

“Necessity of Evolving a Swadeshi System in Administration of Justice”

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PART - I

SALIENT ASPECTS OF BHARATIYA CULTURAL VALUES AND LEGAL, JUDICIAL AND CONSTITUTIONAL SYSTEM **[VYAVAHARA DHARMA AND RAJA DHARMA]**

I commence this lecture by quoting the important statement made by Bhagwati, J of the Supreme Court in his judgment in Pradeep Kumar Jain Vs. Union of India [AIR 1984 SC 1420] which reads:-

It is an interesting fact of history that India was forged into a nation neither on account of common language nor on account of the continued existence of a single political regime over its territories but on account of a common culture evolved over the centuries. It is cultural unity something more fundamental and enduring than any other bond which may unite the people of a country together which has welded the

people of this country into a nation [AIR 1984 SC 1420].

History has shown that despite the fact that our country was under foreigner's rule for some time. Culturally Bharat remained intact as stated by the Supreme Court of India. Even during that period, there were five independent States namely (1) Mysore, (2) Travancore, (3) Cochin, (4) Gwalior and (5) Baroda, which were ruled by Hindu kings who followed Rajadharma as also our legal and judicial system. Moreover, the love for the Country and its people and the deep sense of patriotism remained strong.

It is on account of this feeling that the banner of revolt against foreign rule was raised, repeatedly, and ultimately the nation was successful in overthrowing it. As we all know just two slogans "VANDE MATARAM" and "BHARAT MATA KI JAI" (SALUTATION TO MOTHER INDIA) inspired lakhs of youths to sacrifice their all during the freedom struggle and many became martyrs.

The freedom struggle was so strong, turbulent and countrywide that it was no longer possible for the Britishers to continue to rule. Therefore, Constituent Assembly was formed for the purpose of declaring Indian independence. Dr. Rajendra Prasad was elected as permanent Chairman. Jawaharlal Nehru moved the objective resolution on 13th December 1946 for transferring the power to Indians and was passed. Significant portion of the resolution reads:-

8. "This ancient land attains its rightful and honoured place in the world and makes its full and willing contribution to the promotion of world peace and the welfare of mankind".

Pursuant to the resolution, India became independent and sovereign State with effect from 15th August 1947.

It is the "Rashtra Dharma" of every child of Bharatmata which is the solid unbreakable foundation as pointed out by the Supreme Court of India and it is this culture which has welded the people of this Country into a Nation.

This intense feeling towards the motherland alone has preserved and protected our national unity. From this point of view, Bharat Mata should be the idol to be adored and worshipped by all the citizens and

singing in praise of her should be the common song to be sung by all the citizens. This is the 'Dharma' of every citizen of this country.

With this Preamble, I proceed to speak on the subject:-

I feel greatly honoured by the invitation extended to me by the High Court of Madhya Pradesh and the Madhya Pradesh Judicial Academy to deliver a lecture on any suitable subject on Saturday, the 11th November 2017.

I have accepted the invitation with great pleasure. I have selected the subject "**Necessity of Evolving a Swadeshi System of Administration of Justice**", for the lecture. Having regard to the fact that I have authored a book titled "Legal and Constitutional History of India" and also my work experience as a Member of Parliament which has been published under the title "Our Parliament", I consider it appropriate to make my lecture in two parts as follows:-

PART - I	<u>Salient Aspects of Bharatiya Cultural Values and Legal, Judicial and Constitutional System [Vyavahara Dharma and Raja Dharma]</u>
PART - II	<u>Necessity of Enacting a Uniform Law Regulating the Constitution and Organisation of all the High Courts and consequential Amendment to the Constitution of India.</u>

Origin of State and its purpose:-

The origin of the State (Rajya) as well as the office of the king and the evolving of Raja Dharma -the law conferring power on the king to maintain the rule of law and the directives for the exercise of power -has been explained as early as in Shantiparva of the Mahabharata. After the devastating war of Kurukshetra between the Pandavas and the Kauravas in which the former came out victorious, Yudhistira the eldest of the Pandava brothers requested Bhishma, who was the master of Rajadharma to expound the same to him and he did so. The Shanthiparva of Mahabharata incorporates Bhishma's authoritative exposition of the origin and purpose of the state, the rule of law, the institution of kingship and the duties and the powers of the king. Great stress is laid on the personal character and qualities which a king in whom vast political power is vested must possess for the proper and effective discharge of his functions. Rajadharma, so clearly laid out is vast like an ocean, consists of invaluable and eternal principles worthy of emulation under any system of polity and by all persons exercising political power. The Mahabharata discourse on the topic of Rajadharma discloses that in the very early periods of civilization in this country great importance was attached to Dharma and it was self-imposed by individuals. Consequently, everyone was acting according to Dharma and there was no necessity of any authority to compel obedience to the laws. The existence of such an ideal ' Stateless society' is graphically described in the following Samskrit shloka:

नैव राज्यं न राजाऽऽसीन्न दण्डो न च दाण्डिकः ।
धर्मेणैव प्रजाः सर्वा रक्षन्ति स्म परस्परम् ॥

There was neither kingdom nor the king, neither punishment nor the guilty to be punished. People were acting according to Dharma and thereby protecting one another. [Mahabharata Shanti Parva 54-14]

The above verse gives a clear picture of an ideal stateless society, which appears to have been in existence in the hoary past. Such a society was the most ideal one for the reason that every individual was acting according to 'Dharma' in view of the tremendous faith in Dharma and not out of any fear of being punished by a powerful superior authority like the state. Consequently, there was mutual cooperation and protection. The society was free from the evils arising from selfishness and exploitation by individuals. This sanction which enforced such implicit obedience to Dharma was the faith of the people in it as

also the fear of incurring divine displeasure if Dharma was disobeyed.

Description of territory of Bharat and basic ideals:-

Before speaking about the different aspects of our legal system, I consider it appropriate to refer to two important aspects. The first aspect is Patriotism which arises out of deep love and affection to our motherland which had the capacity to subjugate all differences based on varna, caste, religion or language of different classes of people who together constituted our Nation has been a powerful uniting factor. This feeling should be strengthened in order to make our Nation strong and invincible. Despite the existence of several religions in Bharat, strong foundation of patriotism had been laid down by our ancestors. The territorial integrity and the feeling of fraternity has been incorporated in the following verse of Vishnupurana which reads:

*उत्तरं यत् समुद्रस्य हिमाद्रेश्चैव दक्षिणम् ।
वर्षं तद्भारतं नाम भारती यत्र सन्ततिः ॥*

The Country which lies to the north of the seas and to the south of Himalayas, is Bharat, and the people of this Country are 'Bharateeyas'.

In his book "Fundamental Unity of India" (pp.1-31) Dr. Radha Kumud Mukherjee, the greatest Bharateeya historian of the 20th Century highlights this aspect. He says:

The name Bharata Varsha is not a mere geographical expression like the term 'India' having only a physical reference. It has a deep historical significance symbolising a fundamental unity.

The Rig- Veda, one of the oldest literary records of humanity, reveals conscious and fervent attempts made by the rishis, those profoundly wise organisers of Hindu polity and culture, to visualise the unity of their mother-country, nay, to transfigure mother earth into a living deity and enshrine her in the loving heart of the worshipper.

Thus, there has been a filial attachment between the territory of Bharat and the people living here. The attachment of an individual to his mother is the highest and she is the dearest,

such is also the attachment between the people of this country and the territory of Bharat. The emotional attachment is depicted in the following verse:

न मे वांछास्ति यशसि विद्वत्त्वे न च वा सुखे ।
 प्रभुत्वे नैव वा स्वर्गे मोक्षेऽप्यानंददायके ॥
 परं तु भारते जन्म मानवस्य च वा पशोः ।
 विहंगस्य च वा जन्तोः वृक्षपाषाणयोरपि ॥

I am not enamoured of fame, knowledge, luxuries of life, power, or heaven or Moksha, but my desire is to have rebirth in Bharat, as a human being or as an animal or as a bird, or as an insect or at least as a stone.

This is the same feeling one has in this country towards his mother expressed in the words "Even if I have seven rebirths let me have you as my mother". Probably emotional attachment cannot be placed higher than this.

The concept of love for Bharat as our 'Mathrubhumi' [motherland] among the people of this country is the very foundation of our Nation. This feeling makes every citizen patriotic and makes him remain loyal to the nation not only in its prosperity but also in its adversity and to dedicate himself to the service of the Nation and make great sacrifices for the welfare and happiness of the people. On this aspect Bharat has a glorious history.

Another unique method adopted to generate intense love, respect and sentiment towards this land has been to incorporate prayers addressed to holy rivers and places considered sacred which are spread in different parts of this vast Country. Through such education and imparting samskara to every child in every house and in educational institutions, love and respect to every part of motherland was sought to be ingrained in the hearts of all. Some of them are as below:-

Seven Mokshapuris:-

अयोध्या मथुरा माया काशी कांची अवन्तिका ।
 पूरी द्वारावती चैव सप्तैता मोक्षदायिकाः ॥

"Ayodhya, Mathura, Maya [Hardwar], Kashi, Kanchi, Avantika [Ujjain] Dwarakapuri are the seven most sacred places of pilgrimage.

Seven sacred rivers:-

गंगे च यमुने चैव गोदावरी सरस्वती ।
नर्मदे सिंधु कावेरि जलेस्मिन् सन्धिं करु ॥

"Ganga, Yamuna, Godavari, Saraswati, Narmada, Sindhu, Kaveri are the seven sacred rivers whose water I invoke into the water with which I am taking bath".

There is another shloka which praises the greatness of Bharat Mata and offering salutations to her, which reads:-

रत्नाकराघौतपदां हिमालयकिरीटिनीम् ।
ब्रह्मराजैरित्नाढ्यां वन्दे भारतमातरम् ॥

I salute Bharatmata whose feet is washed by 'Ratnakara Samudra' who wears the crown in the form of Himalaya mountains, who has given birth to innumerable 'Rajarishis' [kings ruling according to Dharma in a selfless manner] and Brahmarishis [men of profound spiritual knowledge].

At the time of commencement of education and thereafter every day before commencement of studies, a child was required to make the following prayer:-

नमस्ते शारदादेवि काश्मीरपुरवासिनि ।
त्वामहं प्रार्थये नित्यं विद्यां बुद्धिं च देहि मे ॥

"I salute the Goddess of learning Sharada whose abode is Kashmir and I pray her to bless me with knowledge".

The aforesaid verses are only illustrative and not exhaustive. There are innumerable such prayers in all the languages. These verses not only indicate the importance to learning and to the prayer given in our culture but also that Kashmir is part and parcel of Bharat in which "Sarvajna Peetha" [seat of all knowledge] had been established. It is recorded in history that Adi Shankaracharya was conferred with the honour of ascending the Sarvajna Peetha situated in Kashmir in view of his profound knowledge

Highest priority for Education:-

It is a matter of fact of our excellent history from times immemorial that highest importance was given to Vidya [Education].

However, it so happened that when our Constitution was drafted and approved by the Constituent Assembly, though several fundamental rights were included in Part-III of the Constitution, education did not find a place there, though it was included in the Directive Principles of State Policy. However, the question whether the education constitutes a fundamental right under the Constitution came up for consideration before a Constitution Bench of the Supreme Court. When large number of Writ Petitions were filed on this aspect, the matters were referred to a Constitution Bench of five judges in Unnikrishnan's case [1993 (1) SCC 645]. I had the opportunity of arguing for the petitioners in the said case. To the question asked by the Court that on what basis I was saying that education was a fundamental right, I submitted that one Samskrit shloka of Bhartruhari who flourished around 7th century would be sufficient to declare that education was a fundamental right. In support of my submission I referred to the following Samskrit Shloka of Bhartruhari, king of Ujjain in Neeti Shataka authored by him, which reads:-

विद्या नाम नरस्य रूपमधिकं प्रच्छन्नगुप्तं धनं
विद्या भोगकरी यशस्सुखकरी विद्या गुरुणां गुरुः ।
विद्या बंधुजनो विदेशगमने विद्या परा देवता
विद्या राजसु पूजिता न तु धनं विद्याविहीनः पशुः ॥

*Education is the special manifestation of man;
Education is the treasure which can be preserved without
fear of loss;
Education secures material pleasure, happiness and
fame;
Education is the teacher of the teacher;
Education is one's friend when one goes abroad
Education is God incarnate;
Education secures honour at the hands of the State,
not money;
A man without education is equal to animal' .*

The Constitution Bench of the Supreme Court held after quoting the above Samskrit shloka that what more was necessary to say that education was a fundamental right. Pursuant to the said judgment, education has become a fundamental right and Article 21-A was subsequently added by the Parliament making education a fundamental right by inserting Article 21-A by 86th

amendment Act of the Constitution as one of the fundamental rights. It reads:-

21-A **“Right to education:** The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine”

In fact as that Samskrit shloka written by Birthruhari in 7th Century indicates that “Vidya” [Education] has been given the highest place in Bharat from times immemorial.

Subject of National curriculum frame work for school education came up for consideration before the Supreme Court of India in Aruna Roy case [2002 (7) SCC 368, at pages 388 and 389]. In the said judgment the Supreme Court has referred to the report of S.B. Chawan Committee at para 29 of the judgment. Relevant portion is at page 389, para 10 of the recommendations of S.B. Chawan Committee which reads:-

It was generally felt that ours is a vast and diverse ancient country historically, geographically and socially. Traditions are different, the ways of thinking and living are also different. But there are certain common elements which unite the country in its diversity. This country has a long tradition. Here from ancient times, there have been great saints and thinkers from different religions and sects who have talked about some eternal values. These values are to be inculcated by our young generation. [para-6]

In ancient times in gurukulas, emphasis used to be primarily on building the character of a student. Today, right from the schools up to the professional colleges, emphasis is on acquiring techniques and not values. We seem to have forgotten that skills acquired on computers tend to become outdated after some time but values remain forever. In other words, the present-day education is nothing but an information transmission process. Our educational system aims at only information based knowledge and the holistic views turning the student into a perfect human being and a useful member of society has been completely set aside. Swami Vivekananda aptly said:-

‘Education is not the amount of information that is put in your brain and runs riot there, undigested, all your life. We must have life building, man-making, character making, assimilation of ideas. If education is identical with information, libraries are the greatest sages of the world and encyclopedias are rishis’.

Truth (satya), righteous conduct (dharma), peace (shanti), love (prem) and non-violence (ahimsa) are the core universal values which can be identified as the foundation stone on which the value based education programme can be built up. These five are indeed universal values and respectively represent the five domains of human personality – intellectual, physical, emotional, psychological and spiritual. They also are correspondingly correlated with the five major objectives of education, namely, knowledge, skill, balance, vision and identity’ [para-7 and 8]

Primary school stage is the period in a child’s life when the seed of value education can be implanted in his/her impressionable mind in a very subtle way. If this seed is nurtured by the capable hands of dedicated teachers in school, if they insert values at appropriate intervals during a child’s school life, it can be easily said that half the battle in building up national character has been won. [para - 9]

It is very essential that at the school level right from primary stage, deliberate, planned and sustained efforts are made to inculcate basic human values among the students. Values are best initiated by a mother to her small child under her tender care in the secure atmosphere of home. However, nowadays, children are enrolled in school as early as at the age of four. At this impressionable stage, values like respect for parents, elders and teachers, truth, punctuality, cleanliness and courtesy can be easily inculcated in small children. They can also be sensitized regarding gender equality”. [para-10]

In fact this is the real education that should be imparted to children at school and college level.

