Reforming politics

By P.P. Rao

THE NATIONAL Democratic Alliance Government and the Opposition deserve a pat on their back for passing unanimously the Constitution Amendment Bill with respect to defections and the size of the Council of Ministers. Such constructive cooperation is needed for carrying out other necessary reforms.

The NDA promised two significant things in its election manifesto in 1990: (i) to appoint a Commission to Review the Constitution of India and (ii) to introduce necessary electoral reforms on the basis of the recommendations of the Dinesh Goswami Committee, the Inderjit Gupta Committee and the Law Commission Report.

The Government fulfilled the first promise by constituting a Commission headed by Justice M.N. Venkatachaliah in 2000. The Commission in its report dated March 31, 2002 noticed serious deficiencies in the working of our democracy and suggested remedial measures. After a lapse of over 20 months, the Government took the first step towards implementing the recommendations by amending the Constitution to curb defections and limit the size of the Council of Ministers. As a result of this amendment, in future, any Member of Parliament or of a State Legislature who defects to another party will lose his seat. He will have to get re-elected to enter the House irrespective of whether he defects singly or as a member of a group consisting of not less than one-third members of the legislature party concerned. Till now, in the name of split, a faction comprising one-third or more members of a legislature party could desert the parent body *en bloc* and join another political party without losing membership of the House. This gave rise to large-scale corruption and horse-trading. Ministerships used to be bartered away for defections. The voters had no say in the matter. Hereafter, the members of a legislature party cannot play such games. The power to decide disputes regarding defection remains with the Speakers. It ought to have been transferred to the Election Commission as suggested by experts.

The latest amendment to the Constitution [on defections] should be the beginning of serious reform and not the end.

Curtailing the size of the Council of Ministers is another step in the right direction. In future, no Council of Ministers can have more than 15 per cent of the strength of the Assembly or the Lok Sabha as Ministers. There is no need for even 15 per cent. A handful of clean and competent Ministers is enough to run the affairs of the country.

But limiting the size of the Council of Ministers will definitely save public money though it will not necessarily mean better governance. The present state of affairs is not at all satisfactory. As Nani Palkhivala pointed out, a person needs years of training to attend to a boiler or to mind a machine, to supervise at shop floor or to build a bridge, to argue a case in a law court or to operate upon a human body, but to steer the lives and destinies of 1000 million of our fellowmen, no education or equipment is required at all. To provide clean and efficient governance, eminent jurists have suggested making a provision in the Constitution enabling the Prime Minister and the Chief Ministers to appoint experts from outside the Legislature as Ministers for handling key portfolios. They could be made ex-officio members for the period they hold office. Another way of improving the quality of Ministers is to lay down appropriate conditions of eligibility for each post insisting on requisite equipment and experience for handling a portfolio with competence. Such a reform will make the post of Minister accessible only to deserving persons.

The NDA Government is yet to get down to dealing with corruption, criminalisation of politics and prevention of electoral malpractices. This is the best time to make all necessary amendments to the Constitution and the Representation of the People Act, 1951 to purify the electoral process, ridding it of corruption, criminalisation and caste and community hold. As suggested by the Law Commission, it should undertake legislation for regulation of political parties to ensure inner party democracy, maintenance of regular accounts of income and expenditure and their periodic audit.

Too many political parties impede the smooth functioning of democracy. A two-party system at the national level to begin with will help make parliamentary democracy a success. The Election Symbols Order should be replaced by an Act of Parliament, raising the norms for recognition of political parties and their classification. The criteria laid down by the Election Commission needs upward revision to an extent that it will result in recognition of only two national parties, on the one hand, and drastic reduction in the number of State parties, on the other. It would be more rational to have a three-fold classification of political parties — national parties, State parties and multi-State parties. The Law Commission's suggestion not to allow independent candidates to contest is sound. Partial state funding in kind is desirable.

The recent elections in five States have shown that the Supreme Court judgment upholding the voters' right to know the antecedents of candidates has made considerable impact. The right to reject all the candidates, if they are not acceptable to a majority of the voters in a constituency, and demand a fresh election will go a long way. Such a measure would transform the voters into masters instead of being helpless vote givers. The latest amendment to the Constitution should be the beginning of serious reform and not the end.

Defective politics

By Rajeev Dhavan

The latest amendment to the anti-defection law is flawed. Defections will not be eliminated.

POLITICS IS kinder to itself than it is to logic. Defective politics led to the anti-defection law of 1985. The anti-defection law led to defective politics. The original design of 1985 came under heavy fire. The Indian Constitution and laws did not recognise the 'political party' as an institution of governance except in the Election Symbols Order of 1968. The anti-defection law in the Tenth Schedule of the Constitution made political parties fundamental to the working of legislatures. Drawing strength from Edmund Burke's famous address to his Bristol constituents in 1790 that he was not their delegate but their representative, backbench legislators claimed that the anti-defection amendment made them mere playthings in the hands of their monolithic parties. But in fact, the reverse was the case. The party was a plaything in the hands of the backbencher. Each party became the potential victim of the 'defecting' movements of its backbench. Anyhow, the Supreme Court's anti-defection judgment of 1992 upheld the anti-defection law by a slim 3:2 majority — whilst striking down the total exclusion of judicial review by courts as being contrary to the basic structure of the Constitution. But this was not a straightforward victory of stability over democratic speech. The Court hinted that the original 1985 amendment protected a legislator's freedom by permitting one-third of a political party to defect. The dissenting judgment contained justified warnings of the incongruities. Not enough attention was given to the vast powers reposed in the Speaker. But the minority judgment threw the baby out with the bathwater by throwing out the whole amendment.

Despite these judicial blessings between 1985 and 2003, the anti-defection law seems to have created chaos. Every conceivable loophole was discovered and exploited. Each defection led to drama. Some dramas exploded into constitutional crises. The Meghalaya Speaker suspended and later disqualified five Opposition members ignoring an order from the Supreme Court. President's rule was imposed on the State to save the situation. In 1988, the Speaker of the Mizoram Assembly found that one of the nine legislators constituting the 'one-third' defection was abroad — thus tentatively viewing the remaining eight as defectors. This was enough for the Governor to dismiss the Ministry and for President's rule to be imposed with the dissolution of the Assembly.

In Nagaland, the Speaker recognised a split, but the Governor decided to impose President's rule under dubious circumstances — for it to be struck down by the Supreme Court in 1994 after it was too late. Even more disturbing were the antics of the Goa defections that gave rise to two Supreme Court decisions in 1993 and 1994. The facts were astounding. The Speaker joined the defectors to become the next Chief Minister. His successor as Speaker refused to adjudicate the matter. Eventually, the Supreme Court upheld the decision to disqualify two legislators, but quashed the decision not to recognise a split. Meanwhile ungainly musical chairs disgraced Goa's governance. In Nagaland, the Governor asked the Speaker to reconsider his decision of disqualifying 10 members — resulting in the Governor's removal from office. In 1993, a mighty confrontation surfaced between the Speaker of Manipur and the Supreme Court in relation to an anti-defection case when the latter ordered the Union Government to bring the Speaker to Court — with a minimum use of force, if necessary. In 1997, the Uttar Pradesh crisis reached the Supreme Court in connection with the Speaker confounding the arithmetic to rule that the 12 MLAs were not defectors. One judge thought this decision was perverse. The matter went to a larger Bench; and, then, to a Constitution Bench on the scope of judicial review over splits as opposed to defections. Meanwhile, time eclipsed the crisis.

What do we make of this alarming state of affairs in the aftermath of the 1985 amendment? These are just some of the crises that nearly brought the Constitution to a standstill . Meanwhile, 'suitcase' politics saved and destroyed many Governments including P.V. Narsimha Rao's Congress regime. Even though Mr. Rao was exculpated, the Supreme Court made a decision in 1998 that legislators who took bribes were immune from prosecution because all this was part of their work. Where money did not change hands, defectors were rewarded with ministerial or government posts. Two conclusions stand out from the pre-2003 experience. The first is that the anti-defection law of 1985 failed miserably — to be totally floored and defeated by every possible ingenuity that could have been devised by Indian politics. This total failure made the anti-defection law a *de facto* nullity. The second is that the fate of any anti-defection law depends on the decision-making ability and integrity of the Speaker. The entire edifice of the anti-defection law collapses if — as in the Goa case — the Speaker himself is an interested party who wants to become Chief Minister. Equally ingenious was the mathematics of the Uttar Pradesh Speaker. But all of them pale in comparison with Shivraj Patil's decision, as Lok Sabha Speaker, in the Ajit Singh Janata Dal defection. More than a year passed by whilst the party members slowly defected until the magic figure was reached. So, while the whole of India knew that a defection was taking place, the Speaker felt that he could not take note of it because it was not brought to his notice. Technically, he may have been right, but was he? In the hands of the Speaker lies the future of the anti-defection law. This will remain so.

LAW AND SOCIETY

The BJP-led Union Government has the habit of rushing into legislation and legal remedies. In 2001-02, it forced the enactment of the Prevention of Terrorism Act — first by an ordinance and then by a joint session of Parliament. Earlier, in 1998, it tried to resolve the differences with the Chief Justice of India on judicial appointments by inviting a reference from the Supreme Court. Following the Gujarat crisis, the advisory jurisdiction was again abused by trying to get the elections advanced. Faced with criticism on POTA, it has now raced through a 'sugar coating' amendment without really examining the entire draconian law and its misuse. The Opposition cannot do much because it wants to run with the hare and hunt with the hounds. That is why the new anti-defection amendment was passed with muted dissent. No doubt the changes were suggested by the Constitution Commission, the Law Commission and a Parliamentary Committee. But this does not obviate the need for a proper examination of the changes by Parliament. There is much that needed to be discussed. But the BJP was in a hurry to protect its new Governments in Madhya Pradesh, Rajasthan and Chhattisgarh.

This is not to question the premise that defections cripple a Constitution's working and hold a government to ransom. Even so, certain factors need consideration. Firstly, there is the question of the extent to which a backbench MP should be denuded of all powers of protest. Even after the amendment, the MPs and the MLAs can shout themselves hoarse against a party as long as they do not formally leave it, or vote against it or abstain during voting. Thus a legislator can invite expulsion but not defect. Is this the possible politics of the future? This is all that would be left of conscientious objection and its discontent. Secondly, by removing the one-third rule, coalitions would still be vulnerable if a coalition partner decides to destabilise the government. This may mean more 'suitcases' for more people — but will leave the coalition vulnerable. Thirdly, it should be borne in mind that the penalty of disqualification will not take place before government formation. Legislators should be forced to retain their electoral party identity. Fourthly, the disqualification will take effect after the voters have cast their vote or abstained. Money will change hands. MPs or MLAs will not be disqualified from standing for elections again. Fifthly, we are still left with the mercurial figure of the Speaker whose record of the last two decades stands out. There is need for an independent decision-making body that is quick, fair and effective. Finally, ever if the amendment downsizes minis tries and removes ministerships, th public economy of inducements wil enlarge.

Like the original anti-defectio amendment of 1985, the preser amendment is flawed. Defection will not be eliminated. The stakes wi be higher; the monies paid exorb tant. This is no way to amend th Constitution.

Switching sides

Defectors not to hold public office

The passage in the Lok Sabha of a Constitution amendment bill seeking to debar a defector from holding public office or a remunerative political post for at least the duration of the legislature or until fresh elections can only be welcomed. Historically, Indian politicians have always come together, forgetting ideological or party affiliations, on issues that affect them personally, such as a raise in their salary or increased perks. Similarly they had also come together to resist putting legislative brakes on accelerating defections. The change of heart that is now reflected in the unanimous passage of the Constitutional amendment in the Lok Sabha can only have taken place because in recent years, not a single major political party in the country has been immune to the virus of defections. Since the mid-1980s Indian politics has seen 'horse-trading' among MLAs and MPs like never before. Every elected member has a price, whether it is in cash or kind and as the recently deposed chief minister Ajit Jogi knows to his detriment.

Political parties have been playing on weaknesses of legislators. In fact defectors have often been in a better bargaining position than 'loyal soldiers' of parties because it is often they who were given huge amounts of money and ministerial or lucrative political posts. After many recent elections, defections have even swung the pendulum of power in a direction different from the one voters had chosen whilst exercising their mandate. Political parties have been so afraid of their legislators being lured away that entire legislature parties have sometimes been flown off at crucial junctures to secluded places and put under virtual house arrest. Even telephone facilities have been withdrawn so they had no contact with the outside world.

Thanks to this scare of defections, and possibly because now the balance of convenience suits no single grouping, the Lok Sabha has approved of the amendment unanimously. This is a welcome measure and should go some way in stopping the rampant horse-trading that takes place after most elections. It is only fair that a member of a legislature remains with the party on whose ticket he wins the election.

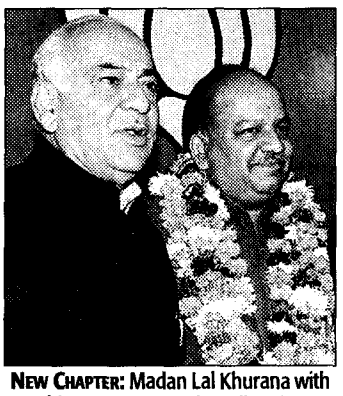
Voters throughout the country are influenced at least as much by the candidate's party affiliation as they are by his individual standing. Defections are, therefore, unfair to the voter. Conscience-stricken legislators finding themselves unable to stay with the party on whose ticket he or she has been elected ought not to find it morally difficult to seek a fresh mandate. Importantly, the timing of the amendment has ensured that no major party — including the ruling BJP which engineered the Jogi affair and the Congress which was severely discomfited by it — could afford to risk the political price of obstructing it. This is a long-needed amendment but it only goes part of the way towards cleansing the political system. More such measures are needed to ensure that governance reflects the electoral mandate properly.

THE STATESMAN 13 DEC 2003

Khurana is new Rajasthan guy

Our Political Bureau
NEW DELHI 19 DECEMBER

THE BJP on Friday kicked Mr Madan Lal Khurana up the ladder by naming him as the new governor of Rajasthan. A formal announcement on the appointment of Mr Khurana, who failed to counter the Congress effectively in the just-concluded election, will be made soon.



NEW CHAPTER: Madan Lal Khurana with his successor Harshvardhan in New Delhi On Friday – AFP

With this the stage has been set for a change in the complexion of the state unit. The BJP on Friday set the process into motion by appointing Mr Harshvardhan as the new party chief of Delhi. The hold of old timers in the Delhi unit was seen as the principal obstacle in the path of the party's forward movement. These leaders did not allow much elbow room for the central unit in the planning of election and the campaign of the party floundered from the beginning.

On his part, Mr Khurana said he was quitting "active politics for now". At a press conference at his party office flanked by BJP Mukhtar Abbas Naqvi and Harshvardhan, Mr Khurana refused to take any questions on his resignation.

The Economic Times 20 DEC 2003

SC upholds Pota validity

Support for terror doesn't warrant arrest

Syed Liaquat Ali
New Delhi December 16

THE SUPREME Court on Tuesday upheld the constitutional validity of Pota, but clarified that the police could not book a person who merely supported a terrorist organisation without an intention to further its activities.

The court said the proof of criminal intention of the person supporting the outfit was a necessary ingredient to book him under the anti-terrorism law.

The judgment gave a relief to MDMK leader Vaiko, who was booked under Section 21(30) for allegedly expressing support for the LTTE at a meeting. Now, the TN government would have to prove he had the criminal intention to further the terrorist activities of the outfit to detain him under the Act. The court said the special court trying Vaiko under Pota would deal with the case in the light of the clarifications.

The court also upheld the validity of the controversial provision (Section 14) of the Act, which deals with the obligation of individuals, including journalists, or organisations to share information with the police on terrorist activities. "It is a settled position of law that a journalist or lawyer does not have a sacrosanct right to withhold information regarding crime under the guise of professional ethics", the court said. It also upheld the validity of Section 32 on the admissibility of a confessional statement made by a suspect before the police.

The court said the provision provided enough safeguards to an accused against forcible extraction of his confessions. On the question granting bail to an accused under the Act, the court accepted interpretation of the Attorney-General that a court can grant bail to an accused who has undergone one year under ordinary law after hearing the public prosecutor. It said an accused could apply for bail under CrPC after he has served one year in jail.

The accused could also approach the court for bail in accordance with the provisions of Pota at the same time.

DMK backs Pota amendment

THE DMK is showing signs of second thoughts on its chief M. Karunanidhi's threat to leave the NDA on the Pota issue after BJP interlocutors spoke to their leaders. It backed the government for the passage of an amendment for giving statutory powers to Pota review committees for redressal of complaints by individuals booked under the anti-terror law.

BJP leaders impressed upon the DMK leaders that the amendment was brought about to ensure the quick release of Vaiko, MDMK leader. If the DMK did not support the amendment, Vaiko's cause would not be served. Significantly, Vaiko's petition was rejected by the Supreme Court on Tuesday as it upheld the validity of Pota.

HTC, New Delhi

HIGHLIGHTS

- Constitutional validity of all the provisions of Pota upheld
- Parliament alone has the competence to enact law to fight terrorism because it's prevalent in many states
- States not competent to enact law against terrorism under the guise of law and order being a state subject
- Everyone bound to give information about terrorist acts to police when sought
- Journalists and lawyers cannot claim immunity from this under the guise of professional ethics
- Mere support to banned organisation not enough for prosecution under Pota
- Prosecution has to prove criminal intention behind such support
- Keeping secret the identity of a witness in exceptional circumstances necessary though it is a deviation from the usual mode of trial
- Normal bail provisions to apply after expiry of one year's detention under Pota
- An accused can apply for bail under the Criminal Procedure Code if he has served one year in jail

THE HINDUSTAN TIMES 17 DEC 2003

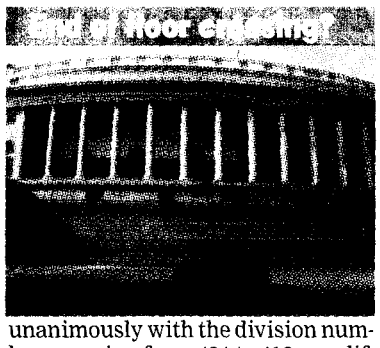
Bill to curb defection gets LS nod

TIMES NEWS NETWORK

New Delhi: The Lok Sabha on Tuesday unanimously passed the Constitution (97th Amendment) Bill which debars defectors from holding any public office for the duration of the remaining term of the existing legislature or until fresh elections.

Henceforth, whether legislators quit singly or one-third walk out, it will be regarded as defection and such persons will lose their seats and not be eligible for ministerships or offices of profit until they win an election again.

The bill also makes it mandatory for the size of all councils of ministers, whether at the Centre or in the states, to be restricted to 15 per cent of the strength of the Lok Sabha or the assemblies. An exception has been made in the case of smaller states like Goa and Sikkim, where the assembly strength is 40 or less. These states can have up to 12 ministers.



Although the bill was passed unanimously with the division numbers varying from 424 to 416—as different clauses were voted—for and none against, there were a few voices of dissent. Interestingly, these were all from MPs of differing socialist hues from Bihar, from both within the NDA and outside it. They included Raghuvansh Prasad Singh (RJD), Ram Vilas Paswan (Lok Janshakti), Devendra Prasad Yadav (JD-U), Prabhunath Singh (Samata) and Pappu Yadav (Independent).

Their complaints varied from the fact that the bill further centralised power in political parties, curbed any kind of ideological dissent or differences, and ended the freedom of expression fundamental to a democracy. Some of them pointed out that the bill continued with the whip system, that is, all MPs belonging to a party had to obey the whip issued before voting on a bill, leaving no room for conscientious objectors.

Raghuvansh Prasad Singh even said that while the bill addressed the issue of splits, it did not speak of mergers. He pointed out that when the JD(U) and Samata "merged" recently, the object was to form one party, but now instead of two, there were three parties—the original JD(U), the original Samata and a newly-merged party.

Replying to the debate, law minister Arun Jaitley rubbished the concerns of the socialists for freedom of expression, saying if any MP felt so strongly about an issue, he could always quit his party.

THE TIMES OF INDIA 17 DEC 2003

Pota passes apex court's scrutiny

& constitution

TIMES NEWS NETWORK

New Delhi: The supreme court on Tuesday upheld the constitutional validity of the Prevention of Terrorism Act (Pota) and held that even journalists and lawyers had no "sacrosanct right" to withhold information regarding a crime under the guise of professional ethics.

Delivering the long-awaited judgment, a bench of Justices S. Rajendra Babu and G.P. Mathur said that parliament alone was competent to enact such a law to counter the menace of terrorism.

The judgment also provided some relief to MDMK leader Vaiko, who had been jailed 18 months ago by the Jayalalithaa government under Pota for speaking in favour of the LTTE, noting that mere "moral support" for a terrorist organisation did not constitute an offence under the act. Incidentally, Vaiko had supported Pota in parliament.

Even attorney-general Soli J. Sorabjee had also argued that moral support per se could not be an offence under Section 21 of Pota, which makes any speech made in favour of a banned terrorist organisation punishable. Mr Sorabjee had also successfully argued that the stringent bail provisions provided in Pota could be made more humane by providing that normal bail provisions provided under the Indian Penal Code would be applicable if a person's detention under Pota exceeded one year.

The bench said that the prosecution had to prove criminal intention behind the speech.

Thus, Vaiko is entitled to bail if the prosecution fails to prove that he had any "intention" to support the LTTE's terrorist activities.

Pota stipulates that journalists and lawyers must reveal information regarding a terrorism-related offence to the police.

The bench said: "It is the duty of everybody to assist the state in the detection of a crime and bringing criminals to justice."

Holding that Section 14 of Pota was not violative of the fundamental rights, the 87-page judgment said: "It is a settled position of law that a journalist or lawyer does not have a sacrosanct right to withhold information regarding a crime under the guise of professional ethics."

LS okays bill to amend Pota

TIMES NEWS NETWORK

New Delhi: Amidst an opposition walkout, the Lok Sabha on Tuesday passed an amendment bill to provide for a Central review committee to prevent the misuse of Pota and ensure its use only against terrorists.

However, the 10-strong AIADMK group did not join other opposition parties in the walkout and instead demanded division to force voting. The amendment proposed by deputy PM L.K. Advani, apparently to bail out MDMK leader Vaiko, who was booked under Pota, was overwhelmingly passed with 257 votes in favour and 10 against. "We are supporting Pota but opposing the amendment," AIADMK member Dr Saroja remarked.

Referring to the SC order earlier in the day, Mr Advani termed the pronouncement as vindication of the anti-terrorist legislation.

THE TIMES OF INDIA

17 DEC 2003

Rein in the defectors

The New Law Will Leave No Loopholes

THE changes approved by the Union Cabinet in the anti-defection law are welcome and should get rid of the worst blemishes of the existing law. The changes are also an improvement over what was earlier proposed. In the earlier version of the Constitution (97th Amendment) Bill, it was proposed that any legislator changing his party identity would automatically stand disqualified as a legislator till he or she was re-elected. Yet, there remained a significant loophole. While the amendment would have meant that defectors lost their membership of the legislature, this did not prevent them from becoming ministers, since one can remain a minister in a government for six months without being a member of the legislature. The amendment that is now proposed will plug this loophole by explicitly prohibiting defectors from holding any "office of profit" till such time as they get a fresh mandate from the electorate. There can be no dispute that such a change in the anti-defection law was necessary. In the nearly two decades since it was originally brought in, the anti-defection law has been reduced to a toothless Act, largely because of some creative interpretation of the provision that stipulated that if one-third or more of a legislature party breaks from the parent body, it would not attract the provisions of the Act. A caveat is in order here. While the amended law would tackle the pernicious practice of defection, it could give the party whips disproportionate clout. The only way in which this can be balanced is through intra-party democracy, the onus for which must fall largely on the parties themselves.

The move to limit the number of ministers in any government to 15% of the size of the relevant legislature is also a long overdue measure. With the polity getting increasingly fragmented, the compulsion of coalition managers to keep allies and supporters happy has seen some jumbo Cabinets at the Centre and in states like Uttar Pradesh. This not only makes governments unwieldy, but also puts an undue burden on the taxpayer. It also comes in the way of downsizing governments. Many government departments continue simply because a minister has to be accommodated. This is a travesty. Parliament must now ensure that these pieces of legislation are enacted as soon as possible.

The Economic Times 13 DEC 2003

Vidarbha stir

NAGPUR, Dec. 12. — Congress leaders Mr Vasant Sathe and Mr NKP Salve, who were on a hunger-strike today to highlight their demand for a separate Vidarbha state, were admitted to hospital after their condition deteriorated. — PTI

THE STATESMAN 13 DEC 2003

HARISH SALVE ASKED TO ASSIST PROSECUTION

SC to monitor appeal in Best Bakery case

By J. Venkatesan

NEW DELHI, OCT. 9. In a significant development in the 'Best Bakery case', the Supreme Court today said it would monitor the appeal filed by the Gujarat Government in the High Court against the acquittal of all the 21 accused in the case by the Vadodara trial court.

A three-judge Bench — comprising the Chief Justice, V.N. Khare, and Justices S.B. Sinha and A.R. Lakshmanan — appointed the senior advocate, Harish Salve, to assist the prosecution in the appeal and to inform the court of the progress at each stage and seek directions, if required.

The Bench also asked the Gujarat Government to finalise the names of the Special Public Prosecutors to conduct the appeal in consultation with the Attorney-General, Soli Sorabjee. It asked Mr. Salve to go through all petitions connected with the post-Godhra riot cases and give his recommendations and suggestions to the court on October 17, the next date of hearing.

Appearing for the Gujarat Government, the Additional Solicitor-General, Mukul Rohtagi, said the State Government had filed an amended appeal before the High Court, and a re-trial as well as further inquiry into the incident, in which 14 persons were burnt to death, had also been sought.

Mr. Rohtagi said the High Court, which admitted the appeal and posted it for final hearing on December 1, had been requested to accept the additional evidence to ensure that what had happened in the trial court was not repeated and that there was no miscarriage of justice. Regarding the on-going cases, he said the State Government had appointed police officers in the rank of Inspector-General of Police to monitor and ensure a link with the Public Prosecutors.

Appearing for the accused, senior counsel, K.T.S. Tulsi, questioned the *locus standi* of the National Human Rights Commission (NHRC) to intervene in the appeal. Citing an earlier ruling of the Supreme Court, he said that under the Criminal Procedure Code, no intervention should be permitted by way of public interest litigation, even if it raised a "million questions of law". When the appeal was pending before the High Court, only that court could alter, substitute or order a re-trial or fresh investigation.

Accusing the NHRC of "sensationalising" the case, Mr. Tulsi said an unprecedented situation had been created as if all the accused were guilty and had been let off by the trial court. The Supreme Court must allow the law to take its normal course and not pass any order bypassing the High Court; otherwise, a lot of prejudice would be caused to the accused. Mr. Justice Khare said: "We are not bypassing the High Court. We exercise due caution. We only want the matter to be seriously prosecuted as it should be."

Appearing for the NHRC, senior counsel, T.R. Andhyarujina and P.P. Rao, said the State Government had shifted the entire blame for the acquittal of the accused to the Vadodara fast track court, which had indicted the police for "tardy investigation".

Appearing for the Citizens for Justice and Peace and the key witness, Zaheera, senior counsel, Shanthi Bhushan, reiterated that it was a fit case for ordering a trial outside Gujarat as it would not be proper to conduct the trial in the surcharged atmosphere prevailing in the State.

Appearing for Mallika Sarabhai and other petitioners, senior counsel, Indira Jaising, urged the court to direct the Gujarat Government to appoint a retired judge of the Supreme Court or the High Court from the minority community as a third member of the Commission of Inquiry probing the incidents. The panel should have a member from the Muslim community to instil confidence among the minority community.

The Bench asked the Gujarat Government to respond to these petitions within six weeks and submit a rejoinder, if any, in two weeks and said these issues would be considered at a later stage.

Incidents an embarrassment, says Advani; 13 accused surrender: Page 11

THE HINDU

10 DEC 2003

THE STATESMAN

22 NOV 2003

Govt agrees to delete offending clause in CCI Act

Our Legal Correspondent

NEW DELHI, Nov. 21. — The government today assured the Supreme Court (coram, Khare, CJ, Sinha, J) that it would delete Section 39 of the Competition Commission of India Act which requires the High Courts to execute the orders of the Commission, a quasi-judicial body.

The Attorney-General of India, Mr Soli Sorabjee, gave this assurance to the court when the Chief Justice observed: "We were hoping to see this scrapped. "Don't wait till we strike it down. Judicial review is a part of the fundamental structure of the Constitution."

The court also observed that it was bound only by the parameters of the Indian Constitution when the counsel for the petitioner, Mr RK Jain, pointed out that the government had instead of doing as the Supreme Court had ordered earlier, defended the appointment of a bureaucrat to head the quasi-judicial body citing precedents from other countries such as the UK.

The Supreme Court had on the PIL filed by Mr Brahm Dutta earlier asked the Centre to stop encroaching upon the judiciary's domain.

Appearing for the Union, Mr Sorabjee told the court that the government had no intention of encroaching upon the judiciary's domain. "Our Constitution envisages separation of powers between the legislature and the judiciary and neither should interfere in the working of the other," he said.

In the counter-affidavit he submitted to the court today, the Centre submitted that neither Rule 3 of the Competition Commission of India (Selection of Chairperson and other Members of the Commission) Rules 2003 and the constitution of the selection committee can be challenged by way of a PIL.

Defending the appointment of a bureaucrat to head the CCI, it stated that the PIL is based on two fundamental misconceptions — that it is a replacement for the Monopolies and Restrictive Trade Practices Commission and therefore it needs to be headed by a person from the judicial fraternity.

The function of the commission is mostly regulatory, it stated. "To that extent the adjudicatory function is not the main function but a supplement to the regulatory mechanism," it states. For this one judicial member has been made a member.

"There is neither an intention nor an actual by-passing of the judiciary. All that has been done is to ensure that the most appropriate person for such special and sensitive assignment is available," it stated.

"In a country where the judiciary is already over-burdened with arrears of cases, which it cannot overcome for a variety of reasons, creating an expert regulatory mechanism with the possibility of its being headed by a non-judicial member is not an affront to the judiciary but more a recognition of the necessity of having regulatory functions performed by persons with exposure to the field of activity which they are supposed to regulate," the affidavit said.

On the offending clause it says: "Section 39 is merely to provide a method of executing the commission's orders and does not have the effect sought to be imputed."

It has neither been given powers equivalent to High Courts nor does it primarily discharge judicial functions, the affidavit added.

The matter will again come up for hearing on 16 December.

Enraged SC waves transfer sword

Blanket bar on Gujarat trials

OUR LEGAL CORRESPONDENT

New Delhi, Nov. 21: Patience wearing thin, the Supreme Court today stayed trial in all riot cases in Gujarat and asked the Modi ministry to respond to a proposal to shift major ones to courts in Maharashtra or any other state.

"We thought they (Gujarat government) are by now wiser... but if this is the state of affairs, then we will transfer all the cases," the court said after *amicus curiae* Harish Salve listed instance after instance of miscarried justice in the state.

This is the harshest indictment of Gujarat since the Supreme Court declared a loss of faith in its government three months ago and asked it to quit if it could not "prosecute the guilty and protect the weak".

The order comes on a three-point suggestion by Salve to check "gross miscarriage of justice" in Gujarat courts and follows close on the heels of the transfer of Jayalalithaa's disproportionate asset cases to Karnataka.

Salve, appointed by the court to assist with the riot cases, suggested in writing that:

■ All investigations be held by a special team of Gujarat police to be selected by a designated agency and headed by an officer of inspector-general rank with "impeccable" track record

CASE MONITOR

- Godhra: **59 train passengers burnt alive on February 27, 2002**
  Case status: Pota court hearing on. 87 arrested, 9 out on bail
- Best Bakery: **14 killed on March 1**
  Status: 21 tried. All acquitted
- Gulbarg Society: **42 burnt alive**
  Status: 29 arrested, 25 out on bail. Trial yet to begin
- Naroda Patia: **83 killed**
  Status: Trial yet to begin. 50 arrested but all out on bail
- Sardarpura: **32 killed**
  Status: 55 arrested but all out on bail. Trial yet to begin. VHP leader appointed as public prosecutor but removed after protests

■ Area-wise local committees be constituted, comprising a retired high court judge, eminent lawyers and citizens, to select public prosecutors

■ Major cases like the Godhra train burning and the killings at Best Bakery, Gulbarg Society, Sardarpura and Naroda Patia be transferred to some other state.

The bench of Chief Justice V.N. Khare and Justices S.B. Sinha and A.R. Lakshmanan then issued notices to the state government, asking it to file a status report in two weeks.

Citing an earlier case, Salve said the "same state officials" would feel secure and function better if they were under the protection of the apex court. This would also rid them of the "pressure from local politics".

Such a team would not report to the state or to any apex agency but would report "directly to the Supreme Court", he said.

