार मनोवृत्ति वाले शासकों ने सत्ता की बागडोर सम्हाली तब–तब प्रेस की स्वतंत्रता को बाधित करने वाला कठोर कानून

बनाया गया तथा उदार मनोवृत्ति वाले शासकों के कार्यकाल में इन कानूनों को निरस्त करके प्रेस के विकास को सुगम बनाया गया। एक महत्वपूर्ण बात यह भी है कि ब्रिटिश शासकों की नीति अंग्रेजों द्वारा प्रकाशित अंग्रेजी पत्रों के प्रति उदार थी जबकि भारतीय भाषा के पत्रों को कठोर कानूनों का सामना करना पड़ा। अंग्रेजों द्वारा प्रकाशित अंग्रेजी पत्रों ने ब्रिटिश नीतियों का प्रायः समर्थन किया जबकि भारतीयों द्वारा प्रकाशित भारतीय भाषा के पत्रों ने ब्रिटिश नीतियों की जमकर निन्दा की।

15 अगस्त 1947 को भारत स्वतंत्र हुआ और 26 जनवरी 1950 को स्वतंत्र भारत का संविधान लागू हुआ। भारतीय संविधान के अन्तर्गत भारतीय नागरिकों को छः मालाधिकार प्रत्याभूत है। अनुच्छेद 19(1) (क) के अन्तर्गत वाणी और अभिव्यक्ति की स्वतंत्रता भारतीय नागरिकों को प्राप्त है। अभिव्यक्ति की स्वतंत्रता में ही प्रेस की स्वतंत्रता अन्तर्निहित है। स्वतंत्र भारत में भी 1951 में प्रेस (आक्षेपणीय सामग्री) अधिनियम बनाया गया जो प्रेस की स्वतंत्रता में बाधक था। यह कानून 1956 में निरस्त हो गया। सन् 1952 में प्रेस की दशा और दिशा पर विचार करने के लिए प्रथम प्रेस आयोग का गठन किया गया। आयोग ने 1954 में अपनी संस्तुति प्रस्तुत की। आयोग की सिफारिश पर 1955 में श्रमजीवी पत्रकार (सेवा की शर्तें) और प्रकीर्ण उपबन्ध अधिनियम, 1965 में प्रेस परिषद अधिनियम, 1956 में समाचार पत्र (मूल्य एवं पृष्ठ) अधिनियम आदि पारित हुआ।

आयोग की संस्तुति पर ही प्रेस रजिस्ट्रार की नियुक्ति हुई। इसके अलावा 1956 में संसदीय कार्यवाही (प्रकाशन संरक्षण) अधिनियम, 1957 में कापी राईट एक्ट, 1971 न्यायालय अवमान अधिनियम, 1990 में प्रसार भारती अधिनियम, 1995 केबुल टी0वी0 कानून, 2000 में सूचना प्रौद्योगिकी अधिनियम, 2005 में सूचना का अधिकार अधिनियम आदि महत्वपूर्ण मीडिया कानून स्वतंत्र भारत में लागू हुआ। 1962 ई0, व 1975 ई0 में घोषित आपात काल के दौरान प्रेस की स्वतंत्रता बाधित हुई। बीसवीं सदी के नवें दशक में मानहानि कानून और अश्लीलता कानून में भी सरकार ने संशोधन का प्रयास किया, किन्तु मीडिया और जनता के व्यापक विरोध के कारण सरकार को पीछे हटना पड़ा। सन् 1980 में द्वितीय प्रेस आयोग का गठन

हुआ, जिसने 1982 में अपना रिपोर्ट प्रस्तुत किया। इस रिपार्ट में प्रेस के विकास के सन्दर्भ में महत्वपूर्ण सिफारिशें की गई थी। 1965 के प्रेस परिषद अधिनियम को 1975 में निरस्त कर दिया गया। पुनः 1978 में नया प्रेस परिषद अधिनियम बना।

स्वतंत्र भारत में प्रेस के विकास हेतु सरकार ने अनेक महत्वपूर्ण प्रयास किये। अनेक समितियों एवं आयोगों का गठन किया। द्वितीय प्रेस आयोग का मानना है कि लोकतांत्रिक तथा विकासशील राष्ट्र में प्रेस की भूमिका सरकार के प्रति न तो शत्रुतापूर्ण हो और न ही मित्रतापूर्ण। प्रेस को रचनात्मक आलोचना का कार्य करना चाहिए।[7]