Important aspect of education in the real sense of the term means providing good Samskara to wit building of character. The expression Samskara has been explained by Sabara Bhashya thus:-

संस्कारो नाम स भवति यस्मिन् जाते पदार्थि भवति योग्यः कस्यचिदर्थस्य ।।

“Samskara is that process undergoing which a person or thing becomes fit for the purpose for which he or it is meant”. [Sabara Bhasya on Jaimini-III, Vol. I, p 338].

In fact the topic of moral degradation came up before Rajya Sabha on 27th July 2009. What I stated in my speech is in pages 27-28 of the book “Our Parliament”. It reads:

Discussion on Moral degradation:-

The problem of moral degradation among substantial number of youths by becoming victims of lust is so serious that it can be ignored only at the peril or disaster to the future of the Nation. That is the cause for raising discussion in question under Rule 177. The reason for this situation is that after struggle for freedom ended and we got the independence and when struggle for political power started, we totally disregarded the importance of moulding the character of our youth despite clear directives of our ancestors also Swamy Vivekananda and Mahatma Gandhi.

As early as in Taittiriyaopaniṣad, after the chapter on education (Shikshavalli), there is a description as to the measure of happiness of a human society.

युवा स्यात्साधु युवाऽध्यायकः ।
आशिष्ठो द्रदिष्ठो बलिष्ठः ।।
तस्येयं पृथिवी सर्वा वित्तस्य पूर्णा स्यात् ।
स एको मानुष आनन्दः ।।

Youth should be good in that they should be (1) learned, (2) of sterling character, (3) of robust health and resolute.

The number of youths of this description is the measure of happiness of a human society. The same directive was very forcefully declared by Swamy Vivekananda. He said that “Man-making and character building education should be imparted to the children and youth’.

Mahatma Gandhi in his letter dated 24-1-1922 published in Hindustan dated 16-8-1965 had warned that “unless character is

ingrained in individuals through education, independent India is sure to become tyranny of Rulers”.

Further, Article 39 contained the following directive.

“The State shall in particular, direct that its policy towards securing:

(f) that childhood and youth are protected as against the moral and material abandonment”.

We have neither included the necessary syllabus in National Educational Policy nor provided protection to children and youth against their losing their moral and material strength. It is here that the State has failed and the State is guilty of dereliction of duty.

In order to impress upon every individual as to how he should conduct himself in life is given in Taittiriyaopanishad at the end of Shikshavalli, (Ch. 1, Lesson-11) advice is given to the outgoing students after securing education. Excerpts from it are reproduced below, which give an idea about the good conduct expected from educated persons throughout their life.

सत्यं वद । धर्मं चर ।
 सत्यान्न प्रमदितव्यम् । धर्मान्न प्रमदितव्यम् ।
 मातृदेवो भव । पितृदेवो भव । आचार्यदेवो भव । अतिथिदेवो भव ।
 यान्यनवद्यानि कर्माणि । तानि सेवितव्यानि । नो इतराणि ।
 एष आदेशः । एष उपदेशः एतदनुशासनम् ।

Speak the truth; follow the prescribed conduct;
 Do not fail to pay attention to truth;
 Never fail to perform duty
 Do not disregard what is proper and good
 Treat your Mother, Father and Teacher as equal to God
 So also, treat your guest as God

Those acts that are irreproachable alone are to be performed, and not those that are forbidden
 This is the directive. This is the advice. This is the discipline to be observed throughout life [Taittiriyaopanishad]

A reading of every one of the directive given to students form inseparable part of Dharma and is highly inspiring and it

concludes with the statement that it is the advice (Upadehsa) and it is the directive (Adesha). It is not only a specific injunction to an outgoing student but also a direction to every human being. The observance of these directives is the duty of every human being, obedience to which protects the Human Rights of all. This is the concept and purpose of Bharatiya Education.

DUTY TOWARDS OTHERS:-

The unique method evolved by the great thinkers who moulded the civilization and culture of this land was to secure the rights to every individuals by creating a corresponding duty in other individuals. This was for the reason that they considered that sense of right always emanates from selfishness whereas the sense of duty always proceeds from selflessness.

In our culture and civilization, primary importance attached was to duty. Our ancestors established a duty based society in which the right given to an individual was the right to perform his duty. This position is declared in the following verse of the Bhagvadgita thus :-

कर्मण्येवाधिकारस्ते ।

Your right (adhikara) is to perform your duty

Therefore, various kinds of rights evolved became values of Bharatiya culture which were based on the duty of every individual towards other individuals. For example, the duty of parents towards their children, and the duty of sons and/or daughters, as the case may be, to maintain their parents in old

age, and the duty of teachers towards their students, the duty of students towards their teachers, the duty of every individual in a family towards other individuals in the family and other members of the concerned human society, the duty of the State towards citizens, the duty of the citizens towards the State were all created to protect the basic human rights. The creation of a duty in one individual necessarily resulted in the creation of a right in the other individual and in the protection of such a right.

Therefore, instead of making right as the foundation of social life and establishing a right based society, the ancient philosophers of this land preferred to establish a duty-based society, where **the right given to an individual is the right to perform his duty**. This fundamental approach to life has been clearly laid down and understood in the entire ancient literature. To illustrate, in Vishnupurana, there is a complete chapter devoted for defining the territorial boundaries as well as the basic philosophy of this Country. The importance given to duty in this land is emphasised in one of the verses therein, which reads:-

अत्रापि भारतं श्रेष्ठं जम्बूद्वीपे महामुने ।
यतो हि कर्मभूरेषा ततोऽन्या भोगभूमयः ॥

Among the various countries, Bharat is regarded as great because this is the land of duty in contradistinction to others which are lands of enjoyment, i.e., based on rights. [Courts of India, p-27].

Mahatma Gandhi eulogized this idealism in the following words:-

“India is to me the dearest country in the world, not because it is my country but because I have discovered the greatest goodness in it. Everything in India attracts me. It has everything that human being with the highest possible aspirations can want.

India is essentially Karmabhumi [land of duty] in contradistinction to Bhogabhumi [land of enjoyment]”. [My Picture of Free India, P-1].

What is the significance? The answer is extremely important. According to the culture evolved in this land, every one owes a duty towards others and by this method, the right of an individual was made part of the duty of other individuals.

Very rightly at the entry door of Rajya Sabha of the Parliament building, 45th verse of 18th Chapter of Bhagvadgita has been inscribed:-

स्वे स्वे कर्मण्यभिरतः संसिद्धिं लभते नरः ।

“By discharging whatever duties are entrusted to an individual, he succeeds in life”. [Bhagvadgeeta 18-45]

SUPREMACY OF DHARMA:-

'Dharma' is a Sanskrit expression of the widest import. There is no corresponding word in any other language. It would also be futile to attempt to give any definition of the word. It can only be explained. It has a wide variety of meanings. A few of them would enable us to understand the range of that expression. For instance, the word 'Dharma' is used to mean Justice (Nyaya), what is right in a given circumstance, moral values of life, pious obligations of individuals, righteous conduct in every sphere of activity, being helpful to other living beings, giving charity to individuals in need of it or to a public cause or alms to the needy, natural qualities or characteristics or properties of living beings and things, duty and law as also constitutional law.

The supreme position assigned to Dharma is incorporated in Taittiriyanopanishad as follows:-

धर्मो विश्वस्य जगतः प्रतिष्ठा ।
लोके धर्मिष्ठं प्रजा उपसर्पन्ति ।
धर्मेण पापमपनुदति ।
धर्मे सर्वं प्रतिष्ठितम् ।
तस्माद्धर्मं परमं वदन्ति ।

Dharma constitutes the foundation of all affairs in the World. People respect those who adhere to Dharma. Dharma insulates (man) against sinful thoughts. Everything in this world is founded on Dharma. Dharma therefore, is considered supreme. [Taittiriyanopanishad - Jnanasandhana Nirupanam - vide Sasvara Vedamantra p. 128]

Definition of Dharma [law]:-

तदेतत्-क्षत्रस्य क्षत्रं यद्धर्मः ।
तस्माद्धर्मात्परं नास्ति ।
अथो अबलीयान् बलीयांसमाशंसते धर्मेण ।
यथा राज्ञा एवम् ॥

The law (Dharma) is the king of kings. No one is superior to the law (Dharma) ; The law (Dharma) aided by the power of the king enables the weak to prevail over the strong. [Brihadaranyakopanishad 1-4-14] [Courts of India, p-27]

Commenting on the above provision. Dr. S. Radhakrishnan observes:

“Even kings are subordinate to Dharma, to the Rule of Law”.
[Principal Upanishads P-170]

Basic aspects of Dharma:-

As far as basic aspects of Dharma are concerned, they were clearly set out in Manu Smriti and Yajnavalkya Smriti as follows:-

वेदोऽखिलो धर्ममूलं स्मृतिशीले च तद्विदाम् ।
आचारश्चैव साधूनामात्मनस्तुष्टिरेव च ॥

Veda is the first source of Dharma. The expression by the Seers (Smritikaras), handed down from generation to generation by memory, the virtuous conduct of those who are well versed in the Vedas, and lastly, what is agreeable to the good conscience, are the other sources. [Manu Smriti II-6]

श्रुतिः स्मृतिः सदाचारः स्वस्य च प्रियमात्मनः ।
सम्यक्सङ्कल्पजः कामो धर्ममूलमिदं स्मृतम् ॥

The Vedas, the Smritis, good conduct or approved usage, what is agreeable to conscience proceeding from good intention, are the sources of law. [Yajnavalkya 1-7].

While Dharma touches on wide varieties of topics, the essence of Dharma is declared by the various literatures as indicated hereunder:-

अक्रोधः सत्यवचनं संविभागः क्षमा तथा ।
प्रजनः स्वेषु दारेषु शौचमद्रोह एव च ॥
आर्जवं भृत्यभरणं नवैते सार्ववर्णिकाः ।

"Being free from anger, (Akrodaha) sharing one's wealth with others, (Samvibhagaha) forgiveness, (Kshama) truthfulness, procreation of children from ones wife alone, purity (in mind, though and deed), (shoucham) not betraying the trust or confidence reposed, (Adrohaha) absence of enmity, maintaining the persons dependent on oneself, these are the nine rules of Dharma to be followed by persons belonging to all sections of society". [M.B. Shantiparva 60, 7-8]

अहिंसा सत्यमस्तयं शौचं इंद्रियनिग्रहः ।
एतं सामासिकं धर्मं चातुर्वर्ण्येऽब्रवीन्मनुः ॥

Ahimsa (non-violence), Satya (truthfulness), Asteya (not coveting the property of others), Shoucham (purity), and Indriyanigraha (control of senses) are in brief, the common Dharma for all the Varnas [Manu Smriti X-63] [Courts of India, p-31]

Five fundamental duties of the State:-

Having realized that existence of an authority to compel obedience to Dharma by the People was essential, ours the most ancient Nation evolved and developed the oldest legal, judicial and constitutional system in the World to wit **Vyavahara Dharma** and **Raja Dharma**. Fundamental duties of the State [rajya] headed by a King, Raja Dharma which is equal to our present Constitution is very meaningfully incorporated in Atrisamhita-28 thus:-

दुष्टस्य दण्डः सुजनस्य पूजा न्यायेन कोषस्य च संप्रवृद्धिः ।
अपक्षपातोऽर्थिषु राष्ट्ररक्षा पश्चैव यज्ञाः कथिता नृपाणाम् ॥

To punish the wicked, to honour (protect) the good, to enrich the treasury by just methods, to be impartial towards the litigants and to protect the kingdom -these are the five yajnas (selfless duties) to be performed by a king [State]. [L & CH p. 601]

In this Samskrit shloka of just two lines, the vast subject of Raja Dharma are briefly and clearly set out under the five heads. The most significant aspect is that they are described as five yajnas meaning thereby they are selfless duties. [L & CH, p. 606]

The propounders of Dharma shastras declared that the king (State) was absolutely necessary to maintain the society in a state of Dharma which was essential for the fulfillment of Artha and Kama of individuals. Rajadharmā, which laid down the Dharma of the Kings which is equivalent to present day Constitution, was paramount.

सर्वे धर्माः सोपधर्मास्त्रियाणां राज्ञो धर्मादिति वेदाच्छृणोमि ।
एवं धर्मान् राजधर्मेषु सर्वान् सर्वावस्थं संप्रलीनान् निबोध ॥

All Dharmās are merged in Rajadharmā, and it is therefore the Supreme Dharma. [Mahabharata Shantiparva Ch. 63, 24-25] [L & C.H p. 578]

Observance of Dharma a must for existence:-

धर्म एव हतो हन्ति धर्मो रक्षति रक्षितः ।
तस्माद्धर्मो न हन्तव्यो मा नो धर्मो हतोऽवधीत् ॥

Dharma protects those who protect it. Those who destroy Dharma get destroyed. Therefore, Dharma should not be destroyed so that we may not be destroyed as a consequence thereof. [Manu Smriti VIII-15].

The principle laid down in this saying is of utmost importance and significance. In the above shortest saying, the entire concept of Rule of Law is incorporated. This shloka is prominently inscribed in the Hall reserved for training of judicial officers of the Karnataka State at the instance of Justice Sri. M.N. Venkatachalaiah, when he was incharge of training of judicial officers.

Welfare of people the highest concern of the State:-

प्रजासुखे सुखं राज्ञः प्रजानां च हिते हितम् ।
नात्मप्रियं हितं राज्ञः प्रजानां तु प्रियं हितम् ॥

In the happiness of the subjects lies the king's happiness, in their welfare his welfare; what pleases himself the king shall not consider good but whatever pleases his subjects the king shall consider good. [Kautilya p. 39 (p. 428). [L & CH 607].

वार्षिकांश्चतुरो मासान्यथेन्द्रोऽभिप्रवर्षति ।
तथाभिवर्षेत्स्वं राष्ट्रं कामैरिन्द्रव्रतं चरन् ॥ ३०४ ॥

The King who occupies the position of Indra should shower benefits on his subjects in the same manner as Indra showers copious rain during the season. [Manu Smriti IX 304].

Protection of people - highest Dharma of Kings:-

नृपस्य परमो धर्मः प्रजानां परिपालनम् ।
दुष्टनिग्रहणं नित्यं न नीत्या ते विना ह्युमे ॥

The highest Dharma of a king is the protection and welfare of the subjects and putting down the wicked. [Shukraniti 27-28]. [L & CH 609].

This shloka clearly indicates the important role of the Government in the administration of State.

SAMANATA (EQUALITY)

यथा सर्वाणि भूतानि धरा धारयते समम् ।
तथा सर्वाणि भूतानि बिभ्रतः पार्थिवं व्रतम् ॥

Just as the mother earth gives equal support to all the living beings, a king should give support to all without any discrimination. [Manu Smriti IX 31] [L & CH 607].