The court also gave a tongue-lashing to additional solicitor-general Mukul Rohtagi, who represents Gujarat, over a riot accused whose bail was not opposed even after his name was found in an FIR. Earlier, he had been given bail on grounds that his name was not mentioned.

"The public prosecutor, a VHP district president, did not even oppose bail," Salve said.

At this, Rohtagi said the high court had granted the bail and the state could not be blamed for it.

Then the chief justice asked: "How many times should we remind you of your duty... why did you then not file a special leave petition before the Supreme Court... high courts err on several occasions... does it mean the state won't do its duty?"

Rohtagi reiterated that the bail was granted by the high court.

"That's what we are saying... why you, the state, did not appeal against it... the state of affairs is worsening...," Chief Justice Khare replied.

Gujarat chief minister Narendra Modi declined comment. "I am not aware of the Supreme Court order. The Gujarat government would reply to the court's queries after studying it (the order) properly."

■ **See Page 8**

THE TELEGRAPH 22 NOV 2003

Jaya subverting judicial process: SC

Cases against CM transferred to Karnataka to ensure fair trial

TIMES NEWS NETWORK

New Delhi: Indicting Tamil Nadu chief minister J. Jayalalithaa for subverting the judicial process for her own benefit, the supreme court on Tuesday transferred two corruption cases pending against her in Chennai to a special court in neighbouring Karnataka.

A bench of Justices S.N. Variava and H.K. Sema noted that the prosecution "appears to have acted hand in glove with the accused (Ms Jayalalithaa)" resulting in the loss of public confidence in the fairness of the trial relating to the cases alleging that Ms Jayalalithaa had amassed assets worth Rs 66 crore, disproportionate to her known sources of income, during her earlier tenure as chief minister.

The court urged the Karnataka high court chief justice to set up a special court under the Prevention of Corruption Act within a month to conduct the trial on a day-to-day basis.

ARRESTING ANARCHY

The court said that the prosecution "appears to have acted hand in glove with the accused (Jayalalithaa)" resulting in the loss of public confidence in the fairness of the trial

The S.M. Krishna government in Karnataka will appoint a senior lawyer as the special public prosecutor for this within six weeks. The special public prosecutor could also initiate perjury action against any of the 64 witnesses of a total of 76 who had resiled from their statements after Ms Jayalalithaa's party took over the reins in the state in March 2001.

Not only had the witnesses resiled, but three public prosecutors and the special prosecutor had also resigned and the special judge had been transferred after Ms Jayalalithaa had returned to power.

She has never appeared before the court and had answered a questionnaire in her defence.

"Be you ever so high the law is above you," the judges recalled, and said "there is a strong indication that the process of justice is being subverted" in Tamil Nadu. "It casts a doubt about the impending failure of justice," the court added.

THE TIMES OF INDIA 19 NOV 2003

THE HINDU

Judges dominion

By Pratap Bhanu Mehta

THE OBSERVATIONS of the Supreme Court that led to a stay on the appointment of a civil servant as Chairman of the Competition Commission raise important issues about the scope of judicial power. The Court implied that only a judge could be appointed chairperson of such a commission. The Competition Commission is an important regulatory agency whose mandate covers the prohibition of anti-competitive agreements, prohibition of abuse of market dominance, scrutiny of mergers and acquisitions, etc. It will primarily deal with companies that have assets of over Rs.1000 crores, and hence the stakes involved in any one of its decisions are likely to be very high. It is extremely important that the Commission discharge its functions honestly and with the best available knowledge. Competition policy is not quite as simple a matter as it first appears: the complex web of relationships that exists between companies in modern capitalism can make detection of anti-competitive stakes in any merger difficult indeed.

It is with this challenge in mind that the Competition Commission Act provided that the chairperson can either be a former judge, or someone with the relevant experience and expertise from a variety of fields ranging from international trade to accounting. Many equivalent Commissions all over the world routinely appoint bankers, academic economists as their heads. Civil servants and judges between them have such an extraordinary monopoly over India's regulatory institutions. Many had hoped that such provisions would in the long run enable the Government to tap a wide variety of talent: from the professions, from the private sector, from academia.

The honourable justices of the Supreme Court seem to rest their objection to the appointment of a civil servant on one central argument: the Commission will perform judicial functions and hence only a judge can be appointed. This argument is not sound: there are numerous regulatory agencies that perform quasi-judicial functions, and it is certainly not an established principle that only judges may do so. That this principle has gained credence is a result of the judiciary's own activism that has blurred the distinction between judicial and quasi-judicial functions rather than a constitutional first principle. Regulatory commissions will inevitably have mixed functions: quasi-judicial and administrative.

There is a danger that a perception will grow that the judiciary is needlessly enlarging its domain.

There is no *a priori* argument that in commissions with mixed mandates, it is necessary to have a judge as a Chairman. In many ways the Competition Commission is unlike standard tribunals. As a nation we have to be prepared that in the context of a changing economy we will create new institutional forms, not all of which will correspond to the forms bequeathed to us by our traditional distinctions and jurisprudence. The central question is this. Is the mission of the Competition Commission, despite the fact that it might perform quasi-judicial functions, such that it is possible that, all things considered, it might be better served by a non-judge as chairperson?

The Supreme Court has, in the past, rightly affirmed that the jurisdiction granted to the Supreme Court and the High Courts is part of the basic structure of the Constitution and no tribunal can supersede those functions. The tendency of some Acts to oust the jurisdiction of the courts is what led to the assertion of judicial sovereignty over tribunals in the first place. But it is not clear why there should be the presumption that the appointment of a non-judge is automatically tantamount to encroaching upon judicial functions or ousting court jurisdiction. There is also a serious problem here. If the Commission is thought of as a judicial entity, and criticism of a judge acting in judicial capacity is seen as criminal contempt, frank criticism of the Commission's work is less likely.

There may be other possible reasons for invalidating the current appointment. But the Commission was created by an Act of Parliament, and the only relevant consideration for the court is the constitutionality of the Act, not the soundness of its policy. It was one thing for the Court to intervene on behalf of parliamentary sovereignty as it did in the oil companies' privatisation case; it is quite another thing for it consistently to go against Parliament. There is a real danger that a perception will grow that the judiciary is needlessly enlarging its domain. One of the members of the bench is reported to have commented that at this rate the Government might one day think of appointing bureaucrats to the Supreme Court as well. This exaggerated fear is out of sync with reality. The judiciary has, going beyond what is mandated by the Constitution, so effectively shut out the executive from appointments to the Supreme Court that the possibility of the judge's fears coming true is quite remote.

The proliferation of post-retirement appointments for judges should be a greater cause for concern. The balance of power, as it currently stands, is largely in the favour of the judiciary. Much of this assertion of judicial power has been for the good, but if the judiciary appears to needlessly extend its dominion whenever Parliament creates any innovative institutions, its own authority will be jeopardised.

(The writer is a Professor of Philosophy and of Law and Governance, JNU.)

THE TIMES OF INDIA

Restrain your hand, SC tells Centre

Government criticised for replacing judicial member with bureaucrat

TIMES NEWS NETWORK

New Delhi: The supreme court on Friday lambasted the Centre over the appointment of a retired bureaucrat as chairman of the newly-created Competition Commission—which has replaced MRTPC, headed by a judge—and said, "If these things are allowed to continue, the day is not far when bureaucrats will replace all the judges in the country."

An anguished bench comprising Chief Justice V.N. Khare and Justice S.B. Sinha also termed it a "direct attempt" to encroach upon the judiciary. "It is a direct encroachment on judicial functioning. It is a direct onslaught on the high courts. Some years later, the government will say that it will replace all the 26 judges of the supreme court with bureaucrats. You must restrain your hand," CJI Khare told attorney general Soli J. Sorabjee. Mr Sorabjee gave an undertaking on behalf of the Centre that until further orders, the commission would not carry out judicial functions. He would only deal with administrative matters.

Petitioner Brahm Dutt's counsel R.K. Jain had challenged the creation of the commission and the appointment of former commerce secretary Deepak Chatterjee as its chairman. "How can a judicial function be discharged by a retired bureaucrat as head of the commission created to deal with mergers and demergers of companies running into thousands of crores..the orders of which were to be executed by the high courts?" Mr Jain raised the preliminary objection. He said MRTPC was always headed by a retired chief justice of a high court.

The bench said, "The matter is very serious." When the high court was the executing court for orders passed by the commission, how could a bureaucrat head the commission, the court wondered.

Mr Jain referred to a 1987 judgment which had held that "all those tribunals which function as a substitute for the high courts to deal with certain matters should ordinarily be headed by a retired chief justice of a high court or a senior judge of the high court". He said that the appointment of Mr Chatterjee was a clear violation of the apex court order and hence liable to be struck down.

He further said that the Centre had failed to appreciate that the commission would be exercising the powers of imposition of penalty of up to Rs 1 crore and deal with very sensitive and vital judicial matters pertaining to competition, ensuring freedom of trade, and protection of the interests of consumers. The chairman ought to have been chosen from the judicial side, he said.

13 more judges for HC

Our Legal Correspondent

NEW DELHI, Oct. 30. — The Centre today cleared 13 new posts of judges at Calcutta High Court. The number of judges in Calcutta High Court will thus go up from 50 to 63. The number of judges in the other 17 High Courts in the country has also been increased by 81.

The move follows a comprehensive triennial review of the judge strength of all High Courts, Union minister for law and justice Mr Arun Jaitley said at a press conference here. The new posts are in addition to 163 vacancies still pending. The judge strength of Madhya Pradesh, Kerala, Patna, Orissa, Punjab and Haryana High Courts will go up by 13, 11, 12, 11 and 13 respectively, Mr Jaitley said.

With the clearance of the new posts, the overall sanctioned strength of judges in the country has gone up from 655 to 749. Delhi will get three more posts of additional judges and Guwahati eight. The posts of additional judges will be converted into permanent ones in Allahabad, Mumbai and Chennai. Chhattisgarh and Uttaranchal have been allocated two posts of judges each. Besides, the posts of additional judges in these states will be converted to permanent ones.

The allotments have been made on the basis of the performance of the courts and the number of pending cases, Mr Jaitley said. Kerala tops the national average of cases disposed per judge with 3,103 cases.

SC tightens screws on Gujarat govt

TIMES NEWS NETWORK

New Delhi: The supreme court on Friday asked the Gujarat government to submit a status report regarding investigation and trial of 12 violence-related cases in which a large number of persons were killed in 2002.

A bench of Chief Justice V.N. Khare and Justices S.B. Sinha and A.R. Lakshmanan sought the details by October 31 of cases relating to the Godhra carnage, and the massacres in Gulbarg society, Naroda-Patia, Sardarpura, Kidiyad and Pandharwada.

Taking serious note of an affidavit filed by Teesta Setalvad of Citizens for Peace and Justice that although over a year had elapsed since the trial courts acquitted all those accused of killing 157 Muslims in three other cases, the state government was yet to appeal against it, the court issued notice to the Modi government and fixed November 7 to hear the matter.

The court will also consider then whether the ongoing trials in all the Gujarat violence cases should be stayed or not. Former solicitor general Harish Salve, who is assisting the court in the Gujarat violence matters, urged the court to ask the state government to plead for re-investigation into the Best Bakery case before the high court.

● 'Prosecutors linked to Sangh', Page 10

Under SC scanner

Case/date	Casualty	Legal status
1. Naroda Patia, Ahmd (28-2-2002)	83	3 chargesheets Charges not framed
2. Gulbarg, Ahmd (28-2-2002)	42	3 chargesheets Charges not framed
3. Sardarpura, Mehsana (1-3-2002)	33	1 chargesheet Charges framed, not come up for trial
4. Kidiyad, Panchmahals (2-3-2002)	97	All accused, including BJP MLA Kalu Maliwad, acquitted
5. Pandharwada Panchmahals (1-3-2002)	70	All accused acquitted on 29-10-2002
6. Dipda darwaja Panchmahals (28-2-2002)	11	Chargesheet filed Charges not framed
7. Abasana, (5-4-2002) Ahmedabad	6	1 chargesheet filed Charges framed
8. Anjanwa, (5-3-2002) Panchmahals	11	Chargesheet filed Charges framed
9. Sesan, (1-3-2002) Banaskantha	14	Chargesheet filed Charges not framed
10. Ode, (1-3-2002) Anand	13	Chargesheet filed Charges framed
11. Anjanwa (2-3-2002) Panchmahals	1	Trial begun, 5 witnesses examined
12. Santrampur (5-3-2002) Panchmahals	11	Chargesheet filed Charges framed

Infographic by Nikhil Mistry

THE TELEGRAPH 12 OCT 2003

Constitutional crisis looms

A STAFF REPORTER

Calcutta, Oct. 11: The continuing violations of Justice Amitava Lala's order and the Bengal government's inability to enforce it — wittingly or unwittingly — is paving the way for a constitutional breakdown in the state, legal experts said today.

Yesterday, the Socialist Unity Centre of India (SUCI) and the CPI (M-L) Liberation had flouted the order banning rallies on weekdays from 8 am to 8 pm. Today, it was the turn of the CPM-dominated People's Relief Committee.

What is surprising experts is the government's "apparent lack of determination to enforce the ban despite having received a copy of Justice Lala's order".

"The situation is definitely heading towards a constitutional breakdown," senior advocate Gitanath Ganguly said. "I am definitely not asking for the implementation of Article 356 of the Constitution and imposition of President's rule in the state.

"But I must say that by deliberately flouting Justice Lala's order, political parties are sending out the wrong signals to everyone. The situation is snowballing into a major constitutional crisis."

Ganguly said "there is nothing wrong if someone does not agree with Lala's order". "But for that, they need not violate a high court order which is clearly the case here. Let the person appeal to the division bench of the high court or later, if need be, in the Supreme Court.

"One must remember that Justice Lala is a product of the court and when he passes a judgment, he is representing the court. The violation may have a far-reaching effect."

State bar council executive chairman Uttam Majumdar said what was "especially appalling" was the government's "inaction" in stopping the rallies even after getting a copy of the order.

In the process, the entire judicial system was getting undermined, Majumdar said. "If such violations carry on, the judiciary would have no role to play and would simply remain an ornamental part of the Constitution of the nation. We might as well close down the courts and let anarchy prevail."

Stressing the need for "immediate action" against the violators, Majumdar said: "I must emphasise that everyone who took part in today's rally should be charged under all sections of the Contempt of Court Act.

"We have already addressed a letter to governor Viren Shah as he is the constitutional head of the state and asked for an appointment. We need to have a detailed discussion on the recent developments of violations of the court order."

A former high court judge said the "entire episode is turning into a nightmare for the judiciary". "What the politicians are doing is condemnable and all violators of the order, including the government for not enforcing it, should be punished for contempt."

Senior advocate Supratik Roy said: "At this rate, a constitutional crisis is imminent. By deliberately inciting the general public against the court order, politicians are demoralising the judiciary, which is one of the three important pillars of democracy.

"If the court's orders are ridiculed, there will not be any rule of law. By addressing people who violated the law, the chief minister is indirectly supporting the violators of the law."

■ **See Page 9**

Bakery case: SC appoints special lawyer

By Rakesh Bhatnagar
TIMES NEWS NETWORK

New Delhi: The supreme court on Thursday appointed former solicitor-general Harish Salve to look into the proceedings of Gujarat's Best Bakery carnage case in which 14 persons were burnt alive but all 21 accused were acquitted by a fast track court in July 2003.

The court also warned the Gujarat government not to retain the same lawyers, who were its prosecutors during the trial at Vadodara, for arguing its appeal before the Gujarat high court.

"Do not associate old public prosecutors who prosecuted the cases before the trial court," a bench of Chief Justice V.N. Khare, Justices S.B. Sinha and A.R. Lakshmanan said.

Hearing a petition by the National Human Rights Commission (NHRC), Citizens for Justice and Peace and several public interest petitions seeking justice for victims of the Gujarat violence, the court asked Mr Salve to give his comments on the Gujarat government's appeal before the high court on October 17.

Additional solicitor-general Mukul Rohtagi, who argued for the state, said that the state advocate-general had taken charge of the appeal and the grounds of appeal had been amended to seek retrial and further inquiry into the bakery case. He also said that seasoned lawyers were appointed as special public prosecutors to conduct the prosecution of other sensitive riot cases.

However, Attorney-General Soli J. Sorabjee said the apex court in the Vineet Narain (hawala) case had directed that "a panel of competent lawyers of experience and impeccable reputation shall be prepared with the advice of the attorney-general" to conduct the prosecution.

Mr Sorabjee suggested that the same procedure be followed in this case and if the petitioners had any comment to make on the appointees, they could give it to him for consideration.

The Gujarat government said that it would send Mr Sorabjee the list of persons who were to be appointed as special public prosecutors.

NHRC's counsel P.P. Rao and S. Murlidhar said that the Gujarat government still did not blame its prosecuting agency and the police for the acquittal of the accused in the case after 37 of the 73 witnesses turned hostile.

Meanwhile, the SC has sought the Gujarat government's response to danseuse Mallika Sarabhai's petition seeking parity in the amount of compensation paid to the violence victims with those in the Bhopal gas leak or Uphaar cinema fire tragedy.

13 accused held, get bail

TIMES NEWS NETWORK

Vadodara: Thirteen of the 21 persons acquitted in the Best Bakery case were arrested and produced before the fast-track court of Justice H.U. Mahida on Thursday. They were given conditional bail after signing a surety of Rs 10,000 each.

When asked about the remaining eight persons, defence counsel in the bakery case Rajendra Trivedi said, "Three persons have gone to Delhi to file an affidavit before the supreme court while the remaining five persons have gone to the Gujarat high court. They will be bailed out on Friday and Saturday."

THE TIMES OF INDIA 10 OCT 2003

Front climbdown from attack on High Court judge

HT Correspondent
Kolkata, October 6

THE LEFT Front on Monday scrambled to soften the sting of its attack on Justice Amitava Lala, saying it had never looked to criticise the judiciary but only one particular judgment. As for the call to flout Justice Lala's order and hold marches during office hours, the Front tried to argue that this was an attempt at "improving the judiciary's functioning".

Front chairman Biman Bose — who had said on Saturday that the judge was "unwanted" in Kolkata and threatened a movement asking him to "go back" — climbed down from the statement. "All that I had said was that his judgment was unwanted," Bose told reporters.

The argument that violating a court ban can improve the judiciary's functioning came from CPI(M) state secretary Anil Biswas. "The legal system all over the world has developed through agitations such as this," he said. "The judiciary is a pillar of democracy and it should function in such a manner that the people never question its efficacy.

"Both legal and extra-legal forms of agitation are established components of political action. We are not launching an illegal struggle and our objective is to improve the functioning of the judiciary. In no country is the judicial system above the political system."

Biswas said he would like to remind those who support the ban on office-hour processions and rallies that democratic rights have not come without agitations such as the one the Left front has announced. Freedom of speech and assembly — even the rights to education, employment and shelter — were attained through struggle. "The rich and the vehicle owners, who favour the judgment, will realise their folly."

The CPI(ML) Liberation, meanwhile, criticised the Left Front, saying its apathy towards struggles on people's issues was encouraging some judges to try and curb the people's rights. "This is judicial despotism in the name of activism," party general secretary Dipankar Bhattacharya said. Liberation will launch an agitation against the High Court order on October 10.

OTHER VOICES

- **CPI(ML) Liberation** To launch agitation against rally ban on October 10, but blames CPI(M) 'apathy' towards popular struggles as an incentive for judiciary to curb people's rights
- **Party for Democratic Socialism** Supports the court order
- **State Bar Council** To discuss filing contempt petition against Biman Bose after the vacation, for his comments against Justice Lala and the Front move to flout the court order

THE HINDUSTAN TIMES 7 OCT 2005

Court bans rallies during work hours

Deepak Praladkha
Kolkata, September 29

THE CALCUTTA High Court has banned all processions and rallies — political or religious — in the city on weekdays between 8 am and 8 pm. It has also fixed the venues for rallies in the heart of the city — the Brigade Parade ground, Rani Rashmoni Road and Sahid Minar.

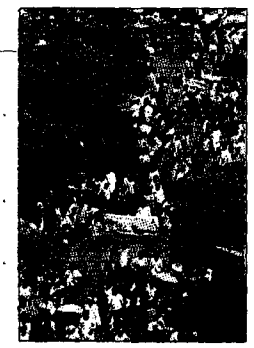
On Monday, Justice Amitava Lala passed these orders, telling the police to stop all processions between these hours on weekdays. The court made it clear that the orders apply to Puja organisers too.

No road or crossing must be closed to allow a political or religious procession to pass, Justice Lala's order said. "They will not be allowed to occupy the entire road...One side shall be kept free." If the marchers resist, "RAF or other force will be sought to protect the people and their vehicles".

The orders will hit organisers of marches where it hurts them most: they must make a security deposit with the traffic police from which compensation will be paid to anyone inconvenienced by a rally on his or her way to the airport, railway station or hospital. The complainant will have to submit an application or file a suit in a civil court. The suit must be disposed of within three months.

Rule of the road

- **TIME** Rallies/marches allowed only before 8 am or after 8 pm, except on Sundays/public holidays
- **PLACE** Brigade Parade Ground, Rani Rashmoni Road or Sahid Minar, if rally planned near the heart of the city
- **TRAFFIC CURB** Roads can't be closed, one side must be left free
- **CASH PUNCH** Organisers must make security deposit from which compensation will be paid to anyone inconvenienced



The judge told the police that no order from their "superiors" (read political bosses) should come in the way of their following the court's directives.

The curbs have been clamped as part of an interim order, passed while Justice Lala was hearing a suo motu contempt proceeding against traffic police officers who had stopped his car near the High Court on September 24 to clear the way for political rallyists. While the judge was stranded in front of Akashvani Bhavan at around 10 am, his security guard contacted Inspector (Traffic HQ) Saroj Roychowdhury only to be told that there was nothing he could do to help.

After reaching the court late, the furious judge took suo motu cognisance of the matter and issued a contempt notice to DC (Traffic) M.K. Singh and other officers to explain why they should not be prosecuted.

During the cross-examination of DC (Traffic), the judge said, "It is not only a case of stopping an HC judge's car, but also one of causing inconvenience to many others." The judge invited any citizen inconvenienced by a rally to lodge a complaint with the court registrar-general to help the court reach a conclusion on the matter.

IN KOLKATA LIVE

- **Cops brought to their knees**
- **Justice Lala: Man with a mission**
- **Comrades the hardest hit**

29 SEP 2003

THE HINDUSTAN TIMES

Apex court reins in Gujarat police

New Delhi: Taking serious note of the alleged police harassment of a woman gang-raped during the Gujarat riots, the supreme court on Thursday told the state police to "keep off" her until it had decided on a petition she had filed earlier. The petition asks for the probe into the sexual assault case to be transferred to the CBI.

Directing the state government to file within a week a reply to the allegations made by the victim, Bilkis Yakub Rasool, a bench comprising Justice M.B. Shah and Justice A.R. Lakshmanan, said, "Until the court decides on her plea for a transfer of the probe to the CBI, it would be appropriate for the state police to keep off her."

Ms Rasool, with legal assistance from the National Human Rights Commission, had earlier filed the petition while pointing out to the apex court that the state police had closed the rape case against the alleged perpetrators despite her medical examination clearly establishing that she had been sexually assaulted by a mob immediately after the Godhra train carnage.

Appearing for the petitioner, senior advocate Harish Salve and advocate Shobha stated that she had left Godhra and moved to Kalol as she apprehended harassment at the hands of the local administration.

But immediately after the apex court had issued notices to the Gujarat government and state police officers on September 8 with regard to her petition, the local administration began inquiring about her whereabouts from relatives.

On September 16, Raju Bhargav of the state crime branch hadquestioned her at 10 p.m. in the presence of her husband and children. PTI

Rape victim's ordeal

Taking note of the victim Bilkis Yakub Rasool's allegations, the court said that until it decides on her plea for a transfer of the probe to the CBI, "it would be appropriate for the state police to keep off her"

THE TIMES OF INDIA

26 SEP 2003

Supreme Court tells CBI to book Maya in Taj case

19/9 9-continued HT-1

HT Correspondent
New Delhi, September 18

THE SUPREME Court directed the CBI on Thursday to register FIRs against former UP chief minister Mayawati, former environment minister Nasimuddin Siddiqui and six bureaucrats for alleged complicity in the Taj Corridor scam. The CBI had indicted the eight in its reports.

The court asked the state government and the Centre to start departmental probes against the bureaucrats, to be completed in four months. The bench of Justices M.B. Shah and B.N. Agrawal was satisfied with the CBI reports showing *prima facie* involvement of the politicians and the bureaucrats in the "misappropriation" of Rs 17 crore.

But the judges asked the CBI to take "appropriate" steps before conducting further inquiries against Mayawati and Siddiqui. This means the CBI will have to gather more evidence and get the appropriate authorities' sanction to prosecute them.

The six bureaucrats named by the CBI are former chief secretary D.S. Bagga, suspended principal secretary R.K. Sharma, former principal secretary to the chief minister P.L. Punia, former state environment secretary V.K. Gupta, Union environment secretary K.C. Mishra and NPCC managing director S.C. Bali. CBI sources say Punia and Bagga have disclosed details of meetings with Mayawati on the Taj project.

THE HIDUSTAN TIMES

19 SEP 2003

Come clean on Pak prisoners: SC

Sep 18 deadline for Centre to explain why prisoners overstaying

PRESS TRUST OF INDIA
NEW DELHI, SEPTEMBER 2

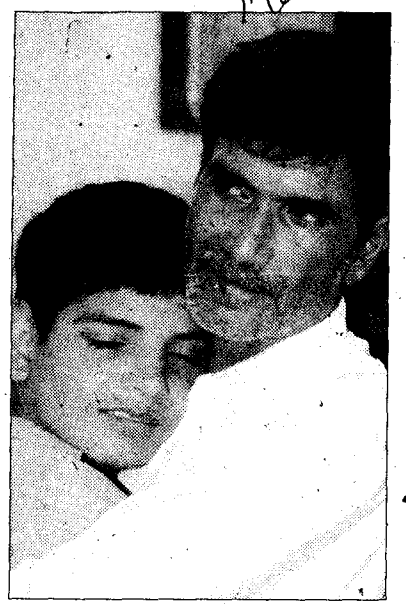
THE Supreme Court today gave time till September 18 to the Union Government to state by which orders 11 Pakistani nationals were kept in prisons despite having served their sentences. The Court also sought information about the jails in which they have been lodged.

The time was given by a bench comprising Justice M.B. Shah and Justice A.R. Lakshmanan when Attorney General Soli J. Sorabjee, whose assistance was sought by the Court during the last hearing, said though he had not been able lay his hands on orders pertaining to their detention, he would be able to file a proper response on the issue if given two weeks' time.

During the last hearing, the bench had permitted Jammu and Kashmir Panthers Party Chief Bhim Singh to send representatives to various jails in which these 11 Pakistani nationals were lodged and interview them for legal aid.

Singh today told the bench that the representatives went to Agra prison where according to Jammu and Kashmir government one Pakistani national —Bisharat Ali Rajput—was detained. However, the jail authorities informed that no such prisoners were detained there.

The bench, then, asked the Government to furnish by the next date of hearing details of the prisons in which these Pakistani nationals have been detained.



HOMECOMING: Ranjit with his mother (L) and Munir with his father. *File*

On the detention orders, the bench observed that "the state of Jammu and Kashmir is issuing orders here and there after petitions were filed in the apex court."

Taking judicial notice of lodging of 11 Pakistani nationals in jails for over a decade, the Court on August 19 had issued a notice to the Attorney General seeking his assistance on the question as to which provision of law permits such a prolonged detention.

In a parallel proceeding, a bench comprising Justice Ruma Pal and Justice P. V. Reddi had, on August 21, said that the Union Government must grant the prayer of few Pakistani prisoners for deportation as they have served their sentence and were not detained under any law or statutory order.

Granting time till September 2 to the government to pass appropriate orders under the Foreigners Act after examining the case of each Pakistani prisoner, the bench had observed that if proper orders were not passed, then the Court would be constrained to direct their release.

Details of 11 prisoners, whose cases were being taken up by a bench headed by Justice Shah, are Bisarat Ali Rajput (Pak-occupied-Kashmir, lodged in Agra), Umar Din (PoK, lodged at Varanasi), Sahid Mehmood (Rawalpindi, lodged at Naini), Mohd Ishfaq Rajput (Sialkot, lodged at Naini), Abdul Khaliq (Faisalabad, lodged at Varanasi), Zamir Ahmed (Gujranwala, lodged at Varanasi), Iftekhar Hyder (Peshawar, lodged at Naini), Salla-ud-Din (Faisalabad, lodged at Naini), Mohd Akram Balouch (Balochistan, lodged at Naini), Habibullah Shah (Wajidapora Kasoor, lodged at Varanasi) and Assadullah Qadri (PoK, lodged at Naini).

INDIAN EXPRESS
3 SEP 2003

SC puts Advani, Joshi on notice in Babri case

By Rakesh Bhatnagar
TIMES NEWS NETWORK

New Delhi: The supreme court on Monday issued notices to deputy Prime Minister L.K. Advani, HRD minister Murli Manohar Joshi, BJP leader Uma Bharti, the Centre, the CBI and the Mulayam Singh Yadav government and others on petitions seeking revival of the conspiracy charge in the Babri masjid demolition case. The court, however, refused to stay the ongoing trial in the case at the Rae Bareli special court.

It asked the respondents to file their replies within two weeks as to why two petitions filed by lawyer Wajahad Ansari and one C.M. Shukla should not be entertained.

The petitioners have sought quashing of the May 30 chargesheet filed by the CBI against the accused in which the charge of conspiracy (section 120-B of IPC) was dropped. The trial court is still to announce its decision on the issue.

A bench of Justices S. Rajendra Babu, K.G. Balakrishnan and Arun Kumar adjourned hearing on another petition filed by Mohammad Aslam alias Bhure seeking a review of the apex court's earlier order allowing the trial of Mr Advani and seven others in the Ayodhya demolition case at Rae Bareli instead of Lucknow. The bench asked Mr Aslam's counsel O.P. Sharma to amend the petition by deleting certain objectionable references to the CBI and others.

Besides the Union ministers, others such as Vinay Katiyar, VHP leader Ashok Singhal, Giriraj Kishore, Vishnu Hari Dalmiya and Sadhvi Rithambara have been issued notices in the conspiracy charge case. As the hearing started in a crowded court room, Mr Ansari's counsel Abhishek Manu Singhvi sought a stay of the trial. The court, however, said, "Proceedings in the Rae Bareli court are going on and let them go on." Mr Ansari's petition said that the CBI's move to drop the conspiracy charge against top politicians was a "colourable and malafide exercise of authority. "

TOI Graphic

THE TIMES OF INDIA

2 SEP 2003

SC refuses to stay Rae Bareilly trial

Our Legal Correspondent

NEW DELHI, Sept. 1. — The Supreme Court (coram, Babu, Balakrishnan, A Kumar, JJ) today rejected a plea to stay the trial in the Babari Masjid demolition case in Rae Bareilly court and issued notices to the Central Bureau of Investigation, the Uttar Pradesh government, the Deputy Prime Minister Mr LK Advani and seven others over the dropping of conspiracy charges under Section 120B in the fresh chargesheet filed in the case.

The court delivered the verdict on three petitions — a review petition filed by Mohammed Aslam, alias Bhure; a petition by advocate Wahajat Ansari, seeking fresh trial at Rae Bareilly on the basis of the earlier CBI chargesheet; and a Public Interest Litigation filed by advocate CM Shukla and two others.

The counsel for Mohammed Aslam, Mr OP Sharma, had sought quashing of the fresh CBI chargesheet filed on 30 May 2003 and a stay on the case's transfer from Lucknow to Rae Bareilly. In the fresh chargesheet, the CBI had dropped the conspiracy charges. The court asked Mr Sharma to delete the offensive portions of his petition and file an amended one.

Wahajat Ansari and CM Shukla had sought to challenge the dropping of conspiracy charges against top BJP and VHP leaders, including human resources development minister Mr Murli Manohar Joshi and Ms Uma Bharati.

Mr Shukla's petition urged the Supreme Court to direct the CBI to submit before the Rae Bareilly court the original chargesheet of 1993 submitted to the Lucknow court.

THE STATESMAN
2 SEP 2003

Not so blunt

The real test for Article 356

Article 356's status as the symbol and substance of Centre-state conflict — the National Commission had identified 31 cases of abuse or suspected abuse in state government dismissals — needs to change. The amendments proposed by the Inter-state Council, which met in Srinagar, could be a significant first step. The safeguards are, first, sending advisories under Articles 256, 257 before action under Article 356, second, asking for and receiving responses from states before dismissal, third, governor's report becoming a speaking document — that is, explaining clearly reasons for the action — and, fourth, keeping assembly under suspended animation until Parliament approves presidential proclamation. It is imperative that to apply the first three changes in the spirit they have been proposed, the documents be laid in Parliament, and, therefore, made public. Rather surprisingly, given official tendencies, the council recognises this and proposes that the governor's report will be an "integral part" of the presidential proclamation. Other "material facts" and "grounds" for them will also be included. Ideally, every piece of paper exchanged between the Centre, the state and the governor should be annexed with the proclamation. But what the council has proposed is a more than a good beginning. It will, for example, make it difficult for partisan governors; such creatures do exist — to take the Central line while assessing a state government. Since the governor has to explain his decision, since the Centre has to view his report in light of the state's response and since the operative part of the arguments and counter-arguments will be available to MPs, media and the people, wholly motivated actions should become a rarity.