निष्कर्षतः हम कह सकते हैं कि सरकार और मीडिया का अर्न्तसम्बन्ध लोकतान्त्रिक शासन प्रणाली में युक्तियुक्त संतुलन स्थापित करने वाला होना चाहिए। प्रेस का यह धर्म है कि सरकार का न तो अविचारित विरोध करे और न ही उसका अन्ध समर्थन करे। उसी प्रकार सरकार का भी यह कर्तव्य है कि वह अपने राजनीतिक हितों के लिए प्रेस की स्वतंत्रता को न तो बाधित करे और न ही प्रेस को राष्ट्र की सम्प्रभुता, समाज की व्यवस्था और व्यक्ति की गरिमा के साथ खिलवाड़ करने की छूट दे। सरकार और मीडिया के बीच युक्तियुक्त संतुलन एवं धनात्मक मनोवृत्ति से ही लोकतांत्रिक व्यवस्था मजबूत होगी।

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[7] भानावत डॉ0 संजीव (2000), प्रेस कानून और पत्रकारिता, पृ0 191, राजस्थान हिन्दी अकादमी, जयपुर।

Our next issue

The Journal of Indian Thought and Policy Research announces the call for papers for next special issue on 'Agriculture and Rural Development'. We are particularly interested in holistic approaches that combine society and economic development with environmental and cultural protection. Need of the hour appears to be new forms of learning and innovations that will enable us to escape from existing routines and systems that are both notoriously persistent and inherently unsustainable. The purpose of special issue is reflected in discussions that argue "not only is doing good the right thing to do, but it also leads to doing better". Submissions for publication will be considered, in the following areas.

- Agricultural economic theory and policy
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- Rural finance
- Resource economics and environment protection
- Employment, labour use and migration
- Agribusiness
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- Development economics
- Rural household behavior
- Rural cooperatives
- Sustainable agriculture
- Irrigation, water resources management, seed science research, agricultural engineering, marine sciences, agronomy, animal science, aquaculture, crop science, dairy science, fish and fisheries, forestry, freshwater science, horticulture, poultry science, soil science, veterinary, virology, viticulture, weed biology and other related topics.

Notes for Contributors - Journal invite research or policy briefs, and case studies (up to 2,500 words) and full articles (up to 8,500 words) or other related papers. The deadline for submission is July 25; 2011.Authors are invited to send their contributions either in Hindi or English. The contributions should preferably be in MS word 2003 format, Times New Roman, 12 font, typed in double space, and Hindi contribution attached with appropriate font to be sent to the Editorial Board, AVAP, Allahabad both in hard and soft copy, until last week of August.

Mailing Address

Arundhati Vashistha Anusandhan Peeth
MAHAVIR BHAWAN, 21/16 Hashimpur Road, Tagore Town,
Allahabad - 211002 (U.P.), BHARAT
Phone & Fax : 91-532-2466563, E-mail : nationalpolicy.in@gmail.com

"The spirit of democracy is not a mechanical thing to be adjusted by abolition of forms. It requires change of heart."

— Mahatma Gandhi

"Democracy is the government of the people, by the people, for the people"

— Abraham Lincoln

"It has been said that democracy is the worst form of government except all the others that have been tried."

— Winston Churchill

"After all, when one tries to change institution, without having changed the nature of men, that unchanged nature will soon resurrect those institution."

— Historian Will Durant

"However good a constitution may be it is sure to turn out to be bad because those who are called on to work it happen to be a bad lot. However bad constitution may be it may turn out to be good if those who are called on to work it happen to be a good lot".

— Dr. Ambedkar

"The real guarantee of successful implementation of any constitution or law lies not in the law of the land or in the institutional framework set up by it, but in the level of consciousness of the common man. This is not meant to under rate the value of the constitution, but first things should come first. We must, therefore, give the highest priority to man moulding programme, constitution is next in importance.

.....Democracy is not only a form of government but is also a form of social organization. The formal framework of democracy is of little value and would be a misfit if there is no social democracy."

— Dattopant Thengadi