पाषण्डनैगमश्रेणीपूगव्रातगणादिषु ।
संरक्षेत्समयं राजा दुर्गे जनपदे तथा ॥

The king should afford protection to compacts of associations of believers of Veda (Naigamas) as also of disbelievers in Veda (Pashandis) and of others. [Narada Smriti vide Dharmokosha P-870]

The Vedas constituted the primordial source of Dharma. The Charter of Equality (Samanata) incorporated in the Rigveda, the most ancient of the Vedas, and in the Atharvanaveda are worth quoting:

अज्येष्ठासो अकनिष्ठास एते
सं भ्रातरो वावृधुः सौभगाय ॥

No one is superior (ajyestaso) or inferior (akanishtasa). All are brothers (ete bhrataraha). All should strive for the interest of all and should progress collectively. (sowbhagaya sam va vridhuhu).

Article 1 of the Universal Declaration of human rights reads thus:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

The above said verse of Rigveda is almost similar though most ancient.

समानी व आकृतिः समाना हृदयानि वः ।
समानमस्तु वो मनो यथा वः सुसहासति ॥

Let there be oneness in your resolutions, hearts and minds. Let the strength to live with mutual co-operation be firm in you all. [RIGVEDA - MANDALA - 10, SUKTA-191, MANTRA-4 - Concluding Part of Rigveda]

This shloka is inscribed in golden letters on the entry gate of Sansad Bhavan.

समानी प्रपा सह वोन्नभागः ।
समाने योक्त्रे सह वो युनज्मि ।
अराः नाभिमिवाभितः ॥

All have equal rights to articles of food and water. The yoke of the chariot of life is placed equally on the shoulders of all. All should live together in harmony supporting one another like the spokes of a wheel of the chariot connecting its rim and the hub. [ATHARVANA VEDA - SAMJNANA SUKTA]

These Vedic provisions forcefully declare equality among all human beings. The last of them impresses that just as no spoke of a wheel is superior to another, no individual can claim to be, or regarded as, superior to others. This has been the grand concept of equality in this country since the earliest period of civilization.

However, in the meandering course of the history, the Society came to be divided into four varnas namely 1. Brahmanas, the class of persons taking the profession of archaks in temple and to teaching and other learned professions; 2. Kshatriyas, warriors and the ruling class; 3. Vyshyas, the class of persons undertaking trade, commerce and agriculture and 4. Shudras, the class of persons rendering other essential services to the society. But the superiority or inferiority of individuals on the basis of his varna does not seem to have been determined by birth in anyone of these classes, For instance, Valmiki and Vyasa, the authors of the two great epics, the Ramayana and Mahabharatha, who are regarded as the greatest poets, writers and philosophers of the country and who are held in the highest esteem down to this day by all sections of the society, belonged to the fourth and the second varna, respectively. This is also the case as regards the heroes of these two great epics. Rama, belonging to Kshatriya class, because of his superb qualities as a man and as an ideal ruler, has won a place in the hearts of one and all for ever. So too Krishna, the greatest of diplomats and warriors, and a great teacher, being the propounder of the immortal Bhagvadgita. Both these are adored and worshipped by all sections of the society as incarnations of God Himself.

At a still later point of time, in the long meandering course of our history, society got divided into innumerable castes and sub-castes on the basis of occupations, vocations or trade or business. The evil of discrimination as high and low among men, on the basis of birth, hereditary avocations and other considerations, and the pernicious practice of untouchability with all its degrading implications came into existence. However, all right-thinking persons and social reformers have been fighting against these evils which were afflicting the society. Mahatma Gandhi, Dr. B.R. Ambedkar, the greatest of such reformers, had as their life's mission the total abolition of untouchability, and toiled in that direction. In spite of such divisive and undesirable customs, the love for the country and its culture, the common heritage and aspirations of our people, and the basic tenets of dharma have held us together and there has always been unity despite diversity in the country on the ideal that all of us are children of one mother. This feeling and sentiment was refurbished during our struggle for freedom when everyone fought for it unitedly raising one slogan "Bharat Mata Ki Jai" On account of the continuing crusade by social reformers against these evils and the bond of oneness regenerated during the freedom struggle, the evil of casteism and untouchability has substantially declined.

In view of the above vedic declarations, the various discriminatory provisions in the Smritis and other customs have to be regarded as invalid being opposed to the Shruti and set aside as inconsistent with Dharma, which alone is of eternal value, just as in modern constitutional law, provisions of laws enacted by legislatures are set aside if they are inconsistent with the Constitution. In fact Vyasa Smriti expressly provided as follows:-

श्रुतिस्मृतिपुराणानां विरोधो यत्र दृश्यते ।

तत्र श्रौतं प्रमाणन्तु तयोर्द्वेषे स्मृतिर्वरा ॥

Whenever there is conflict between the provisions in the vedas (shruti) and those in smritis or puranas (including custom or usage) what is stated in the veda alone should be taken as authority.

The provisions in the smritis or custom, which ran counter to the Shruti was Adharma and invalid. Manu Smriti also incorporated the following directive vide Ch.IV-176:

परित्यजेदर्थकामौ यौ स्यातां धर्मवर्जितौ ।

धर्म चाप्यसुखोदरकं लोकविक्रुष्टमेव च ॥

Discard wealth (artha) or desire (kama) if it is contrary to Dharma **as also any usage or custom or rules regarded as source of Dharma if they were to lead to unhappiness of any one or arouse people's indignation".**

Our constitution has discarded undesirable customs and practices and has re-established Dharma in the real sense of that expression by tabooing the aforesaid social evils and conferring the right to equality (vide Articles 14, 15 and 16) and abolishes untouchability (vide Article 17).

It is therefore, the duty or Dharma of every individual to obey these provisions in letter and spirit in thought, word and deed which will strengthen the feeling of fraternity and ensure the dignity of individuals.

Administration of State according to law including judicial system [Raja Dharma] was one of the most important and obligatory functions of a King [State]. The ancient texts on the topic stressed that the very object with which the institution of 'Kingship' was conceived and brought into existence was for the

enforcement of Dharma by the use of the might of the King [State] and also to punish individuals for contravention of Dharma and to give protection and relief to those who were subjected to injury and in whose favour Dharma [law] lay. The smritis greatly emphasized that it was the responsibility of the King to protect the people through proper and impartial administration of justice and that alone could bring peace, happiness and prosperity to the King as well to the people. Any indifference towards this important function of the king, the Smritis cautioned, would bring calamity to the State and to the King himself and to the people as well.

Ancient India bestowed great attention in evolving a sound administrative system of State including constitution of legal, judicial and constitutional system and administration of justice. The provisions made on the topic including institution of kingship, council of ministers, the description of the highest court to be located at the capital city, of lower courts under royal authority, and of people's courts recognised as having the power to decide cases, the qualifications of as well as quality of judges and other officers of the Court were prescribed. Appointment of experts as assessors to assist the court on technical questions, whenever necessary, was provided for. Law of procedure and of evidence were laid down. A code of conduct for judges and others concerned in the administration of justice and provisions for punishment of officers committing offences in the course of the administration of justice, had also been provided. After making a detailed survey of the Hindu judicial system and the historical evidence available, Sir S. Varadachariar concludes:

“Whenever and wherever and so far as circumstances permitted, attempts were all along being made in Hindu India to administer justice broadly on the lines indicated in the law books”.
[Hindu Judicial System - S. Varadachariar]

The elaborate provisions made on the topic are indicative of a fairly well developed system of administration of justice.

In the meandering course of our long history, running to several centuries, Bharatiya system of Rajadharma and Vyavarahadharma came to be firmly established. However, thereafter, for historical reasons, firstly Muslim rulers and thereafter the British rulers had introduced their own

administrative System. Particularly, the latter introduced Anglo-Saxon jurisprudence which we had immediately prior to our acquiring independence on 15th August 1947. On becoming a free Nation, it was essential that in all spheres of National activity, we should have restored and incorporated principles and doctrines of eternal value evolved in this Country from ancient times which would have made our Constitutional, Legal and Judicial System qualitatively distinct and superior. In fact, Mahatma Gandhiji who headed the movement for political freedom pleaded for Swadeshi concept in that after securing political independence, every sphere of National activity must be swadeshi oriented. In this regard he had said:

“it seems to me that before we can appreciate Swaraj, we should have not only love but passion for Swadeshi, every one of our acts should bear the **Swadeshi stamp**. Swaraj can only be built upon the assumption that the most of what is national is on the whole sound”. [My Picture of Free India]

But unfortunately, we failed to do so. On the other hand, there has been greater tendency to import more and more western concepts and life style. We have not made necessary changes in judicial, educational and administrative system etc., so as to bring about qualitative changes in conformity with our requirement. This is the main cause for most of our social, economic and political problems.

The plea that we should incorporate our concepts in the sphere of judicial, constitutional and legal system, does not mean that we should not enrich our knowledge by the legal, judicial and constitutional system of other countries. In fact from ancient times our slogan has been:-

आ नो भद्राः क्रतवो यन्तु विश्वतः ।

“Let noble thoughts come to us from every side”.
[Rigveda 1-879-i].

Therefore, we always welcomed thoughts and principles which enrich our knowledge and strengthen our social and national life. Accordingly, our legal, judicial and constitutional system must be rooted in the basic concepts evolved in this land from times immemorial. But we failed to do so. We secured political independence on 15th August 1947. I studied in the Law College

between 1954-1956 after ten years after we became independent where the subject for study was still Roman Law in our Law Colleges.

Justice S.S. Dhavan, a former Judge of Allahabad High Court in his enlightening paper entitled "WHY STUDY INDIAN JURISPRUDENCE AT ALL" [1966] has forcefully brought forth this aspect. I consider it appropriate to quote what he has stated on this aspect. The relevant portion of the article reads:-

I consider that the teaching of Indian jurisprudence in our law faculties is essential for the healthy development of our judicial process Today, a law student in India is virtually ignorant of Indian jurisprudence. He does not know as I did not know - that the Indian Juridical system and the Indian judiciary have the oldest pedigree of any existing judicial system in the World, that the "dharmasthiyam" part of Kautilya's Arthashastra is, in the words of present Chief Justice of India, "one of the earliest secular codes of law in the World", and the high level at which legal and judicial principles were discussed, the precision with which statements of law are made, and the absolutely secular atmosphere which it breathes throughout, give it a place of pride in the history of legal literature". [Excerpts from the paper presented by him on "Secularism: its implication for law and life in India at a Symposium organized by the Indian Law Institute, New Delhi in November 1965].

Similarly, for historical reasons, I like others did not know anything about the existence of an established legal, judicial and constitutional system in Bharat. It is only after I became a Professor in Law at BMS Law College, Bangalore in 1969 at the instance of E.S. Venkataramaiah, who was then the Principal of that Private Law College, who later became a High Court Judge, Supreme Court Judge and also the Chief Justice of India and I became a Judge of the High Court of Mysore redesignated as the High Court of Karnataka, I secured the benefit of the library comprising of vast literature on our ancient legal and judicial system.

One of the book was titled "Introduction to Hindu Law" by D. Pathak, wherein he has stated as follows:-

"Some of the ancient rules of law propounded by

the Shrutikaras, Smritikaras and Nibhandhakararas, take us by surprise by their strikingly modern character and outstanding insight into jurisprudential concepts. The Hindu jurists not only developed substantive law but also formulated side by side adjectival law for the enforcement and establishment of the substantial law”.

Under the inspiration and guidance of E.S. Venkataramaiah, who was not only an eminent lawyer but also a profound scholar in Samskrit literature, I authored a book titled “***Legal and Constitutional History of India***” [722 pages] with the subsidy by National Book Trust. Firstly, it was published by N.M. Tripathi Pivate Limited, Bombay in 1984 and subsequently by M/s Universal Law Publishing Co. (Pvt). Ltd., Delhi. In this book I have incorporated the salient features of our substantive as well as procedural law evolved in Bharat since ancient times. Bar Council of India made it a subject for study in all law colleges in the Country. It gives a detailed account of our substantive as well as procedural law to wit *Vyavahara Dharma* and *Raja Dharma* the Constitutional Law of Bharat. It has undergone six editions. Salient aspects of that subject are indicated in that book are briefly given here.

Expansive meaning of Dharma:-

Mahabharata contains a discussion of this topic. On being questioned by Yudhistira about the meaning and scope of Dharma, Bhishmacharya stated thus:-

‘धारणाद्धर्ममित्याहुर्धर्मेण विधृताः प्रजाः ।

यः स्याद्धारणसंयुक्तः स धर्म इति निश्चयः ॥

That which ensures welfare of all living beings is surely Dharma. [Mahabharata Shantiparva 109-9-11].

Origin of Vyavahara [law suits]:-

धर्मैकतानाः पुरुषास्तदासन् सत्यवादिनः ।

तदा न व्यवहारोऽभून्न द्वेषो नापि मत्सरः ॥

नष्टे धर्मे मनुष्याणां व्यवहारः प्रवर्तते ।

द्रष्टा च व्यवहाराणां राजा दण्डधरः स्मृतः ॥

"When people were of Dharma abiding nature and truthful there existed neither hatred nor envy nor any legal disputes. Practice of Dharma having declined in mankind, law-suits [Vyavahara] were invented and the king was entrusted with the power to decide law-suits as he had the sanction of Dharma to enforce obedience to, and to order punishment for disobedience of, Dharma. [Nar. P-5 1-2, Dharmakosa p-3].

In the above verses of Narada, the cause for the coming into existence of law-suits has been explained. They indicate that as the tendency to obey rules of Dharma voluntarily, which is said to have been in existence at an earlier point of time, no longer continued to prevail among individuals and violations became frequent, the society invented the machinery and procedure for enforcement of law. This situation lead to the necessity of codification. Consequently law regulating to civil rights and liabilities and law declaring offences and prescribing penalties on all important matters were codified and arranged topicwise from time to time by eminent authors.

Meaning of Vyavahara:-

वि नानार्थेऽव सन्देहे हरणं हार उच्यते ।
नानासन्देह हरणाद् व्यवहार इति स्मृतः ॥

Etymologically, vi means 'various' ava means 'doubts', hara means 'removing' - so Vyavahara means, 'removing of various doubts'.

Vyavahara means proceedings in a court of law between two parties in which the violation of Dharma is established by effort.

Together the word Vyavahara was coined at common parlance as transactions or disputes between two or more persons.

The word *Vyavahara* also came to be used to mean a 'legal proceeding'. This term is popular and in vogue even to this day

at common parlance. The branch or division of law which regulated the rights and liabilities of parties in a legal proceeding was therefore called *Vyavaharapada*. This corresponds in modern times to an enactment on a particular topic of law. From very ancient times the disputes or laws have been arranged under eighteen topics.

Enumeration of topics of Vyavahara:-

Manu Smriti has specified eighteen topics which arose during ancient times. The very title of the topics given clearly indicate the topic. However, they are not exhaustive.