Article 356 is being reformed precisely because Congress-style electoral dominance is no longer possible. The BJP rules with the help of many others and Congress fantasies of roaring back to power notwithstanding, it will have the same constraints. Powerful state satraps mean a Centre susceptible to reason. One test of an amended Article 356 may come, therefore, when politics changes again. The other real test can come any time — parties rise above politics when a genuine crisis is at hand. Take, Bihar, for example, which can slide into chaos any time now. Will the Congress support the BJP in Parliament if all the rules of the new game are followed by government? Or take Gujarat riots and multiply them by 100. Will the BJP agree to follow Congress advice that Article 356 be explored? The day such agreements are possible will represent a real achievement.

THE STATESMAN

2 SEP 2003

SATURDAY, AUGUST 30, 2003

AMENDING ARTICLE 356

THE BROAD CONSENSUS that emerged at the Inter-State Council meeting over what is arguably the Constitution's most contentious provision — Article 356 — is a most welcome thing. The spirit of cooperative federalism has raised the hope of a constitutional amendment that will build safeguards into this emergency provision to prevent its misuse. The Union Law Minister, Arun Jaitley's press briefing suggested that these safeguards will incorporate the essence of the Supreme Court's landmark 1994 judgment in the S.R. Bommai vs Union of India case and include recommendations made by bodies such as the Sarkaria Commission and the National Commission to Review the Working of the Constitution (NCRWC). Article 356 gives the Centre the power to take over the functions of a State Government in the event of a failure of the constitutional machinery in that State. However, the history of its use clearly reveals that it was invoked more often to fix politically inconvenient State Governments, precipitate fresh elections and for other reasons that have no relevance to the purpose of the Article.

In recent years, the judgment in the Bommai case has served as a salutary check — and indeed bar — against such misuse. The Court's ruling that the Centre cannot dissolve State legislatures unless the proclamation under Article 356 (1) is approved by the Lok Sabha and the Rajya Sabha has served as an effective restraint during a period when no party or combination of parties has enjoyed a majority in both Houses of Parliament. The Court also held that any such proclamation is open to judicial review to the extent of examining whether it was issued on the basis of relevant material or whether it was a *mala fide* exercise of power. This pronouncement has deterred the use of the Article for narrow, political ends. Between 1950 and 1994, when the Bommai judgment was delivered, Article 356 was used on more than 90 occasions. In many cases, State Governments were dismissed even when they enjoyed a majority in the Assembly and in other cases, without being given an opportunity to prove their strength on the floor of the House. Instances of such misuse have all but vanished in recent years, but it is important to strengthen and institutionalise the safeguards through a constitutional amendment.

Among other things, such an amendment must ensure that, if used at all, the recourse to Article 356 must be a last resort — one that is embraced after exhausting the options provided by other Articles in the Constitution such as 256, 257 and, more importantly, 355. Other measures, such as the condition that the Centre must formally communicate to a State the facts and reasons for proposing to bring it under President's Rule and give the State an opportunity to reply, are essentially intended to ensure that the proposed use of Article 356 is based on a rigorous method. Mr. Jaitley's suggestion that the Governor's report recommending President's Rule should be in the nature of a "speaking order" is virtually identical to the recommendation made by the NCRWC. This was that such a report should contain "a precise and clear statement of all the material facts and grounds, on the basis of which the President may satisfy himself as to the existence or otherwise of the situation contemplated in Article 356." Like some other emergency provisions in the Constitution, Article 356 was introduced as an extraordinary safeguard, not something that is invoked in non-extreme circumstances. During the Constituent Assembly debates, Dr. B.R. Ambedkar even hoped it would be a "dead letter," something that would "never be called into operation." The purpose of the proposed constitutional amendment should be to ensure that this democratic vision of cooperative federalism comes true, however late in the day.

Article 356 to be retained

Centre and states agree on 'sparing use' of law

Chandan Nandy
Srinagar, August 28

A CONSENSUS has been arrived at on the issue of contract labour and other contentious subjects between the Centre and the states at the Eighth Inter-State Council meeting here on Wednesday.

Chaired by Prime Minister A.B. Vajpayee, the Centre and the states agreed that Article 365, which empowers the President to impose sanctions on states for non-compliance of the Centre's directives made under Articles 256 and 257, should be "sparingly used" in place of Article 356.

Article 365 was agreed to be retained, although there were demands by certain states — for instance West Bengal, that it be abolished. It was decided that a "cautious approach" be adopted and states be informed of its use before it is applied.

Briefing newspersons, Deputy Prime Minister L.K. Advani said there was "general consensus" on the constitutional recommendations of the Sarkaria Commission. He said all felt that Article 356 should be used as a "last resort". The safeguards against the misuse of Article 356, as enshrined in the Bommai judgment, were accepted. This would now mean incorporation of the safeguards in the Constitution through an amendment.

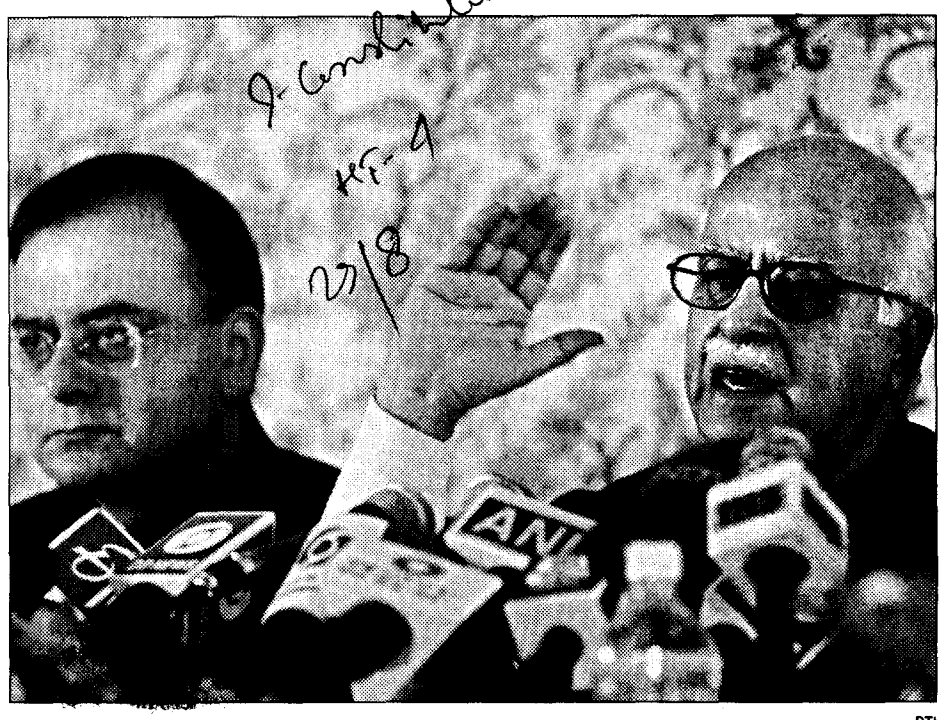
Sources told *Hindustan Times* that on the issue of contract labour and contract appointments, a general agreement was reached that states would now be free to implement their respective schemes. States not in favour of the scheme would not be compelled to enforce it.

There were suggestions that the law on contract labour be implemented. Andhra Pradesh Chief Minister Chandrababu Naidu was a proponent of amendments in labour laws. He felt that unless "wide-ranging" reforms were carried out, growth and development would not be achieved. He suggested that more freedom be given to states to introduce labour reforms.

Kerala Chief Minister A.K. Anthony said policy decisions could no longer be taken casually on the requests of one or two states. He said certain decisions taken — like reduction of customs duty on the import of palm oil and rubber — had a sweeping impact on the economy of his state.

West Bengal CM Buddhadeb Bhattacharjee said though his government was against large-scale downsizing of the workforce, there was need for "rationalisation of employees by taking necessary steps towards cost-effective and efficient policies".

The Centre is also believed to have agreed to suggestions that states' concurrence be taken before sending in the Army and security forces in the event of internal disturbances or external aggression. Article 335 of the Constitution casts a duty on the Centre to protect states faced by internal disturbances or external aggression.



PTI

DRIVING CONSENSUS: Deputy PM L.K. Advani addresses the media at the conclusion of the Inter-State Council meet in Srinagar on Thursday, while Law Minister Arun Jaitley looks on.

Publish Malimath Report!

w 5-8 1998 J-comm. (Law)

Criminal justice reform must be transparent

The Central government's proposal to make the threatening of witnesses a punishable offence is laudable but appears not to be well considered. We are informed that a new Section will be inserted in the Indian Penal Code, Section 195(A), to provide punishment of seven years in prison or fine or both to witnesses who perjure themselves by turning hostile. Even this would not have happened if the Supreme Court had not sent a notice to the Government to submit their views on implementing the Malimath Committee's Report on reforming the criminal justice system. The Committee's Report was submitted to government long ago but it has not been made public; it can be assumed that the criminal justice system is of interest to the general public and not only to criminals! Efforts to obtain copies of the Report have not been successful and rumour has it that it is because copies have not been printed. We wonder why? A three-page summary put out some weeks ago was worse than useless.

Official briefings suggest that the purpose is to prevent witnesses perjuring themselves and turning hostile. Also the recording of evidence is to be made more stringent, which is all to the good. There are two aspects that have been overlooked. First, it cannot be assumed that pressure is exerted only after the first statement has been recorded. Often witnesses are forced to give tutored evidence at the threshold. Allowing statements to be recorded before police officers may or may not improve matters. Second, it is conceded that in most cases of witnesses turning hostile, it is under mortal threats as in the Best Bakery case in Gujarat. But the punishment should be visited on the criminals administering threats and exerting pressure not on the witness. The proposed amendment seeks to punish the witness and convict him of perjury. Instead the need in cases, where a court is convinced that witness is retracting his evidence under duress is for exemplary punishment to be visited on the party exerting the pressure and to protect the victim.

Further comment must await the text of the amendment proposed being available and there is no reason for such a major change in the law and procedure to be carried out in secret and behind closed doors. It is not enough to say that the public will know when the amendment is moved in Parliament. There is advantage in taking the public into confidence. Any responsive government not carrying out a hidden agenda must welcome public debate on an issue of this importance. The first and elementary step is to publish the Report or are Government waiting for another directive from the Supreme Court to do what is their plain duty?

THE STATESMAN

15 AUG 2003

The Supreme Court has not negated workers' right to strike, but restated an existing law

Curbing immoral rights

N.R. MADHAVA MENON

The recent judgment of the Supreme Court in the matter of Tamil Nadu government employees' strike has evoked sharp reactions supporting and opposing the availability of a democratic remedy long believed to be part of labour jurisprudence in the country. Much of the criticism appears to have been advanced on the wrong assumption that the court was negativizing the right of workers to strike under industrial law. In fact, the issue before the court was limited to strike by civil servants who are governed by the Constitution and the civil services regulations rather than by the Industrial Disputes Act.

"Right" is an interest or a benefit protected by law. In this regard, moral and equitable rights have to be distinguished as they depend on social consensus and cultural traditions rather than on law. The nature and extent of the interest protected are laid down by the law: as also the limits and restrictions on them. In other words, no right known to law is absolute and all rights are subject to reasonable restrictions and are available only so long as they are invoked within the stipulated conditions. That is why there is the concept of legal and illegal strikes. Illegal strikes or strikes accompanied by violence are no more considered as rights but are actionable as torts and crimes under appropriate laws.

Again, in an environment where freedom is taken as licence and where rights are claimed in total disregard of corresponding duties, there is utter confusion about what is legal and what is legitimate in a constitutional democracy. There is no mention of right to strike in the chapter on fundamental rights in the Constitution. What the Constitution provides is freedom to assemble peacefully without arms or to form associations or to seek remedies under law whenever the rights are threatened. The democratic right to protest (collective bargaining) is part of the right to freedom. Article 19, which guarantees these rights, stipulates the limits of their exercise and empowers the state to put reasonable restrictions on the enjoyment of these rights in the interest of public order, security of the state or interests of general public. In applying the test of reasonableness of restrictions, the broad criterion followed is whether the law strikes a proper balance between public interests on the one hand and the rights of individuals on the other hand. This is ultimately for the court to decide. In the context of the Tamil Nadu government servants' strike, therefore, the issue is whether the action taken by the government in dismissing employees *en masse* is justified and whether the law under which it was done (the Tamil Nadu Essential Services Maintenance Act, 2002 and the Ordinance No. 3 of 2003) is constitutionally valid, that is, whether it can pass the test of "reasonable restriction" under Article 19 (2).

Politicians and political parties who depend on vote bank politics among the working class for their own survival have been misinterpreting laws and judicial decisions whenever they found them inconvenient to their vested interests. After the end of the Cold War and the adoption of market economy in country after country, there emerged a struggle between ideologies and practices in countries like India. It is in this context that one has to appreciate the support and opposition to the Supreme Court's refusal to accept any right to strike on the part of government employees. Very recently, the court was called upon to examine whether lawyers (who are not employees of government, but independent professionals licensed to provide public services) have a right to go on strike. Taking into consideration the resulting harm to society, the court declared that lawyers have no such right as distinguished from collective protest short of striking work. A similar view was taken when bank employees went on strike.

This is the considered view of the court in respect of whether going on strike is part of a fundamental right (Article 19 on right to freedom) guaranteed by the Constitution. Peaceful protest without serious disruption of public life is still part of the right to freedom and right to access justice. But when serious harm results to others, the right becomes a wrong, a legal strike becomes an illegal one and government interventions become reasonable restrictions on the right.

In the case of government servants (unlike industrial workers), not only is there no fundamental right to go on strike, but also an express prohibition against strike under the government servants' conduct rules. Rule 22 provides that "no Government servant shall engage himself in strike or in incitements thereto or in similar activities". Since the rule is not declared an unreasonable restriction, it is constitutionally permissible in public interest. In the circumstances, the court legitimately ruled that the government servants did not have even a statutory right to strike. Therefore, every strike by government servants is illegal under the existing law.

This raises the question of remedies available to government servants to fight injustice. After all, access to justice is the most fundamental of all constitutional rights. The Constitution has provided special service privileges and protection to civil servants under Article 311 and has empowered the state to set up administrative tribunals (besides the ordinary courts

available to every citizen) to process disputes and complaints of persons in public services. Their salaries and allowances are revised periodically through recommendations of specially appointed pay commissions.

Today, over 90 per cent of state revenue is spent on maintaining the civil services, leaving little for development work. Considering the rising unemployed populations and those living below the poverty line, the government servants are a privileged and pampered lot in the country today. As such, going on strike en masse to compel the government to increase pension benefits and the like is *prima facie* immoral, illegal and unjustified. This is the view the court took in the matter. However, the court took a lenient view on behalf of the employees to read an element of injustice in the government's action in dismissing over two lakhs of them. The court felt that despite the act and the rules possibly permitting such action, it was an unequal situation and the employees' capacity to resist state action was very limited. Many employees were compelled by their leaders or blindly followed others when they went on strike.

In this view of the matter, to meet the ends of justice, the court directed reinstatement of dismissed employees on their tendering an unconditional apology and a promise to abide by the law. The court also wanted the government to ensure that it would not take

"Those who condemn the Supreme Court ruling are doing a disservice to democracy"

disciplinary action against those who went on strike (permissible under the rules) but confine disciplinary action to those who indulged in violence and against whom a first information report had been lodged. No break in service would result because of going on strike, said the court. Furthermore, the claims of those who are not reinstated would be heard expeditiously by three retired high court judges to be named by the chief justice and their decisions made binding on the state government. Employees aggrieved by the decision of these judges can appeal in an appropriate forum. It is submitted that it is a case where the court attempted a difficult task of upholding the law and securing public interest while ensuring the state action does not result in injustice to employees.

Thus, reading the judgment one finds the following propositions of law emerging out of it. One, there is no fundamental or legal right for government servants to go on strike. Though the court said that there is not even a moral or equitable right to do so, the matter is still open as the law is still not clear on the issue. Two, government employees, if they have grievances, have to seek alternative procedures which are specially made available to them under the Constitution and the laws. Collective bargaining is still a valid right available to them but not strike which put the society to irreparable harm.

Three, the denial of right to strike for government servants (conduct rules) is reasonable restriction on the right to freedom as provided in Article 19 (2). It is so, on balancing of individual right with interest of public at large and the rights of those intended to be served by public servants. Four, the exceptional step of mass dismissal of employees taken by the government under the Tamil Nadu Essential Services Maintenance Act and ordinance is to be tested for its constitutional validity through separate action and no judgment on its validity is passed by the court.

From a correct reading of the judgment it is clear that what the court has done is a restatement of the existing law as applicable to government servants and not negation of right to strike of workers generally. Secondly, the Supreme Court, being not only a court of law but also a court of justice, has done what is expected of it in providing "justice" to the aggrieved government servants even when their actions were not justified under law. Thirdly, the court has clarified the elementary principle that every right is subject to reasonable restrictions and a right will cease to be a right once it has crossed those restrictions. Balancing individual rights and public or social interests is essentially a function of the court under a rule of law society and no one can despise the court for doing its constitutional duty. Those elements who still condemn the judgment and deliberately incite civil servants to sabotage the rule of law by going on strike are doing a distinct disservice to democracy, human rights and rule of law.

The author is vice-chancellor, West Bengal National University of Juridical Sciences, Calcutta

CABINET CLEARS BILL FOR CURRENT SESSION ■ SALE, EXPORT OF BEEF MAY BE STOPPED

Pre-poll push to cow slaughter ban

Statesman News Service

NEW DELHI, Aug. 11. — A Bill imposing a nationwide ban on cow slaughter was cleared today by the Cabinet for introduction in the ongoing Parliament session.

Briefing reporters after a Cabinet meeting today, Union minister for parliamentary affairs Ms Sushma Swaraj said if Parliament passed the proposed 'Cruelty to Cow Bill', it will be binding on all states.

Initially, the Cabinet considered a proposal to bring this Bill under Article 252. This, however, would have resulted in a situation where the Centre can legislate on the subject but would have to leave the states with the right to decide whether or not to adopt the decision.

The Cabinet, therefore, decided to introduce this Constitutional Amendment Bill under Entry 17 of the Concurrent List of the Seventh Schedule to the Constitution, which deals with prevention of cruelty to animals.

The ban on cruelty, however, does not apply to buffaloes, sheep or other cattle, but only cows.

"As it will be introduced under the Concurrent List, subject to Parliament clearing it, the Bill will be binding on all states," a government functionary said. Cow slaughter is now allowed in Arunachal Pradesh, Kerala, Meghalaya, Mizoram, Nagaland, Tripura and West Bengal.

Government sources said the proposed Bill includes jail sentences of up to five years and hefty fines for those who are found guilty of cruelty to cows. The Bill seeks a complete ban on "cow slaughter", sale of "cow meat" and "export of cows or cow meat". Anyone who kills a cow could be sentenced to as much as five years in jail, while injuring one could attract a fine of Rs 5,000, said an official. The Bill also includes clauses on government-funded institutes to care for "uneconomical cows". "That's just a more acceptable name for the *gaushala* or *gausadan*."

The initial proposal for the Bill was under Article 252. Sources said when Mr Rajnath Singh took charge of the agriculture ministry he had referred the matter to the law ministry seeking suggestions on how a nationwide and binding law could be proposed. The draft was returned with a suggestion that the Bill could be introduced under the Concurrent List to ensure countrywide concurrence.

Congress caught in a dilemma, page 4

THE COWS HAVE IT! If the proposed Bill banning cow slaughter comes into effect, this may become an all-too-familiar sight in Delhi and other cities. Emotive and electoral issues apart, stray cows, as this one on a central Delhi street on Monday, are a major urban traffic irritant. — AFP

Bengal counts cash loss

KOLKATA, Aug. 11. — The Centre's decision to ban cow slaughter drew a cold reaction from the Left Front government.

With the chief minister away in the Capital, his seniormost Cabinet colleague, labour minister Md Amin, was available for a reaction. The minister pointed out the economic repercussions of the proposed move, saying, "If you ask for my personal opinion, I will say such an act will cause immense economic loss for a country like India. There are too many issues involved before this Bill is passed by Parliament. We have to see the stand of the NDA government."

The minister also wondered about footwear procurements since such a ban would result in a shortage of leather. — SNS

Threatening witnesses to be a punishable offence

Statesman News Service

NEW DELHI, Aug. 11. — The Cabinet today cleared a proposal making the threatening of witnesses a punishable offence under the penal code. Amendments and a new section, 195(A), will be introduced to make such an offence punishable with a term of seven years in prison or a fine or both.

The decision follows a Supreme Court notice to the Centre seeking to know the steps being taken to implement the Malimath Committee report on reforming the criminal justice system. The committee had suggested initiating action on grounds of perjury if the witness lies under oath.

The proposal followed a spate of recent high-profile cases where witnesses turned hostile. These include the BMW case, Jessica Lal murder, Nitish Katara murder, and the Best Bakery case in June in which most witnesses turned hostile leading to the acquittal of all 21 accused.

Today's Cabinet decision to amend certain penal provisions has made it mandatory for the police to record the statement of a witness before a magistrate. By the existing laws, such a statement could be recorded before a police officer.

Discussing the Bill, Union home secretary Mr N Gopalaswami said now if a witness went back on his statement he could be charged with perjury by the magistrate himself. Magistrates are now not empowered to take such an action on their own, but have to seek the permission of higher judicial authorities in matter of perjury.

The proposed legislation would also allow an accused to go in for plea bargaining for reduction of sentence in case of an offence punishable with less than seven years' imprisonment. But the issue of plea bargain would not be applicable in case of offences punishable with more than seven years of jail or a life term.

For plea bargaining to reduce sentence, the accused would have to plead for it himself, and no one can do it on his behalf. The move, expected to save trial time, would come under Section 265(A) of the CrPC.

On the dowry front, the Bill, by amending Section 498(A) of the IPC, seeks to allow withdrawal of a dowry case by making it compoundable in case of mutual agreement between the parties concerned.

THE STATESMAN

12 AUG 2003

RIGHT TO CONTEST

IN A NARROW legal sense, there can be no objection to the Supreme Court judgment that upholds the constitutionality of the Haryana law that bars anyone having more than two children from becoming a sarpanch or a panch of a panchayat. The provision in the Haryana Panchayati Raj Act, 1994 was challenged mainly on the ground that it violated fundamental rights guaranteed in the Constitution, particularly Article 25 (freedom of conscience and free profession, practice and propagation of religion). Dismissing the argument that the two-child stipulation contravenes Muslim personal law, the Court has held quite correctly that the right to contest an election is "neither a fundamental nor a common law right." It has declared that this right, created by a statute, "is obviously subject to qualifications and disqualifications enacted by legislation." However, the issues raised by the ruling go well beyond the limited question of whether it is unconstitutional to deprive someone who chooses to have more than two children of the privilege of holding elected office. The key issues are social and political.

In the context of India's attempts to limit its burgeoning population, the two-child norm must be part of a broad suasive policy; it cannot be a coercive or enforceable law. Given this reality, what is the social or political rationale for a legal provision that bars those with more than two children from holding elected office? There are some dubious assumptions at work here. Elected leaders are role models for the rest of society and debarring those who flout the two-child norm from holding elected office is a way of underlining one of the key elements of the country's population policy. Even if one were to accept this line of argument, the question remains: is the imposition of such a restriction reasonable? Can it play a tangible role in helping to achieve the larger objective of curbing the population growth? The link between controlling population and the fecundity of panchs and sarpanches is greatly exaggerated. It strains credulity to assume that those who elect village leaders with two children or fewer will somehow be influenced by their example.

There is a not very subtle elitism behind the restrictive legal provisions in the Haryana Panchayati Raj Act. No State Assembly is likely to adopt legislation that places comparable restrictions on MLAs. Will the Members of Parliament submit themselves to a legislative *diktat* that, as role models, they must personally reflect the norms of the national policy on population? The two-child restriction has also raised concerns of a practical nature. It was submitted during the hearings in the apex court that aspirants to panchayat posts felt compelled to give up the 'extra' children in adoption. In response, the Court merely observed that disqualification is not wiped out if children are given away in adoption — a response that does not address the social concerns behind the problem. It was also argued that women are affected most by this disqualification as they can rarely resist having a third child if their husbands wish to. The Court's observation that it did not believe that they could be compelled to have children against their wishes is a debatable, if not fallacious, proposition. As democratic women's groups have argued, population stabilisation can be achieved by social and economic policies that are inclusive of women and with a focus on their overall empowerment.

SC ruling counter to fundamental rights: CPM

Statesman News Service

NEW DELHI, Aug. 6. — The CPI-M politburo today termed as "retrograde" the Supreme Court ruling against strikes by government employees, and said it was contrary to the fundamental rights in the Constitution.

The Aituc leader, Mr Gurudas Das Gupta, said in a statement that the Central trade unions would convene a national convention here "to defend the right to strike by the working class".

He said: "Not only in India but all over the world, the right to strike is sacrosanct. It's in consonance with the letter and spirit of the Constitution of India".

The CPI-M politburo said: "This is an unprecedented judgment which deprives lakhs of government employees of their basic right to organise and resort to strike action. It is contrary to the fundamental rights in the Constitution and the ILO conventions to which India is a party."

The BJP is to study the systems prevailing in China and Russia to formulate its response to the Supreme Court judgement, BJP spokesperson Mr Vijay Kumar Malhotra said.

Protests in West Bengal: The ruling CPI-M will take out processions across West Bengal tomorrow in protest against today's Supreme Court judgment on strike, SNS adds from Kolkata.

Mr Anil Biswas, state secretary, said his party state secretariat took the decision, while Mr Buddhadeb Bhattacharjee said at Writers' Buildings he would talk to his Cabinet colleagues on the issue. The CPI-M state secretariat said: "In the political history, strikes are not a plaything for the poor and the exploited, but a right earned through struggle and sacrifice". "The SC verdict is undesirable and unacceptable."

Codifying personal laws

By Rajeev Dhavan

The real controversy is over the codification of 'personal laws' based on religion or custom.

TRIGGERED BY the Chief Justice of India, V.N. Khare's stray remark in the Christian Bequests case (2003), there is a renewed demand for a uniform civil code. What does this demand entail? India already has a 'uniform civil code' — reputedly one of the best in the world. 'Codification' of civil laws means placing all civil laws affecting the relationships between private citizens on a statutory basis. India's codification began in the mid-19th century and continues to this day. This includes the Contract Act 1872, the Transfer of Property Act 1872, the Trusts Act 1882, the Civil Procedure Code (now of 1976), the Evidence Act 1872, the Companies Acts 1956, which amongst others (including the codification of criminal law through the Penal Code of 1860 and the Criminal Procedure Code) form the Code Indica.

Following Napoleon's Code in France, codification became a craze in the 19th century which witnessed famous controversies such as those between Thibaut and Savigny in Germany and over Field's Code in New York. India became the laboratory for codifying the English 'common' and 'chancery' law. India's example was followed throughout the Empire (now the Commonwealth) except in England where — due to propertied and commercial interests — codification was never made except in bits and pieces in the 20th century. But the English neither codified the Tort law in India (even though a draft was prepared by Sir Frederick Pollock) nor the personal laws of all communities (Hindu, Muslim and others). Why? Changing personal laws would have created controversy — as it did in many instances. No less, joint family and other laws supported powerful male propertied business and the state's revenue interests. Inevitably, the English used the 'courts' to codify the law. Islamic law was changed and 'dharma sastra' rewritten while purporting to follow the religious texts. Some judgments — as on Waqfs — led to legislation in 1913. Often, British Courts (as Gandhi pointed out) made "egregious blunders." In the 1930s, some changes regarding choice of law were made by the Shariat Act 1937. Around the same time, the codification of the Hindu law was commenced which eventually resulted 15 years later in the Hindu Marriage, Succession, Adoption and Minority and Guardianship Acts (1955-56). But (following a bitter controversy among the then Prime Minister, Jawaharlal Nehru, the then President, Rajendra Prasad, and other pressures) the codification of Hindu law remained incomplete in that crucial area of joint family property from which women were excluded. This resulted in the piquant situation in which a woman could be Prime Minister of India but not the *karta* (head) of a Hindu joint family!

This background elucidates the real scope of the proposal for a uniform civil code. India already has one. The real controversy is over the codification of 'personal laws' based on religion or custom. Why has it become such an issue? Surely not because — as Chief Justice Khare points out — it is in the Directive Principles of State Policy which contain the goals of the Constitution. This is not the only stated but un-achieved goal in 53 years of Independence. There are other equally important issues relating to a living wage for workers, Dalits, equality, public ownership of India's assets and so on.

So, what is the uniform civil code controversy really about? Codification is not an end in itself. It may lead to bad laws. Napoleon's Code sought rationality, convenience and to eliminate judges from taking over governance. No code can ever elude interpretation. The judges did take over. The Indian controversy — really about uniform personal laws — has two trajectories. The first is genuine; the second is not. The genuine concern is that many personal laws relating to marriage, inheritance, guardianship, divorce, maintenance and property relations in all communities are unjust — especially unjust to women. The second impetus for uniform personal laws is purely political — a communal weapon to chastise Muslims with the false argument that Hindus have a code, and to force Muslims to yield to one. Hindus did not codify the joint family property law, which entrusted power and wealth to men. But, that is besides the point. Do we want a uniform civil code (really uniform personal laws) for its own political sake to give the BJP and others a communal edge in politics or for genuine justice reasons?

The 'justice' argument is that religious law and practice (protected under Article 25) must yield to the 'equality', due process and other imperatives (in Article 14 and others). It is precisely in this area where the High Courts, and now the Supreme Court, have fumbled. Realising that they were entering into a political thicket, distinguished judges like Justices Chagla and Gajendragadkar in Bombay (1951-53) effectively took the view that it was not the business of the judges to reform the law on 'equality' grounds because personal law was not 'law' to attract fundamental rights invocations. This view was confirmed by the Supreme Court in 1980; and, more fully in 1996 — even though rightly criticised by several jurists as basically flawed, most notably in books by Justice A. M. Bhattacharjee on Hindu and Muslim law. How can 'personal law' which is enforced everyday by law courts not be 'law' for 'equality' purposes — especially when 'custom' is included in Article 13 to attract the fundamental rights dispensation? By refusing this 'Article 13' solution, judges avoided controversy and abdicated their role to read equality into doubtful personal laws.

But, another 'fine' distinction was created. Judicial forbearance in testing personal laws against equality standards is limited to uncodified laws. As soon as a personal law is codified, it becomes 'law' and can be struck down on fundamental rights grounds. Thus, the Travancore-Cochin Christian Succession Act 1916 was struck down in Mary Roy's case (1986) and denial of guardianship rights to mothers and other women was read down in Geetha Hariharan's case (1999). The rights of tribal women in Chota Nagpur should have been upheld in Madhu Kishwar's case (1996) but were not for doubtful reasons. These strategic contradictions become self-evident in Shamim Ara's case (2002), in which the Supreme Court, interpreting the statutory 'maintenance provisions,' reformed personal Muslim law to virtually invalidate the triple *talaq* which was part of the uncodified personal law. In the latest Christian Bequests judgment (2003), the statutory provisions of the Succession Act was found to discriminate against Christians bequeathing their property to charity. Likewise, the reform of uncodified personal laws can certainly be brought within the remit of the Supreme Court and High Courts, which have artfully resisted this empowerment whilst professing social reformism.

From time to time, Justice V.R. Krishna Iyer and others have espoused the case for a uniform civil code — a view that finds forceful support in a published article by Justice Ruma Pal (now on the Supreme Court). In Sarla Mudgal's case (1995) — concerning the bigamy rights of a Hindu convert to Islam — a 'direction' was given to the Union Government to secure a uniform civil code. But, if a uniform civil code was a constitutional imperative, why did the Supreme Court in Daniel Latifi's case (2001) not strike down the special Muslim maintenance law (enacted in 1986 after Shah Bano's case of 1985) when this law was clearly at variance with the 'uniform' maintenance provisions of the criminal code? Perhaps, because a uniform civil code is not an end in itself.

This brings us to the core issues. The purpose of codifying 'personal laws' is to secure justice. This can be done through the courts and fundamental rights (the Article 13 solution) or by parliamentary legislation to fulfil Directive Principles (the Article 44 solution). The judges have refused to adopt the Article 13 solution. Parliament, which has failed to pass a uniform adoption law since 1972, is wary of the Article 44 solution. The Supreme Court's request to Parliament for a uniform civil code adds juristic fuel to political fire to create the platform for Hindu fundamentalist attacks on Muslims and others. Surely, this is not what the Court intended. The issue remains: uncodified personal laws which govern ordinary peoples' lives need to be examined for injustice. The Courts refuse to enter the fray. Hindu law codification took several years and stopped when community consent stopped. These matters require consent and consensus, not majoritarian coercion. The fundamentalists should back off; and allow Muslim and other communities to begin the real debate without political weaponry being pointed at their head. The real issue is achieving justice — not politically coerced half-baked uniformity for its own sake.

The Constitution and reservation

By P. B. Sawant

It will be unconstitutional to keep reservation on economic criteria confined to any particular social group.

THE PRINCIPLE of equality permeates the Constitution of India. All the citizens are entitled to be treated by the state equally, irrespective of their caste, race, religion, sex, descent, place of birth and residence. No citizen may be discriminated against by the state only on any of these grounds. The exceptions to this principle are made in favour of women and children, the backward classes, the Scheduled Castes and the Scheduled Tribes, and the weaker sections.

Under Article 15 (3) of the Constitution, any special provision may be made for women and children belonging to all social groups transcending caste, religion etc., for their advancement and welfarein all fields. Under Article 15 (4), special provisions may be made for the advancement of any socially and educationally backward class and for the Scheduled Castes and the Scheduled Tribes. The "advancement" meant here is again in any field. This sub-clause (4) of Article 15 was inserted by an amendment in 1951. Article 16 (4) permits the state to make any provision for the reservation of appointments or posts in favour of any backward class, which, in the opinion of the state, is not adequately represented in the services under it. The expression "backward class" in this sub-clause is interpreted by the Supreme Court to mean "socially and educationally backward" as is specifically mentioned in the sub-clause (4) added later to Article 15. Article 46 directs the state to promote with special care the educational and economic interests of the "weaker sections of the people", particularly of the Scheduled Castes and the Scheduled Tribes and also directs the state "to protect them from social injustice and all forms of exploitation". Article 335 states that the claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration consistently with the maintenance of efficiency of administration in the making of appointments to the services and posts in connection with the affairs of the Union and of a State.

Although *prima facie*, these appear to be the exceptions to the citizens' right to equality before the law or to the equal protection of the laws guaranteed by Article 14, a deeper consideration will show that in fact they enable the state to make the right to equality a reality for the vast majority of the backward classes which, together with the Scheduled Castes and the Scheduled Tribes, constitute about 85 per cent of the population. The right to equality without the capacity and the means to avail of the benefits equally is a cruel joke on the deprived sections of the society. It widens the social and economic inequalities progressively with the haves making use of the guaranteed right to amass the fruits of progress, and the have-nots remaining where they are. The exceptions enable the state to make the deprived capable of availing of the benefits which otherwise they would not be able to. It is to give effect to the principle of equality that the exceptions become mandatory in any unequal society such as ours which intends to become egalitarian. The principle of equality is not an esoteric concept. It may be used as a constructive tool of social engineering, for building a society based on social justice. To treat two unequals as equals causes as much injustice as to treat two equals unequally. The jurisprudence of equality, therefore, requires that those below are levelled up to those above.

The exceptions made in the Constitution are in favour of four classes for certain stated purposes, with or without conditions — (i) women and children in general, i.e. belonging to all social groups and all the strata of the society regardless 'of class, caste, race, religion etc. [Article 15 (3)], obviously for their all-round welfare and development (ii) the socially and educationally backward classes and [for their advancement, Article 15(4)] (iii) the Scheduled Castes and the Scheduled Tribes (iv) the 'weaker sections', which, in particular, include the Scheduled Castes and the Scheduled Tribes for promoting with special care their educational and economic interests and to protect them from social injustice and all forms of exploitation [Article 46].

Which is this fourth category of the "weaker sections" mentioned in Article 46? It is obvious that they are similar in conditions to and include sections other than the Scheduled Castes and the Scheduled Tribes, for they are 'particularly' referred to in it. It is also clear that to qualify itself to be included in it, the section of the people has to consist of those (a) whose educational and economic interests need to be promoted with special care, and (b) who need to be protected from social injustice and all forms of exploitation.

Would not the purpose have been served if the expression 'backward classes' had been used instead of 'weaker sections' as done in Article 16 (4), which would mean all the weaker sections, including the Scheduled Castes and the Scheduled Tribes? It may be remembered here that sub-clause (4) of Article 15 was not there originally — it was inserted by an amendment and the expression 'backward classes' was used with a qualification 'socially and educationally (backward classes)' and not only socially or educationally backward but backward on both counts. Second, the Scheduled Castes and the Scheduled Tribes were separated from the expression 'backward classes' to make a distinction between them and the other backward classes (OBCs). The effort, it seems, has been to maintain the same distinction in Article 46.

Incidentally, it is also necessary to point out that the Supreme Court in all its decisions on reservation has interpreted the expression 'backward classes' in Article 16 (4) to mean the "socially and educationally" backward. It also emphatically rejected "economic backwardness" as the only or the primary criterion for reservation under article 16 (4) and observed that economic backwardness has to be on account of social and educational backwardness. When Article 46 refers to "weaker sections", it qualifies that expression with different and more parenthetical clauses as pointed out earlier. Although Article 46 speaks of weaker sections, whose "economic" interests have also to be promoted along with their "educational" interests with special care, it also speaks of "protecting" them from all forms of "social injustice and exploitation". Therefore, it is obvious that the "weaker sections" referred to in Article 46 are those other than the Scheduled Castes and the Scheduled Tribes who are backward both socially and educationally and need to be protected from social injustice and all forms of exploitation. Those sections, which are merely economically weak or backward, would not qualify for promotion of their interests under the cover of this Article.

The present system of reservation is in favour of 'classes', and not individuals. And in order that the individuals may qualify for them, they must belong to those classes. There is no one or particular 'class' which is economically backward. All classes and social groups have economically backward individuals. But on that account alone, a group does not qualify to be called a backward class.

What is, however, argued is that it is not the 'upper' castes or the social groups, but the poor individuals in the groups who should be entitled to reservation. As has been pointed out earlier, reservation has been provided in the Constitution for 'classes', not individuals. If the individuals have to be provided with reservation on the economic criterion, then those satisfying the said criterion and belonging to any caste and social group, irrespective of any distinction will be entitled to it, including the individuals belonging to the backward classes and the Scheduled Castes and the Scheduled Tribes. For, such reservation will fall in the general category and all will be entitled to it whether there is reservation on other grounds or not. A backward class person may choose to apply for reservation on economic criterion, instead of the reservation made for his class, or if he does not get a seat on the basis of class reservation, he may claim a seat on economic grounds and if he is qualified for it, he cannot be denied the same. On the other hand, he may qualify for it better if the poorer are entitled to it. Since economic criteria, whatever these may be, will run common through all the social groups, it will be contrary to the right to equality and therefore unconstitutional to keep them confined to any particular social group or groups.

Some other features of the present reservation system may be borne in mind, which is often forgotten by many, in their supercilious approach to the problems of reservation. The existing reservation in state employment under Article 16 (4) is in favour of such backward classes, which, in the opinion of the state, are "not adequately represented" in the services. It is clear from this provision that it is to give the "classes" adequate representation in state administration that reservation has been made.

(The writer is a former Judge of the Supreme Court.)

THE TIMES OF INDIA

Take back dismissed TN govt staff, suggests SC

TIMES NEWS NETWORK & PTI

New Delhi/Chennai: The supreme court on Monday took a humane view of the dismissed 1.7 lakh Tamil Nadu government employees even as it suggested that those who did not indulge in violence could be taken back on tendering an unconditional apology and undertaking that they would not resort to this illegal mode of protest.

The court also declared the strike as illegal and said the Jayalalitha government had sent a "tough message that maladministration can be cured by this way".

A Bench of Justices M.B. Shah and A.R. Lakshmanan asked the state government's counsel, K.K. Venugopal and P.P. Rao, to respond to the suggestion by Thursday when the matter came up for hearing.

When P. Chidambaram and T.R. Andhyarujina, counsel for the petitioner employees and a DMK leader, questioned the very basis of notifying the ordinance amending the Essential Services Maintenance Act (Esma) and the manner in which the employees were prevented from joining duty, the Bench said it appeared the employees were repenting over resorting to strike.

Thus, the Bench said, it would be proper if the government allowed them to join duty after they tendered an unconditional apology with their joining report. The judges disapproved the employees' stand and said they had thought "strike is their birthright".

Mr Venugopal and Mr Rao justified the dismissal of nearly 1.7 lakh striking employees who were dismissed under the amended Esma on July 4. The employees had gone on strike protesting against the withdrawal of certain cash benefits under the pension scheme.

Mr Venugopal said that the state government had already reinstated more than 20,000 employees after scrutinising their applications questioning their dismissal.

When counsel Andhyarujina questioned the constitutional validity of Esma, the Bench asked, "Under which provision of the constitution, government employees have the right to hold a state government, or any government for that matter, to ransom."

The Bench further said, "Strike as a weapon is always misused which results in chaos and total maladministration. There is no constitutional provision under which the government employees can claim as a matter of right to go on strike."

Meanwhile, the Tamil Nadu government on Monday issued notices to all the dismissed employees, asking them to appear before their appointing authorities from July 28.

According to official sources, the fate of these employees, who had given explanatory letters on their absence, will be known only after they personally appear before the authorities concerned, who will decide about their reinstatement. The process will be completed by July 30.

The dismissed employees were seen forming serpentine queues in front of all government offices throughout the state to receive the summons from higher officials.

A delegation of the dismissed employees, led by G. Suryamurthy, president of the Tamil Nadu Government Officials Union, called on state chief secretary Lakshmi Pranesh and appealed to her to speed up the process of reinstatement of the dismissed employees.

Take back Govt. staff, SC suggests to Tamil Nadu

By J. Venkatesan

NEW DELHI, JULY 21. The Supreme Court today came down heavily on the Tamil Nadu Government employees for resorting to a strike and "holding the State to ransom" and "bringing the administration to a grinding halt".

It, however, suggested to the State Government to "show magnanimity and grace" and take back the 1.70 lakh sacked employees on their tendering an unconditional apology for participating in the "illegal strike" and an undertaking that they would abide by the 'Conduct Rules' in future.

A Bench, comprising Justices M.B. Shah and A.R. Lakshmanan, gave this suggestion to the State's senior counsel, K.K. Venugopal and P.P. Rao, who sought time till Thursday to take instructions and respond to the court's suggestions. The Bench wanted the Government to pass orders immediately on these lines without waiting for the court to pass orders.

Mr. Venugopal submitted that the State Government had already reinstated more than 20,000 employees after scrutinising their representations. When counsel said that the employees could wait till their representations were considered and disposed of, the Bench said there was "no question of waiting till the enquiry was over" as that would take time.

The Bench said that except against those whom there were specific cases of violence, which needed an enquiry, all the remaining staff could be taken back immediately on compassionate grounds. It referred to the apex court judgment declaring the strike by lawyers as illegal and said the "State has taken appropriate action as there is no alternative today to deal with the strike".

The employees did not have any fundamental right to go on strike and such illegal strikes had to be dealt with firmly by the authorities. The State Government's tough stand in this case had sent a message to government servants all over the country that "maladministration can be cured this way".

The Bench was hearing a batch of petitions challenging the dismissal of the 1.70 lakh government employees invoking an ordinance to amend the Tamil Nadu Essential Services Maintenance Act, 2002.

The employees had gone on strike in support of their demands, including restoration of certain cash benefits withdrawn under the pension scheme.

When the senior advocate T.R. Andhyarujina, counsel for the DMK MP, C. Kuppuswamy, questioned the constitutional validity of the ordinance, the Bench asked him "under which provision of the Constitution, Government employees have the right to hold a State Government, or any Government for that matter, to ransom". He argued that the ordinance was the most draconian piece of legislation anywhere in the statute book and it violated Article 311 (2) of the Constitution as the pre-decisional enquiry had been dispensed with.

The Bench observed that "strike as a weapon is always misused which results in chaos and total maladministration". Further "there is no Constitutional provision under which the government employees can claim as a matter of right to go on strike".

Senior counsel, P. Chidambaram, appearing for one of the appellants, conceded the strike was illegal but said when on July 4 the strike was declared illegal by the ordinance, the employees wanted to join duty from July 7 but the Government prevented them from doing so.

LAW DISCRIMINATING AGAINST CHRISTIANS STRUCK DOWN

SC suggests framing of a common civil code

By J. Venkatesan

NEW DELHI, JULY 23. The Supreme Court has suggested that Parliament frame a common civil code for the country as that would help the cause of national integration.

A three-judge Bench, comprising the Chief Justice, V.N. Khare, Justice S.B. Sinha and Justice A.R. Lakshmanan, made this suggestion while declaring as unconstitutional Section 118 of the Indian Succession Act, 1925 (ISA) on the ground that it was arbitrary, irrational and violated Article 14 of the Constitution.

(Article 14 says that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.)

The Bench was allowing a writ petition from a Christian priest, John Vallamattom, challenging the provision as it discriminated against Christians bequeathing their property for charitable and religious purposes.

'Parliament yet to act'

Writing the main judgment, the Chief Justice observed "it is a matter of regret that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies".

Under Section 118 of the ISA, applicable only to Christians, "no man having a nephew or niece or any nearer relative shall have power to bequeath any property to religious or charitable uses, except by a will executed not less than 12 months before his death and deposited within six months from its execution in some place provided by law for safe custody of the will of living persons". The Bench said that while Article 25 of the Constitution guaranteed freedom of conscience and free profession, practice and propagation of religion, Article 44 (the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India) divested religion from social relations and the personal law. The Bench observed: "It is no matter of doubt that marriage, succession and the like matters of secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution (right to freedom of religion)."

It was of the view that any legislation which would bring succession and the like matters of a secular character within the purview of these two Articles was suspect.

The Bench also pointed out that India being a signatory to the Declaration on the Right to Development adopted by the World Conference on Human Rights and United Nations Covenant on Civil and Political Rights, Section 118 of the ISA must be judged from these covenants. Mr. Justice Sinha and Mr. Justice Lakshmanan wrote separate but concurring judgments. They, however, did not touch upon the common civil code aspect.

In his judgment, Mr. Justice Lakshmanan pointed out that such a procedural burden mandated under Section 118 of the ISA was not falling upon Hindu, Muslim, Jain or Parsi testators. He was of the view that contribution for religious and charitable purposes was a philanthropic act intended to serve humanity at large and was also recognised as a religious obligation.

Therefore, bequeathing property for religious and charitable purposes could not be controlled or restricted by the Legislature as it would offend the fundamental rights of the testator under Articles 25 and 26 of the Constitution. He further observed that there could not be any unusual burden on Christian testators alone when all other testators making similar bequests for similar charities and religious purposes were not subjected to such procedure.

Mr. Justice Lakshmanan held that Section 118 of the ISA "is anomalous, discriminatory and violative of Articles 14, 15 (prohibition of discrimination on grounds of religion...), 25 and 26 of the Constitution and should be struck down".

BJP welcomes suggestion: Page 11

FRIDAY, JULY 25, 2003

A WELCOME RELIEF

THE SUPREME COURT has played a vital role in easing, and possibly bringing to an end, the highly undesirable situation that has developed on the ground in Tamil Nadu. This situation reflected the standoff between the State Government and about 200,000 of its employees who had been dismissed for their participation in a strike. The court played its constructive, and indeed breakthrough, role by wresting an undertaking from the Government that it would reinstate, without a break in service, the dismissed employees on their tendering an unconditional apology for participating in an "illegal" strike. The interim order of the apex court will be widely welcomed for ending the agonising uncertainty over the livelihood and future of such a large workforce. The Government has stipulated as another condition for reinstatement the submission of an undertaking by the employees that they would abide by Rule 22 of the Service Conduct Rules (which prohibits participation in strikes).

The Supreme Court's final order in the landmark case relating to the *en masse* dismissal of State Government employees, including teachers, will be awaited with great interest round the country. The issues involved in this case include the constitutional validity of the Tamil Nadu Essential Services Maintenance Act (TESMA) as amended by the ordinance promulgated within a couple of days of the launch of an indefinite strike on July 2; the assumption of the summary power of dismissal without application of mind, without even an inquiry; retrospective effect given to the ordinance; and the concept of "deemed participation" in an illegal strike. It is clear that the apex court has taken cognisance of the centrality of the questions raised by the petitioners. It has observed that the Madras High Court clearly erred in not entertaining petitions on the dismissals under Article 226 of the Constitution (writ jurisdiction over matters involving fundamental rights) and in asking nearly 200,000 employees to go to an administrative tribunal made up of one member. A reasonable inference that can be drawn from the Supreme Court's observations on July 24 is that the ordinance promulgated by the State Government is not constitutionally sound; the court observed that the Government should "consult proper lawyers" before converting the ordinance into a statute.

However, the observations made by the apex court's two-judge bench on July 21, to the effect that strikes were always a misused weapon and that employees were holding the State to ransom, have hardly served to clarify issues from the point of view of law and justice. Whether these observations translate into any binding opinion remains to be seen. The immediate practical issue concerns the implementation of the State Government's undertaking. Two unresolved questions arise from the Government's determination not to reinstate 2,200 employees who had been arrested and those against whom FIRs have been registered, and to proceed under the disciplinary rules against those who had "incited" the strike or "indulged in violence." In any employer-employee dispute, questions will be raised about alleged victimisation of the leadership of agitators. But what should receive the utmost consideration of all concerned is that in labour relations, neither law nor tough postures can accomplish what the spirit of 'bipartism' and social partnership can, as has been pointed out by any number of committees and conferences over the decades.

Venkaiah for debate on uniform civil code

Statesman News Service

CHENNAI, July 27. — The BJP today appealed to political parties and social and religious groups to participate in a nationwide debate on evolving a uniform civil code following the Supreme Court's obiter dicta in a recent judgment.

"This is the third time the Supreme Court has called upon the Centre to give effect to the directive principle enshrined in Article 44 of the Constitution and evolve a common civil code – the earlier occasions being the 1985 Shah Banu case and the 1995 Sarala Mudgal case," the BJP president, Mr M Venkaiah Naidu, told mediapersons here.

On the stand of the Congress and the Left parties, that a common civil code was possible only if the Muslims came forward to accept it, Mr Naidu said: "They want to go by the veto of *mullah*s and undermine the views of progressive Muslims."

Mr M Venkaiah Naidu

Late Prime Minister Rajiv Gandhi had amended the law after the Supreme Court judgment in the Shah Banu case, relating to the maintenance of divorced Muslim women, to garner Muslim votes, he said, adding: "What happened afterwards is history."

The Congress and other opposition parties were linking the Supreme Court's suggestion to Muslim security which was "absurd", the BJP president said. Muslims living in America, Australia and UK and other European countries were acceptable to civil laws applicable to all citizens. Also, polygamy was banned in Cyria, Indonesia, Morocco, Iran and even Pakistan. Many Islamic countries have codified and reformed Muslim personal law to check its misuse, Mr Naidu insisted, appealing to "enlightened Muslims" to consider the Supreme Court verdict "in the correct perspective."

A common civil code "will not be just an amalgamation of various personal laws, but will be modern and progressive, just and humane," Mr Naidu said.

"We can examine the various personal laws, identify fair and equitable ingredients in them, prepare a draft code on that basis and throw it open for a national debate," the BJP president opined. He pointed out that the Hindu civil code Bill was enacted despite opposition from important people.

What is uniform civil code?

THE term civil code is used to cover all the laws relating to rights relating to property and otherwise in personal matters like marriage, divorce, maintenance, adoption and inheritance. As things stand, there are different laws governing these aspects for different communities in India. Thus, the laws governing inheritance or divorce among Hindus would be different from those pertaining to Muslims or Christians.

This diversity demands a uniform civil code, which means unifying all these "personal laws" to have one set of secular laws that will apply to all citizens of India . Though the exact contours of such a uniform code have not been spelt out, it should presumably incorporate the most modern and progressive aspects of all existing personal laws while discarding those which are retrograde.

What does the Indian Constitution have to say on the subject?

Article 44, which is one of the "directive principles" laid down in the Constitution says: "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India." Article 37 of the Constitution makes it clear that these directive principles "shall not be enforceable by any court." Nevertheless, they are "fundamental in the governance of the country."

What has the Supreme Court said on the issue?

Very recently, while hearing a case pertaining to whether a Christian has the right to bequeath property to a charity, the court regretted that the state had not yet implemented a uniform civil code. This is not the first time that the apex court has expressed itself in favour of a uniform civil code, or taken a dim view of the government's and legislature's inability to bring it into being. There have been other occasions — like during the Shah Bano case and later in the Sarla Mudgal case — where too the apex court came out strongly in favour of the enactment of a uniform civil code. But none of these comments are binding on the executive or the legislature and do not amount to orders. At best, they exert moral pressure on the Indian state to move towards formulating a uniform civil code.

Would a uniform code affect the personal laws of only one community?

Not at all. The perception that a uniform civil code will necessitate changes in only the Muslim personal law is incorrect. As women's organisations and others have repeatedly pointed out, personal laws governing different communities in India have a common feature — they are all gender-biased.

For instance, the law pertaining to succession among Hindus is unequal in the way it treats men and women. A truly modern, secular, non-discriminatory and progressive code would, therefore, mean changes in all personal laws. The concept of the "Hindu undivided family," where it pertains to succession, would obviously have to undergo a change under a uniform civil code.

What had prevented a uniform civil code from coming into being?

Since it involves a change in laws, an obvious prerequisite is sufficient support for the move within Parliament. The reason this has been difficult to achieve is because most parties believe the reform of laws pertaining to the personal domain is better done by pressure for such change from within communities rather than as an imposition from above.

The Economic Times

BJP holds out quota carrot for upper castes

HT Correspondent
Jaipur, May 25

THE BJP has proposed the setting up of a national commission to examine reservation for upper castes. The party passed a resolution at its national office-bearers' meeting in Jaipur on Sunday requesting the Centre to "appoint a commission for Economically Backward Classes (EBCs)... so that the economically weaker sections of the society will also be helped, without diluting the protection to the socially backward classes".

The resolution comes within days of the Congress-ruled Rajasthan government's declaration of intent to provide job quotas for the upper-caste poor.

Rajasthan Chief Minister Ashok Gehlot's move came after an agitation over quotas in the state. But it also sought to break the near monopoly that the BJP enjoys in the upper-caste constituency.

While the BJP had described Gehlot's move as a political stunt, its response takes the issue of reservation for economically weaker sections of the upper castes beyond Rajasthan: to the national level.

However, the BJP resolution noted that reservations on the grounds of economic criteria would require a constitutional amendment. It was, therefore, necessary to define the EBCs scientifically, to determine the quota to be prescribed and the scope of the amendment. The resolution also said it was necessary to create a national consensus amongst all political parties.

After the national office-bearers meeting, newly-appointed Union Agriculture Minister Rajnath Singh and general secretary Pramod Mahajan talked to Social Justice Front leaders (who are at the forefront of the quota agitation) and invited them to Delhi for talks with Deputy Prime Minister Lal Krishna Advani on Monday.

SJF president and BJP MLA Devi Singh Bhati, however, said the SJF would stick to the demand for splitting the OBC list so that castes added to the Mandal Commission's list from 1999 onwards are treated separately.

The BJP chose to sidestep the issue saying that splitting the OBC list was the state government's job.

26 MAY 2003

THE HINDUSTAN TIMES

FUNDAMENTAL RIGHTS-III

Justice Delayed Is Rule Of Law Destroyed

By SOLI J SORABJEE

A redeeming feature is the judgment of the Supreme Court in what is popularly known as the Jehovah's Witnesses case. School children belonging to the Jehovah's Witnesses faith refused to sing the National Anthem though they respectfully stood when the Anthem was sung. The reason was that they desist from singing the Anthem of every country because their religion does not permit them to join any rituals except in their prayers to Jehovah their God. These children were expelled by the school authorities, which action was sustained by the High Court. In appeal the Supreme Court reversed the decision of the High Court.

The court held that the question was not whether a particular religious belief or practice appeals to the reason or sentiment of the court but whether the belief is genuinely held as part of the profession or practice of religion. If the belief is genuinely and conscientiously held it attract the protection of Article 25 subject, of course, to the restrictions contained therein, namely, public order, morality and health. The judgment concluded with these ringing words "Our tradition teaches tolerance; our philosophy preaches tolerance; our Constitution practices tolerance; let us not dilute it."

Impairing religious freedom

At present there is acute need to remind ourselves about this fine message of tolerance. The events of 2002 in the state of Gujarat in India were shameful. Dastardly acts were committed by members of different communities against one another. By all accounts Muslims and, in particular, members of the Muslim Bohra community suffered the most. When wrongdoers and law-breakers are not prosecuted but roam at large with apparent impunity, minorities are bound to feel insecure. Fortunately these incidents did not take place in other parts of India. Communal frenzy was contained. Gujarat was an aberration never to be repeated.

Recently the states of Tamil Nadu and Gujarat have passed laws prohibiting conversion from one religion to another by use of force or allurement or by fraudulent means. There can be no dispute that conversion brought about by force, fraud or deceit cannot be regarded as a true and genuine conversion and should not be permitted.

The problematic part about these laws is the provision that the person who converts any person from one religion to another shall send an intimation to the district magistrate about the fact of such conversion in the prescribed form. The Gujarat legislation goes one step further and provides that prior permission for the proposed conversion has to be obtained from the district magistrate and the person who is converted has also to send an intimation of his conversion to the magistrate of the district concerned in the prescribed form. Failure to comply with these statutory provisions invites severe punishment of imprisonment and fine.

These state laws have the effect of deterring genuine conversions and impair the substance of religious freedom guaranteed by the Constitution. Moreover, they intrude on a person's right to privacy. One's religious belief

is essentially a private matter as is conversion from one religion to another. It is the result of deep seated inner convictions. These laws tend to shake the confidence of the minority communities and accentuate their sense of insecurity. Questions of constitutionality apart, these are unwise measures in the present Indian context.

One of the greatest achievements, and one which has enabled the court to make its invaluable contribution to the protection of human rights, has been the liberalisation of the rule of *locus standi*. The liberalisation of the rule of *locus standi* in the field of public law has fostered the development of public interest litigation. Violation of human rights often takes place owing to non-implementation of laws. For example, inaction in enforcing laws that protect young children in workshops or laws and regulations to prevent pollution. One of the main reasons for judicial intervention is the gross and persistent failure of the executive to implement the laws made by Parliament and the state legislatures and to discharge its legal and constitutional obligations.

Criminal justice collapsing

It must be acknowledged that the judicial pendulum in PIL can swing and has on occasions swung erratically. Some orders and directions which have been passed are beyond the judicial sphere and without full consideration of their consequences on budgetary allocations and their fiscal implications. It must be remembered that every matter of public interest cannot be the basis of a PIL, eg, increase in the price of onions or in railway fares.

Rights without remedies are useless. A mere declaration of invalidity of an executive order or an administrative decision which has resulted in the violation of a person's fundamental rights would not provide a meaningful remedy. In some constitutions there is a provision for award of compensation to victims of unlawful arrest or detention. The Indian Constitution contains no such provision. Nonetheless the Supreme Court has, in some cases, ordered payment of compensation by the state as a remedy in public law independent of the remedy in tort. This has provided appreciable relief to the victims of custodial violence. In these cases the reality of fundamental rights has matched its rhetoric.

There is one area where the rhetoric of fundamental rights has not been translated into reality. Access to justice is a basic human right.

However, unless there is effective and expeditious access, there is a denial of justice and also denial of the basic human right. Hamlet's lament about the laws' delays still haunts us in India and the horrendous arrears of cases in courts is a disgraceful blot on our legal system, especially the criminal justice delivery system which is on the verge of collapse. Because justice is not dispensed speedily people have come to believe that there is no such thing as justice in courts. This perception has caused many a potential litigant who has been wronged to settle out of court on terms which are unfair to him or to secure justice by taking the law into his own hands or by recourse to a parallel mafia dominated system of justice that has sprung up. The gravity of this development cannot be underestimated. Justice delayed will not only be justice denied, it will be the Rule of Law destroyed.

Government has initiated several measures to clear the backlog of cases. Fast track courts have been established. Amendments have been made to expedite the justice delivery system. Alternative Dispute Resolution is vigorously promoted and requisite legislation has been passed in that behalf. Arrears of cases in the Supreme Court have been substantially reduced. In other courts the burden of arrears is still heavy. The legal profession needs to be transformed in its methods and mindset to overcome this grave problem. Judges must address the problem of arrears seriously and with determination. Judicial unpunctuality in the subordinate courts and in some High Courts must be eschewed. Adjournments should not be granted at the drop of a hat especially to accommodate senior counsel who are busy making money in other courts. Most important, governments should fill in good time judicial vacancies which are known.

Living realities

The time has now come to ask: have fundamental rights remained in the realm of empty rhetoric or have they become living realities for the people of India? What is the overall picture? Frankly, it is a mixed picture, rosy in some parts, dismal in other areas. Social justice, which is the signature tune of the Constitution, still eludes us and vast inequalities in which and income painfully persist. However, fundamental rights in the Indian Constitution have not been mere parchment promises or ornaments for external display. Thanks to their enforcement, several unreasonable and discriminatory laws have been struck down, undertrial prisoners languishing in jails for inordinately long periods have been released; victims of discrimination and arbitrary action have secured relief; persons treated like serfs and held in bondage have secured freedom and have been rehabilitated; inmates of care homes and mental asylums have been restored their humanity; and the condition of workers in stone quarries and brick kilns and that of young children working in hazardous occupations has undergone a humanising change. Environmental pollution has been checked and accountability in the use of the hazardous technology has been made possible and has yielded salutary results.

No doubt much remains to be done. But remember that some fundamental rights have become living realities to some extent, for at least some illiterate, indigent and exploited segments of the humanity of India, a country with a population of one billion consisting of six main ethnic groups and 52 major tribes; six major religions and 6,400 castes and sub-castes; 18 major languages and 1,600 minor languages and dialects. And that, if I may venture to say, is no mean achievement.

(Concluded)

FUNDAMENTAL RIGHTS-II

Safeguards Against Emergency Provisions

By SOLI J SORABJEE

In India one witnesses the horrendous spectacle of numerous undertrial prisoners languishing in jails for periods longer than the maximum term for which they could have been sentenced if convicted. This is because of the inordinate delays in criminal trials. Faced with this situation the Supreme Court ruled that speedy trial is an integral and essential part of the fundamental right to life and liberty. A procedure whereby undertrials remained in jail for such long periods was not a fair, just and reasonable procedure. Therefore Article 21 was violated. As a consequence numerous undertrials have been released. This has provided much needed relief to these harassed sections of society and to them Article 21 has not been mere rhetoric but a tangible reality.

Right to life and liberty

The expression "life" in Article 21 has received an expansive judicial interpretation. The Supreme Court has ruled that "life" does not connote merely physical existence but embraces something more, namely, the right to live with human dignity. Based on this interpretation the Court has ruled that the right to live with human dignity encompasses within its ambit, the protection and preservation of an environment free from pollution of air and water. The Court has issued numerous directions regarding polluting industries, emission of fumes from vehicular traffic and related matters. One tangible reality is that environmental pollution in New Delhi has been appreciably reduced. Health and sanitation have been held to be essential facets of the right to life. Consequently, courts have intervened and provided relief to inmates of asylums and so-called "care homes" who were living in sub-human conditions.

I am sorry to say that in June 1975 a spurious Emergency was imposed on the country by the Congress government. Democracy and the Rule of Law suffered a temporary demise. As a result of the declaration of Emergency basic human rights got suspended. The fundamental right to life and liberty was obliterated. The Supreme Court in its disastrous judgment in ADM Jabalpur vs SS Shukla held that once Article 21, which guarantees right to life and personal liberty, is suspended during the operation of the Proclamation of Emergency, no judicial review and in effect no writ of habeas corpus is available, even in cases where an order of detention is established to be mala fide. One realises the wisdom of the Motilal Nehru Committee's report which required the insertion of a writ of Habeas Corpus as a guaranteed fundamental right. The Emergency was revoked by the Janata government in March 1977 which replaced the Congress government at the Centre.

The Indian experience of the June 1975 Emergency highlighted the necessity for certain safeguards in respect of exercise of powers under the Emergency provisions. The Constitution was amended and Article 20 and Article 21 were made non-suspendable. Consequently the basis of the aforesaid Supreme Court judgment has been displaced and courts can examine legality of detention orders and other forms of deprivation of personal liberty even during an Emergency.

Level playing field

What about equality? The ideal of equality reflected in the constitutional provisions is that of real, authentic de facto equality, not the formal majestic equality of law which forbids the rich and the poor alike to beg in the streets and sleep under the bridges. The Indian constitutional concept obliges the state to adopt affirmative measures to eliminate inequalities and to provide opportunities for the meaningful exercise of fundamental rights.

The Indian Constitution enacts special provisions to give preferential treatment for members of the SC and ST, the Dalits, in the matter of public employment and seats in state-run educational institutions. The principle underlying preferential treatment is that formal guarantees of equal rights are insufficient when ancient prejudices and resulting inequalities persist. To correct the imbalance and create a level playing field by helping certain weak and handicapped segments by special care is a step toward, and not away from, equality. Indeed, to treat unequals equally is itself a patent form of discrimination. To apply the same law to the ox and the lion is oppression.