तेषामाद्यमृणादानं निक्षेपोऽस्वामिविक्रयः ।
 सम्भूय च समुत्थानं दत्तस्यानपकर्म च ॥
 वेतनस्यैव चादानं संविदश्च व्यतिक्रमः ।
 ऋयविक्रयानुशयो विवादः स्वामिपालयोः ॥
 सीमाविवादधर्मश्च पारुष्ये दण्डवाचिके ।
 स्तेयं च साहसं चैव स्त्रीसंग्रहणमेव च ॥
 स्त्रीपुंघर्मो विभागश्च द्यूतमाह्वय एव च ।
 पदान्यष्टादशैतानि व्यवहारस्थिताविह ॥

[Manu Smriti VIII-4-7]

1. Runadana - payment of debts
2. Nikshepa - Deposits
3. Aswamy Vikraya - sale without ownership
4. Sambhaya Samuthana - Joint undertakings [partnership]
5. Dattasyanapakarma - Resumption of gift
6. Vetanadana - payment of wages
7. Samvidvyatikrama - Violation of convention of guilds and corporations
8. Krayavikrayanusaya - sale and purchase
9. Swamipala Vivada - disputes between master and servant
10. Sivavivada - Boundary dispute
11. Vakparushya - Defamation
12. Dandaparushya - Assault
13. Steya - Theft
14. Sahasa - Offence by violence
15. Strisangrahana - Adultery
16. Stripumdharma - Duties of husband and wife
17. Vibhaga - Partition
18. Dyutasamahvaya - Betting and gambling

[Legal and Constitutional History of India, page 67] [Courts of India, page 40].

They have been greatly enlarged as the activities of the society have been ever enlarging.

Institution of suit or lodging of complaint:-

स्वधनस्य यथा प्राप्तिः परधर्मस्य वर्जनम् ।
न्यायेन क्रियते यत्र व्यवहारः स उच्यते ॥

Vyavahara is a proceeding in which the taking away of one's wealth by another and the avoidance of Dharma by individuals is prevented by means of truth. [Harita Smriti Chandrika p-1-2]

The reason for coming into existence of legal proceeding has been explained here:-

धर्मैकतानाः पुरुषाः तदाऽऽसन् सत्यवादिनः ।
तदा न व्यवहारोऽभूत् न द्वेषो नापि मत्सरः ॥
नष्टे धर्मे मनुष्याणां व्यवहारः प्रवर्तते ।
द्रष्टा च व्यवहाराणां राजा दण्डधरः स्मृतः ।
लोकसंरक्षणार्थाय धर्मसंस्थापनाय च ॥

“When men conducted themselves entirely according to Dharma and were truthful there was no proceeding at law, no hatred, nor jealousy. It is when Dharma declined from among men that a legal proceeding relating to payment of debt and various types of other disputes started and the king has been appointed to decide law suits. Vyavahara Dharma was invented to protect people and to ensure rule of Dharma (law). [Narada Smriti P 5, 1-2, Dharmakosa, pp 3-4]. [Courts of India, p-40]

Classification into civil and criminal unique:-

In most of the ancient jurisprudences, there was no demarcation between civil and criminal wrongs. The criminal offences were treated as tort. As a result, a person could be

punished for criminal offences committed by him, if only some one related to him lodged a complaint. But it was not so in ancient India. As regards a civil wrong, only the injured party could lodge a plaint i.e., one who had locus standi. As regards offences any private informant or an officer of the State could initiate. In either case, it was the duty of the State to hold trial and punish the accused found guilty.

द्विपदो व्यवहारः स्यात् धनहिंसासमुद्भवः ।

द्विसप्तकोऽर्थमूलस्तु हिंसामूलश्चतुर्विधः ॥

“There are two branches of Vyavahara - one arising out of wealth and another out of violence. [Brihaspati Smriti P. 283-4 (p.2.S)

ऋणादानादि दायविभागान्तानां देयनिबन्धनत्वेन प्रतिपादनम् ।

साहसापि-पञ्चकस्य दण्डनिबन्धनत्वम् ॥

In the case of disputes relating to debt, etc., pecuniary relief is provided for. In the case of offences/crimes, punishment is prescribed.

Judicial proceedings [Nyaya Kramaha]:-

Institution of civil suit or criminal complaints:-

स्मृत्याचारव्यपेतेन मार्गेणाघर्षितः परैः ।

आवेदयति चेद्राज्ञे व्यवहारपदं हि तत् ॥

If one, injured by others in violation of a law of the *Smritis* and usage, were to inform the king, that becomes a fit matter for judicial proceedings. [Yajnavalkya II - 5]

How to write a plaint:-

अल्पाक्षरः प्रभूतार्थो निःसन्धिग्धो निराकुलः ।

विरोधिकारणैर्युक्तो विरोधिप्रतिषेधकः ॥

A plaint should be brief in words, rich in content, unambiguous, free from confusion, devoid of improper arguments and capable of being traversed by the defendant and it should set out the prayer sought

against the opponent. [Brihaspati p. 290-5-6; Dharmakosa p. 144]

Contents of written statement:-

विनिश्चिते पूर्वपक्षे ग्राह्याग्राह्यविशेषिते ।
प्रतिज्ञाते स्थिरीभूते लेखयेदुत्तरं ततः ॥

When a plaint of this description has been preferred by the plaintiff, the defendant should tender an answer conformable to such plaint. [Brihaspati p. 290.6; (p. 36.2S)]

Four types of pleas open for a defendant:-

सत्यं मिथ्योत्तरं चैव प्रत्यवस्कन्दनं तथा ।
पूर्वन्यायविधिश्चैवमुत्तरं स्याच्चतुर्विधम् ॥

Reply (the plea of the defendant) may be of four kinds; *Satyam* (admission), *Mithyam* [denial], *Pratyavaskandanam* (special plea) and *Purvanyaya* [former judgment]. [Katyayana 165].

These procedures are applicable to the courts of first instance.

For purpose of this Lecture, I am referring to the salient aspects of administration of justice at the higher level to wit the High Courts and the Supreme Court.

Excellent guidance for an ideal judiciary in ancient Bharatiya Legal, Judicial and Constitutional System:-

In Rajadharma, the king was advised to appoint suitable persons as judges, indicating therein the qualities and the qualification of a person to be appointed as a judge.

Qualification and appointment of Judges:-

व्यवहारेषु धर्मेषु योक्तव्याश्च बहुश्रुताः ।
 प्रमाणज्ञा महीपाल न्यायशास्त्रावलम्बिनः ॥
 वेदार्थतत्त्वविद् राजन् तर्कशास्त्रबहुश्रुताः ।
 मन्त्रे च व्यवहारे च नियोक्तव्या विजानता ॥

“A person who is (i) well versed in Vyavahara [laws regulating judicial proceedings] and Dharma [law on all topics], (ii) a Bahushruta [profound scholar] (iii) a Pramanajna [well versed in the law of evidence], (iv) Nyayasastravalambinah [law abiding] and (v) has fully studied the vedas and Tarka [logic] should be appointed to carry on the administration of justice. [Mahabharata Shanti Parva 24-18]. [Courts of India, p-40].

This provision in Mahabharata prescribed the qualification as also the qualities of persons to be appointed as judges. The provisions in Narada Smriti and Katyayana Smriti were similar [See Legal and Constitutional History of India]. At present, the qualification/eligibility of person to be appointed as judges are laid down in the Constitution and the law should be adhered to in the light of ancient texts referred to above.

राजा तु धार्मिकान् सभ्यान् नियुञ्ज्यात् सुपरीक्षितान् ।
 व्यवहारधुरं वोढुं ये शक्ताः सद्गवा इव ॥
 धर्मशास्त्रार्थकुशलाः कुलीनाः सत्यवादिनः ।
 समाः शत्रौ च मित्रे च नृपतेः स्युः सभासदः ॥

“Let the king appoint, as members of the Court of Justice, honourable men of tried integrity [sabhyas] who are able to bear the burden of the administration of justice and who are well versed in the sacred laws, rules of prudence, who are noble and impartial towards friends and foes. [Narada Smriti p. 36-4-5 [Dharmakosa ..43]

Shukraniti:-

In Shukraniti, an ancient treatise on polity [compiled and edited by Gustav Oppert, [1882] there are illuminating provisions prescribing qualifications and quality of Judges. Shukraniti page 149, 15 to 18 reads:-

व्यवहारविदः प्राज्ञा वृत्तशीलगुणान्विताः।
 रिपौ मित्रे सभा ये च धर्मज्ञाः सत्यवादिनः ॥167॥
 निरालसा जितक्रोधकामलोभाः प्रियंवदाः ।
 सभ्याः सभासदः कार्या वृद्धाः सर्वासु जातिषु ॥168॥

“Those who are well versed in the arts of politics, have intelligence and are men of good deeds, habits and attributes, who are impartial to friends and foes alike, religious-minded and truthful, who are not slothful, who have conquered the passions of anger, just and cupidity, who are gentle in speech and old in age should be made members of Council irrespective of caste”.

A reading of these provisions at once indicates not only the qualifications and personality traits of a person who should be appointed as a Judge but also throws light on the independence and impartiality required of a judge in dispensing justice. This is an important aspect, which should be taken into account and a fool proof method should be prescribed for appointment of judges at all levels.

King to decide cases according to law [dharma shastras] and opinion of judges:-:

धर्मशास्त्रं पुरस्कृत्य प्राड्विवाकमते स्थितः ।
 समाहितमतिः पश्येत् व्यवहारानुक्रमात् ॥

“The King should try cases with great care, according to law and in due order adhering to the opinion of the Chief Justice.

Regarding dispensation of justice, the guidelines given to the judges in the Shukraniti are of great value and worthy to be followed by Judges at all times:

धर्मशास्त्रानुसारेण क्रोधलोभविवर्जितः ।

The cases should be decided in accordance with law [Dharma] bereft of anger and greed. [Shukraniti IV 5-9]

The judges were cautioned that they should avoid five causes which would constitute the basis for attributing reasonable likelihood of bias against them.

पक्षपाताधिरोपस्य कारणानि च पञ्च वै ।
रागलोभभयद्वेषा वादिनोच्छ्र रहश्श्रुतिः ॥

There are five causes which give rise to the charge of partiality [against the judge]. They are:

[i] Raga - Exhibiting affection in favour of a party to a litigation by speech or conduct in the Court or outside.

[ii] Lobha - Being greedy, which creates an impression in the mind of the litigant public that he is amenable to receive bribes, pecuniary or otherwise.

[iii] Bhaya - [Fear] Afraid to deliver judgment against powerful parties or Government.

[iv] Dwesha - [Ill-will] Giving an impression that he has enmity against one of the party to the litigation by his conduct in the Court or outside.

[v] Vadoscharahashruthi - A judge meeting and hearing a party to a case secretly, which in the present day context includes meeting of their Advocates secretly. [Shukraniti IV-5-14,15]

Every one of the above circumstances or causes indicated in Shukraniti which would furnish a valid ground to level charges of partiality against a Judge, were intended to warn the judges not to give room for these causes which would destroy the faith of the people on the independent and impartial judiciary. This warning is worthy to be borne in mind by all judges and members of Tribunals who are conferred with power to decide cases.

It is of great significance to note that the form of oath to be taken by the judges of the High Courts and the Supreme Court before assuming their office, prescribed in the third schedule to the Constitution incorporate the very words specified in the aforesaid verse of Shukraniti.

The King and Judges were also cautioned against the delay in disposal of cases. Katyayana Smriti [339-40] incorporated its importance in the following verse:-

न कालहरणं कार्यं राज्ञा साक्षिप्रभाषणे ।
महान् दोषो भवेत्कालाद् धर्मव्यावृत्तिलक्षणः ॥

“The king should not delay in hearing cases and examining the witnesses. A serious defect, namely, miscarriage of justice, would result owing to delay in examination of witnesses. [Katyayana-339-340]. [Courts of India , p-40]

Manner of writing judgment [Jayapatra]:-

सकलं पूर्ववादं च सोत्तरं सक्रियं तथा ।
सावधारणकं चैव तज्ज्ञेयं जयपत्रकम् ॥

“A document which incorporates the contents of the plaint, the answer, the gist of the trial, the consideration given to them and the decision thereon, is called Jayapatra. [Narada Smriti-307-19; Dharmakosa-357].

Contents of Jayapatra:-

The development of procedural law or Vyavahara Dharma is discernible by the rules laid down in the matter of writing judgment:-

पूर्वोत्तरे क्रियापादं प्रकाणं तत्परीक्षणम् ।
निगदं स्मृतिवाक्यं च यथासम्भ्यं विनिश्चितम् ।
एतत्सर्वं समासेन जयपत्रेऽभिलेखयेत् ॥

“Jayapatra [document of victory] is one which incorporates (i) a brief statement of the plaint and the answer (ii) the evidence adduced by the parties; (iii) the discussions on the issues involved; (iv) the consideration of the arguments advanced by the parties; (v) the law applicable to the case; (vi) the opinion of Sabhyas (vii) the decision given by the Chief Justice and other judges; and (viii) the royal

seal". [Vyasa, Dharmakosa -376]. [Brihaspati Sutra, 298, 34 (p. 64-26 S).

No offender should remain unpunished:-

Another most important guideline regarding the imposition of penalty on wrong doers was to the following effect.

पिताचार्यः सुहृन्माता भार्या पुत्रः पुरोहितः ।
नादण्ड्यो नाम राज्ञोऽस्ति यः स्वधर्मे न तिष्ठति ॥ ३३५ ॥

"In criminal cases, the ruler should not leave an offender unpunished, whether the guilty is father, or a teacher, or a friend, or mother, or wife, or a son, or a domestic priest. If the guilty are not punished there will be no rule of law." [Manu Smriti VIII-335]

Apart from the above verse which directed the King to punish the offender whatever be his relationship, in view of the definition of law given in Brihadaranyakopanishad, which declared that the law is the king of kings and no one is superior to law [Dharma], even the king was liable to be punished for any offence committed by him.

A shining example of supremacy of Dharma and fearless judiciary and making an order convicting the ruler himself on a charge of murder is recorded in the history. The gist of the case was that after the death of Peshwa Madhava Rao on 18-11-1772, his only surviving younger brother Narayana Rao who was just seventeen years of age succeeded to the position of Peshwa and became the Ruler. But his uncle Raghunatha Rao being ambitious for power, hatched a conspiracy to overthrow Narayana Rao and as a result young Narayana Rao was murdered on 30-8-1774 and Raghunatha Rao assumed power as a ruler. Despite he being a Peshwa, the Ruler, the then Chief Justice Ramashastry Prabhune probed into the murder and held Raghunatha Rao and 49 others including a woman guilty of murder and convicted them for the offence. This decision was communicated to the ruler Peshwa Raghunatha Rao, as according to law, the power to decide the quantum of penalty and to impose it on the person found guilty of an offence by a judge was vested in the King. The Peshwa took no action, he himself being the first accused in the case. The Chief Justice insisted on his decision being given effect to. As a consequence of this insistence, Raghunatha Rao dismissed

Ramasastri from his post, who then quietly returned to his village. But Dharma asserted its supremacy through the people. They refused to recognize Raghunatha Rao as the Peshwa as he had been found guilty of the murder of young Narayana Rao who was their lawful ruler. A council of twelve persons called 'Barabhai' was formed which took over the administration after deposing Raghunatha Rao which continued until legitimate Ruler attained majority. In this regard, eminent Historian Sardesai observes:-

"Thus once in a way both Raghunatha Rao and the public realized what power the silent judiciary possessed in a well governed State and what support it has to its preservation". [New History of Marathas Vol. II, PP-30-33].