Reservations for ST and ST has led to intense legal and political controversies. Unfortunately, it is forgotten that compensatory discrimination or preferential treatment is not an end in itself and must cease when conditions of imbalance have been remedied. Otherwise there is serious danger that discrimination, benign or otherwise, may become perpetual and may soon degenerate into reverse discrimination.

What is the position about freedom of expression and freedom of the press which are the essential concomitants of any genuine democracy? Happily, they are firmly entrenched and have received generous judicial protection. It can be confidently said that freedom of expression and freedom of the press are palpable vibrant realities. Read the Indian newspapers and attend meetings organised by protest groups and political parties and you will be convinced of the reality in operation of these invaluable fundamental rights.

What about the minorities? Minorities were most concerned about religious freedom and their right to establish and administer educational institutions of their choice. The Supreme Court has by and large protected the rights of the minorities in matter of educational institutions. It has struck down provisions that encroached upon the autonomy of minority educational institutions in the matter of appointment of principals, appointment and dismissal of teachers, admission of students belonging to the minority community.

Propagation of religion

Subsequently the autonomy of minority educational institutions was diluted by the requirement that government aided institutions should admit 50 per cent of students of non-minority communities in their minority educational institutions. A recent 11-judge bench has done a balancing act and permitted minority educational institutions aided by state funding to admit students belonging to the minority group provided it admits a reasonable extent of non-minority students. The disappointing part about the judgment is that it has left it to the executive to decide whether the preference for admission of students of its own community is reasonable or not.

Debates in the Constituent Assembly clearly indicate that propagation of religion was intended to include conversion. It was emphasised that Islam and Christianity were proselytising religions and attached great importance to "propagation of religion". Unfortunately, the expression "to propagate" one's religion received an unduly restrictive interpretation from the Supreme Court in 1977. It held that the right to propagate does not include the right to convert another person to one's own religion. The Supreme Court did not refer to any part of the Constituent Assembly Debates though they were cited before it. It reached its conclusion on the basis of one of the meanings given in the Oxford Dictionary to the word "propagate". This judgment has diluted the substance of the right to propagate one's religion which was deliberately incorporated in the Constitution.

(To be concluded)

FUNDAMENTAL RIGHTS-I

Law On Acquisition Of Property

By SOLI J SORABJEE

India achieved independence and partially fulfilled its "tryst with destiny" on 15 August 1947. It was a historic event in the life of the nation when "after a long night of waiting, a night full of fateful protests and silent prayers", India attained freedom and independence. On 26 November 1949 after debates in the Constituent Assembly, which lasted nearly three years, the people of India gave unto themselves a Constitution which among other things guaranteed a comprehensive array of basic human rights. These occupy pride of place in Part III of the Constitution under the heading of Fundamental Rights.

The demand for constitutional guarantees of human rights for Indians did not originate nor was it impelled by the Universal Declaration of Human Rights 1948 of which the Constituent Assembly was aware. The demand was ancient and persistent. It was made as far back as in 1895 in the Constitution of India Bill, popularly called the Swaraj Bill spearheaded by Lokmanya Tilak.

Nationalist demand

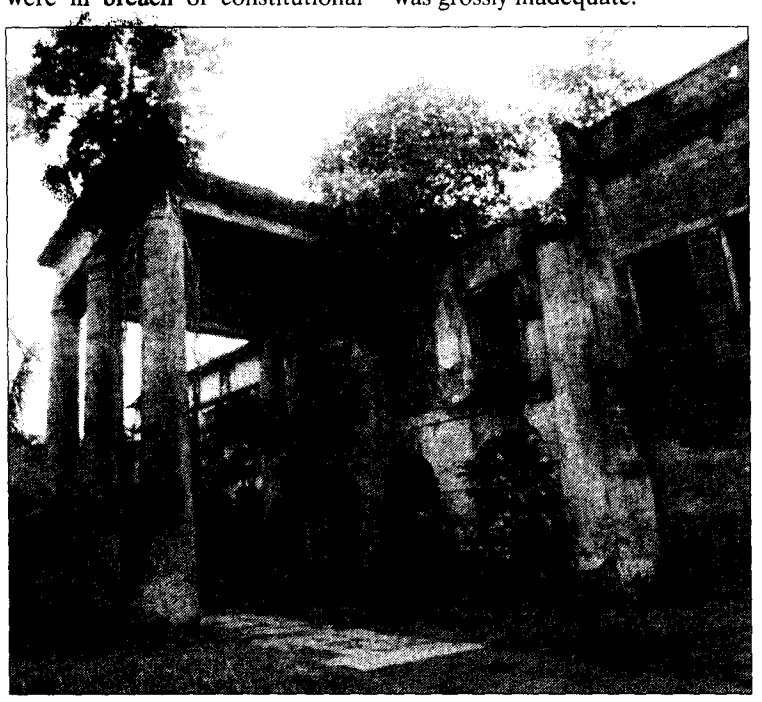
Similar demands were made by nationalist leaders throughout the freedom struggle. The latest was by the Sapru Committee which was of the firm opinion that in the peculiar circumstances of India, fundamental rights were necessary not only as an assurance and guarantee to the minorities but also for prescribing a standard of conduct for the legislatures, governments and the courts.

The subject of fundamental rights, "the most criticised part of the Constitution" was debated extensively and with passion for 38 days in the Constituent Assembly. Member after member referred to fundamental rights as "inalienable rights" or "inherent rights" or "sacred rights" or "most valued rights", without which life is not worth living.

What were the reasons for the insistence upon the guarantee of fundamental rights in the Indian Constitution? More than one: the bitter experience and memories of the ease with which basic human rights, particularly personal liberty and freedom of expression, were trampled upon during British colonial rule. A main reason also was the problem of minorities in India to whom fundamental rights and their protection by an independent judiciary were of great concern.

Moreover, fundamental rights were also essential for prescribing a standard of conduct for the legislatures and the governments. It was recognised that the vast accumulation of powers in the legislature and the executive had to be subject to the discipline of fundamental rights. Indeed, Parliament itself needed to be checked and controlled. A popular legislature swayed by passion and prejudice could ride roughshod over the basic human rights of the people. It is precisely in such cases that the guarantee of fundamental rights is needed as a constitutional constraint on majoritarian rule.

There were heated debates in the Constituent Assembly about whether five or seven gentlemen sitting in ivory judicial towers should be entrusted with the power of striking down laws which were in breach of constitutional safeguards. Ultimately, the Founding Fathers trusted the judiciary rather than the Parliament and state Legislatures to protect fundamental rights.



A Bill of Rights is not a self-executing instrument. Its efficacy, its reality depends upon its interpretation and enforcement by an independent judiciary vested with the power of judicial review. Let me start with property rights.

Property rights deleted

The subject has generated lively debate in the Constituent Assembly. Two views were expressed. One extreme view was that all property is theft and there should be no compensation at all for acquisition of property, especially for vast lands and estates of zamindars. The other view was that right to property is a natural right and there should be full compensation. Concerns were expressed about judicial invalidation of laws acquiring property because of non-payment of compensation. The understanding of the Foundation Fathers was that there would be no judicial interference except in cases where compensation awarded for acquisition of property was grossly inadequate. Indeed, an assurance to that effect was given during the course of the debates by an eminent legal luminary, Dr KM Munshi.

It was in this background that Article 31(2) of the Constitution was enacted. It permitted acquisition of property by the state provided it was for a public purpose and there was payment of compensation. Lo and behold, in 1954 the Supreme Court ruled that the expression "compensation" in Article 31(2) required full indemnification of loss to the owner of the property. That was quite contrary to the understanding of the Founding Fathers who believed that courts would intervene in matters of compensation only if the quantum awarded was grossly inadequate.

Nehru was furious. He thundered: "Lawyers have purloined the Constitution". Article 31(2) was amended by the Constitution (Fourth Amendment) Act, 1955 to the effect that no law shall be called in question in any court on the ground that compensation provided by that law is not adequate. That did not, however, forestall judicial intervention. The Supreme Court ruled that even after the amendment, because of the retention of the expression "compensation" in the Article, acquisition of property could be struck down, not on the ground that what was awarded was not just or fair compensation, but that the principles specified by the law for determination of compensation were neither relevant nor well-recognised.

The climax of such judicial forays was the controversial decision of the Supreme Court in what is popularly known as the bank nationalisation case. The Supreme Court struck down the law by a majority of 10 to one on the ground that it failed "to provide to the expropriated banks compensation determined according to the relevant principles".

Parliament again sprang into action. The Constitution was once again amended by the Constitution (25th Amendment) Act 1971. The expression "compensation" was deleted and in its place the expression "amount" was substituted. But even that did not solve the problem. Legal ingenuity being what it is, it was persuasively argued that if the amount awarded is illusory then it is no amount at all and the constitutional guarantee is breached. One judicial view expressed was that "if the right to property still finds a place in the Constitution, you cannot mock at the man and ridicule his right. You cannot tell him: "I will take your fortune for a farthing".

By now Parliament was fed up and was determined to obviate forensic battles and judicial interventions in the matter of property rights. Ultimately, by the Constitution (44th Amendment) Act 1978, property rights guaranteed by Articles 29(1)(f) and Article 31 were totally deleted from the Constitution. At present the right to property is declared by Article 300-A in these terms: "No person shall be deprived of his property save by the authority of law". This is merely a reaffirmation of the principle of the Rule of Law that no action which is prejudicial to the person of property of a person shall be taken without the authority of law.

Test of reasonableness

The rhetoric of the fundamental right to property in the Indian Constitution had become too much of a reality and was debated. Thus ultimately it became a non-entity, neither rhetoric nor reality. A bizarre situation indeed! As the Constitution stands, the state can pass a law for acquisition of property without providing for any amount. However, what is constitutionally permissible is not possible in the world of practical politics.

The National Commission to Review the Working of the Constitution has recommended insertion of a provision in the Constitution that "there shall be no arbitrary deprivation or acquisition of property". This would take care of situations of acquisition of property on patently unreasonable terms. What is the reality about the content and effective enforcement of the fundamental right to life and liberty? In the beginning this vital fundamental right took a back seat. Article 21 of the Constitution provides that "no person shall be deprived of his life or personal liberty except according to procedure established by law".

In its first historic judgment delivered on 19 May 1950 the Supreme Court placed a narrow and restrictive interpretation upon this Article. The majority held that the "procedure established by law", means any procedure established by law and refused to infuse the procedure with principles of natural justice. It was only after three decades that the Supreme Court overturned its previous decision in *Gopalan* and held in its landmark judgment in *Maneka Gandhi* in 1978 that "procedure contemplated by Article 21 must answer the test of reasonableness. It must be "right, just and fair".

(To be continued)

This is the first part of the text of a lecture delivered by the Attorney General for India at the Nehru Centre, London, on 11 June.

New Governor for Assam

OUR BUREAU

Guwahati/New Delhi, June 2: The Centre today replaced retired army General S.K. Sinha with another ex-army officer Lt. Gen. Ajay Singh, sending a message to Assam's insurgent outfits that there will be no let-up in the military offensive.

As the then GOC of the Tezpur-based 4 Corps, Lt. Gen. Singh had successfully led Operation Rhino against the Ulfa and the NDFB in the late Nineties.

Official sources in Delhi confirmed that Gen. Singh would be the next Governor of Assam replacing Gen. Sinha who left Dispur today to take up his new assignment as Jammu and Kashmir Governor.

Tomorrow, Gen. Singh is scheduled to meet his predecessor, who is in the capital for a briefing on the situation in Assam.

It has become a practice for the Centre to post retired armymen to insurgency-prone states, a trend not appreciated by the people of Assam.

In fact, Dulal Chandra Barooah, a BJP leader from Assam, said he would convey to deputy Prime Minister L.K. Advani that the people of the state did not appreciate having army generals at Raj Bhavan.

"It sends a wrong message," Barooah said. But he admitted that Gen. Singh was familiar with Assam and "is popular with the people".

Like Gen. Sinha, it is expected that the new Governor with his vast military experience will be the "guiding force" behind the three-tier Unified Command structure, which formulates and executes counter-insurgency operations in Assam.

Though Gen. Singh's tactics against the Ulfa had been very successful, there were few allegations of human rights violations by the units under him. "However, he had made it a point as GOC to keep in touch with the civil administration and make sure that civilians were not unnecessarily harassed," a home ministry official said.

In Guwahati, before leaving Assam today for his new assignment, Gen. Sinha said he would continue to raise his voice for the scrapping of Illegal Migration (Determination by Tribunal) Act.

He reiterated that the Act has been a hindrance to detecting and deporting illegal migrants.

Sinha was accorded a warm farewell at the Lokapriya Gopinath Bardoloi International Airport by the government.

Chief minister Tarun Gogoi, his wife and ministerial colleagues, senior government and army officials were present at the ceremony.

THE TELEGRAPH

= 3 JUN 2003

COST OF JUSTICE

THE RECENT NOTIFICATION by the Centre of 1,308 Fast Track Courts (FTCs) in the country is a definite indication of some progress on the steps launched towards securing speedy delivery of justice. But it is to be borne in mind that the expansion of administrative infrastructure alone cannot mitigate the vexed problem of docket explosion that continues to plague the Judiciary. To that extent, filling vacancies in the High Courts and the Supreme Court, improvements in the rate of conviction and curbs on adjournments are some of the other measures that must supplement the constitution of FTCs. The 100 per cent Centrally-funded project has fallen well behind the target of putting in place a total of 1,734 functional FTCs by April 2001. Under the arrangement, the State Governments are to provide the basic infrastructure for these courts and the High Courts fully empowered in the selection of judges. The scheme envisages appointment of ad hoc judges from among retired sessions or additional sessions judges, members of the Bar and judicial officers for a tenure of two years. Significantly, the very idea of FTCs as an answer to judicial delays, quite apart from their composition and jurisdiction, has been questioned from many quarters.

The Eleventh Finance Commission had recommended the establishment of five FTCs for every district in the country at a total cost of Rs.502.9 crores. One of the primary considerations behind the EFC's proposal appears to have been to introduce a measure of financial prudence in the arena of judicial administration. The constitution of FTCs was put forward as the preferred cost-saving alternative in response to demands from State Governments for grants to the tune of Rs. 4,780 crores for upgrading existing infrastructure and setting up additional courts. This reasoning was also buttressed by the argument that the FTCs should principally try cases of undertrials so as to save on the cost of maintenance, rehabilitation and correctional programmes. The cause of justice would after all be better served if long-pending cases were disposed of within a reasonable period. Even though the entire process of operationalising FTCs was envisaged over a four-year time span, the task of constituting them is yet to be completed. It is important that States that have fallen behind take steps to fulfil one of the basic prerequisites for an efficacious justice delivery mechanism.

The scheme of FTCs suffered a setback when the Andhra Pradesh High Court issued orders in April 2001 suspending their constitution and the appointment of judicial officers. Although the Supreme Court stayed the interim order, it nevertheless questioned the rather limited role assigned to the Judiciary and the manner in which the entire process was set in motion. It specifically observed that the identification of cases to be tried in the FTCs should have been left to the discretion of the High Courts. Clearly, the current state of affairs calls for greater coordination between the endeavours of the political executive and the judicial wings of the state. For, there is a deep connection between the efficacy of the criminal justice administration and the forward march of the Constitutional democratic process in a society. There has been a qualitative shift over the years in understanding judicial delays — from merely being seen as a problem of docket explosion to incorporating the facet of human rights that is intrinsic to the delivery of justice. The priority assigned to FTCs to clear pending cases involving undertrials — despite the economic reasons averred to — should be seen as reflecting this new thinking. The goal of securing speedy convictions is not necessarily incompatible with keeping judicial costs to the minimum. But the former cannot be sacrificed for the latter.

THURSDAY, MAY 15, 2003

ARMY AND DEPLOYMENT

IT MAY SEEM ironic that such divergent and seemingly irreconcilable views exist between the Centre and the States over the application of an Article of the Constitution that has never been used or availed of. But the divisions in the Inter-State Council's standing committee, over whether the Centre has the right to unilaterally deploy armed forces in the States, are a reflection of a familiar and perhaps understandable tension that results from the quasi-federal nature of the Indian state. Article 355 states that it is the duty of the Centre to protect all States against external aggression and internal disturbance and to ensure that the governance of every State is carried on in accordance with the Constitutional provisions. Fearful of a perceived erosion of their authority and worried about the possible misuse of power by an insensitive or partisan Centre, the States want the Army to be deployed only with the "concurrence" of the appropriate State Government. The Centre's argument in favour of retaining the power to deploy troops unilaterally rests on a hypothetical scenario, but a potentially dangerous and not totally inconceivable one. As the Deputy Prime Minister, L.K. Advani, put it, what happens in the event the Centre feels troops must be deployed and a certain State (particularly sensitive ones such as Jammu and Kashmir or those in the Northeast) simply refuses to concur?

The two major emergency provisions in the Constitution, Article 352 (proclamation of Emergency) and Article 356 (dismissal of a State Government), have been used with devastating effect — the first only once (by Indira Gandhi in 1975 to suspend the very democratic process) and the second numerous times (to dismiss 'inconvenient' State Governments). In contrast, Article 355 has never been employed and, unlike other emergency provisions, the Sarkaria Commission on Centre-State relations made no recommendation about altering the scope of its application. The Commission held that in the unusual event where a situation is "fast drifting towards anarchy" or a "physical breakdown of the State administration", the Centre may *suo motu* deploy its armed forces in order to deal with the internal disturbance and restore public order. In adopting this view, the Commission was concerned about the possibility of a State Government being "unable or unwilling to suppress an internal disturbance" or even refusing to "seek the aid of the armed forces of the Union in this matter". Ordinarily, however, the Commission held that the Union Government should invariably consult and seek the cooperation of the State Government concerned before sending troops in.

Given that there has been no concrete instance of the Centre having deployed the Army *suo motu*, the disagreement over the scope of Article 355 at this juncture may be of largely academic interest. Modelled on Article 4 of the U.S. Constitution, which lays down that the Federal Government shall guarantee a republican form of Government in every State, Article 355 has been subjected to relatively little examination or scrutiny. This is partly because it is the subsequent Constitutional provision, the more potent and the frequently misused Article 356, that has plagued Centre-State relations. Also partly because Article 355 is ambiguous about how the Union Government should discharge its obligations of protecting a State. Through mere advice? Through assistance in the shape of materials and finance? Through deployment of the Army to aid the State police? During the communal carnage in Gujarat, the ruling BJP had supported a parliamentary motion that called on the Centre to intervene effectively under Article 355. Despite repeated assurances that the Centre would do everything to fulfil its Constitutional obligations under this Article, the NDA Government did next to nothing towards restoring public order in the State. All in all, it seemed that the Centre had endorsed the Opposition plea for the use of Article 355 in Gujarat only because it knew it would not be held accountable due to the ambiguity of this Constitutional provision.

The Judiciary

By P.P. Rao

It is possible to root out corruption in the Judiciary if a provision is made in the Constitution for premature retirement... on the ground of doubtful integrity.

THE INDIAN Judiciary has an impressive record and its credibility used to be very high till recently. The Executive and the Legislature are way behind even today. Speeches heard recently in Parliament indicate the concern of the people at large that all is not well with the Judiciary. A few corrective measures are absolutely necessary to restore its health and make the institution more effective and accountable. Without the Judiciary, there can be no rule of law. Unless its house is in order, it cannot exercise effective control over the Executive and the Legislature. The people of India have a tremendous stake in the Judiciary which is the only hope and last resort for all oppressed citizens. More than power, it is the moral authority that sustains the Judiciary.

The few instances of doubtful integrity of judges of High Courts in the North, the West and the South, widely reported and commented upon in the media last year and the ongoing prosecution of a former Judge of the Delhi High Court underline the need for a constitutional mechanism to weed out from the Judiciary members suspected of moral turpitude. The Prevention of Corruption Acts, 1947 and 1988, have not succeeded in checking corruption. S. P. Bharucha as Chief Justice of India frankly admitted that there was corruption in the ranks of the Judiciary to some extent, mostly at the lower levels. The constitutional provision for impeachment of judges of High Courts and of the Supreme Court is impracticable. The disease of judicial corruption has, therefore, to be tackled by other methods before it assumes the proportions of an epidemic.

In C. Ravichandran vs. Justice A. M. Bhattacharjee (1995), the Supreme Court suggested an in-house method which is non-transparent, time-consuming and uncertain. The need for an alternative method of getting rid of judges of doubtful integrity is being felt acutely. It is possible to root out corruption in the Judiciary if a provision is made in the Constitution for premature retirement of public servants in public interest on the ground of doubtful integrity regardless of the length of service put in. The power to retire will have to be in the hands of the Judiciary itself to maintain its independence. In the case of the subordinate judiciary, this can be done by amending the service rules. The view expressed by the Supreme Court in O. P. Bhandari v. ITDC Ltd. (1986) suggests that such a provision will be valid. Getting rid of the black sheep alone is not enough. The resultant vacancies must be filled up by the most deserving young men and women by amending the rules of recruitment at the entry point. Five national law universities are functioning in Bangalore, Hyderabad, Bhopal, Kolkata, and Jodhpur. In addition, there are a number of law schools with five-year degree courses attracting equally bright students. They are all imparting legal education of a high quality and their products are a class apart. To tone up the quality of justice at the level of subordinate judiciary, it is necessary to induct fresh law graduates who have done well in the five-year degree course as Civil Judges/ Magistrates straightaway after giving intensive training for at least one or two years at the National Judicial Academy, Bhopal. In addition, if a provision is made for fast track promotions at reasonable intervals, depending upon their overall performance, merit and integrity as in the case of All India Services, it would encourage the toppers to opt for a judicial career.

Before Independence and for some years thereafter, it was the practice to appoint the most competent lawyers as law officers, public prosecutors and Government pleaders in consultation with the Chief Justices of the High Courts and, in due course, consider them for elevation to the Bench. Later on, political connections and extraneous factors such as caste came to prevail over consideration of integrity and ability in the matter of appointment of Government counsel and judges. Consequently, the quality of justice began to deteriorate. It is by chance that we find some bright and exceptionally good judges on the Bench. The assumption of exclusive power of selection of judges by the Judiciary by a laboured interpretation of the Constitution in 1993 has not yielded the expected results, although some improvement in quality is noticeable. There have been several instances where more deserving judges were either not selected or were made to wait for long. Vacancies remain unfilled for long spells. It is, therefore, necessary to improve the standard of selection and make it transparent. In the matter of appointment of law officers and judges of High Courts and the Supreme Court, ability and integrity should be the primary considerations. A minimum tenure of not less than five years on the Bench is necessary for a judge to settle down and make his contribution. Seniority should have a play only when all other factors are approximately equal.

The idea of a judicial collegium to recommend candidates for appointment as judges first mooted by P. N. Bhagwati, J., in 1982 has received wide support; the latest supporter being the National Commission to Review the Working of the Constitution which recommended that for appointment of judges of the Supreme Court the composition of the National Judicial Commission (NJC) should be: the Chief Justice of India (CJI) as Chairman, with two senior-most judges of the Supreme Court; the Union Minister for Law and Justice and one eminent person nominated by the President after consulting the CJI as Members. The Government desires the nomination to be made by the Prime Minister, instead of the President. They would also like to invest the NJC with disciplinary jurisdiction, which is debatable. Instead of substituting the Prime Minister for the President, a better course would be to allow the President to nominate after consulting the Prime Minister, the Leader of the Opposition and the CJI. The nominee should be a distinguished retired Judge, an eminent senior advocate or a jurist.

The most pressing problem facing the Judiciary is its inability to deliver speedy justice. It is possible to ease the congestion by introducing shift system in all courts deploying retired judges and administrative staff who enjoy high reputation for integrity and efficiency. The Law Commission in its 125th Report (1988) recommended introducing shift system in the Supreme Court. In 1999, the then Law Minister, thought of shift system in all courts, but could not implement it. Shift system is in vogue in industrial establishments and some educational institutions because of necessity. With minimum cost, the shift system can yield maximum output, providing immense relief to lakhs of helpless litigants, endlessly waiting for justice. The prospect of re-employment after retirement will also act as incentive to serving judges and judicial officers to remain honest and discharge their duties efficiently. Retired judges need not then look forward to the Executive for discretionary assignments. This would reinforce the independence of the judiciary. No reform can be a success without the cooperation of the Bar. Shift system, helps distribution of work among more lawyers and to some extent break, the monopoly of a few practitioners in every court. It will give more satisfaction to the litigants as compared to any other alternative method of dispute resolution such as arbitration or Lok Adalat. There is no point in wasting the precious human resources in the shape of retired judges when the institution is about to collapse under the weight of pending cases.

(The writer is a Senior Advocate practising in the Supreme Court.)

JUDICIAL ACCOUNTABILITY

IN RESPONSE TO widespread demands from within and outside the Judiciary to check the steady erosion in the balance of power in regard to selection, appointment and transfer of judges of the higher courts, besides putting in place a mechanism to scrutinise their official conduct, the Union Cabinet has finally given its nod for the establishment of a National Judicial Commission. As per its decision — which broadly reflects the recommendations of the National Commission to Review the Working of the Constitution — the NJC is expected to be broad-based in its composition, comprising the Chief Justice of India (CJI) as its Chairman, two seniormost judges of the Supreme Court, the Union Minister for Law and Company Affairs and one person of eminence to be nominated by the President in consultation with the Prime Minister as members. The clamour for such a commission gained momentum especially after the apex court wrested from the Executive altogether the power pertaining to the selection and appointment of judges of the Supreme Court and the High Courts and the transfer of judges of the High Courts in what is famously known as the Second Judges' case in 1993. The judgment concentrated the power of appointing judges of the apex court solely in the hands of the CJI by interpreting the President's authority in Article 124 of the Constitution to "consult" the latter as to make his opinion binding upon him. A recent ruling of the court also upheld the 1993 judgment, while requiring in addition that the consultation process be guided by the decision of a collegium of judges headed by the CJI. The net result of the above two judgments has been that the process of mutual consultation between the Executive and the Judiciary has been superseded; for "consultation" has come to be confused with concurrence, or still worse, surrender. What is particularly disturbing about this state of affairs is their complete contrariness to Constitutional provisions and the diminution of accountability to Parliament.

If the lack of transparency in judicial appointments has been a matter of growing concern, an almost simultaneous development has been the outcry for evolving effective complaint mechanisms to deal with errant judges. The demand has been articulated with increasing force following charges of alleged misconduct in relation to some High Courts. In view of the near impracticality of impeachment as a procedure to deal with corrupt judges, the viability of an in-house mechanism such as the ones constituted by the CJI to probe the Punjab and Karnataka incidents would be worthy of serious consideration. Another point to be considered could be the existence of disciplinary controls by the High Courts over the lower courts and the absence of a similar mechanism in respect of High Courts and the Supreme Court. The proposed commission would have to address these areas of concern as a matter of utmost priority, for they impinge directly on the Judiciary's larger role in civil society as the custodian of justice and human rights.

The watchdog role enjoined upon the Judiciary in a democracy could hardly be overstated. The Constitutional provisions against encroachments on judicial freedom in Articles 141, 142 and 144 would have to be seen in this light. However, a fundamental prerequisite for it to perform such a role is accountability, no less than autonomy and independence. Clearly, the credibility of the Judiciary as an institution cannot be held hostage to the criminal nexus of a few and transparency at every level should be the objective of its functioning. In this respect, the stakes are equally high for the Judiciary as for the Executive which has been lately exercised over the question of parliamentary proprieties vis-a-vis the jurisdiction of the Judiciary.

Amendment Bill on anti-defection law in LS

By Our Special Correspondent

NEW DELHI, MAY 5. The Government today introduced in the Lok Sabha the 97th Constitution Amendment Bill to strengthen the anti-defection law and limit the size of the council of ministers to 10 per cent of the respective strengths of Parliament and the State legislatures.

The Congress leader, Shivraj Patil, urged the Government not to hurry the legislation and suggested that it be referred for detailed discussion to the Standing Committee.

In his reply, the Law and Justice Minister, Arun Jaitley, said the Government would strive for the widest possible political consensus and was open to referring the Bill to the Standing Committee.

While the Congress said it had no objection to the Bill and the Samajwadi Party endorsed the demand for referring it to the Standing Committee, the Lok Janshakti leader, Ram Vilas Paswan, expressed reservations about the bid to put "shackles" on individual members who may differ with their party line.

Through the Bill, the Government proposes to implement the recommendation made by the 1990 Dinesh Goswami Committee on Electoral Reforms, the Law Commission in its report on "Reform of Electoral Laws" and, most recently, by the National Commission to Review the Working of the Constitution (NCRWC). All three reports had recommended the omission of the provision in the Tenth Schedule to the Constitution pertaining to exemption from disqualification in case of a split.

Also, the Bill incorporates the NCRWC recommendation that a defector should be penalised for his/her action by debarring him/her for at least the duration of the remaining term of the existing legislature or until the next elections; whichever is earlier.

Though the NCRWC had also proposed that the council of ministers be limited to 10 per cent of the Lower House of the State legislature, the Bill limits the size to 10 per cent of the strength of House or Houses concerned whether unicameral or bicameral. "However, in case of smaller States like Sikkim, Mizoram and Goa — having 32, 40 and 40 members in the Legislative Assemblies respectively — a minimum strength of seven Ministers is proposed."

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THE HINDU 6 MAY 2003

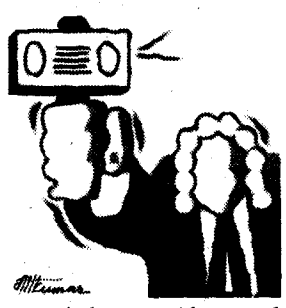
When the judge is in the dock

T.R. ANDHYARUJINA

On the golden jubilee of the Supreme Court in January 2000, Chief Justice Anand proudly stated, "It is a matter of pride and satisfaction that the judiciary today enjoys credibility far greater that that enjoyed by the other two wings of the state." A year later, this sense of self-satisfaction was shaken when the succeeding chief justice, S.P. Bharucha, publicly lamented that "eighty per cent of the judges in the country were honest and incorruptible and the smaller percentage was bringing the entire judiciary into disrepute". Between last year and this year, at least eight judges of different high courts have come into prominence for alleged misconduct and impropriety affecting the discharge of their judicial functions.

Even if some of these charges are unsubstantiated, their mere airing can shake public confidence in the higher judiciary. Even worse is the impression gaining ground that there is no way of disciplining judges of superior courts. There is then an urgent need to set up a credible machinery to investigate charges against judges.

The Constitution framers provided for the removal of Supreme Court and high court judges for proven misbehaviour or incapacity through impeachment by Parliament. When this method was adopted in 1950, the superior judiciary consisted of a cohesive body of seven judges of the Supreme Court and a few judges of five high courts. The makers of our Constitution obviously believed the occasion for the removal of judges of a superior court would be a rare event. Half a century later, conditions are different. There are now 25 judges of the Supreme Court and about 600 of the high courts. The winds of falling standards of public life have not swept past judges of the superior courts without affecting them. In the only instance in which impeachment was tried in 1993, in the case of Justice V. Ramaswamy of the Supreme Court, the method proved cumbersome, dilatory and political. Removal of judges by impeachment is therefore no longer a practical method.



In the absence of a legally sanctioned method for disciplining judges of superior courts, extra-constitutional methods have been resorted to. On two occasions, the Bombay Bar took the law in their own hands against judges whose integrity came into question. On the first occasion, they called for the resignation of four judges, and in response the then chief justice of the high court did not assign work to them till they were transferred or retired. On the second occasion, they called for the resignation of the chief justice of the high court, who eventually resigned at the instance of the chief justice. This is a dangerous method as it makes lawyers self-appointed disciplinary authorities over judges.

Last year, the chief justice appointed three committees of judges to inquire into allegations of impropriety by judges of three high courts. The result was unsatisfactory as these committees did not have the authority of law to summon evidence and effectively investigate the charges. Even when in some cases the findings were against judges, no action could be taken against them. A convenient way to avoid action against a judge under a cloud has been to transfer him to another high court resulting in protests from the bar of that high court, which understandably does not wants such a judge.

As long as the Constitution is not amended to change the method of removal, there cannot be an alternate legal method of their removal. But short of removal of judges of superior courts, there is no reason for not making a law for investigating misconduct of judges and disciplining them. In the US, while the method of removal by impeachment of federal judges by Congress is still considered appropriate, there is a supplemental law — the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. We can adapt it for our purpose.

Under this Act, complaints alleging that a judge "has engaged in conduct pre-judicial to the effective and expeditious administration of the business of courts" can be made to the chief judge of a Judicial Council of Judges. If the complaint is frivolous it is dismissed. If not, it is investigated by a special committee of judges. Upon receipt of their report, the Judicial Council may, one, direct the judge under investigation to take such action as the Council deems fit. Two, request the judge to retire voluntarily. Three, order that on a temporary basis no further cases should be assigned to him. Four, reprimand such a judge publicly or privately. Five, report the case to the House of Representatives for impeachment. The judge has full opportunity to defend himself and he has a right of review to a Federal Judicial Council whose proceedings are confidential.

A similar law must be enacted by the Indian Parliament in consultation with the chief justice. It will provide a legal way to take disciplinary action against judges of superior courts. It will provide protection to the judges against groundless charges and, at the same time, satisfy the lawyers and the public that complaints against judges of superior courts are investigated by a credible machinery. It will also largely solve the problem of bringing the judge in contempt by public criticism of judges, as a failure to resort to this machinery may be a good ground for believing that the complainant did not have a genuine complaint against the judge.

The writer is a former solicitor general of India

3 MAY 2003

INDIAN EXPRESS

List of governors sent to President

By Our Special Correspondent

NEW DELHI, MAY 1. Ending weeks of waiting and speculation, the Government today sent to the President, A. P. J. Abdul Kalam, a list of names for the posts of Governors to five States, for his assent. The term of the current Governors of Jammu and Kashmir, Gujarat, Rajasthan, Punjab and Himachal Pradesh, ended over the last month.

It is believed that Lt. Gen. (retd.) S. K. Sinha, now the Governor of Assam will replace Girish Chandra Saxena in Jammu and Kashmir. The senior BJP leader from Bihar and party functionary, Kailashpati Mishra, has confirmed that his name is in the list and that he is to replace the fellow partyman, Sundar Singh Bhandari, in Gujarat.

The other names on the list are the former U.P. Chief Minister, Ramprakash Gupta, and two former High Court judges, O. P. Verma and A. K. Kokji. Mr. Gupta, a BJP leader, is expected to replace Anshuman Singh in Rajasthan; Mr. Verma, who retired as the Chief Justice of the Kerala High Court, has long been spoken of as the successor to the current Punjab Governor, J. F. Ribeiro. Mr. Kokji's name, by elimination, would suggest itself for Himachal Pradesh.

THE HINDU

2 MAY 2003

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HINDUSTAN TIMES

A defect corrected

IF APPROVED by Parliament, the proposed laws to stop defections and limit the size of the cabinet are expected to introduce a measure of sanity in the country's political life. Since the anti-defection law has become something of a joke, no tears will be shed if it is scrapped. The idea behind legitimising only those defections which added up to a third of the membership of a party's legislature wing was to make the task of floor-crossing somewhat difficult. But Indian politicians are nothing if not innovative. Thanks to partisan speakers, the idea of some kind of a rolling defection was introduced under which the presiding officers could wait till the magic one-third number was reached before the defecting group was given a separate bloc of seats in the House.

Instead of this charade, any violation of the party whip will now entail expulsion from the House. This suggestion has long been in the air since it was believed that a person switching his allegiance to a new party should return to his electorate for a fresh verdict. But it was never implemented because the parties found it convenient to add to their numbers by luring legislators from their rivals. It is possible that the present political environment in Uttar Pradesh, where Ms Mayawati is in the habit of poaching on other parties, has persuaded the BJP at the Centre to opt for this remedy. But whatever the reason, few will doubt its usefulness in checking the familiar '*aya Ram, gaya Ram*' phenomenon.

The limit placed on the size of the ministries is related to this move on defections. After all, a ministerial berth — as also the posts of chairmen in public sector enterprises carrying similar perquisites — was one of the baits offered to potential defectors. Now that no ministry can be larger than 10 per cent of the total strength of the House (there will be a different criterion for the smaller states), the ability of the parties to entice newcomers will be limited. (Perhaps, public sector units will come to the rescue.) It would have been more to the purpose if this law could be introduced with retrospective effect, causing a flutter at the Centre and in states like UP and Bihar. But one must be thankful for small mercies.

DELIMITATION ON BASIS OF 2001 CENSUS

No more jumbo ministries

Statesman News Service

NEW DELHI, April 23. — The Cabinet today decided to impose a restriction on the size of council of ministers but Prime Minister Atal Behari Vajpayee's ministers need not worry. They will get to keep their chairs.

The government had taken the advice of the National Commission to Review the Working of the Constitution to limit the number of ministers but with a relaxation that will ensure Mr Vajpayee will still have two more vacant seats in his Cabinet for his next cabinet reshuffle or expansion to induct leaders of the National Democratic Alliance partners.

In its report submitted last year, the NCRWC had not only recommended that the practice of jumbo council of ministers be prohibited by law, but also recommended that the number of ministers do not exceed 10 per cent of the total strength of the popular House of the Legislature. That is, 10 per cent of the strength of the state legislative Assembly and 10 per cent of the Lok Sabha.

This would have meant that rather than inducting NDA partners at the next Cabinet reshuffle expected after the Budget session of Parliament, Mr Vajpayee would have had to drop 22-23 ministers to stay on the right side of the law. Not anymore.

In its decision announced by Union health and parliamentary affairs minister Mrs Sushma Swaraj, the Union Cabinet retained the 10 per cent ceiling but said in case of bicameral Houses, the strength of both Houses — Legislative Assembly and Legislative Council — would be taken into consideration. This deviation from the NCRWC recommendation, however, will make all the difference.

Mrs Swaraj suggested this restriction would ensure that the pressures of coalition politics did not allow a situation to arise where almost all members of the legislature were ministers as was happening in smaller states. In its modified form, this rule will hit the smaller states most, especially the ones

Turn to page 2

Curbs on defection

NEW DELHI, April 23. — The Cabinet decided to recommend amending the anti-defection law to curb "bulk defections" through legal splits. The bill amending the Tenth Schedule of the Constitution (anti-defection law) will seek to delete Para three of the Tenth Schedule that pertains to exemption from disqualification in case of splits.

According to the new provision, if any MP or MLA votes against the party whip, he will stand disqualified. At present, if the violation of the whip is by one-third of the strength of the parliamentary or legislature party, there could be no disqualification. — SNS

CABINET TO MOVE AGAINST DEFECTION

Contempt rule changes likely

Srinjoy Chowdhury in New Delhi

April 22. — Proposals to change the contempt of court rules and amend the Anti-defection Law are likely to be placed before the Cabinet tomorrow. The Delimitation Bill too will be placed before the Cabinet, which will also take up for discussion proposed changes in the Special Protection Group Act, making it more need-based.

The proposed changes in the Contempt of Court Act, 1973, are being seen as a way to strike a balance between the judiciary and civil society. Under the changes, truth can be introduced as defence in a matter of contempt of court.

This means that a person, organisation or media house can't be held for contempt of court for speaking or writing the truth. Legislators, for instance, can't be held in contempt of court if truth is an issue. This is likely to apply to media houses as well.

Currently, High Courts and the Supreme Court can charge anyone for contempt of court even if the person is speaking or writing the truth.

Several media houses have recently been hauled up for writing about the alleged involvement of three Karnataka High Court judges in the Mysore sex scandal case. A contempt case is in the Supreme Court, but the judges have been cleared by a commission of inquiry.

Under the proposed amendments to the Anti-defection Act, a Member of Parliament changing his/her party will immediately stand disqualified. Presently, a third of the Members of Parliament of a party can defect without being disqualified under the Anti-defection law. If the Cabinet approves the changes, there is a strong possibility that Parliament would pass them because the BJP as well as the Congress would benefit from the changes. Recently, the Congress had suffered after a split in its Uttar Pradesh Legislative Party.

Most parties, it appears, are against the proposed Delimitation Bill, which provides for gerrymandering constituencies and changing the reserved seats. This could hurt a number of established politicians if their seats are suddenly reserved for certain sections of the population. The Cabinet is studying certain minor changes in the Bill.

All former Prime Ministers and their families are entitled to SPG protection for a decade after leaving office. The Cabinet will decide whether the protection should be there automatically or whether there is sufficient threat to ensure protection.

A number of other issues too will be placed before the Cabinet. This includes the decision on increasing the foreign direct investment limit in a number of sectors including information and broadcasting, aviation, petroleum and insurance. There are also plans for changes in the laws to develop science cities or their smaller versions.

THE STATESMAN

23 APR 2003

Justice with a 'quest for truth'

Statesman News Service

NEW DELHI, April 21. — The Justice Malimath Committee has recommended a criminal justice system that works harder to "search for the truth" rather than just try the accused, provides summary trials for offences punishable with less than three years, limits adjournments in courts to "exceptional circumstances" and treats confessional statements of witnesses before a superintendent of police as evidence in courts.

The committee did not favour Mr LK Advani's suggestion of death penalty for rapists, instead recommending that a person convicted of rape would stay behind bars his entire life. It supported the demand for a federal agency. The committee said an amendment to the Constitution should put crimes of interstate and international ramifications in the Central List of the Seventh Schedule of the Constitution.

HITS & MISSES

- Rejects death penalty for rapists, recommends that they be imprisoned for life
- Women with children younger than seven years not to go to jail but be put under house arrest, electronic gadgets on anklet to sound alarm if they step out
- Confessional statements video-recorded before SP-rank officers to be admissible in court as under Pota
- Standard of proof for conviction brought down, 'clear and convincing proof' will do rather than 'proof beyond reasonable doubt'

The Malimath committee that set out to help the "collapsing" criminal justice system stand on its feet two years ago has submitted its 158 recommendations to the Deputy Prime Minister. The recommendations, if implemented, will change the face of the criminal justice system.

The quest for truth should be the guiding star of the system, Mr Justice (retd) VS Malimath told reporters minutes before he handed over the report.

Mr Justice Malimath recommends that it should no longer be necessary for courts to be convinced of the involvement of an accused beyond reasonable doubt. This requirement is unreasonable, he said, suggesting that it should be replaced with the requirement for the prosecution to give "clear and convincing proof". In the search for the truth, the committee has sought to empower the lower judiciary on the lines of the High Courts to summon and examine any person as witness and issue directions to the investigating officer as may be necessary. "The courts, police and the prosecution have to play a dynamic and pro-active role in the search

Turn to page 2

Report calls for major overhaul of country's criminal justice system

■ Statement to police should be admissible in court; protect witness, no death for rapist

EXPRESS NEWS SERVICE
NEW DELHI, APRIL 21

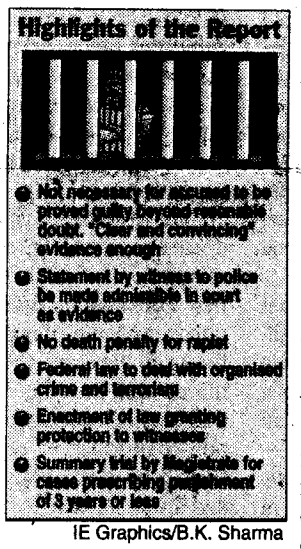
IN a pathfinding report on reforming the Criminal Justice System of the country, a committee headed by Justice V.S. Malimath has recommended several far-reaching changes.

Among the reforms suggested are: an accused should not be presumed innocent till proved guilty "beyond reasonable doubt," and a statement by him made before the police should be admissible in court as evidence. The committee has also said there should be no death penalty for rapists and that a federal law should be enacted to deal with organised crime and terrorism. It recommends the right to all magistrates to try cases with punishment of three years or less.

It has recommended the constitution of permanent criminal benches in high courts and the Supreme Court to be presided by specialised judges. Also, to ensure discipline and better code of conduct among judges, it has suggested that the Chief Justice be conferred with certain special powers.

Rights of the victim and the witness are recognised for the first time by the committee. It has suggested a witness protection programme and also the right of the victim to participate in the trial for offences punishable with imprisonment of seven years and above. The victim too should have the right to protection and right to compensation.

The six-member committee has recommended additional rights for women in some cases of crimes against women, like entitling a woman living with a man, as his wife, for a reasonably long period to maintenance. It has also recommended creation of a separate offence prescribing adequate punishment for non-penile penetration.



IE Graphics/B.K. Sharma

However, the committee has suggested that section 498-A of IPC — cruelty against woman by husband and his relatives — be made less stringent, by making it bailable and compoundable. The committee said that the section accounts for undue harassment.

While some of the recommendations are bound to ruffle a few feathers, others would be accepted as much needed, albeit coming a bit late. While presenting the report to Deputy Prime Minister L.K. Advani, Justice Malimath said that this was the first-ever comprehensive review

CONTINUED ON PAGE 2

Report calls for major overhaul of country's criminal justice system

■ Statement to police should be admissible in court; protect witness, no death for rapist

EXPRESS NEWS SERVICE
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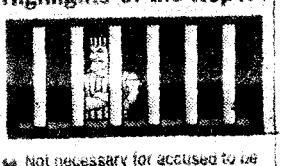
Highlights of the Report



- Not necessary for accused to be proved guilty beyond reasonable doubt. "Clear and convincing" evidence enough
- Statement by witness to police be made admissible in court as evidence
- No death penalty for rapist
- Federal law to deal with organised crime and terrorism
- Enactment of law granting protection to witnesses
- Summary trial by Magistrate for cases prescribing punishment of 3 years or less

IE Graphics/B.K. Sharma

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CONTINUED ON PAGE 2

22 APR 2003 INDIAN EXPRESS

Judicial appointments

By K.T. Thomas

THE PLEA for setting up of a National Judicial Commission (NJC), as a panacea for solving the problem of misdemeanours or delinquencies of judges of the higher judiciary, overlooks certain realities. The present system of a collegium of senior judges recommending the names for appointment of judges to the High Courts, and another collegium of senior judges of the Supreme Court filtering such recommendations at a second level was introduced only in October 1998, when a Bench of nine judges of the Supreme Court exercised its advisory jurisdiction under Article 143 of the Constitution. The same Bench advised that a larger collegium of senior judges of the Supreme Court recommend persons to be appointed as judges of the Supreme Court. By an earlier decision, the Supreme Court introduced the concept of primacy of the Chief Justice of India in the matter of recommendations to the higher judiciary (Supreme Court Advocates on Record Association vs. Union of India – 1993 (4) SC 441).Those who advocate the substitution of the present system with an NJC often point to the allegations of delinquencies attributed to some judges, particularly those reported during the last five years. One should not disregard the pivotal point that all these judges were appointed prior to the commencement of the present experiment of a judges' collegium making the recommendations.

It is true that the earlier practice, which started in 1950, held the field for more than four decades wherein a singular authority (Chief Justice of the High Court) exercised the exclusive privilege to initiate the recommendations to the High Court. In exceptional cases, such power was exercised by certain Chief Ministers who were strong enough to exert control over the Chief Justices in the matter of initial recommendations. Barring such exceptions, the recommendations made by the Chief Justices invariably passed through all the further stages culminating in appointment. It was when the vacancies to be filled up were many that the selection became lax — then it was not very difficult for an advocate to have his name recommended either by the Chief Minister or perhaps even by the Chief Justice concerned. When the percentage of such appointees increased, members of the legal profession began to express their concern and distress. It snowballed into a clamour for a relook at the existing system. The demand for slashing the factor of political influence in judges' appointments became strident. It was in this background that the Supreme Court ruled that the recommendation made by the CJI should have primacy. The present system of a judges' collegium came into being within five years thereafter.

A National Judicial Commission, which is being mooted now as a remedy, would only accelerate the proliferation of any delinquencies in the higher judiciary.

The foremost among the advantages of the present system is that the recommendation is made through a collective exercise of persons who have undoubtedly the capacity and competence to decide on the merits of those to be recommended as judges. No one can possibly dispute that senior judges are the best persons to make a judgment regarding the competence of legal men to be considered for judgeship. It is open to the Executive to point out the weaknesses of those chosen. The collegium would and must reconsider the suggestions in that perspective and then take a final decision.

This system does not preclude the Executive from suggesting to the Chief Justice even other names. The collegium of the first level would undoubtedly consider such names also. What happens practically is that by the time the recommendations of the first-level collegium reach the second for consideration, the Ministry of Law collects details about those recommended. The result of such enquiries would be forwarded to the collegium of the second level (Supreme Court). Only those names which the second collegium approves can be forwarded to the Law Ministry. It must be borne in mind that the Central Government at this stage is not bound to advise the President of India to appoint the names approved. It is open to the Centre to send the names back to the collegium of the Supreme Court for reconsideration for any reason whatsoever. If the collegium, after reconsidering the recommendations in the light of the points raised by the Centre, reiterates its earlier stand and the CJI makes the recommendation accordingly, then the Centre has to advise the President to appoint those recommended.

In the last five years, the above system has worked. I do not say that the system is flawless, but by and large it is better than those experimented with earlier. The present system was achieved without making any amendment to the Constitution — it was done through judicial interpretation. The criticism against the present system, among other things, is that the interpretation made by the nine-judge Bench of the Supreme Court regarding Articles 124 (2) and 217 (1) of the Constitution is not in consonance with the intention of its framers. It is even said that the Supreme Court grabbed the power of recommendation by overstretching the freedom of interpretation in the decisions rendered in the Supreme Court Advocates-on-Record Association vs. Union of India case and also in the Re-Special Reference matter. But those who plead for the setting up of an NJC cannot overlook that even its formation would be contrary to the intention of the Constitution framers.

The present system can be improved by resourceful and imaginative Chief Justices, if they adopt new measures to identify persons most suited to be recommended for judgeship. As the Chief Justices in all the High Courts are from outside now, it might be difficult for them to identify the best persons, at least during the initial months of their tenure. One serving Chief Justice has evolved a practical measure to solve the problem. He requested his co-judges to suggest names of those they considered worthy of recommendation. All the judges responded and he included the names in (what he called) the "zone of consideration". He observed them individually and finally selected some of them and put their names to the collegium of senior judges of the High Court. Why should the present system be replaced by an NJC at all? Why can the country not wait for a reasonable period of time to lapse for deciding on all aspects of the viability and efficacy of the present system? Five yearsare not sufficient to jettison the present practice by pronouncing that an NJC is a better substitute. The U.S. system, or the Canadian system, is now being quoted to support the plea for setting up an NJC. We may bear in mind that the Constituent Assembly had discussed those systems threadbare and found them not acceptable to our country. In fact, some of the judges of the U.S. and Canada, when they visited India, praised our present practice of selecting judges. When I visited Russia with Justice A.S. Anand and Justice Bharucha — two former CJIs — we found that persons of the judicial set-up there were appreciative of the system of appointing judges in India.

It appears that there is controversy as to who should be made members of an NJC. In all the suggestions in favour of setting up an NJC, there is demand for the inclusion of politicians. Once this is done, the inevitable consequence would be the smudging of the already battered image of our judicial institution. A National Judicial Commission, which is being mooted now as a remedy, would only accelerate the proliferation of any delinquencies in the higher judiciary.

(The writer is a former Judge, Supreme Court of India.)

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By K.T. Thomas

THE PLEA for setting up of a National Judicial Commission (NJC), as a panacea for solving the problem of misdemeanours or delinquencies of judges of the higher judiciary, overlooks certain realities. The present system of a collegium of senior judges recommending the names for appointment of judges to the High Courts, and another collegium of senior judges of the Supreme Court filtering such recommendations at a second level was introduced only in October 1998, when a Bench of nine judges of the Supreme Court exercised its advisory jurisdiction under Article 143 of the Constitution. The same Bench advised that a larger collegium of senior judges of the Supreme Court recommend persons to be appointed as judges of the upreme Court. By an earlier decision, the Supreme Court introduced the concept of primacy of the Chief Justice of India in the matter of recommendations to the higher judiciary (Supreme Court Advocates on Record Association vs. Union of India – 1993 (4) SC 441).Those who advocate the substitution of the present system with an NJC often point to the allegations of delinquencies attributed to some judges, particularly those reported during the last five years. One should not disregard the pivotal point that all these judges were appointed prior to the commencement of the present experiment of a judges' collegium making the recommendations.

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(The writer is a former preme Court of India.)

HP-10

Centre to elicit views on statute amendment bill

By Gargi Parsai

NEW DELHI, APRIL 12. The Government will soon initiate talks with political parties to ascertain their views on the 79th Constitution Amendment Bill, which calls for debarring MPs and MLAs with more than two living children from contesting elections from the date the Bill is passed. The Bill is pending in the Rajya Sabha since 1992.

The move is seen as an attempt by the Government to test the waters, as it were, on an issue which has been put on the back-burner following vehement opposition by women's groups on the ground that it will affect women most, as a majority of them are not the decision-makers on the size of the family.

Speaking to *The Hindu*, the Minister for Health and Family Welfare, Sushma Swaraj, said the Centre favoured the two-child norm, which was in consonance with the stated policy of the Government for achieving a couple replacement level of TFR (Total Fertility Rate) 2.1 by 2010 and population stabilisation by 2045.

"But there have been disagreements on the Bill. During the formulation of the National Population Policy, there was no consensus on incentives and disincentives although there was agreement on the target-free approach."

If political parties are willing, she would bring the Bill in this session of Parliament itself. On the opposition from women's groups, she said it was for the political parties to build a consensus with their constituents. But she was open to meeting any group or people on the subject.

'No difference with States'

In a departure from the earlier stance of her predecessors, Ms. Swaraj said she had no difference with State Governments coming up with their own policies that do not conform to the national policy. Several States, including Madhya Pradesh, Maharashtra, Rajasthan, Andhra Pradesh and Goa, have evolved their own policies calling for stringent measures to control population. In Madhya Pradesh, there has been a case of a woman sarpanch being removed from her post after giving birth to a third child. In some other States, a couple with a third child was deprived of official facilities for the third child. However, none of the States have so far debarred members of the legislative assembly from contesting elections or holding officials posts after having a third child. Ms. Swaraj's immediate predecessor, Shatrughan Sinha, had stated that the Centre would hold back family welfare funds to States, which deviated from the national policy.

Ms. Swaraj said 11 States were in a position to achieve a TFR of 2.1 by 2010 and 12 States and Union Territories had a TFR of 3. Eight smaller States had a TFR of more than 3, but they were not in a position to influence the population growth in a big way.

Ms. Swaraj categorically said that injectable contraceptives would not be brought into the family welfare system unless it was established beyond doubt that there were no side effects.

Ayodhya status quo to stay: SC

Our Legal Correspondent

NEW DELHI, March 31. — The Supreme Court (coram, Babu, Quadri, Shah, Hegde, Raju, JJ) today refused to vacate its earlier stay on all religious activity at the undisputed land in Ayodhya. It directed that the ban would remain in force till Allahabad High Court disposed of the suits relating to the disputed land where the Babari Masjid once stood.

"On consideration of the entire matter, we are of the view that the order made by this court on 13.3.2002, as modified on 14.3.2002, should be operative until disposal of the suits in the High Court of Allahabad, not only to maintain communal harmony but also to fulfil other objectives of the (Acquisition of Certain Area at Ayodhya Act, 1993) Act," the Bench said.

In effect, the court rejected the Centre's plea to vacate last year's stay though it actually disposed of the original petition filed by Mohammed Aslam Bhure seeking handover of all the acquired land — the 2.77 acres under dispute and the undisputed 67.703 acres — at Ayodhya to the Army to prevent any temple-building activity there. The court did not entertain the plea that the land be entrusted to the Army. It ruled in favour of maintaining status quo obtained in March 2002.

Referring to its 1994 judgement in this context, the court said it was clear that the eventual use of the adjacent land, the ownership of which now vests with the Central government, would depend upon the outcome of the litigation involving the disputed property. "Thus the two acquired lands are intrinsically connected with one another and cannot be separated at this stage of proceedings for different treatment during the interregnum," the Bench said.

■ The SC orders status quo at the undisputed site to be maintained till the High Court decides on title suits. This would help maintain harmony and fulfil other objectives

■ Since the disputed and undisputed land are 'intrinsically' connected, transfer of management to a body or a trust could complicate matters

The court said since the status quo had been maintained at the site for over a decade now, and adjudication of the disputes pending before the High Court was approaching the final stages, it would not be appropriate to disturb that state of affairs. "If land is transferred to any other body or trust as provided under Section 6 of the Act at this stage, further complications may arise," it observed. "It is well known that preservation of the property in its original condition is necessary to give appropriate relief to the parties on the termination of the proceedings before the courts, and therefore we do not think that this is one of

Turn to page 2

The Judiciary and the Legislature — II

By V.R. Krishna Iyer

A CERTAIN lofty courtesy, innocent of measly rivalry, must inform and illumine the mutuality between the Legislature and the Judiciary. Judge power is central to the constitutional order and the Legislature must deal with reverence towards the Judiciary. Judicial independence and immunity are unassailable. This is fundamental. At the same time, the House in large measure has a representative character and the court can never act as a third chamber of the House, even though it has the power to strike down an unconstitutional legislation and pronounce upon excesses outside the legislative chamber.

Having said this, our law lords must know their limitations. The power to interpret law and adjudicate upon disputes is vested in the courts. This must be unreservedly accepted by the legislators and the Speaker. There is no competitive spirit but fair accommodation by each of that portion of sovereignty which is assigned under the Constitution to the other. When the court addresses the Speaker, great respect must be shown — he should not be commanded to appear in court. The purpose of the judge issuing the summons is not to exercise authority but to give an opportunity. Once this aspect is understood, the Speaker's point of view, if any, may be brought to the notice of the court through the Advocate-General who is a constitutional entity. The Secretary of the Assembly can give the necessary instruction and bring to the notice of the House that its proceedings are altogether beyond court purview. There is an absolute bar to enquiry by the court into the proceedings inside the House.

Likewise, the freedom of speech of the members inside the House is a great guarantee of democracy. Free debate in basic and what is said cannot be censured by any curial process. Judges are protected in their conduct even inside the House since they are beyond the pale of intra-mural criticism. When the conduct of a judge comes under censure in the course of a debate, the Chair must pull up the member and expunge the violative portion of the member's expression. Unfortunately, when this is not done, there is no specific provision in the Constitution to set right the deviant. Can the court intervene when its conduct is debated in violation of the constitutional provision? This is a grey area. Again, it must be noted that what is absolutely protected inside the House is freedom of speech and to vote — nothing beyond. Suppose a member attempts to murder and there is violence in violation of proper conduct, what happens to the offences so committed? I should assume that the Speaker is the supremo and may summon police help but beyond that, the court does not lose its jurisdiction to try a murder merely because the venue is the House. Where lawlessness, departing from the rules of conduct, takes over, the law of the land and the authority entrusted with the administration of justice do not blink at the scene. These are matters which Speakers' Conferences must discuss and take decisions, where judges and jurists must ponder and consider solutions. What our Founding Fathers did not dream of are now becoming vulgar realities. The law of contempt power enjoyed by the House and the court may be pressed into service up to a point, but there is still need to examine the contra-constitutional developments, so that orderly administration of the legislative and judicial business may be ensured as part of our civilised democratic order.

Our Constitution desires mutual reverence between the two institutions.

A source of functional confusion relating to the Speaker vis-a-vis the higher judiciary needs specific mention. The Tenth Schedule vests in the Speaker the power to decide on questions of legislators' defection. When he rules under the Schedule, he acts as a tribunal and his finding, if arbitrary, is vulnerable to judicial review. The provisions in Article 6 and 7 notwithstanding, the court can examine the validity of the Speaker's holding. A Division Bench of the Kerala High Court, speaking through Narayana Kurup. J., has eruditely expounded the law:

"By applying these well known and accepted tests of what constitutes a Tribunal, the speaker or the Chairman, acting under paragraph 6 (1) of the Tenth Schedule of the Constitution has been held to be a Tribunal. In Kihota Hollohon v. Zachilhu (AIR 1993 SC 412) the Supreme Court held that the Speaker while exercising powers and discharging functions under the Tenth Schedule acts as Tribunal adjudicating rights and obligations under the Tenth Schedule and his decisions in that capacity are amenable to judicial review. It was also held that the concept of statutory finality embodied in paragraph 6 (1) does not detract from or abrogate judicial review under Articles 136, 226 and 227 of the Constitution in so far as infirmities based on violations of constitutional mandates, mala fides, non-compliance with Rules of Natural Justice and perversity are concerned. Therefore, the question relating to the jurisdiction of the High Court to entertain writ petitions challenging the orders of the Speaker now stands concluded by the aforesaid judgment of the Supreme Court in Hihota Hollohon v. Zachilhu (AIR 1993 SC 412 supra) case wherein the provisions of Paragraph 7 of the Tenth Schedule which bars jurisdiction of courts in respect of any matter connected with the disqualification of a member of a House under the Schedule have been held to be unconstitutional and it has been held that the Speaker while passing an order in exercise of his powers under sub-paragraph (1) of paragraph 6 of the Tenth Schedule functions as a "Tribunal' and the order passed by him is subject to judicial review under Arts. 32, 136, 226 and 227 of the Constitution."

The constellation of propositions which crystallises from this long exposition may be presented as pervasive principles which possess constitutional paramountcy. The first fundamental is that judicial independence never bends or bows before the Executive or the Legislature, as laid down by the nine judges' Bench in the Judges Case. This doctrine puts the judges in their forensic performance beyond the contempt power of the Legislature. The judges, in their curial capacity, are not answerable to the House or its officers.

Second, judicial supremacy derived from the Constitution and specified in Articles 32, 142, 136, 226 and 227 empowers the court under public law to decide any case brought by any aggrieved citizen against any order, fiat or ukase emanating from any authority in the House. The legality of such a directive, if it operates from any conduct of a citizen outside the House, is amenable to judicial jurisdiction. However, if the action is taken by the Speaker in the legislative chamber, the court cannot sit in review, the plenary authority being vested in the House. Even here, if what is alleged as the basis of action is a privilege of the House or member, it is open to the court to examine whether such a privilege exists provided that the Assembly's action infringes, *prima facie*, a fundamental right of the citizen.

Third, whatever is spoken (or voted upon inside the House) is beyond the power of the court to investigate or adjudicate. The member's conduct inside the chamber is immune to judicial scrutiny. Fourth, even if a member, contrary to the express provision of Section 211, does indulge in improper speech, the corrective mechanism is the Speaker, not the court.

Fifth, when the court, in connection with any matter pending before it, requests the Speaker for information (or for the purpose of affording an opportunity for explanation makes a request) it behoves the Speakerto respond in a spirit of cooperation. Sixth, the court shall hold the Speaker and the proceedings of the House in all solemnity. And seventh, when the Speaker decides a matter bearing on the defection law, judicial review is integral to constitutional law. The glory of our Constitution desires mutual reverence between the Legislature and the Judiciary in such a manner that comity and camaraderie become the majestic *modus vivendi*.

(Concluded)

THE HINDU

1 APR 2003

Citizen's 'right to know' reaffirmed

By K.K. Katyal

NEW DELHI, MARCH 14. The Supreme Court, it is certain, will earn the gratitude of the people, of the voters — the ultimate sovereign — for re-confirming their fundamental right to know the antecedents of the candidates, their possible criminal past, assets and educational qualifications, before the elections.

The Government had abridged this right by amending the election law, with the support of all parties, nullifying an earlier order of the apex court. That abridgment has been set aside now.

The debate on this all-important issue was polarised between the political establishment, in its entirety, on the one hand, and the judiciary, the Election Commission and the electorate, on the other. The Government, along with the political establishment, may find it hard to reconcile itself to the latest verdict of the Supreme Court. This was evident from its decision to call another all-party meeting to consider the new situation. They would do well to recognise the impropriety, if not the futility, of persisting with a course of action that was not approved either by the people or by the high constitutional organs.

There was some confusion about the Congress stand. The all-party decision on July 8 last was unanimous in rejecting the Election Commission's directive, based on the Supreme Court judgment, requiring the candidates to furnish details of criminal antecedents, if any, and assets, along with their nomination forms. The claim on unanimity was not questioned by the Congress. At that stage, it wanted the election process to be simplified and the issues such as criminalisation of politics to be addressed through separate legislation. Later, however, the party veered round to a categorical view — against diluting the order of the Election Commission. That position was confirmed now, with the Congress spokesman, Jaipal Reddy, expressing satisfaction that their stand had been vindicated by the latest judgment of the Supreme Court.

The issue involved is simple, revolving as it does on the qualitatively different positions of the Election Commission (based on the Supreme Court order) and the Government — pre-election disclosure of antecedents and assets as against post-poll declarations by the elected candidates. Last year's all-party meeting disfavoured the first course, supporting the second one. The amendment, adopted by Parliament later, with remarkable promptitude, incorporated the all-party stand. As against these two steps backward, the all-party conclave took half a step forward — by proposing a bar on contesting elections by persons against whom charges have been framed by courts in two separate cases of heinous crime as against the provision in the Election Commission order, barring those with two years' conviction in a criminal case.

The judicial utterances at the preceding stages were highly significant. For instance, the Delhi High Court, in November 2000, held that "for making a right choice by election in regard to candidates at the election, it was essential that the past of the candidate should not be kept in the dark as it was not in the interest of democracy and well-being of the country".

The Supreme Court, in May 2002, dealt with a contention "that elections in the country are fought with the help of money power, which is gathered from black sources and, once elected to power, it becomes easy to collect tons of black money, which is used for retaining power and for re-election". At another stage, it said: "The little man of this country would have basic elementary right to know full particulars of a candidate who is to represent him in Parliament where laws to bind his liberty and property may be enacted".