The case is an ever inspiring one, a glowing tribute to the 'Supremacy of Dharma' the independence of judiciary and the exemplary conduct exhibited by a Judge.

The idealism placed before the judges in the provisions of 'Dharma Shastras' regarding administration of justice are such which are of eternal value and it is only by keeping those ideals uppermost in the minds of judges and acting in conformity with it, they would be able to sustain the implicit faith and confidence of the people in the judiciary which constitutes one of the main pillars of the Constitution of India and fulfill the role assigned to the judiciary by the Constitution.

Protection against officers of the State and Royal favourites:-

आयुक्तकेभ्यश्चौरैभ्यः परेभ्यो राजवल्लभात् ।
पृथिवीपतिलोभाच्च प्रजानां पञ्चधा भयम् ।
पञ्चप्रकारमप्येत पोह्यं नृपतेर्भयम् ॥

The subjects require protection against wicked officers of the king, thieves, enemies of the king, royal favourites (such as the queen, princes etc), and more than all, against the greed of the king himself. The king should ensure that the people are free from these fears. [Kamandaka V 82-83 [pp. 63-64]

The above verse cautions the rulers not to yield to such wrong influences and cause loss, hardship or damage to citizens by the action or inaction of officers in order to secure what they desire or

what their favourites desire and it was his personal obligation to secure justice to the people.

Suo-motu relief granted:-

There is an illuminating instance related in Rajatarangini as to how Chandrapida, the king of Kashmir [680-688 AD] upheld the rule or law. The officers of the king undertook construction of a temple of Lord Tribhuvanawami on a certain site. On a portion of that site there was a hut belonging to a Charmakara [cobbler]. He refused to remove his hut inspite of being asked to do so by the King's officers. Thereupon the officers complained to the king about the obstinacy of the Charmakara. However, to their surprise, the officers got a rebuff from the king who censured them for lack of foresight in encroaching upon the site by making the following order:-

नियम्यतां विनिर्माणं यद्द्वान्यत्र विधीयताम् ।
 परभूम्यपहारेण सुकृतं कः कलङ्कयेत् ॥
 ये द्रष्टारः सदसतां ते धर्मविगुणाः क्रियाः ।
 वयमेव विदधमश्चेत् यातु न्यायेन कोऽध्वना ॥

Stop construction or build (the temple) somewhere else. Who would tarnish such a pious act by illegally depriving a man of his land? If we who are the judges of what is right and what is not right, act unlawfully, who then will abide by the law?

Sequel to the order by king Chandrapida as above, the cobbler's hut was restored to him who gratefully thanked the King in the following words:-

राजधर्मानुरोधेन परवत्ता तवोचिता ।
 स्वस्ति तुभ्यं चिरं स्थेया धर्म्या दृत्तान्तपद्धतिः ।
 दर्शयन्तीदृशीः श्रद्धा श्रद्धेया धर्मचारिणाम् ॥

Yielding to another (however low), adhering to the principles of Rajadharna, is the appropriate course for a king. I wish you well. May you live long, establishing the supremacy of the law (Dharma). Seeing in you such faith in Dharna others will also act accordingly.

[RAJATARANGINI: IV 75-77]

This incident which is recorded in Rajatarangini indicates the exemplary conduct of the king and ideal attitude of an ordinary praja [citizen].

Special provision for protection of women:-

Undoubtedly the right to equality and all other human rights are all applicable to men and women, equally. However, the ancient Bharatiya thinkers considered that having due regard to the special attributes of womanhood, they require special protection for it is undisputable that women are vulnerable to attack by men with evil propensities. It is a matter of common knowledge that offences against women by men have been a problem throughout human history and not vice versa. Even at present, when we boast of modern civilization and scientific advancement, the rate of offences against women are on the increase every year. Men behave in inhuman manner against women. In particular, sexual assault against women, which is the most heinous and ruins the whole life of a woman, is indulged in by many men who are nothing but demons in human form. The law enforcing agencies such as the police and the Courts come into picture only after a woman suffers an irreparable injury and consequently, they are not adequate to protect the rights of women.

As a solution to this problem, the ancient Bharatiya thinkers considered that right to be protected was of utmost importance to women. They also came to the conclusion that the best method to protect the right was to ingrain the ideal of 'Respect for Womanhood' in every individual and, in particular, in men through moral education right from the inception and at all levels of education. This was thought of as the best method by which human right to protection could be secured to women.

This right became the most cherished value of life in Bharat from times immemorial. Men were asked not to consider women as an object of mere physical pleasure but to regard them as divine treasure for family life. In view of the role assigned to women by Nature to be mothers, and in view of the fact that the mother is the dearest person on the earth to an individual and in view of the intense love and affection of mother to her children, and her readiness to make tremendous sacrifices for the sake of her children, the mother came to be regarded as God incarnate [Mata Pratyaksha Devatha]. Further, as every woman was a potential mother and possessed motherly qualities, the cultural

value evolved was to treat mother as God and to treat every woman, except in her relationship to a man as wife, as equal to mother.

Hitopadesha of Narayana is a compilation of code of conduct. In that in his inimitable style, Narayana lays down the following directive.

मातृवत्परदारेषु परद्रव्येषु लोष्टवत् ।
आत्मवत्सर्वभूतेषु यः पश्यति स पण्डितः ॥

A person who treats every woman other than his wife as equal to his own mother, regards wealth or money belonging to another person as equal to lump of mud, regards all living beings as his own atma, can be regarded as really educated person.

This value appears to have been created and cultivated assiduously as an antidote to sexual propensity of man, for, once the value that every woman is equal to mother is ingrained in the heart of a man, sinful thoughts of committing any sexual offence against woman gets destroyed. There can be no doubt that inculcating of such a value is the greatest safety against sexual propensities of man. Manu Smriti therefore mandates the giving of highest respect and regards to women in the following verse:-

यत्र नार्यस्तु पूज्यन्ते रमन्ते तत्र देवताः ॥

Gods are pleased, with the house in which women are respected. [Manu Smriti-III-56]

स्त्रियां तु रोचमानायां सर्वं तद्रोचते कुलम् ।
तस्यां त्वरोचमानायां सर्वमेव न रोचते ।
सुवासिनीः कुमारंश्च रोगिणो गर्भिणीः स्त्रियः ।
अतिथिभ्योग्र एवैतान् भोजयेदविचारयन् ॥

The house in which women folk are decorated with dress and jewellery, shines, otherwise, the house is sure to suffer.

Recently married daughters, as well as daughter-in-law, young girls as also pregnant women should be served with meals even before the guests. [Manu Smriti III-62-114]

. The creation and maintaining of this value in Bharatiya culture is really the most valuable contribution to the humanity.

Apart from creating the value of respect for womanhood, there have been special provisions for protecting several human rights of women, in view of the disabilities and vulnerability of women for attack by men. Rules of Dharma created an obligation on the part of the male members of a family to afford protection to every woman at every age and stage of life. Further, under Raja Dharma, it was the duty of the State to provide protection to women. The Rule of Dharma which made it the duty of male members of the family to afford protection to women reads:-

पिता रक्षति कौमारे भर्ता रक्षति यौवने ।
रक्षन्ति स्थविरे पुत्रा न स्त्री स्वातन्त्र्यमर्हति ॥

The father protects the girl in her childhood, the husband protects her after marriage and her sons protect her in old age. At no stage should a woman be left free. [Manu Smriti IX-3]

On the basis of the last part of the above verse, without reference to the earlier parts and other verses in Manu Smriti (referred to earlier) the criticism leveled against Manu Smriti is that it wanted women to live like slaves of man throughout their life. Nothing can be farther from the truth.

The meaning and purpose of the aforesaid verse is that a woman requires and is entitled to protection at every stage of her life. Correspondingly, it is the duty of the father, the husband and the sons to look after her daughter, wife and mother respectively. It is the duty of the father to look after his daughter with all care, educate her having due regard to her aptitude including in art and crafts, and music and celebrate her marriage. Thereafter, the fundamental duty and responsibility to maintain and protect her stands shifted to her husband, and thereafter when her sons become aged, that duty gets shifted to the sons. In fact, protection and care is essential to male children as well as aged fathers. However, special provision is made for women. Therefore, the real intention of the verse is to declare the obligation of the father, husband and sons to maintain and protect daughter, wife and mother respectively. It is not a directive to subjugate or dominate them. Therefore, to interpret the verse to the effect that women must be treated as a slave by his father during her childhood and by her husband after her

marriage and by her sons in old age, and that she should be deprived of freedom throughout her life is wholly erroneous and perverse.

This topic can be completed best by quoting what Kerry Brown, a British author has stated in her book "The Essential Teachings of Hinduism" Arrow Books, London, 1990 for ascertaining the real meaning of the controversial verse in Manu Smriti thus:-

In Hinduism, a woman is looked after not because she is inferior or incapable but, on the contrary, because she is treasured. She is the pride and power of the society. Just as the crown jewels should not be left unguarded, neither should a woman be left unprotected. No extra burden of earning a living should be placed on women who already bear huge responsibilities in society; childbirth; child care, domestic well being and spiritual growth. She is the transmitter of culture to her children.

The important role assigned to women has been correctly identified. It is no doubt true that times have changed. We have women who are competent in various professions, avocations, business, competent political rulers, bureaucrats, technocrats, advocates, judges and what not! In many cases, they have surpassed and excelled than men. But the fact remains that their responsibility as mothers to look after the interests of their children and to transmit cultural values to them and to make them good citizens has not decreased but has increased in view of the greater chances of moral and material abandonment among youths in the prevailing hostile environment. Further, we are seeing that atrocities on women are increasing day by day. Obscenity is spreading like wild fire through cinematograph films, such activities instigate onslaughts on woman and tantamount to clear violation of human rights of women. Women's Organisations are craving for protection. It is for the reason that since women are vulnerable to attack in many ways by men, the duty to afford protection to the person and property of women throughout their life had been made part of the rule of Dharma and Raja Dharma this is indicated by a few provisions of the ancient law of India.

Exception to women's property from law of adverse possession:-

The provision of ancient Indian law regarding perfecting title to an immovable property by adverse possession was very strict,

but was made inapplicable in respect of property belonging to women, State and Temple.

न भोगं कल्पयेत्स्त्रीषु देवराजधनेषु च ।

“No plea of adverse possession is tenable in respect of property belonging to woman, State and Temple”. [Katyayana 330]

Death sentence for rape of women in custody:-

संरुद्धस्य वा तत्रैव घातः । तदेवाध्यक्षेण गृहीतायामार्यायां । विषात् ॥

Capital sentence should be imposed for offence of rape committed against a women arrested by an officer of the State [vide Kautilya’s Arthasastra P-256] [L & CH 390]

Protection to girls carried away by force:-

बलञ्चेत्प्रहृता कन्या मन्त्रैर्यदि न संस्कृता ।

अन्यस्मै विधिवदेया यथा कन्या तथैव सा ॥

If a damsel has been abducted and not given in marriage in accordance with law, she may lawfully be given to another man. She is as chaste as a maiden”. [Vasishta P-92-73, Dharmakosha P-1021]

The rule indicates that unless a girl is lawfully given in marriage following the procedure prescribed the mere fact that a man [offender-kidnapper] carried her away, married forcibly and kept her as his wife forcibly, did not deprive her of having a legal and valid marriage. The concluding words, “She is as good as a maiden were obviously meant to impress upon the society that a girl being an unfortunate victim of an offence should not be looked down upon by the society. This provision is most humane, for if a girl were to become an unfortunate victim of sexual assault by a man and for that reason the society were to reject social status and refuse to take her in marriage, it would be a case of most inhuman treatment and a calamity”. Therefore, the

above direction was incorporated in order to make her acceptable to the society as a virgin girl.

The sanctity of the special right of women evolved in our culture has been emphasized by the Supreme Court of India in the case of *Air India Vs. Nergesh Meerza*, AIR 1981 SC 1829, while striking down a rule which provided that the services of an Air Hostess shall stand terminated on first pregnancy, in the following words:-

“Coming now to the second limb of the provisions according to which the services of Air Hostesses would stand terminated on first pregnancy, we find ourselves in complete agreement with the argument of Mr. Setalvad that this is a most unreasonable and arbitrary provision which shocks the conscience of the Court it seems to us that the termination of the services of an Air Hostess under such circumstances is not only a callous and cruel act but an open insult to Indian womanhood – the most sacrosanct and cherished institution. We are constrained to observe that such a course of action is extremely detestable and abhorrent to the notions of a civilized society. Apart from being grossly unethical, it smacks of a deep rooted sense of utter selfishness at the cost of all human values”. (Para-80 Page-1850).

Thus, special human right to women should be conserved in order to check the trend of increasing onslaught on women.

सर्वेषु चापराधेषु पुंसो योऽर्थ दमः स्मृतः ।

In respect of offences committed by women only half of it [quantum of penalty] is prescribed for women”. Katyayana 487]

See the special treatment accorded to women in the above verse. The above provision has certainly taken into account not only the general possibility of women committing the offences, having been instigated by men, but also the tender nature of womanhood who could not withstand the heavy penalty prescribed for man, which might be injurious to the interests of children, if any.

Under our Constitution, clause (3) of Article 15 empowers the State to make special provisions in favour of women, but no such

provision has been made. This provision is also worthy of emulation. Hence, a general suitable provision on the above lines regarding women offenders should be introduced in the Penal Code.

Practice sexual morality:-

The great importance was attached as part of education to ingraining character in children and youth and they were cautioned to be free from committing sexual immorality.

न हि द्विशमनायुष्यं लोके किंचन विद्यते ।

यादृशं पुरुषस्येह परदारोपसेवनम् ॥

“There is no offence which is more heinous and condemnable than having sexual intercourse with a woman who is not his wife” [Manu Smriti 4-134]

But unfortunately, this rule which was regarded as one of the most fundamental rule in the Society for without observation of which there will be chaos in the family life. Therefore, our ancestors laid down that sexual activities must be confined to husband and wife only. No sensible person can deny the wisdom of this rule.

Punishment on both indulging in adultery:-

स्त्रीपुंसयोर्मिथुनीभावः सङ्ग्रहणम् ।

“Unlawful coming together of a man and women for sexual enjoyment constitutes the offence of Strisangrhana [adultery]. [Mitakshara on Yajnavalkya II-283, Narada Vide Smriti Chandrika P-16]

गृहमागत्य या नारी प्रलोभ्य स्पर्शनादिना ।

कामयेत्तत्र सा दण्ड्या नरस्यार्धदमः स्मृतः ॥

When a woman comes to a man's house and excites his concupiscence by touching him or by like acts, she shall be punished with half the punishment prescribed for men. [Brihaspati P-367-15 (p. 191.16.S)]

But Section 497 of the Indian Penal Code provides punishment only for man, and thereby provides no remedy to the wife of the adulterer to prosecute the woman offender. Thus, it is discriminatory against women for, an aggrieved woman can prosecute her husband but not the woman offender.

But our Supreme Court has upheld the Constitutional validity of Section 497 of the IPC challenged in Sowmithri Vishnu Vs. Union of India, [AIR 1985 SC 1618] inter alia on the ground that it is a provision in favour of woman, by a curious reasoning.