Or "the Voter's (little man-citizen's) right to know antecedents, including the criminal past of the candidate is much more fundamental and basic for survival of democracy. The little man may think over before making his choice of electing law-breakers as law makers".

CPI hails SC verdict on electoral law

By Our Special Correspondent

NEW DELHI, MARCH. 14. The Communist Party of India today suggested that all political parties and Parliament "gracefully accept" the Supreme Court judgment striking down the amended electoral reforms law.

The party general secretary, A.B. Bardhan, said here that its MPs had moved amendments in Parliament which were negated. "Voters have a right to know their candidates. So be it. Let information be supplied about the candidates' criminal antecedents if any, assets and liabilities and educational qualifications at the time of filing nominations," he said.

The party argued that since no distinction was made in the laws between criminal acts and those arising from agitation on peoples issues that candidate should be allowed to state also the nature of the offence for which there was a case against on him on her. And no returning officer should have the power to disqualify a candidate, as was provided in the earlier Election Commission's order.

Briefing correspondents on the outcome of the party's national executive here earlier this week, Mr. Bardhan observed that the work of Delimitation Commission has caused serious apprehensions and created complications in several states.

While welcoming the constitution of the commission, the CPI expects more transparency in its work and more public hearing so that people get adequate information. It said the associate members in the commission should be really associated in its work.

Giving details about the Bharat Jan Jagran Yatra during April-May, 2003, Mr. Bardhan said the party leaders would head five main "jathas". The party's national secretaries, D. Raja and Atul Kumar Anjaan, will lead one jatha each on April 8 from Kanyakumari to Delhi and Moirang-Imphal to Delhi.

Amarjeet Kaur would lead the Srinagar-Delhi jatha on April 23, while the one from Goa would be led by Govindrao Pansare and another from Mumbai would be headed by former MP, Nagendra Nath Ojha.

All along the route, the party has planned 50 big rallies which would be addressed by all-India party leaders and about 400 town and village public meetings. The party will also approach other Left and democratic parties and prominent citizens to join the public meetings and receptions along the way. All jathas will culminate in a rally at the Talkatora Stadium here on May 9. The purpose of the rally is to counter the BJP and the Sangh Parivar's "vicious communal, fascist ideological, political and cultural offensive which divide our people, and its virulent economic offensive which serve the interests of domestic monopoly, and foreign MNCs," the party said.

Meanwhile, the CPI(M) has said that the amendments were perfect and the party would consult other political parties before moving ahead.

15 MAR 2003

THE HINDU

'VOTERS RIGHT TO KNOW IS FUNDAMENTAL'

SC rules poll reform unconstitutional

Our Legal Correspondent

NEW DELHI, March 13. — The Supreme Court (coram, Shah, Reddi, Dharmadhikari, JJ) today declared the electoral reform amendment unconstitutional and ordered status quo on voters' right to know be restored on the basis of its May 2002 judgment.

The court today struck down Section 33B of the Representation of the People Act, 2002, and restored the earlier order (coram, Shah, Singh, Sema, JJ), making it mandatory for candidates to reveal details of their assets and liabilities, educational qualifications and criminal records when filing their nomination papers.

"Sec 33B of the RP Act, 2002 is violative of the people's right to information and Art 19(1) of the Constitution," said Mr Justice MB Shah speaking for the Bench. "On the question of declaring of assets by a candidate and his spouse after the election results, these have to be filed at the time of filing nominations," Mr Justice Shah said, adding that "public scrutiny was the surest means of cleansing our democratic governing system".

The court directive asked the Election Commission to issue a fresh notification in this regard which will operate prospectively and not retrospectively.

The court said the amendment passed by Parliament is clearly beyond "legislative competence" and does not pass the "test of constitutionality". This, because the legislation imposes a complete ban on disclosure of information to voters about a candidate, the Bench observed in separate but concurring judgments.

The voter's right to information was vitally linked to the right to

Turn to page 2

What it means for candidates

CANDIDATES to file an affidavit along with nomination papers disclosing these details:

- Whether the candidate has been convicted/acquitted, discharged of any criminal offence in the past — if any, whether he has been punished with imprisonment or fine
- Prior to six months of filing nomination, whether the candidate is accused in any pending case, or any offence punishable with imprisonment for two years or more, and in which charge is framed or cognisance is taken by a court of law. If so, details thereof
- The assets (immovable, movable, bank balances, etc) of a candidate and of his/her spouse and that of dependents.
- Liabilities, if any, particularly whether there are any dues of any public financial institution or government dues
- The educational qualifications of the candidate

Willful refusal to file an affidavit can be a ground for rejection of nomination, and substantial and willful non-disclosure can be a ground for subsequent disqualification and prosecution for perjury.

More reports on page 6

14 MAR 2003

THE STATESMAN

PM HOUSE:

residence is at 7 Race Course Road on the same side of the lane.

"The proximity of the functions to the Prime Minister's residence can pose security risks. Further, there are a large number of guests coming into the bungalow, on whom we have no control or check," said a senior police officer.

In the normal course, no vehicle is allowed to stop in front of the Prime Minister's residence on Race Course Road, but on nights when these functions are held, the road is chock-a-block with parked cars.

The Delhi police's security wing said the matter was not under their jurisdiction. "We only give security for the Prime Minister at the place of his destination in the Capital," an officer said.

The special commissioner (security and operations), Mr S K Kain, refused to comment from the security point of view, saying he was not aware of the issue. "But it is the jurisdiction of the local police to give permission for such a wedding function," Mr Kain said.

The area police were aware of the wedding functions held at the MP's house, but added that no permission was required if the party was held within the premises. "We cannot stop a private function in the house of an MP," the DCP (New Delhi), Mr Manoj Kumar Lall, said.

Another officer in New Delhi district said the area police had never been asked to provide extra security arrangements at the [illegible] to contact the SPG director, stating that the "matter was not in their jurisdiction".

The SPG had earlier tried to acquire a portion of Gymkhana club (2, Safdarjung Road) "for security reasons" — it is currently being contested in the Delhi High Court. The SPG was disturbed by the frequent functions at the club, fearing that anyone could climb the boundary wall and cross the road to the Prime Minister's residence. The club had responded by restricting the entry to members and increased the height of the boundary wall, but it was not accepted. Finally, they lodged a case in the Delhi High Court.

Dr S Venugopal, who is also the chairman of the Parliament Assurance Committee, said he had never encountered any queries from security agencies on the wedding functions held at his house. He said that most of the functions were held at the request of his fellow MPs, who had recommended that their cousin or relative can organise a function at his house, when he is out of Delhi.

"I was out to my constituency like every weekend, so I had allowed a DCP to hold a wedding function. He had promised me that guests would be limited and there would be little noise," Dr Venugopal said. He added that the cars must have been parked on the road, with the permission of the area police. "After all, even an MP can't park their car in front of the Prime Minister's residence."

The TDP MP said he intends to stop these functions in the future. "If something happens when I am not there, then I will be

SC:

freedom of expression guaranteed to him under Article 19 of the Constitution, and the amendment curtailed this right, it noted.

"The right to vote would be meaningless unless citizens were well informed about the antecedents of a candidate." Mr Justice Shah said, rejecting the Union of India's plea that the voter's right to information cannot be termed as a fundamental right and that even the right to cast votes is a statutory right.

"A voter is first a citizen of the country and apart from statutory rights, he has fundamental rights conferred by the Constitution," he said. The court was disposing of three separate PILs filed by the PUCL, the Lok Satta and the Association for Democratic Reforms in this regard.

The judgment amounted to a major setback for the government which had brought in Sec 33B last year after an all-party consensus to circumvent the May 2 order of the court making it mandatory for all candidates to reveal their criminal antecedents, assets and educational qualifications.

Sec 33B reads: "Notwithstanding anything contained in any judgment, decree or order of any court, any directive, order or any other instruction issued by the EC, no candidate shall be liable to disclose or furnish any such information in respect of his election which is not required to be disclosed or furnished under this Act or the rule made thereunder."

After today's judgment, the government appeared to be on uncertain grounds, with some top functionaries suggesting tha "legislature would be abdicatin responsibility" if it does not do an and others saying that there would appeal to a larger Bench.

"However, it's too early now. V examining the judgment," senior c said. But Parliamentary Affairs and Minister, Mrs Sushma Swaraj told re that the government was mulling all-party meeting to discuss the fo the judgment. "But a date for tha clearly have to be fixed by the Ministry," she said.

Ms Kamini Jaiswal, senior couns PUCL, upon whose petition the c with the issue, said the governmen no option but to implement directive. "They have no other op implement it in the next polls," s/

Welcoming the order, the Commission (EC) said that adequate time to implement th the Assembly elections due in December this year.

The Commission, however, comment on whether there w modification in its June sugges role of the returning office nomination papers in information was provide candidate's antecedents or th officer would be upgraded.

EC officials said the Comm to obtain a copy of the co declined to respond to sp without having seen it. H hoped that the order would for "cleansing" the electoral

FUNDAMENTAL RIGHTS-II

5 6 19/3

Corruption Is The Antithesis Of Good Governance

By SOLI J SORABJEE

Fundamental rights in our Constitution are enforceable against the State and its instrumentalities. They cannot be enforced against individuals and private entities. There are exceptions like the practice of untouchability, denial of admission to shops, public restaurants, hotels and places of public entertainment on grounds of race, religion, caste or sex. These provisions are enforceable also against private individuals. But the general position is that private entities which would include business houses are not bject to the discipline of fun-...mental rights.

Universal corruption

There is a school of thought that even non-State bodies and institutions and entities which perform functions of a public nature or whose activities are quasi-governmental should be included in the definition of "State" and thus brought within the net of the fundamental rights chapter. For example, private entities which are engaged in utilities like generation and supply of electricity, or engaged in banking or whose activities and functions have repercussions on the community. This thinking is based on the functional theory. If the definition of State is amended and business house by applying the functional test are brought within the net of Part III of our Constitution guaranteeing fundamental rights then they would have to comply with and observe the fundamental rights which would be enforceable against them. For example, business enterprises would be subject to the guarantee of Equality and non-discrimination in employment. Workers would be able to enforce their right to freedom of expression and their right to form trade unions and associations as a fundamental right against their employer. Another consequence would be that the provisions regarding reservations in public employment in favour of Scheduled Castes and Scheduled Tribes and Other Backward Classes would also be attracted.

The matter was debated in the ruption is its universality and above all, its impartiality. Corruption is not guilty of discrimination on the ground of race, religion caste, creed, colour, language or sex. It is universal. Corruption hits everyone in every walk of life.

Unfortunately it is not yet realised that corruption is not merely a matter of aggrandizement of the corrupt official or the individuals who are its beneficiaries. Corruption is the antithesis of good governance. The consequences of acts of corruption are not confined to the giver and taker of bribes who are both contaminated but affect the general community. In a country where the choice of priorities and projects is motivated by corruption the country's genuine development priorities are sacrificed.

For example, securing large lucrative contracts having huge financial implications for useless and unproductive projects.

Redeeming image

Corruption is a potent source of violation of human rights, especially the economic and social rights of the people. By diverting scarce resources to low or non-priorities, corruption is in large part responsible for the neglect of basic human rights such as food, health, shelter and education.

The corrupt officials and business echelons and regretfully have not even spared the judiciary in some cases. This perception may be wrong, it may be unjustified, but it is widely held. Rules of confidentiality do not permit me to give you details but I can say that this perception about the business community is not entirely unfounded. Therefore the business community has a special role to play in ensuring good governance and redeem its image. One of the major ways of doing it is by wholeheartedly combating corruption without any ifs and buts.

On the subject of "combating bribery" OECD has made interesting recommendations. If I may quote some of them:

1. Enterprises should not offer, nor give into demands, to pay public officials or the employees of business partners any portion of a contract payment. They should not use subcontracts, purchase orders or consulting agreements as means of channeling payments to public officials, to employees of business partners or to their relatives or business associates.

2. Enterprises should enhance the transparency of their activities in the fight against bribery and extortion. Measures could include making public commitments against bribery and extortion and disclosing the management systems

those who misappropriate s patronage... they are crea news, *unethical norms wl destroy the very fabric of a soci* (emphasis supplied).

The tragic fact is that the cause of absence of good go nance is that we are facing an a crisis of moral leadership. search in vain for a person in world of politics and business in public life who embo essential ethical values and can provide inspiration and g ance to the people. We had such person in the world of pol and public life, Jayaprak Narain. He departed from midst way back in 1978. Unfo nately his message and legacy not been transmitted to fut generations. Two months ago lost another great individual, N Palkhivala. He was fearless fig for freedom and probity in pu life.

Crying need

The creation of a "corrupt free" public milieu depends on building up of moral capa within individuals, communi and social institutions. Unfo nately we live in times when th are no men and women to m our Himalayan peaks, when political system has more crimi and hypocrites per capita tha any time in our history. I pathetic that a sizeable numbe our law makers in Parliament State legislatures have colou criminal backgrounds. It distressing that such persons supported and funded by busi houses because they can del the goods.

The crying need in the millennium is for men and wo who will relentlessly struggle ainst the onslaught of materia and corruption, personalities are sound and profound enoug generate ethical ideals wl radiate from them as a force impart a fresh intellectual, eth and spiritual dimension to democracy by which we swear flavat it for foreign consumpt May I recall the wise words Louis D Brandeis, the great A ...ican Judge: "Democracy is

functions of a public nature or whose activities are quasi-governmental should be included in the definition of "State" and thus brought within the net of the fundamental rights chapter. For example, private entities which are engaged in utilities like generation and supply of electricity, or engaged in banking or whose activities and functions have repercussions on the community. This thinking is based on the functional theory. If the definition of State is amended and business house by applying the functional test are brought within the net of Part III of our Constitution guaranteeing fundamental rights then they would have to comply with and observe the fundamental rights which would be enforceable against them. For example, business enterprises would be subject to the guarantee of Equality and non-discrimination in employment. Workers would be able to enforce their right to freedom of expression and their right to form trade unions and associations as a fundamental right against their employer. Another consequence would be that the provisions regarding reservations in public employment in favour of Scheduled Castes and Scheduled Tribes and Other Backward Classes would also be attracted.

The matter was debated in the deliberations of the National Commission to Review the Working of the Constitution (NCRWC). The Commission in its report has recommended that the definition of State in the Constitution be amended to include "any person in relation to such of its functions which are of a public nature". Incidentally the UK Human Rights Act 1998 contains a similar provision.

The said point is that the recommendations made in the Report have not been debated in Parliament or other public fora. The Commission was criticised and condemned even before it commenced its work. The members of the Commission were called names and described as sheep in wolves clothing. But these critics are silent about the report and its recommendations.

It is impossible to speak of social responsibilities and good governance without mentioning corruption, a subject which has been debated and discussed endlessly ad-nauseum. Ethical norms and values cannot meaningfully exist in a society which is riddled with corruption. The only thing that can be said in favour of cor-

elopment priorities are sacrificed.

For example, securing large lucrative contracts having huge financial implications for useless and unproductive projects.

Redeeming image

Corruption is a potent source of violation of human rights, especially the economic and social rights of the people. By diverting scarce resources to low or non-priorities, corruption is in large part responsible for the neglect of basic human rights such as food, health, shelter and education.

The corrupt officials and business enterprises which are the beneficiaries of corrupt transactions are violators of human rights and should be treated and dealt with as such. They should be socially ostracised.

For heaven's sake do not invite ministers, officials and politicians and industrialists who have earned a well deserved reputation for corruption to inaugurate schools, hospitals and charitable foundations. The first and foremost obligation and responsibility of a business enterprise is not to indulge in and encourage corruption. There should be no recourse to the alibi that since others are in the corruption game why should we abstain and suffer commercially.

There is a persistent perception that business people and industrialists are largely responsible for encouraging and perpetuating corruption. Tax officials are offered irresistible inducements for passing favourable orders. Municipal authorities are bribed by real estate-walas for fudging FSIs and passing plans in utter contravention of the laws thereby making a mockery of town planning and development. These sinister forces

nor give into demands, to pay public officials or the employees of business partners any portion of a contract payment. They should not use subcontracts, purchase orders or consulting agreements as means of channeling payments to public officials, to employees of business partners or to their relatives or business associates.

2. Enterprises should enhance the transparency of their activities in the fight against bribery and extortion. Measures could include making public commitments against bribery and extortion and disclosing the management systems the company has adopted in order to honour these commitments. The enterprise should also foster openness and dialogue with the public so as to promote its awareness of and co-operation with the fight against bribery and extortion.

3. Enterprises shall not make illegal contributions to candidates for public office or to political parties or to other political organisations. Contributions should fully comply with public disclosure requirements and should be reported to senior management.

In the present climate all this would appear to be a foolish fancy and a Herculean task. But that task has to be undertaken in earnest if we are really serious about tackling the cancer of corruption which corrodes the moral fabric of every society, and ultimately leads to its decay and disintegration.

May I refer to certain extracts from the Report (1999) on The Crisis of Governance' prepared by the Mahbub Ul Haq Human Development Centre:

"It is a cruel injustice when the economy is continually raped by corrupt officials and politicians by

Palkhivala. He was fearless fig for freedom and probity in pu life.

Crying need

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As I conclude I am reminded the concluding remarks of Rajendra Prasad in the Constit ent Assembly on November 1949. He said: "India needs tod nothing more than a set of hon men who will have the interests the country before them. ... If t people who are elected a capable and *men of character a integrity*, they would be able make the best even of a defecti Constitution. If they are lacking these, the Constitution cann help the country...". These wore the insistence on persons character and integrity, their rin and resonance, have a compelli relevance today.

It seems that we have banishe these ideals and regard them as th silly slogans of impractical peopl Sadly we are paying a heavy pric for that banishment. Our endeav our must be to allow re-entry int our public lives and into the worl of trade and commerce of th ideals of truth, honesty an decency.

FUNDAMENTAL RIGHTS

Social Responsibilities And Obligation Of Business Houses

By SOLI J SORABJEE

The framing of free India's Constitution was a formidable challenge to our Founding Fathers. Despite numerous odds and difficulties such as the widespread riots in the aftermath of partition, the assassination of Gandhiji and the Telungana movement, our Founding Fathers have accomplished their task in a period of two years, eleven months and 17 days from the time it first met on 9 December 1946 to the conclusion of its monumental endeavour on 26 November 1949. According to the eminent American writer and social historian Granville Austin it was "perhaps the greatest political venture since that originated in Philadelphia in 1781".

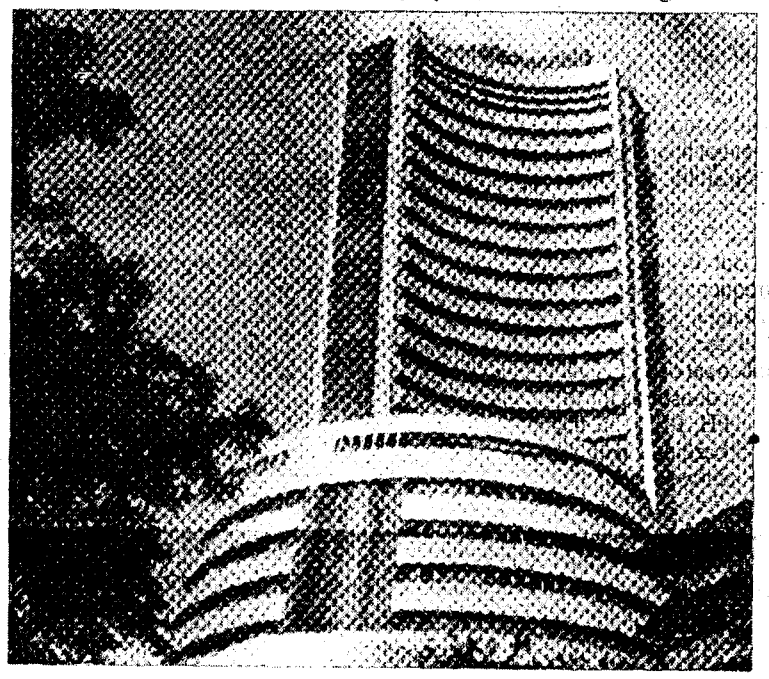
Ethical elements

Our Founding Fathers made a conscious deliberate choice. They decided to adopt democracy or rather the democratic way of life as the basis of our Constitution. They were aware of the drawbacks and difficulties involved in a democratic system. However despite the temptation of quick solutions and short term spectacular results offered by an authoritarian system they preferred democracy and rejected the theory of total State control and domination. They had firm belief in individual freedoms which were incorporated and guaranteed as fundamental rights in our Constitution. The Chapter on fundamental rights occupied 38 days of the Constituent Assembly. There was not much difficulty in enunciating fundamental rights. However no freedom can be absolute and unregulated. Individual freedoms have to be reconciled with the larger interests of society. There has to be a fair accommodation between these two competing interests.

The vexed problem was about the nature and extent of restrictions which may be imposed on the exercise of fundamental rights. After extensive debate and discus-

tionale underlying the restrictions has an ethical content and that entails ethical obligations and social responsibilities apart from the legal sanctions contained in the restrictions imposed.

Today good governance has become a buzz word. Several seminars have been held on the subject. In the maze of talks and lectures on this subject we must not lose sight of the central fact that good governance is not the exclusive domain or obligation of the State. Business enterprises and large corporations are also obliged to play a role in ensuring good governance because they wield vast powers and discharge functions which have repercussions on the community. Power carries responsibilities and that entails obligations. You may well ask,



obligations to whom? Primarily to the community and to the workers.

Part IV of our Constitution sets out Directive Principles of State Policy. They embody the goals and ideals for making our country a

Duties laid down in our Constitution, in my view, every right has implicit in it an obligation or a duty. In short every right gives rise to a corresponding duty. This thought was beautifully expressed by the our Father of the Nation, Gandhiji: "I learned from my illiterate but wise mother that all rights to be deserved and preserved come from duty well done. Thus the very right to live accrues to us when we do the duty of citizenship of the world. From this one fundamental statement, perhaps it is easy enough to define duties of man and woman and correlate every right to some corresponding duty to be first performed..."

Walter Lippman, the renowned American political commentator, projected the same thought when he said: "For every right that you cherish you have a duty which you must fulfil. For every hope that you entertain, you have a task you must perform. For every good that you wish could happen ... you will have to sacrifice your comfort and

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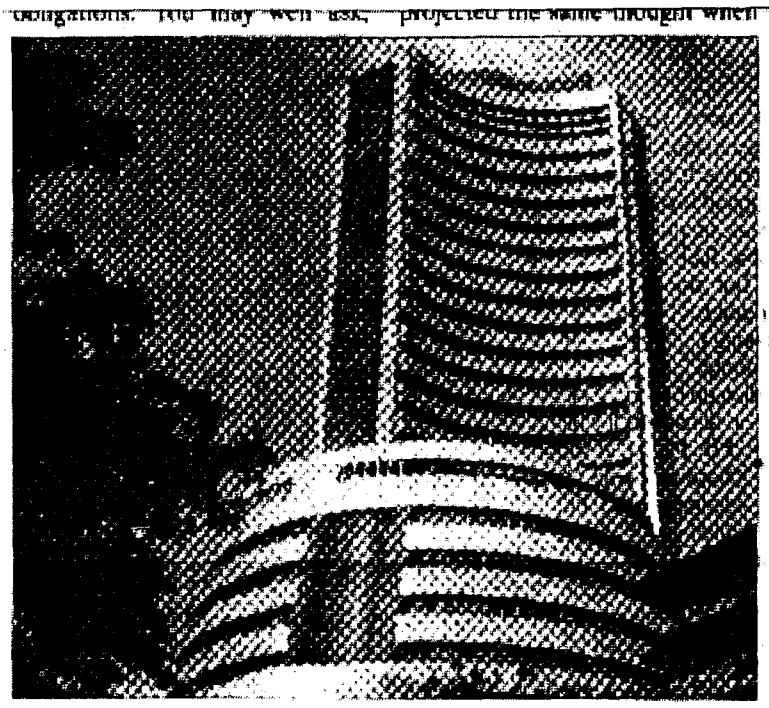
The vexed problem was about the nature and extent of restrictions which may be imposed on the exercise of fundamental rights. After extensive debate and discussion it was decided that fundamental rights would be subject to reasonable restrictions in the interest of the general public.

One of such individual freedoms is guaranteed by Article 19(1)(g) namely, the fundamental right to practise any profession, or to carry on any occupation, trade or business.

Consequently restrictions can be imposed on business enterprises. Take the case of companies manufacturing drugs. One of the major restrictions that can be imposed is that the drugs manufactured must not be spurious, must conform to certain standards in the interest of the health and well-being of the consumers and the general public. Why? Because it is unethical, it is wrong to impair the health of persons by selling them harmful products in order to make profits. Take another example. Industries which cause serious environmental damage by discharging effluents into a river or a stream or into the soil or by emission of gases which pollute the atmosphere can be subject to stringent restrictions in order to prevent atmospheric pollution. Again the reason is that it is unethical, it is immoral to impair the health of the community by such business activities. The point I wish to emphasise is that the ra-



obligations to whom? Primarily to the community and to the workers.

Part IV of our Constitution sets out Directive Principles of State Policy. They embody the goals and ideals for making our country a true welfare state in the right sense. Directive Principles are not directly enforceable by any court but are nonetheless "fundamental in the governance of our country". So the concept of good governance is implicit in our Constitution. The Directive Principles which are relevant and important for business houses and corporations inter alia are (i) " that there is equal pay for equal work for both men and women"; and (ii) "that the health and strength of workers, men and women, and the tender age of children are not abused; and the provision for a living wage for workers. There can be no good governance if Directive Principles are flouted and neglected. It is the obligation and responsibility of business enterprises to comply with these Directive Principles which also contain ethical elements.

Prevalent temper

Our Constitution for the first time in 1976 introduced the concept of fundamental duties. Article 51-A lays down certain fundamental duties for citizens. It is elegantly drafted. One of the duties is "to protect and improve the natural environment". Duties clearly entail obligations. Consequently protection and preservation of environment is a vital non-

he said: "For every right that you cherish you have a duty which you must fulfil. For every hope that you entertain, you have a task you must perform. For every good that you wish could happen ... you will have to sacrifice your comfort and ease. There is nothing for nothing any longer".

The Universal Declaration of Human Rights 1945 (UDHR), which is regarded as the Magna Carta of Mankind, recognises the vital link between human rights and corresponding responsibility entailed in the exercise of one's right. Let me quote Article 29 of the Declaration.

"1. Everyone had duties to the community in which alone the free and full development of his personality is possible.

It is now recognised and accepted that whilst we may aim at the greatest amount of freedom possible, it is also necessary to develop the fullest sense of responsibility that will allow that freedom itself to grow. Freedom without acceptance of responsibility can destroy the freedom itself, whereas when rights and responsibilities are balanced, then freedom is enhanced and a better world can be created. Proper synthesis of human rights with human responsibilities is essential for effective realisation of the rights of the human family.

It cannot be disputed that the business community is a very important segment in any democratic society based on market economy. Consequently business enterprises, by reason of their activities and functions, are under

cable laws and regulations. The fore the notion of discharg social responsibilities appears them meaningless and quixotic

Social practices

This is totally unacceptal (The actions of a business en prise or an industrial house has definite impact on other segme of civil society.) Lack of c mercial morality constitutes maladministration which is antithesis of good governar There is no reason in principle exempt the business commun from the discipline of ethi norms and standards required be observed in administration in the public sectors.

It is however, refreshing to kn that enlightened companies moving away from the assumpt that the sole purpose of busines to make profits. It is realised t business enterprises must a improve the health of the soci in which they operate and sho be alive to their human rig obligations. Profits are import to the survival of the enterpr but must not override the needs all the stake holders, which clude shareholders, employee customers, supplies, communiti our planet and its heirs. Increa ingly business leaders and ma gers are slowly coming round the view that socially responsi practices enhance long-term p fitability and competitiveness.

Reference may usefully be ma in this context to the Organisati for Economic Co-operation a Development (OECD) which h provided guidelines for multin ional enterprises. The guidelir provide principles and standar of good practice consistent w applicable laws. The general p licies of the OECD inter alia down that enterprises "shou contribute to economic, social a environmental progress with view to achieving sustainable de elopment; respect the hum rights of those affected by th activities consistent with the h government's international oblig tions and commitments". The are encouraging developmer and should become the gene norm. It indicates that busine enterprises must comply wi human rights obligations. For e ample, avoidance of discrimin tory practices in the matter employment; respecting the rig of the employees to form tra union and other associations; pr venting exploitation of children

THE STATESMAN

13 MAR 2003

SATURDAY, MARCH 8, 2003

UNDEMOCRATIC WAYS

THE MANNER IN which the Uttar Pradesh State Assembly Speaker had acted in not allowing even a customary discussion on several motions of importance, including the motion of thanks for the Governor's address, the State budget and the motion of no-confidence moved by a combined Opposition in the State Assembly runs counter to the norms of parliamentary democracy. The adjournment *sine die* of the Assembly session even before the Opposition could realise that such important matters of business of the House were being put to vote is not just an affront to the established procedures that guide the functioning of the House but also an indication of how partisan the Speaker, Kesrinath Tripathi, could turn. The abrupt adjournment of the House, just hours after the Opposition had moved the no-confidence motion and without even waiting to go through the formality of convening the Business Advisory Committee (the appropriate forum to decide on the schedule for debate and voting on the motion), hence, is violative of the House procedure. For this very reason, it is now imperative for the Governor, Vishnu Kant Shastri, to instruct the Chief Minister to convene a session of the Assembly and also ensure that the House proceedings are conducted according to established norms and procedures. This has become important because the adjournment of the House soon after the no-confidence motion was tabled has raised a doubt over the Government's majority support.

While the demand by the Samajwadi Party along with the Congress and the Left parties in Parliament for dismissal of the Mayawati Government is without basis (for the BSP-BJP combine has not yet been reduced to a minority in the Assembly as of now), it is necessary for the ruling combine in Uttar Pradesh to demonstrate its majority in the context of the happenings in the Assembly. The move by the combined Opposition in Uttar Pradesh to seek the Governor's intervention to ensure that the Assembly session is convened immediately is indeed appropriate in this context. Ms. Mayawati's actions in the past few months, beginning with her moves to effect splits in the Congress Legislature Party as well as in the smaller outfits such as the Apna Dal (after a section in the BJP raised the banner of revolt against her continuance as Chief Minister) and rewarding such dissidents with ministerial berths, had even otherwise eroded the legitimacy of the dispensation considerably. The concerted moves by the Opposition including the coming together of the Congress and the Samajwadi Party in the State in recent weeks and indications that a section within the BJP Legislature Party was willing go against her in the Assembly had raised doubts over the combine's strength in the House. The no-confidence motion, moved in the immediate aftermath of revelations (in the form of videotapes in which Ms. Mayawati is alleged to have exhorted her party MLAs and MPs to part with a portion of their spoils from the funds at their disposal under the MPLADS) had assumed significance for several reasons. The move to bring the Assembly session to an abrupt end raises serious questions in this larger context too.

Be that as it may, the unruly scenes enacted by the members of the Samajwadi Party in the two Houses of Parliament in the wake of the developments in Uttar Pradesh too need to be condemned. While the Samajwadi Party MPs were justified in raising the developments in the State, the manner in which they went about doing that was indeed unseemly. By raising their decibel levels and indulging in such acts as was done by the party MP, Akilesh Singh, on the floor of the Lok Sabha (for which he was admonished) and by disrupting the conduct of the Question Hour in the Rajya Sabha, the party's MPs are only weakening their cause. Such behaviour within Parliament or any State Legislature offends both decency and democratic values.

HC wants to dig up truth at Ayodhya

TIMES NEWS NETWORK & PTI

Lucknow: The Lucknow bench of the Allahabad high court on Wednesday ordered the excavation of the disputed site at Ayodhya to verify whether or not a temple existed there on which the Babri mosque was built.

The three-judge bench of Justice Sudhir Narain, Justice S.R. Alam and Justice Bhanwar Singh hearing the Ram Janmabhoomi Babri Masjid title suit, directed the Archaeological Survey of India (ASI) to start the excavation within a week of the issuance of the order and submit its report to the court within a week of completion of job.

The court directed that the excavation be carried out without disturbing the makeshift Ram temple where the idol of Ram Lalla is installed. The digging should spare the area of the 'chabutra', where the idol is placed, the order said.

The court also clarified that the excavators should not affect the worship of Ram Lalla and thus the status quo as regards puja and worshippers' right of darshan should be maintained.

A New Delhi-based Canadian company, Tojo India Vikas International (Pvt) Ltd, which had carried out a study of the site using radars some time back, has been told to assist the excavators by providing technical assistance.

The hearing will resume on March 24 by which date the ASI has been asked to intimate the court about the progress regarding the excavation.

Meanwhile, the Centre, which had acquired 67 acres of land in 1993 at Ayodhya after the demolition of the Babri masjid, is likely to argue before the supreme court on Thursday that the undisputed land should be handed back to its "rightful owners" after making provision for access to the disputed area.

A five-judge constitution bench headed by Justice S. Rajendra Babu will commence hearing on Thursday on a bunch of petitions on the issue and an application filed by the Centre seeking the vacation of the apex court's order banning any religious activity on the undisputed land.