With utmost respect to the Supreme Court it is submitted that the above view is not justified and is not in conformity with our values of life as could be ascertained from ancient law on adultery as indicated above. Further, the Supreme Court has not viewed from the point of view of the woman whose matrimonial happiness is destroyed by another woman against whom no legal action can be taken. So viewed the provision is wholly discriminatory against the woman for offence adultery is not unilateral, it is bilateral. It is wrong to say man alone is guilty of offence of adultery and the woman concerned is a victim. She is as much an offender as the man is. Any provision under clause (3) of Article 15 to be considered as a special provision in favour of woman, should be favourable to woman who are victims and not in favour of woman who are offenders. Law to be fair, equitable and non-discriminatory, must afford remedy to woman who suffers injustice and not to woman who indulges in offence. A comparison of the definition of adultery in Section 497 of the IPC and the ancient laws would at once show that the ancient law is reasonable and conform to morals whereas Section 497 excludes all extra marital connections except with the wife of another whose husband is living and that too only if it is without his consent. Thus, it gives a free license to indulge in sexual intercourse outside the wedlock with another woman who is unmarried or a widow and even with a woman whose husband is alive with the consent of the husband. Thus, present Section 497 is irrational. The section instead of preventing adultery, it encourages adultery whereas the ancient provisions by defining adultery to the effect that any sexual intercourse by a man with a woman who is not his wife is adultery is rational and in conformity with moral code of conduct.

Thus, both on moral and rational grounds, the ancient provision is sound and that is why the Law Commission recommended that Section 497 should be amended accordingly. It has not been done so far. It should be amended.

Protection to women against sexual harassment at work places:-

In the modern civilizational setup and economy, it has become inevitable by and large for both men and women to earn income

to lead a comfortable life whether married or unmarried. As a consequence, they have to seek employment. With the enforcement of the Constitution of India incorporating Fundamental Rights vide Article 14, 19 and 21, 15(1)(3) and also incorporating the Fundamental Duties vide Article 51-A giving full protection to women employees at work places has become the fundamental duty of the State. During the modern civilizational setup, it is natural that both men and women have the right to secure employment both in private and public sector. On account of moral degradation in the society, giving protection to women employees against sexual harassment by male employees at work places has become considerably important. As such things have been going on at various places where women go for employment, in the absence of any suitable legislation, guideline have been issued by the Union Government for protection and enforcement of these rights of women in work places. The matter also came up before the Hon'ble Supreme Court in the case of Vishaka Vs. State of Rajasthan [1997 (6) SCC 241]. The Supreme Court considered the matter in detail and said:-

“The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. Independence of judiciary forms a part of our constitutional scheme. The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction domestic law when there is no inconsistency between them and there is a void in the domestic law”. [para 14]

The Supreme Court issued as many as 12 guidelines incorporated in the judgment and directed that the above guidelines and norms would be strictly observed in all work places for the preservation and enforcement of the right to gender equality of the working women. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field.

After the Supreme Court laid down the guidelines, the question of sexual harassment at workplace came up for consideration before the Supreme Court in the case of Medha Kotwal Lele and others Vs. Union of India [2013 (1) SCC 311] and 2013 (1) SCC 313 in which the Supreme Court directed that a

State Level Officer should be appointed to ensure the implementation of the directions issued in Vishaka's case.

The substance of these decisions clearly indicate that giving protection against sexual harassment to women at work places has become a necessity and therefore not only all available remedies social, educational, cultural as well as legal has to be undertaken in order to ensure safety of women at work places but also for eradication of this social evil which is of utmost importance.

It has been the cultural value of Bharat from most ancient times that every woman should be treated as equal to one's own mother. But unfortunately, on account of moral degradation due to western civilizational influence, acts of sexual harassment against women has become so serious that it has to be dwelt with not merely by the criminal law providing suitable punishment, it has also to be eradicated by moulding the character of individuals right from their childhood and ingraining in their heart that sexual onslaught on women is the most heinous, in view of the cultural value that every women has to be treated as equal to one's own mother. This aspect has been highlighted by the Supreme Court in Aruna Roy's case [2002 (7) SCC 368], that the real remedy is to mould the character of individuals in accordance with our own culture. It is for this reason, Swami Vivekananda in the book on himself stated that the greatest lesson or knowledge which he received during his childhood was through one Samskrit shloka quoted earlier which mandated that a man who can be regarded as a really educated man is he who treats every woman as equal to his own mother, the money not belonging to him as lump of mud. This is the only the real and effective remedy rooted in Dharma and Samskriti for once such injury is inflicted on a woman, the damage or wound caused is irremediable.

Prohibition of intoxicating liquor and ban on cow slaughter:-

During the freedom struggle there has been two important demands as part of freedom struggle. First has been against intoxicating drinks and the second related to ban on cow slaughter. In view of this public demands, in the Constitution in Part-IV of Directive Principles of State Policy, Article 47 was incorporated for prohibiting manufacture and sale of intoxicating drinks and second important demand was for ban on cow slaughter. In view of this second demand of National importance

in the Directive Principles of State Policy in Part-IV of the Constitution Article 48 was incorporated containing a direction to prohibit slaughter of cows. But unfortunately, both these directives of utmost importance to the Nation were not implemented. As a result, when I was a Member of the Parliament [Rajya Sabha] I had introduced a Bill to amend the Constitution for the purpose of including these two items in Part-III of the Constitution as Fundamental Rights, which was introduced as "Constitution (Amendment) Bill, 2009". Relevant portion of the amendment Bill reads:-

17A: Prohibition of manufacture, sale and consumption of intoxicating drinks and drugs:-
Manufacture, sale and consumption of intoxicating drinks and drugs which are injurious to health except for medicinal purpose and as expressly provided by any law made by the Parliament, is prohibited.

17B:- Prohibition of slaughter of cow and its progeny:-
(1) Cow shall be the national animal.

[2] Cow and its progeny shall be entitled to protection in all respects.

[3] Slaughter of cows, calves and other milch and draught cattle is prohibited.

[4] Slaughter of cows, calves and other milch and draught cattle shall be an offence punishable in accordance with law.

In the statement of objects and reasons given in support of the two Bills I had stated as follows:-

The failure to implement article 47 has resulted in a disaster in that substantial percentage of youths have become alcohol addicts and have fallen into immoral acts and habits which are incidental to addiction to alcohol which is the biggest problem the nation is facing in all its activities.

Moreover, failure to implement article 48 has in addition to the adversely affecting our cattle wealth and agriculture is also inconsistent with the feeling of fraternity among the citizens and is destructive of the cultural values of this country which hold cow in the highest esteem and consumption of beef is tabooed in our culture. Further, non-violence [ahimsa] and

service to humanity [manava seva] being our National ethos, cow which represents both these values is proposed to be declared as 'National Animal' entitled to protection in all respects, as a mark of our distinction.

But unfortunately, these two demands in support of which there has been overwhelming majority, they have not been implemented. In the Bill, I proposed that instead of continuing these two items in Directive Principles which were not enforceable, they should have made part of Part-III of the Constitution so that they become mandatory and enforceable. But unfortunately, politics has prevailed over the Constitutional provisions. In view of the persistent demand, both these articles should be inserted into Part-III of the Constitution as indicated in the Bill in National importance.

Learning of Devanagari script for National unity:-

According to Article 343 of the Constitution which provides that official language of the Union shall be Hindi in Devanagari Script. Therefore, it is expedient that in National interest every citizen of this Country should learn Devanagari script if not Hindi or Samskrit as a language. As this is of great importance for National unity, when I was a Member of Parliament [Rajya Sabha] I had introduced a Bill titled "Learning of Devanagari Script for National Unity, Bill 2011" The said bill was intended to ensure that every citizen of this Country learns atleast Devanagari Script which goes a long way in ensuring National unity. The Statement of Objects and Reasons furnished in support of the Bill reads:-

Under Article 343 of the Constitution Hindi in Devanagari Script has been made the official language of the Union. It is a matter of common knowledge that out of the 22 languages mentioned in the 8th Schedule to the Constitution, the script of three languages namely Samskrit, Hindi and Marathi is Devanagari Script. Number of States have been formed on the basis of language considering that it is as essential in democracy that the Government should speak to the people in their own language. In view of this policy, each State has adopted its own official language and consequently the primary education is imparted by and large in the language in which all children learn not only the official language of the State but also its scripts. Though Hindi has been declared as the official language of the Union, it

takes considerable time to use the said language effectively at all levels and in all departments of the Union. However, learning Devanagari Script by all the citizens will go a long way in the matter of National unity as learning of Devanagari Script would enable the citizens to read and write any words or phrases in Devanagari Script. It would also help in having single sign boards and in particular on all the Kilometer stones. As a result, citizens do not feel any difficulty after crossing borders of their State and travel in other parts of the Country. Therefore, in National interest it is considered necessary to prescribe that every citizen learns Devanagari Script which is sure to help National unity.

The entire Bill is printed at pages 212 and 213 of the book "Our Parliament" containing my performance as a Member of Parliament [Rajya Sabha]. This Bill also could not be taken up before the Parliament for want of time.

Dharma of husband and wife - family life:-

The relationship between Husband and wife through which a family comes into existence has been considered as the most important and sacred in Hindu way of life. The important provisions concerning this aspect are as below:-

देवदत्तां पतिर्भार्यां विन्दते नेच्छयात्मनः ।
तां साध्वीं बिभृयान्नित्यं देवानां प्रियमाचरन् ॥

Husband receives his wife from the Gods, he does not wed her according to his own will, doing what is agreeable to the Gods, he must always support her. [Manu Smriti IX-95] [L & CH 258]

This enunciation is the same as the famous statement in English, "Marriages are made in Heaven". Inconformity with this spirit, code of conduct applicable to husband and wife is also laid down in Manu Smriti. They are

तथा नित्यं यतेयातां स्त्रीपुंसौ तु कृतक्रियौ ।
यथा नातिचरेतां तौ वियुक्तावितरेतरम् ॥

Let man and woman, united in a marriage, constantly exert themselves that they may not be

disunited and may not violate their mutual fidelity.
[Manu Smriti IX 102] [L & CH 258]

अन्योन्यस्याव्यभीचारो भवेदामरणान्तिकः ।
एष धर्मः समासेन ज्ञेयः स्त्रीपुंसयोः परः ॥

Let mutual fidelity continue until death. This is the
summary of the highest law for the husband and wife.
[Manu Smriti IX 101] [page 258 of L and C. H]

The above verses of Manu Smriti contain the quintessence of
the philosophy inherent in the Hindu concept of marriage and,
irrespective of the changes in law brought about, is still inspiring
substantial number of husbands and wives and, in all probability,
will continue to inspire many future generations.

In view of the great importance and significance, from last
sixty years I have been sending a printed greeting card
incorporating the above shloka in response to all marriage
invitations which I receive. This has been highly appreciated.

Relationship unbreakable:-

न निष्क्रयविसर्गाभ्यां भर्तुर्भार्या विमुच्यते ।
एवं धर्मं विजानीभः प्राक्प्रजापतिनिर्मितम् ॥ ४६ ॥

By sale or separation (abandonment) the husband
and wife can not be liberated (severed) from each
other; we know this law to have been originally made
by the creator of the universe. [Manu Smriti Ch. IX-46]

DOCTRINE OF TRIVARGA:-

The Doctrine of Trivarga comprising “DHARMA”, “ARTHA”, and
“KAMA” was evolved as the sum and substance of Bharatiya
philosophy of life. The doctrine was invented to strike a
reasonable balance between interests of the individual and the
public interest, which means, the interests of all individuals who
constitute society or the Nation and even the entire humanity.

The object was to secure and protect the Right to Happiness through the supremacy of Dharma - over Artha [wealth], desires for securing material pleasure and Kama [every type of desire including the desire for securing wealth and every type of pleasure]. It offers an invaluable and everlasting solution for all the problems of human beings for all times to come, irrespective of their belonging or not belonging to any religion, society or Nation and gave the following mandate:

परित्यजेदर्थकामौ यौ स्यातां धर्मवर्जितौ ।

The desire [kama] and material wealth [artha] must be rejected, if they are contrary to Dharma. [Manu Smriti IV 176] [Courts of India, p-25]

This doctrine means that proper and legitimate means of acquisition of Artha i.e., material wealth and pleasure must regulate the desire [Kama] as well as the means of acquiring material pleasure [Artha]. This fundamental principle manifests itself through various provisions meant to sustain the life of the individual and the Society. It is for this reason, that all the works on 'Dharma' declare with one voice that 'Trivarga' sustains the World. They are:

In Ramayana

त्रिवर्गं फलभोक्ता तु । राजा धर्मेण युज्यते ॥

The essence of Rajadharma is the Ruler must conform to rule of Trivarga(Ramayana 38- 23)

In Mahabharata:

धर्मार्थकामाः सममेव सेव्या स उत्तमो योभिरत्नः त्रिवर्गः ।

"Dharma, Artha and Kama [Trivarga] should be fulfilled together harmoniously. [Shanti Parva 167-40].

In Kautilya Arthasastra

समं वा त्रिवर्गं सेवेत ।

The Trivarga (Dharma, Artha and Kama) should be obeyed together.

Barhaspatya Sutra- II-43:

नीतेः फलं धर्मार्थकामावाप्तिः॥

The goal of polity (Rajaniti) is the fulfillment of Dharma, Artha and Kama.

In Kamandaka Niti

गृहीतमेतन्निपुणेन मन्त्रिणा त्रिवर्गनिष्पत्तिमुपैति शाश्वतीम्॥

The State administered with the assistance of sagacious ministers secures the three goals (Trivarga) in an enduring manner

Somadeva:

“अथ धर्मार्थ काम फलाय राज्याय नमः”

I salute the State which brings about fulfillment of Dharma, Artha and Kama. [Nitivakyamrita]

Bharat Ratna C. Subramanyam on Trivarga said in his book “C.S. Speaks” thus:- “Indian philosophy refers to Dharma, Artha and Kama as TRIVARGA, the inseparable group of three, treats them as the warp and woof of ordered human society”.

Justice V.R. Krishna Iyer in his Foreword to my book “Trivarga” has eulogized Trivarga in his inimitable language thus:-

"Reject wealth (artha) and desires (kama) which are contrary to Dharma (righteous code of conduct)" namely "Ahimsa (non-violence), Satya (truthfulness), Asteya (not acquiring illegitimate wealth), Shaucham (purity) and Indriyanigraha (control of senses) are, in brief, the common dharma for all the varnas."

The trinity of fundamentals - Dharma, Artha, Kama - which constitutes the constellation is collectively expressed as Trivarga.

The glorious epics, the Manusmriti, Kautilya's Artha Shastra and other classics governed the ruler and the ruled. Indeed, the rules of Dharma govern every sphere of activity, every profession, every avocation. **The doctrine of Trivarga is an enduring system of values holding good in the social, political**

domestic and international planes of human business.

Dharma to secure happiness for all:-

The scope and meaning as also the role of Dharma in securing and preserving the right to happiness of all has been vividly explained by Justice K. Ramaswamy, speaking for the Supreme Court of India in his judgment in case of A.S. Narayana Dixitulu Vs. State of Andhra Pradesh [1996 (9) SCC 548] has quoted my view with approval.

“The concept of ‘dharma’ has been explained by Justice M. Rama Jois in his Legal and Constitution History of India (Vol. I), at pp 1 to 4 quoting the following verse from Mahabharata:-

धारणाद् धर्म इत्याहुर्धर्मो धारयते प्रजाः ।
यत् स्याद् धारणसंयुक्तं स धर्म इति निश्चयः ॥

Dharmasustains the society
Dh maintains the social order
Dharma ensures well being and
progress of Humanity
Dharma is surely that which fulfills these objectives
[Karna Parva Ch. 69, Verse-58]

.....

Dharma embraces every type of righteous conduct covering every aspect of life essential for the sustenance and welfare of the individual and the society. [para 60]

“The word Dharma or Hindu Dharma denotes upholding, supporting, nourishing that which upholds, nourishes or supports the stability of the society, maintaining social order and general well-being and progress of mankind; whatever conduces to the fulfillment of these objects is Dharma; it is Hindu dharma. [para 79]. [Courts of India, p-25].

“Dharma” or rules of righteous conduct was evolved to secure Right to Happiness for all without any exception. The idea, that for the good or happiness of a greater number, unhappiness or misery could be inflicted on a smaller number, was never accepted in Bharatiya culture and civilization. Instead, the “right to happiness” of every human being was laid down as an ideal. The ideal that all should enjoy peace and happiness is implicit in this prayer

सर्वे भवन्तु सुखिनः, सर्वे सन्तु निरामयाः।
सर्वे भद्राणि पश्यन्तु, मा कश्चिद् दुःखमाप्नुयात् ॥

Let all be happy, let all be free from diseases, let all see auspicious things and let nobody suffer from grief.

The universal happiness has been the essence of our National life is evidenced by the fact that this shloka is inscribed in golden letters on the gate of Samsad Bhavan.

The right to happiness is a compendious expression covering all specific human rights intended to secure happiness. That is why the ideal and slogan 'लोकाः समस्ता सुखिनो भवन्तु' that is "Let all people be happy" became an article of faith in our social and constitutional system, comprising various specific human rights, the protection of which leads to happiness.

This being a comprehensive human right merits to be included in the Universal Declaration of Human Rights made by the United Nations on 10th December 1948.

BHARAT - OUR MOTHERLAND:-

From times immemorial there has been an inseparable filial attachment between the sacred land of Bharat and the people of Bharat. This aspect is expressed in Vishnupurana thus:

उत्तरं यत् समुद्रस्य हिमाद्रेश्चैव दक्षिणम्।
वर्षं तद्भारतं नाम भारती यत्र सन्ततिः ॥

The Country which lies to the north of the seas and to the south of Himalayas, is Bharat, and the people of this Country are 'Bharateeyas'. [Ch-III Verse-1].

People of this Country never considered Bharat as their landed property. They considered Bharat as mother which in Bharatiya Culture has the penultimate status after God who has the ultimate status. In the book authored by Dr. Radha Kumud Mukherjee, the greatest historian of our times, highlighting this aspect has been said:

The name Bharata Varsha is not a mere geographical expression like the term 'India' having only a physical

reference. It has a deep historical significance symbolising a fundamental unity.

Therefore, it is appropriate that the word 'India that is' in Article 1 of the Constitution of India should be deleted. After deletion of these words, Article 1 will read as follows:-

1. Name and territory of the Union:- (1) Bharat shall be a Union of States.

This would be consistent with our National slogan **"Bharat Mata Ki Jai"**.

There is an ever shining example of love and affection towards motherland exhibited by Lord Rama the great hero of the Ramayana which is expressed in a popular Sanskrit verse. The occasion was this. After the defeat of Ravana in the war, his younger brother Laxmana appears to have told Rama that, instead of returning to Ayodhya, the place where they were insulted and from which they were driven out, they could as well become the rulers of Lanka which was a rich country then. Rama replied thus :-

*अपि स्वर्णमयी लंका न मे लक्ष्मण रोचते ।
जननी जन्मभूमिश्च स्वर्गादपि गरीयसी ॥*

May be, Laxmana, Lanka is full of gold. But one's mother and the motherland are greater than Heaven.

This should be the feeling of loyalty to Bharat of every citizen of this Nation wherever he resides on account of employment, trade or business or for whatever reason.

On consideration of excellent principles of administration of justice including procedural law, the book Courts of India – Past to Present published by the Supreme Court rightly states as follows:-

"All unique principles, well-thought out procedures and best practices, some of which surpass the modern legal system, made the Hindu Court System sustain and serve for a couple of millenniums" (Courts of India p, 32)

The salient aspects of Dharma and Rajadharma makes every Bharatiya proud of his heritage and inspires him not only to follow them but also to improve and remain as a model to the World at large.

It is for this reason, in Part-I of this lecture, I have indicated the salient aspects of Bharatiya Cultural Values and Legal, Judicial and Constitutional System [Vyavahara Dharma and Raja Dharma] which will enable the present or future legislature either at State level or at Union level to formulate a Swadeshi Jurisprudence.

PART – II

PART – II

NECESSITY OF ENACTING A UNIFORM LAW REGULATING THE CONSTITUTION AND ORGANISATION OF ALL THE HIGH COURTS AND

CONSEQUENTIAL AMENDMENT TO THE CONSTITUTION OF INDIA

The founding fathers of the Constitution incorporated Article 32 in the Constitution as part of the fundamental right. This article is declared by Dr. Ambedkar as the most important article of the Constitution. Under the said Article, a person can move the highest Court directly without approaching any other Court for enforcement of fundamental rights. This is an extremely good and beneficial provision and the most important aspect of Indian constitution. Having done so, the founding fathers also considered that there should be a provision for appeal to the highest court against the orders of the High Courts on grant of certificate by the High Court.

[1] In respect of matters involving interpretation of provisions of the Constitution vide Article 132

[2] In cases involving questions of law of general importance, which in the opinion of the High Court requires to be decided by the Supreme Court vide Article 133 and

[3] In respect of criminal matters as provided in Article 134.

Apart from the above provisions, founding fathers also incorporated Article 136 to approach the Supreme Court in appeal by seeking its special leave against the orders made by any Court or Tribunal in the territory of India.

But having regard to the vastness of the Country and population, the experience during the last more than five

decades regarding the jurisdiction under Article 136 has been that it is highly expensive even at the admission stage and more so thereafter, if notice is ordered and/or leave is granted. As the remedy of filing Special Leave Petition is available, large number of Special Leave Petitions are being filed by the litigants to take a chance even in respect of ordinary civil and criminal matters. But in practical terms statistics show that only in a few Special Leave Petitions, notices are issued or leave is granted. Large number of Special Leave Petitions, probably 80 to 85 percent are rejected at the admission stage itself. As a result, while it has become a matter of taking chance for the parties at heavy cost as described in a judgment that it has only become *lawyers paradise* being an in exhaustive source of income to them and also heavy burden for the litigants and heavy work load on the Supreme Court, which is coming in the way of disposal of important matters involving questions of interpretation of the provisions of the Constitution and other matters of great importance, which are pending for five to ten years or even more.

Therefore, it is in National interest, to give finality to the decisions/orders of the High Courts in all ordinary civil and criminal matters and to reduce the work load on the Supreme Court under Article 136 and enable it to devote more time on important matters.

For this reason I as a Member of Parliament [Rajya Sabha] had introduced a Private Member's Bill for amending Article 136 as follows:-

(1A) Nothing in clause (1) shall apply to any judgment, decree or order of any Court or Tribunal unless the case involves:

- (a) a question of law as to the interpretation of the provisions of the Constitution or of the Central Law and/or a question as to the Constitutional validity of State or Central law; or
- (b) any question of general importance which in the opinion of the Supreme Court needs to be decided by it.

Explanation:- In this Article the expression 'Law' shall mean and include any law made by the Parliament or any State Legislature or any rule or order made thereunder or any order issued by or on behalf of the Central or any State Governments having the force of law; [pages 222 to 226 of my book Our Parliament]

In the Private Member's bill I had also proposed for reconstitution of the High Courts after abolishing what are called letters patent appeals which came into existence during the British period which provided for an appeal in ordinary civil and criminal matters from the decision of the single Judge of the High Court to the Division Bench of the same High Court, as a result, there has been differences in original and appellate jurisdiction of the High Courts. They are:-

[1] Some have original, civil jurisdiction, others do not,

[2] There exists letters patent appeals, from the decision of the High Court to the same High Court i.e., from the decision rendered by a single judge of a High Court to two judges of the same Court in some of the High Courts, which are called intra-court appeals.

[3] This is opposed to the very concept of appeal which means approaching a superior Court against the decision of the lower Courts. The Supreme Court in the case of **Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatraya Bapat - AIR 1970 SC Page-1** has clearly stated what does an appeal means thus:

“The right of appeal is one of entering a superior court and invoking its aid and interposition to redress the error of the Court below. Two things which are required to constitute appellate jurisdiction are the existence of the relation of superior and inferior Court and the power on the part of the former to review decisions of the latter”.

On this aspect we have the earliest dissenting judgment by Justice Subodhranjan Das Gupta reported in AIR 1953 Cal. 433, disagreeing with the majority and holding that there can be no appeal against the judgment of a single judge under Article 226 of the Constitution as single judge of High Court is no inferior court.

Similarly, as far as letters patent appeals or appeal from the decision of single judge to two other judges of the same High Court, created by State Legislation as it has happened in Karnataka and Kerala, the very condition precedent namely existence of relationship of superior and inferior courts is absent.

Still, it is going on.

[b] Under the scheme of the Constitution, an appeal lies only to the Supreme Court from the decision of the High Court. Division Bench of a High Court is not a Court superior to the High Court just because the power is exercised by a single Judge.

[c] Taking inspiration from the provisions for letters patent appeal, even some State Legislatures have proceeded to provide appeal to two judges from the decision of the single Judge, which is devoid of Legislative competence.

There can be no doubt that provision for filing the Special Leave Petition to the Supreme Court under Article 136 should be continued, but it should be restricted in respect of matters raising questions of constitutional validity of Central or State Laws, interpretation of Constitution and of Central Law and also in respect of matters of National importance, **which in the opinion of the Supreme Court requires to be decided by it** is necessary. This can be done either by parliamentary legislation or the Supreme Court itself by making such a declaration under Article 141. Such steps on the one hand reduces the heavy burden of innumerable Special Leave Petitions in ordinary civil and criminal matters on the Supreme Court and on the other hand keeps the power and jurisdiction of the Supreme Court very wide enabling it to devote their time and energy which is being spent on hearing innumerable Special Leave Petitions most of which are dismissed at the admission stage or after ordering notice to the respondents or even without notice in cases where there is no substance.

Part-VI of the Constitution provides for formation of States and Chapter-V of Part-VI provides for establishment of High Courts in the States. Relevant Articles are:

214. **High Courts for States:-** There shall be a High Court for each State.

215. **High Courts to be courts of record:-** Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.

216. **Constitution of High Courts:-** Every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint.

225. Jurisdiction of existing High Courts:- Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution:

226. Power of High Courts to issue certain writs:-

(1) Notwithstanding anything in article 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

xxxxx

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32.

227. Power of superintendence over all courts by the High Court:-

(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

(2) Without prejudice to the generality of the foregoing provision, the High Court may— (a) call for returns from such courts; (b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and (c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

The aforesaid specific matters relating to the High Courts in the States have been incorporated in the Constitution itself.

Under the scheme of the Constitution, the legislative power on the topic of the constitution and organization of the High Courts is conferred on the Parliament vide entry-78 of the Union List. Article 246 of the Constitution reads:

246. Subject matter of laws made by Parliament and by the Legislatures of States : (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

In view of clause 1 of Article 246 read with entry 78 of the Union List, a common law ought to have been enacted by the Parliament regulating the Constitution and Organization of all the High Courts. Though 67 yrs are over since the constitution came into force, no such law has been made. The resultant position is some of the High Courts are still functioning under the letters patents issued more than a century before by the British Government [Emperor] and some new High Courts have inherited the jurisdiction of the erstwhile High Courts given to them under the letters patent issued by British Crown and the jurisdiction and powers of a few other High Courts is regulated by laws made by the Parliament in exercise of its powers under Articles 3 and 4 of the Constitution relating to reorganization of States and in some cases States Legislatures have proceeded to make laws to regulate the constitution and organization of the High Courts though it is within the legislative power of the Union Legislature.

The position therefore is as follows:-

Chartered High Courts have Original Civil Jurisdiction, others do not have it.

Even regarding exercise of the extraordinary jurisdiction under Article 226 there has been no uniformity, in that:

- (a) in some High Courts writ jurisdiction is being exercised by Division Bench of two judges.
- (b) In some High Courts writ petitions are being entertained by Division Bench and thereafter referred to single Judge.
- (c) In some High Courts single Judges entertain writ petition and thereafter refer to Division Bench.
- (d) In some High Courts Division Benches entertain appeal against the decision of High Courts rendered by a single Judge following the pattern of Letters Patent Appeals though under the Constitution High Court is one and no

appeal is feasible or possible against the High Court itself calling them as "INTRA COURT APPEALS" though as stated by the Supreme Court in AIR 1970 SC page 1, the very concept of appeal means an appeal from a lower court to a higher court and single Judge of a High Court is also High Court and not a court lower to Division Bench. Therefore, the term intra court appeal is a contradiction in terms.

No original jurisdiction except in six High Courts:-

Another most important aspect to be taken note of is that out of the 24 High Courts established in different States, only six High Courts have got original civil jurisdiction. They are: High Court of Calcutta, Bombay, Madras, Delhi, Jammu and Kashmir and Himachal Pradesh.

Therefore, the question whether the original jurisdiction of the High Courts should be continued or abolished has been the subject matter of consideration by Justice Satish Chandra [Chief Justice of Allahabad High Court] Committee who gave its report in 1986 recommending that ordinary civil jurisdiction of the High Courts should be abolished and that the original civil suits pending before some of the High Courts must be transferred to the City Civil Courts or the District Judge's Court having unlimited pecuniary jurisdiction. Government of India accepted the Justice Satish Chandra Committee report which is extracted in Justice Malimath Committee report, which reads:-

"Government of India, Ministry of Home Affairs (Department of Justice), addressed a communication to the Registrars of High Courts (D.O. No. 35/2/86-Jus(M) dated October 5, 1988) enclosing a summary of recommendations of the Satish Chandra Committee as accepted by the Government of India. Accordingly, the Government of India have accepted the following, amongst others, recommendations of the said Committee.

Ordinary Original Civil Jurisdiction of High Courts:-

- (i) The Ordinary Original Civil Jurisdiction of the High Court of Delhi, Himachal Pradesh and Jammu & Kashmir be abolished forthwith.

- (ii) The City Civil Courts in the three Presidency Towns be vested with unlimited pecuniary jurisdiction for civil work
- (iii) All the cases pending in the Ordinary Original Civil Jurisdiction of the High Courts be forthwith transferred to the Courts below”.