"The Union government is likely to refer to the earlier judgments of the apex court, which had directed the maintenance of the status quo in the disputed area of five acres," law ministry sources said.

"On the 67 acres of undisputed land, the supreme court had said that it was desirable that the government should hand over the same to the rightful owners once it decided upon the area of land required to give access to the disputed land," they said.

It was for the government to decide how much of the 67 acres of land would be required for providing access to the disputed land, the sources added.

The quest

- Excavation to ascertain the existence of a temple will begin within a week
- Idol of Ram Lalla as well as worship should not be disturbed: HC
- ASI to submit report to court within a week of completion of work

6 MAR 2003 THE TIMES OF INDIA

TEMPLE PLEA HEARING ON 6 MARCH

SC declines ruling now

Statesman News Service

NEW DELHI, Feb. 21. — The Supreme Court (coram, Khare CJ, Lakshmanan, J) today declined to issue any immediate ruling on the Centre's plea for vacating its order of 13/14 March 2002 prohibiting any religious or construction activity on the 67.703 acres of acquired land adjacent to the disputed site in Ayodhya.

The court, however, accepted the plea for early resolution of the status of the acquired land and fixed 6 March as the date on which a five-member Constitution Bench, to be nominated by the Chief Justice of India, would take up for "final disposal" a clutch of petitions on the issue.

If for any reason the hearing scheduled for 6 March could not proceed the question of vacating the stay imposed last year could be dealt with, the two-member Bench directed after a brief yet lively hearing this morning.

The date of 6 March would be beyond the "deadline" of the *dharamsansad* organised by the Vishwa Hindu Parishad on 23 February, but in fixing that day the court also rejected the pleas of the All India Muslim Personal Law Board, Babari Masjid Action Committee and the Babari Masjid Movement Coordination Committee that the matter only be taken up after the Holi holidays. While the court refrained from commenting on the many contentious points made by counsel today, the Chief Justice was categorical that "we are never pressurised, be sure about it."

Pressing the Centre's application for vacating the interim order of 13/14 March 2002 and pleading for early disposal of the parent petition, the Solicitor General, Mr Kirit N Raval, said that continued uncertainty created difficulties and that public interest dictated that the matter brooks no delay. He suggested a date next week.

When the Solicitor General referred to the interim order of last March having laid down a ten-week time frame for dealing with the original petition of Mohd Bhure, the bench reminded him that the Centre's formal response had been filed in October — well beyond the stipulated 10 weeks.

There was distinct "needle" when senior counsel for All India Muslim Personal Law Board, Mr Kapil Sibal, observed that after taking so long to file its response the Centre now had no grounds to plead for immediate disposal of the matter. Mr Raval replied that the Centre was trying to retain the present peaceful atmosphere. Mr Sibal countered that the Centre's time-frame was aimed at catering to the dharam sansad.

Advising the court against getting dragged into needless controversy, senior counsel for the Babari Masjid Action Committee, Mr Rajeev Dhawan, said that the supporters of the government were pressuring it, and in turn the government was trying to pressure the court. The Chief Justice asserted that the court would never be pressurised.

Senior counsel, Mr Siddhartha Shankar Ray, who is appearing in the crucial title suit before the Allahabad High Court, informed the bench of the status and progress being made in that judicial action. Things were moving, he said, and he saw no need for the Supreme Court to opine on the status of the acquired land at this juncture. In fact the initial order of 1994 had settled that, Mr Ray said.

Would the VHP publicly state that it would abide the High Court verdict in the title suit, as the Wakf Board had declared, Mr Ray asked.

There was no response from VHP's counsel, Mr B Mishra, who earlier had spoken of his organisation being "much maligned" and having "to answer the masses who are devotees of Lord Ram." He pleaded for an early hearing as did counsel for the UP government.

Constitution Bench to study VHP stand

NEW DELHI, Feb. 21. — The locus standi of the VHP on the dispute over the building of a Ram Mandir in Ayodhya will be among the issues to be placed before the five-member Constitution Bench. The Supreme Court today included an application from the Raj Rajeshwari Sita Ram Trust which claimed to be the "original owners" of that land. Its counsel told the court today that "the VHP does not own an inch" of the land.

In another development, the VHP's working president, Mr Ashok Singhal, claimed there was "clinching evidence" to prove the existence of a temple beneath the disputed site where the Babari Masjid stood till it was demolished on December 1992. This statement came a day after the Prime Minister told a rally in Himachal Pradesh that he believed that a temple had existed at the disputed site in Ayodhya. — SNS

AYODHYA:

THE STATESMAN

22 FEB 2003

The apex court's Ayodhya burden

HD-10 19/2

By Harish Khare

The Judiciary's obligation is to summon the wise words and the commensurate constitutional innovations to re-enforce the sanctity and legitimacy of the rule of law.

THE AYODHYA ball has once again landed in the Judiciary's court. Rather, the Ayodhya ball has been lobbed before the apex court's Constitution Bench by a Central Government that wavers between political cleverness and constitutional timidity. Because of the Vajpayee Government's obsession with unprincipledness, the Supreme Court is about to be tested, just as most other constitutional institutions were tested in recent years and mercifully stood their ground. The long and short of the Government's Ayodhya application before the Supreme Court (scheduled to be taken up on February 21) is that the court is being asked to provide aid and comfort to those who have no faith in democratic values or the rule of law. The Government tried the same trick last year and got a well-deserved judicial rebuff.

Their Lordships can be trusted to see through the Government's political cunning as well as through the VHP's propaganda that the so-called "undisputed" land belonged to it. Though technically the VHP is not a party in the legal dispute before the court, its leaders have arrogated to themselves the right to insist on how the law of the land would have to conform to their "feelings", supposedly anchored in their "faith". But the VHP's long record of bluff and bluster need not detain the Judiciary; it is the Vajpayee Government's abuse of its position (as a neutral enforcer of the law) that their Lordships would be duty bound to dis-reward.

The Vajpayee Government's opponents have accused it of going to the Supreme Court purely with an eye on the electoral benefits in the coming Assembly elections. This is a matter between the BJP and its rivals; the Judiciary cannot and should not be concerned with this or that political party's manoeuvres, except taking precaution against blatant exploitation of judicial prestige. But it should be obvious to one and all — not excluding those in the judicial fraternity — that the Vajpayee Government's legal tactics are in response to the calibrated pressure mounted by the VHP. The Government in fact did not have to wait for the President to read his address to the joint session of Parliament before appealing to the Judiciary to "expedite" the Ayodhya dispute. If the Government was sincere in an early resolution of the dispute, it could have made the same plea before the Supreme Court anytime earlier than February 5/6; it certainly was aware that the so-called Dharam Sansad was scheduled to meet in the last week of February 2003. The Government is also not unaware of the VHP's deliberate reluctance to state publicly that it would abide by the judicial verdict in the Ayodhya matter.

STATECRAFT

Yet, the Government has invoked the Judiciary on the eve of the Dharam Sansad in the hope that the Lordships would pull its chestnuts out of the Ayodhya fire. May be after the Gujarat verdict, the Vajpayee establishment is genuinely scared of the VHP's capacity to work up the mobs; may be the BJP-RSS crowd is unwilling to risk the displeasure of the "revered" sadhus and sants. Whatever the Government's fears and whatever the VHP's calculations, the Judiciary's obligation is clear and unambiguous.

This obligation is to summon the wise words and the commensurate constitutional innovations to re-enforce the sanctity and legitimacy of the rule of law in this ancient land. The obligation becomes even more urgent because the present phase of the Ayodhya imbroglio is characterised by an aggressive assertion of the power of "jan shakti". This mythical "jan shakti" is asserted to be superior to the "raj shakti". And, of course, there is a thinly disguised threat that the potency of this "jan shakti" can always be demonstrated by trishul-rattling violent mobs in the streets. This is the crux of the current application of surrender the Vajpayee Government has made before the Supreme Court.

It is possible to argue that if the VHP and other self-appointed guardians of the "Hindus" are so unwilling to submit themselves to the Judiciary and its verdicts, they are only following the equally unwholesome precedent set by the Muslim leadership in the wake of the Shah Bano case; if Muslims "mobs" could unnerve a Prime Minister who had more than 400 seats in the Lok Sabha why should Hindu "mobs" not stampede a Prime Minister who presides over at best a wobbly coalition? If the Congress could practice duplicity and timidity why deny the BJP a similar shot?

This is a politician's argument; the judicial functionaries have an obligation to rise above the partisanship or passions of the moment. Nor can the apex court worry too much about the Prime Minister's vulnerability.

Apart from this crowding in by the mobs, the institutions of law have been coming under pressure from another source, which can perhaps be called the Mahatma tradition. Ever since the Indian republic was founded, the legitimate authority had to contend with those who claimed to speak in a "moral idiom". The "moral voices" have a tendency to elevate themselves above the procedural exactness of legal institutions.

A Jayaprakash Narayan would arrogate to himself the right to demand that the elected Government in Bihar be dismissed; a Morarji Desai would go on a fast unto death, insisting that the Gujarat Assembly be dissolved. Those were the pre-Bommai case days; the republic was still to settle down to constitutional habits and legal constraints. After 50 years, there is no need for the Judiciary to give the time of the day to anyone who assumes immunity from the purview of the law of the land.

We are not yet finished with the Mahatma tradition; the RSS, for instance, continues to exercise the right — and is conceded the right — to dictate to the democratically elected Government and its Prime Minister how to behave. This extra-constitutionalism can have no place in a polity based on the rule of law.

Yet, it can be asked that if the Judiciary has the sacred obligation to uphold the Constitution, what about the duty of the law (and its institutions and officers) to help resolve — and, if possible, dissolve — conflicts in society? There is some merit in castigating the Judiciary for taking so long in deciding the legal dispute about Ayodhya/Babri Masjid provenance. Ironically, the charge is made by those very people who use the delay-prone legal mechanism (such as the selective use of inquiry commissions or filibustering the CBI probe in the Ayodhya case) for partisan purposes. Nonetheless, it is unfair to single out judicial procrastination only in the case of the Ayodhya dispute.

Resolution and dissolution of conflicts in society is the responsibility of the politicians, who double as administrators, parliamentarians and occasionally as statesmen. The Judiciary can only be expected to ensure that the legal playing field was levelled, and that the state stayed firmly in the neutral role; inversely, the Judiciary is enjoined upon to ensure that those who manage to capture state power do not misuse their legitimate authority. It is, then, the burden of the court to rescue civil society and the polity from destructive narrow-mindedness. The issue at stake goes beyond the Vajpayee Government's dilemma vis-a-vis the "mandir crowd". As a civil society we all have to be tutored in the logic and restraints of the rule of the law; past mistakes, deliberate or unconscious, cannot give a licence to be undisciplined or unlawful. The crux of the matter before the Judiciary is to insulate the polity from the kings who are unable or unwilling to live up to the canons of their raj dharma.

THE HINDU 19 FEB 2003

A quota-driven polity

By Neera Chandhoke

Social justice, which in principle should mean redistribution of resources, has been narrowed down to signify just one thing — quotas.

IN THE course of a field trip to one of Delhi's Jhuggi Jhopri colonies, our research team interviewed people belonging to the Bhil tribe. In response to questions on the specific problems faced by the residents of the area, we were repeatedly requested to support the Bhils in their endeavours to acquire a certificate which would state that they belong to a scheduled tribe. This demand was a little puzzling considering that this particular settlement confronts enormous problems in terms of lack of access to water, electricity, sanitation, schools and health facilities.

Yet, the only problem identified by the Pradhan of the area was that no politician had helped them get such a certificate. When we asked the members why they were so keen to acquire the certificate, the answer was simply this: their children would be able to get into school, and adults would be able to get jobs. In short, the members of the group would be able to claim reservation. In fact, the very idea that the children should go to school depended on the extension of a quota.

Elections to the Delhi Assembly are around the corner, and undoubtedly some canny politician will promise that these people get such a certificate in return for the 2,000 votes of the settlement. Politicians after all excel in choosing soft options — quotas, instead of water and sanitation.

However, the demand for reservation from a people, who otherwise live in subhuman conditions, raises some troublesome issues. For one, it appears that reservation has increasingly emerged as a mantra for the instant redemption of the poor and disprivileged. And this group is not alone in this, across the board various groups are asking for quotas instead of basic amenities for themselves.

But will reservation help the children of this particular settlement acquire a decent education? These children cannot bathe because there is no water; they cannot study because there are no electricity connections; they cannot afford clothing because they are poor, and they cannot enjoy good health because they live amidst filthy open drains. However, instead of considering that ordinary people are entitled to those basic goods that allow them to live a decent life, politicians take the easy way out and grant a one per cent or two per cent reservation in schools and jobs in the Government, in return for votes. In turn, the poor demand what seems to them possible and probable — quotas.

It is precisely this quota-driven politics of our country that highlights the problem with reservation as a soft option. There is nothing wrong with reservation. Reservation is an integral part of the norm of equality, which prescribes that the doubly disprivileged be given access to supportive measures that the affluent and upper caste sections of society do not require. But there certainly are definite problems with the policy of reservation as practised in the country to date.

Reservation has become a surrogate for other substantive measures that add up to social justice such as access to land rights particularly for women, primary education, health, income, sanitation and a decent standard of living. After all, the adoption of these measures requires the taking of hard decisions because they involve a redistribution of resources. But our political class would rather choose the soft option of granting reservations in the educational system and in the public sector, without considering that reservations require back up measures such as access to a minimum income, or health. Reservation in short has become a substitute for meaningful policy decisions that should lead to social justice. Conversely, social justice, which in principle should mean redistribution of resources, has been narrowed down to signify just one thing — quotas. But note that this leaves the deeply inegalitarian and hierarchical structuring of our society untouched. The affluent continue to enjoy a standard of living that is ostentatious and vulgar, and the demands of the poor are fobbed off with the promise of more and more reservation.

The somewhat casual manner in which the reservation policy has been implemented has had four unhealthy side-effects. First, reservation pitting group against group has created a competitive polity, instead of one where marginalised groups come together in solidarity against oppression. Second, politicians, who are in a democracy supposed to be nothing more than the representatives of the people, are transformed into patrons, even potentates, even as they, particularly during election time, recklessly promise reservation after reservation to groups. This, it is more than obvious, does not lead to a democratic polity but to a hierarchical one where patron-client relations substitute for relationships of equality. Third, people come to demand reservation (instead of social justice) not as a matter of right but as a matter of charity. People are not only rendered recipients of benevolence; they become dependent on the will of this or that political party. The basic principle of democracy — equality — is compromised.

Fourth, and this brings me back to the point mentioned above. Consider that the demand for or the grant of reservation need not, indeed cannot, modify the distribution of resources in our society at all. We can give quotas *ad infinitum*, but this will not affect the kind of benefits that the well-off enjoy in a liberalised India. The basic structure of inequality remains unmodified. It is precisely here that the differences between the practice of reservation and the principle of egalitarianism — to which reservation belongs conceptually — emerge sharply. Egalitarianism or radical equality presumes that every citizen has an equal prepolitical right to the resources of a country. If the way politics is practised makes for inequality, then this should be resisted by another kind of politics that calls for the reorganisation of society along egalitarian lines. This in turn demands redistribution of resources and not merely reservation as a substitute for other hard policy decisions. But demands for the reorganisation of the polity should be made from a position of strength — that of the right to equal resources — and not from a position of a recipient of charity. For, charity diminishes the status of individuals unbearably.

Further, radical equality, as opposed to reservation, is a relational concept. The poor should not be poor but the rich should also not be rich beyond belief. No matter how many quotas we give to the impoverished, the rich will still continue to enjoy far more benefits than are due to them. But if the gap between classes is not remedied, inequality is reproduced generation after generation and no amount of reservation will modify it or qualify it.

Of course, no egalitarian suggests that everyone should get an equal income. People must be rewarded for their hard work, their entrepreneurship, and their skills. All that egalitarians demand is that people who have been historically disprivileged should get the same chance as the privileged to demonstrate their capacity for hard work, their entrepreneurship and their skills. But this cannot happen unless they are given some amount of resources that allow them a headstart in life. It follows that if certain castes or classes have been historically disprivileged they should be given greater resources. But this is not to compensate them for 'misfortune' or 'brute luck'. It is because everyone has a right to an equal share in the collective resources of a society. This is called egalitarianism, which demands much more than just reservation. To stop just at reservation, to make it the sole axis of policies, is to vulgarise both egalitarianism and democracy.

SC rejects govt's plea on Ayodhya

By Rakesh Bhatnagar
TIMES NEWS NETWORK

New Delhi: The Centre suffered a jolt in the supreme court on Thursday when it rejected its plea for early hearing of an application seeking vacation of the March 13, 2002 order banning any kind of religious activity on the 77 acres of land acquired by the Union government after the demolition of the disputed structure 11 years ago.

When solicitor-general Kirit N. Raval urged a bench of Chief Justice V.N. Khare, Justices S.P. Sinha and A.R. Lakshamanan to hear the government application at an early date, the bench inquired when the matter would be heard. When told that it would be heard on February 21, the judges said the government should come only on that date.

The Centre was apparently keen on an early hearing in view of the VHP- organised Dharam Sansad, scheduled for February 22-23, to chalk out plans for the temple's construction in case the government failed to hand over the 'undisputed' land to it.

The court had on March 13 last year passed the order banning religious activity on the 'undisputed' land on a petition filed by Mohammed Aslam Bhure. The court order had been issued in view of the massive influx of pro-temple activists in Ayodhya on the eve of the controversial VHP-organised shiladaan ceremony.

Apprehending a law and order problem, which had arisen earlier as well whenever any such ceremony had been organised in Ayodhya, the court felt it was imperative to ban "any kind of religious activity, including shiladaan", on the acquired 'undisputed' land. The Centre now says that Mr Bhure's plea has become infructuous as peace prevails in the area.

But Mr Bhure has challenged the plea saying that in 1994, the court had made it clear that "it (acquired land) cannot be used for any anti-secular purpose".

14 FEB 2003 THE TIMES OF INDIA

Activist Governors

By Rajeev Dhavan

The only kind of activism that a Governor is entitled to is a neutral constitutional activism of doing his job without fear or favour.

AT THE recent Conference of Governors, both the President and the Prime Minister of India supported the call for "activist Governors". Do we really want this? Can Governors be trusted to remain within the activism of the Constitution? The Governors of British India were the 'hit men' of the Raj. The Constituent Assembly had toyed with the idea of activating Governors by making the post a responsible activist institution. But, the idea of elected Governors was abandoned so that directly 'elected' Governors would not vie for prominence against indirectly selected Chief Ministers or Prime Ministers responsible to the Lok Sabha or the Vidhan Sabha. But, except during the Nehru era — and, even then, not totally — the Governor's office has become a political office. During Indira Gandhi's era many Governors ran amok — holding a Congress brief for the party in power in New Delhi rather than objectively discharging their constitutional powers and responsibilities.

The Bhagwan Sahay Committee (1971) sustained this charge; and, the Sarkaria Committee (1988) openly stated that "the role of the Governor has emerged as one of the key issues in Union-State relations". Chapter IV of the Sarkaria Commission Report makes rewarding reading. Not one of the recommendations of the report has been followed. One important recommendation was that people from the party in power should not be appointed to the office of Governor. Today, the BJP has no qualms about appointing party people to gubernatorial posts. That this sustains — but intensifies — an earlier trend hardly does the issue justice. The Constitution Commission (2002) echoed what the Sarkaria Commission said — stressing the role of the Governor as a "detached figure... not too intimately connected with the local politics of the State and not being a person who has taken too great a part in politics". All this good advice is violated.

Now, all of a sudden there is a call for 'activist Governors'. The President probably meant this in the spirit that Governors should neutrally involve themselves in issues of social justice. But, the same may not be what either the Prime Minister or his party have in mind — since the party faithful and their followers have been seconded to many Governors' posts. But what is significant is the timing of this new BJP policy of wanting activist Governors.

Two recent instances come to mind straightaway which have to be painted against the broader conspectus of political opportunism. The first is that of the Gujarat Governor, S. S. Bhandari — with his strong BJP connections. After the carnage in Gujarat, July 2002 the Chief Minister, Narendra Modi, decided to rule without being accountable to the Legislature. He, therefore, decided to dissolve the Legislature. Under these circumstances, the duty of the Governor was to refuse such a dissolution. This does not normally happen; and, has not happened in England since 1924. But the rules laid down through constitutional practice are that if (a) there is a viable Legislature (b) capable of doing its job and (c) with no other disastrous financial or other results, the Legislature should continue. This is one of the rare areas where the Governor is not just a puppet or figurehead, but has to exercise his discretion.

LAW AND SOCIETY

The Constitution gives the Governor the power to get information from his Chief Minister (Article 167) so that he too can guide his Chief Minister; and where necessary prevent an abuse of the Constitution. Instead, the Governor of Gujarat was emboldened to not only subvert democratic accountability to the Legislature but also precipitate a constitutional crisis which led to a reference to the Supreme Court. In doing this, Mr. Modi became an unaccountable Chief Minister to an administration which defied accountability. If the request for dissolving the Assembly had been denied, Mr. Modi would have been obliged to summon the Legislature. Had Mr. Modi refused, a situation would have arisen wherein President's Rule would have had to be imposed. Indeed, a situation had already arisen where Gujarat was being run contrary to the secular principles of the Constitution; and law and order had broken down in certain areas. This was not just the view of various private reports but also that of the National Human Rights Commission. It did not require an activist Governor to recommend President's Rule when, perhaps, this was one occasion in India's history when it might have been necessary to do so. In fact, the Governor did not even consider this. That this influenced future political events cannot evade causal connection. The only kind of activism that a Governor is entitled to is a neutral constitutional activism of doing his job without fear or favour.

This leads to the second example of the Rajasthan Governor, Ashuman Singh, whose decisions taken during December 2002-January 2003 represent another kind of the "new activism" which has led to some accusations that his behaviour has led to the creation of a new kind of 'Hindutva' Governor who has saffronised his office. In December 2002, it was stated that there would be a Ram Katha in Jaipur from January 4-12, 2003. This is part of the entitlement of every person who wants to do a Ram Katha. But, what happened next was alarming not just to critics of the BJP; but, perforce, even to some of the party's allies in office at the Centre. An invitation was circulated which carried a picture of a tri-colour India. Inset was a saffron-painted Rajasthan. Inside the 'saffron painted' Rajasthan was the photograph of Mr. Anshuman Singh. A fair inference was that a 'saffron' Governor reigned in a 'saffron' State in a tri-colour India. But, the card went further. Both the Governor and his wife extended a cordial welcome to all participants at the Ram Katha. It did not stop there. Further inquiries were routed to the Governor's ADC (aide-de-camp). The Governor took the view that this represented no more than his sending Id or Christmas greetings or attending a *qawali* session. But such an explanation is facile? Would it be all right for a Chief Minister to invite people to a Muslim function showing a map of India coloured in Islamic green with a crescent moon? It is no one's case that under our concept of benign secularism equal support can be given to all faiths. We do not follow the strict neutrality principle of the total separation of religion from the state. But, depicting a Governor in a 'saffron State' in a tri-colour India contrives an overtly political message.

What happened next was no less interesting. The Rajasthan Chief Minister told some groups who met him that he did not approve of the Governor's actions. Allegedly, the Governor was aware of the views of the Chief Minister which constitute the aid and advice which Governors are obliged to follow. The Governor's actions may fulfil his own possible agenda to be reappointed in Rajasthan. It certainly fulfils the BJP's agenda in the coming elections in Rajasthan. Has the Governor helped that agenda? He most certainly has.

This brings us back to the call for activist Governors. What we need is more neutral, less political and — in that context — less activist Governors. This constitutional post requires greater scrutiny and oversight over it. Since the Governor is appointed by the President on the advice of the Prime Minister, such posts should be within the scrutiny of Parliament. Appointments should be made after due consultation of a parliamentary Committee which should exercise oversight over the post. This is not to deny the Governor independence or his full term. But, such a Committee would be a forum for complaint. Besides, the Governor should know that he is not an unelected law unto himself; but there are others watching him.

THE HINDU

'PARTICIPATE IN DEVELOPMENT PROCESS'

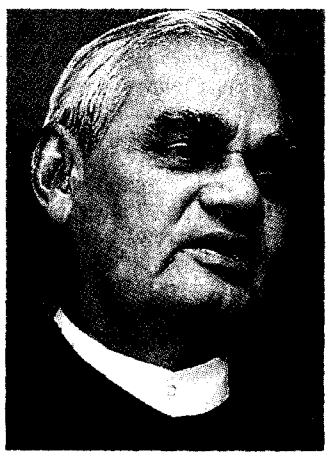
Vajpayee for 'pro-active' role by Governors

By Neena Vyas

NEW DELHI, JAN. 12. For the first time since Independence, a clear road-map has been drawn up to transform the country into a "developed India" and all Governors must play a "pro-active role" with a "total sense of partnership" in this endeavour, the Prime Minister, Atal Behari Vajpayee, said today, addressing the concluding session of the two-day Governors' Conference at the Rashtrapati Bhavan here.

In the existing constitutional set-up, it was possible for the Governors to become "full-fledged" participants in the development process. Resources would not be a constraint — instead, what was needed was effective and purposeful implementation of development projects, Mr. Vajpayee said.

Making the country a developed India by 2020 has been one of the ideas repeatedly articulated by the President, A.P.J. Abdul Kalam.



And now, it seems the Prime Minister has taken it up, while pointing out that the goal has found a mention in the Tenth Plan document.

'Year of action'

Dr. Kalam made a computer presentation today on his vision of a developed India and wanted 2003 to be a "year of action" towards achieving that goal.

A discussion followed in which the Governors said that much would depend on the policies being efficiently implemented on the ground. Transparency in governance, a forward-looking youth policy, employment generation schemes and meaningful development schemes were some aspects which they emphasised.

Over the two days, several important issues were discussed — from unemployment, insurgency, the role of universities, terrorism, Centre-State relations and illegal immigration to problems in the criminal justice system. Twenty-eight Governors and two Lieutenant Governors participated in the discussions, which were also attended by the Vice-President, Bhairon Singh Shekhawat, and several Cabinet Ministers.

Apparently, many Governors today called for Central legislation, clearly defining their role as Chancellors of universities, a post occupied by them by virtue of their office and normally seen as decorative. The view was that a university was a place where opportunity was offered to fire the imagination of the youth with the vision of a developed India. The fact that some of them asked for legislation on this demonstrated that they wanted to play an active role in these institutes of higher learning.

The Human Resource Development Minister, Murli Manohar Joshi, responded rather guardedly by saying that the Government would take measures in this regard, but it would have to be done "without affecting the autonomous functioning of universities."

Mr. Shekhawat expressed concern over population explosion and the PDS. He was also worried about the collapse of the criminal justice system as a result of the piling up of cases and delay in the delivery of justice.

THE HINDU

Governors could do more: Kalam

By Our Special Correspondent

NEW DELHI, JAN. 11. The President, A.P.J. Abdul Kalam, has called upon Governors to "provide sage advice beyond any political considerations to the people and the Government".

Inaugurating the Governors' Conference at the Rashtrapati Bhavan this morning, he described the Governor's role as that of "a noble healer". He wanted them to "give leadership to move the development process with fast interface between the Centre and the States".

Besides all the 28 Governors and three Lt. Governors, the two-day meet is being attended by the Prime Minister, the Deputy Prime Minister and other senior Ministers as well as by the Cabinet Secretary and the Union Home Secretary.

The burden of the President's exhortation was that without becoming a rival centre of power or authority, the Governors could still be more than ornamental figures, confined to the Raj Bhavans. He said he was "convinced of the imperative need for the Governors of the States concerned to reach the grassroots to understand the problems and focus them to the State Government concerned and sometimes the Central Government for fast action to remove the sufferings of the common people".

Whether it be the issues of insurgency, communal tension or networking of rivers, the Governors could "play a salutary role in creating a climate of consensus" among the States and the people. Also, the Governor had to play a key role in creating harmony between the Centre and the States. Above all, the "Governors have a positive role to play to bring about unity of minds".

After the President's opening remarks, the Governors settled down for working sessions. The morning session was devoted to "an integrated approach to combating militancy and insurgency" while the post-lunch session's theme was "appraisal of the law and order situation, and the role of the Governor in communal harmony". Between the two sessions, the Vice-President, Bhairon Singh Shekhawat, hosted lunch for the Governors at the Hyderabad House.

Whereas the Governors of Chattisgarh, Jharkhand and Andhra Pradesh talked of the naxalite-related violence, the Jammu and Kashmir Governor, G.C. Saxena, dwelt on the post-election situation. He told his fellow-Governors that the people who had participated in the elections in large numbers did so because they were keen to secure governance in key developmental areas. Mr. Saxena said the new Government was earnestly addressing itself to problems of education, housing, etc.. He also cited relative figures of insurgency-related violence to show that the "healing-touch" policy was working.

The Governors from the Northeast were also heard with attention, especially in the context of the on-going peace process. The Nagaland Governor, Shyamal Dutt, welcomed the negotiations with the NSCN (I-M) leaders, whereas the Meghalaya Governor suggested the creation of a National Integration Council at the State-level, to be headed by the Governor. The Assam Governor, S.K. Sinha, talked of the unresolved problem of the illegal immigrants from Bangladesh and how the insurgents still managed to get military support from outside sources.

The Deputy Prime Minister, L.K. Advani, responded to these concerns at the end of the second session. He said he deemed their interventions as "guidance" rather than observations made during a parliamentary debate. Mr. Advani cataloged the areas of concerns and successes in matter of internal security. Expressing satisfaction over the "free and fair" elections in Jammu and Kashmir, he promised help to Tamil Nadu and Karnataka in nabbing the sandalwood smuggler, Veerappan. Besides, Mr. Advani shared with the Governors the results of the recent conference of the Chief Secretaries and the Directors-General of Police.

The President, A.P.J. Abdul Kalam, addressing the Governors' Conference at the Rashtrapati Bhavan in New Delhi on Saturday. Listening to him are the Vice-President, Bhairon Singh Shekhawat, and the Prime Minister, A.B. Vajpayee. — Photo: V.V. Krishnan

TAMIL NADU / 'SITUATION VOLATILE' IN TIRUNELVELI

Conversion law causes caste polarisation

By P. Sudhakar

TIRUNELVELI, JAN. 4. Besides creating a wedge among religions, the recently-enacted anti-conversion law has provided succour to another divisive trend — caste polarisation which virtually ruined the peace and prosperity in the southern part of Tamil Nadu in the past. For, leaders of caste Hindus, who have maintained bitter enmity with Dalits for generations, have started projecting themselves as the 'custodian' of this controversial legislation.

An indication of the precarious polarisation is a Hindu revival conference to be conducted here on Sunday by the All-India Mooventhar Munnetra Kazhagam, a predominantly Thevar outfit. Leaders of Hindu outfits and vocal supporters of the law are expected to participate. To be precise, the Thevars in the south are stridently supporting the law as the Dalits and their organisations, Dalits Panthers of India and Puthiya Tamizhagam, are vehemently opposing the measure for reasons of oppression practised against them for decades.

In a bid to rediscover their self-respect, the Dalits, who suffered a lot at the hands of the caste Hindus in Tirunelveli and Tuticorin districts, embraced either Islam or Christianity. This created ripples across the country in general and in Tamil Nadu in particular.

The mass conversions, which took place at Meenakshipuram in Tirunelveli district, formed the epicentre of the issue, which prompted the then BJP MP, Atal Behari Vajpayee, to rush to this small Dalit hamlet near Courtallam to stop the exercise. However, his mission proved ineffective, as he could not address the main grievance of the Dalits — casteist oppression and not cash.

"Tirunelveli district witnessed the worst clashes in the past as the Dalits were ill-treated, especially by the Thevars, on several occasions. When the Dalits paid them back in their own coin, the district lost its tranquillity and several lives too. Now, the Thevars have joined hands with the fundamentalist groups who are stoutly supporting the anti-conversion law. While the Thevars want to suppress the Dalits, the fanatics have succeeded in preventing them from embracing other religions. We are afraid that the district is sitting on a powerful explosive fitted with a timer. Now the fundamentalists are fostering enmity once again," said a professor of the Manonmaniam Sundaranar University.

A top police official here admitted that the Dalits could not enter some of the temples in the district and participate in rituals such as 'Pookkuzhi' (fire-walking) during festivals.

"If leaders of these fundamentalist groups work overtime for Dalit equality also, there will not be any conversion. But the leaders of the religious groups have preferred to join hands with the oppressive forces down south, and this has only strengthened the argument of the Dalits that they are forced to embrace other faiths because they have to put up with untouchability and inequality when they remain Hindus. And this dangerous trend will only undermine the harmony of society," says the police official.

Meanwhile, the police, now on high alert, were said to have sent a report to the State Government, explaining the situation prevailing in the district after the enactment of the anti-conversion law.

"We have made it clear that the situation is volatile and if the Government continues to allow the religious leaders to share the dais with the oppressive forces, it could lead to fresh clashes in the south."

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