The same matter was again considered by Justice Malimath [Chief Justice of Karnataka and Kerala High Court] Committee comprising of three senior Chief Justices.

The Committee agreed with the recommendations of the Satish Chandra Committee that original civil jurisdiction of some of the High Courts should be abolished.

In accordance with the above recommendations of Justice Satish Chandra Committee report, by Maharashtra Act 15 of 1987, original civil jurisdiction of the Bombay High Court was abolished. By a separate legislation, unlimited pecuniary civil jurisdiction was vested in the City Civil Courts. The constitutional validity of the said law has been upheld by the Hon’ble Supreme Court by a five judge bench in *Jamshed N. Guzdar Vs. State of Maharashtra and Ors.* - 2005 (2) SCC 591.

In order to ensure uniformity in all the High Courts, the Justice Malimath Committee recommended that the following enactments should be passed by the Parliament.

- (1) Prescribing for the abolition of an Appeal to a Division Bench of the High Court against the decision or order rendered by a Single Judge of the High Court in a proceeding under article 226 or article 227 of the Constitution; and
- (2) conferment of power on the High Courts in the matter of deciding which category of cases under article 226 and 227 of the Constitution should be heard by a Single Judge or a Division Bench, as the case may be.”

Another important para in Justice Malimath Committee report regarding the enormous increase in the pendency of the cases which should be taken into account.

“Hasty and imperfect legislation without adequate investigative exercise on the part of the Executive regarding the real need for the enactment or such law or a proper public debate and institutional consultation

with expert bodies, professional association etc., results in more institution of cases in the High Courts.”

High courts under the Government of India Act and their continuance under the Constitution:-

The High Court established for each State or group of States, in relation to that territory, constitutes the highest court of civil and criminal appeal, reference and revision and is also invested with extraordinary original jurisdiction to issue prerogative writs for enforcement of rights given to individuals under the Constitution and the laws. At the time of commencement of the Constitution, for historical reasons, the States were categorised as part ‘A’, ‘B’ and ‘C’ States. At that time, there were nine part ‘A’ States, eight part ‘B’ States and 10 part ‘C’ States. Clause (1) of Article 214 of the Constitution of India provided for the establishment of a High Court for each State. Clause (2) of the same Article provided that the High Court exercising jurisdiction in relation to any province before the commencement of the Constitution shall be deemed to be the High Court for the corresponding State. By virtue of this clause at the commencement of the Constitution, the following High Courts became the High Courts of the corresponding part-A States under the Constitution.

- [1] Assam High Court for the State of Assam.
- [2] Patna High Court for the State of Bihar
- [3] Orissa High Court for the State of Orissa
- [4] Bombay High Court for the State of Bombay
- [5] Nagpur High Court for the State of Madhya Pradesh
- [6] Madras High Court for the State of Madras
- [7] Punjab High Court for the State of Punjab
- [8] Allahabad High Court for the United Province, later called Uttar Pradesh
- [9] Calcutta High Court for the State of West Bengal.

By virtue of Article 238(12) read with Article 214(2) of the Constitution, the highest court functioning in each of the Part-B States prior to their merger in the Union of India, became the High Court established for the respective part ‘B’ State under the Constitution. Similarly, there were courts of Judicial Commissioners for part ‘C’ States, at Ajmer, Bhopal, Kutch and Vindhya Pradesh. They were all declared to be the High Courts for the purposes of the constitution under Section 305 of the Judicial Commissioner’s Courts [Declaration as High Courts] Act XV 1950. These Courts were abolished under Section 50(1) of the States Reorganization Act, 1956, with the reorganization of States, with

effect from 1st November 1956, when New High Courts came to be established for each of the corresponding new State.

Union territory of Delhi which occupies an unique and vital position, being the capital city of India, was earlier placed under the jurisdiction of the Punjab High Court. Later a separate High Court was established for this union territory. There were also courts of Judicial Commissioners for the Union territories of Himachal Pradesh, Manipur and Tripura. Himachal Pradesh was brought under the jurisdiction of the Delhi High Court, until a separate High Court for Himachal Pradesh was established, Manipur and Tripura were brought under the jurisdiction of the Gauhati High Court.

As a result of the Reorganization of States through various enactments, enacted by the Parliament and regulations made as empowered, by Articles 3 and 4 and other Articles of the Constitution, the latest position regarding the number of High Courts, their territorial jurisdiction and the provision of law under which they came into existence are as mentioned in the table below”

Court name	Established	Act established	Jurisdiction
<u>Allahabad High Court</u> ^[3]	11 June 1866	<u>Indian High Courts Act 1861</u>	<u>Uttar Pradesh, Allahabad</u>
<u>Madras High Court</u> ^[4]	15 August 1862	<u>Indian High Courts Act 1861</u>	<u>Puducherry, Tamil Nadu, Chennai</u>
<u>Chhattisgarh High Court</u>	1 November 2000	<u>Madhya Pradesh Reorganisation Act, 2000</u>	<u>Chhattisgarh, Bilaspur</u>
<u>Delhi High Court</u> ^[5]	31 October 1966	<u>Delhi High Court Act, 1966</u>	<u>National Capital Territory of Delhi, New Delhi</u>
<u>Gauhati High Court</u> ^[6]	1 March 1948	<u>Government of India Act, 1935</u>	<u>Arunachal Pradesh, Assam, Mizoram, Nagaland, Guwahati</u>

Court name	Established	Act established	Jurisdiction
<u>Gujarat High Court</u>	1 May 1960	<u>Bombay Reorganisation Act, 1960</u>	<u>Gujarat, Ahmedabad</u>
<u>High Court of Judicature at Hyderabad^[7]</u>	5 July 1954	<u>Andhra State Act, 1953</u>	<u>Andhra Pradesh, Telangana, Hyderabad</u>
<u>Himachal Pradesh High Court</u>	1971	<u>State of Himachal Pradesh Act, 1970</u>	<u>Himachal Pradesh, Shimla</u>
<u>Jammu and Kashmir High Court</u>	28 August 1943	<u>Letters Patent issued by then Maharaja of Kashmir</u>	<u>Jammu and Kashmir, Srinagar/Jammu</u>
<u>Jharkhand High Court</u>	15 November 2000	<u>Bihar Reorganisation Act, 2000</u>	<u>Jharkhand, Ranchi</u>
<u>Karnataka High Court^[11]</u>	1884	<u>Mysore High Court Act, 1884</u>	<u>Karnataka, Bengaluru</u>
<u>Kerala High Court^[12]</u>	1956	<u>States Reorganisation Act, 1956</u>	<u>Kerala, Lakshadweep, Kochi</u>
<u>Kolkata High Court^[13]</u>	2 July 1862	<u>Indian High Courts Act 1861</u>	<u>Andaman and Nicobar Islands, West Bengal, Kolkata</u>
<u>Madhya Pradesh High Court^[14]</u>	2 January 1936	<u>Government of India Act, 1935</u>	<u>Madhya Pradesh, Jabalpur</u>

Court name	Established	Act established	Jurisdiction
<u>Manipur High Court</u>	25 March 2013	<u>North-Eastern Areas (Reorganisation) and Other Related Laws (Amendment) Act, 2012</u>	<u>Manipur, Imphal</u>
<u>Meghalaya High Court</u>	23 March 2013	<u>North-Eastern Areas (Reorganisation) and Other Related Laws (Amendment) Act, 2012</u>	<u>Meghalaya, Shillong</u>
<u>Mumbai High Court</u> ^[15]	14 August 1862	<u>Indian High Courts Act 1861</u>	<u>Goa, Dadra and Nagar Haveli, Daman and Diu, Maharashtra, Mumbai</u>
<u>Odisha High Court</u> ^[16]	3 April 1948	<u>Orissa High Court Ordinance, 1948</u>	<u>Odisha, Cuttack</u>
<u>Patna High Court</u>	2 September 1916	Letters Patent issued by the Crown	<u>Bihar, Patna</u>
<u>Punjab and Haryana High Court</u> ^[17]	15 August 1947	<u>Punjab High Court Ordinance, 1947</u>	<u>Chandigarh, Haryana, Punjab, Chandigarh</u>
<u>Rajasthan High Court</u>	21 June 1949	<u>Rajasthan High Court Ordinance, 1949</u>	<u>Rajasthan, Jodhpur</u>

Court name	Established	Act established	Jurisdiction
<u>Sikkim High Court</u>	16 May 1975	<u>The 36th Amendment to the Indian Constitution</u>	<u>Sikkim, Gangtok</u>
<u>Tripura High Court</u>	26 March 2013	<u>North-Eastern Areas (Reorganisation) and Other Related Laws (Amendment) Act, 2012</u>	<u>Tripura, Agartala</u>
<u>Uttarakhand High Court</u> ^[18]	9 November 2000	<u>Uttar Pradesh Reorganisation Act, 2000</u>	<u>Uttarakhand, Nainital</u>

Under the Government of India Act, 1935, the legislative power to enact a law on the subject, **the Constitution and Organization of the High Courts** vested in the provincial legislature. But a change was brought about in the Constitution of India. The subject of Constitution and Organization of the High Courts was specifically included in entry No. 78 of the Union List. **This change was brought about in the Constitution with the object of bringing about uniformity in the Constitution and Organization among all the High Courts in India.** Under the scheme of the Constitution, the High Courts occupy a very important position. The framers of the Constitution felt that the Constitution and Organization of the High Court if left to the provincial legislature, there might be no uniformity in the Constitution, Organization, Jurisdiction and Powers of the High Courts. Hence, not only the legislative subject of Constitution and Organization of the High Court was included in the Union list, the provision for appointment of the Judges of the High Court, their conditions of service were laid down in the Constitution itself. Subject to these provisions Parliament is given the power to make laws on those topics. Under Article 216, central authority, viz., the President of India, is the authority for appointing Chief Justice and Judges of all the High Courts. As regards jurisdiction and powers, certain jurisdiction and powers considered vital for rule of

law were conferred on the High Courts by the constitutional provisions. They are, power to punish for contempt of itself (article 215), the writ jurisdiction i.e., power to issue writs or orders for enforcement of fundamental and legal rights (article 226), supervisory jurisdiction over subordinate courts and tribunals in the concerned State (article 227), power to withdraw cases involving interpretation of Constitution from the subordinate courts (article 228), administrative control over the staff of the High Courts (article 229) and subordinate judiciary (article 233-235). Explaining the object and purpose underlying the aforesaid constitutional scheme, in the course of the debates in the Constituent Assembly, Dr. Ambedkar states as follows:-

“We have deliberately brought in the High Courts because we felt that it was necessary to bring in High Courts in view of certain articles we have already passedthe only matter that is left to the Provincial Legislature is to fix jurisdiction of the High Courts in a pecuniary way or with regard to the subject matter. The rest of the High Court is placed within the jurisdiction of the Centre”.

Shri Alladi Krishnaswamy Iyer said:-

“We have already taken a particular step in regard to the High Court that is appointment of the Judge in the hands of the President. Secondly so far as the organization and jurisdiction is concerned, the idea is that there must be uniformity in the organization of the High Courts in the different parts of India, subject of course to the provisions of the Constitution. Therefore, in so far as the organization is concerned, with a view to emphasize the principle of uniformity and to see that there is uniformity in the different High Courts, this power is transferred to the Central Legislature. It will be realized that we have High Courts and High Courts. There are High Courts which have been functioning for several years for a century. There are High Courts which have come into being recently and it is also proposed to bring in all the High Courts in the State under the jurisdiction of Parliament and see that there is certain uniformity in the organization and constitution of the different High Courts in India. The only legislature that can function in this regard is the Parliament. That is why that part of the amendment provides for it.”

In view of the change brought about in the constitution and the object with which this change was brought about, it was necessary for the Indian Parliament to have enacted a common law for regulating the Constitution, Organization and general jurisdiction of all the High Courts in India and by that process, achieve uniformity in the matter of Constitution, Organization, Jurisdiction and powers of the various High Courts. No such legislative action has been taken by the Union Parliament so far. In view of inaction in this matter, the position is, that some of the High Courts are still functioning under the letters patent issued more than a century before by the British Government and some new High Courts have inherited the jurisdiction of the erstwhile High Courts given to them under the letters patent and the jurisdiction and powers of a few other High Courts is regulated by laws made by Parliament in exercise of its powers under Articles 3 and 4 of the Constitution relating to organization of States and in some cases States Legislatures have proceeded to make Laws to regulate the constitution and organization of the High Courts. It is high time that the Parliament which alone is given the power to make law regulating constitution, organization, general jurisdiction and powers of the High Court should enact a uniform law on the topic.

A reading of Article 246 read with Entry 78 of Union List, it is crystal clear that only the Parliament has got exclusive power to make a law regulating the Constitution and Organization of all the High Courts in the Country. But no such law has been enacted. Even when this was pointed out to the Government, the Government has given a reply stating that in view of Article 214-231 relating to the High Courts, no need has arisen to enact a separate uniform law regulating the Constitution and Organization of the High Courts.

Alladi Krishnaswamy Iyer in the Constituent Assembly clearly had stated that the power to make a law on the topic of Constitution and Organization of the High Courts which was given to the States in the Government of India Act 1935 was shifted to Union List for the purpose of enabling the Parliament to make a uniform law regulating the Constitution and Organization of the High Courts. Not only this obligation is not discharged but even after it was pointed out, the reply as above was given which tantamount to the shirking of obligations of Parliament to do so.

In the absence of enacting a uniform law regarding Constitution and Organization of all the High Courts, there are number of differences between the rules and regulations made by the different High Courts or by the State Legislatures as pointed out above. It is high time that the Parliament should come forward with a clear and uniform law on this subject.

Instead of the Parliament enacting a law regulating the Constitution and Organization of all the High Courts, allowing them to function under the Charters issued by the British Emperor even after more than 60 years after the commencement of the Constitution and allowing rules made differently by different High Courts or State Legislatures indicates nothing but the failure on the part of the Union Government to discharge its obligation. This is a sad commentary on the functioning of our Constitutional system and there is a famous statement in English that “***better late than never***”. Therefore, though there has been inordinate delay on the subject of enacting a common law regulating the constitution and organization of all the High Courts, it is the paramount duty of the Parliament to enact such a law without further delay.

There is one more important matter deserves to be considered by the Parliament while enacting a Uniform Law regulating the Constitution, Organization and the general Jurisdiction of the High Courts and the Supreme Court in respect of which there is an enlightening provision in our ancient laws.

One unanimous or majority judgment in cases where the Court comprises of three or more judges:-

यत्र सभ्यो जनः सर्वः साध्वेतदिति मन्यते ।

स निःशल्यो विवादः स्यात् सशल्यः स्यादतोऽन्यथा ॥

Unanimous decision by all the judges leaves no room for doubt while a majority decision leaves doubt in the minds of litigants. [Narada Smriti vide Dharmakosha p. 48] [Vyavahara Prakasha, page 27], [L & CH, page 503], [Courts of India p-39]

संख्यावैषम्ये तु भूयोऽल्पविरोधे भूयसां स्यात्सधर्मत्वमिति न्यायेन
विप्रतिपत्तौ अधिकसंख्यावचनमादरणीयं गुणसाम्ये ।

When there is no unanimity among the judges, opinion of the majority of the Sabhyas [judges] should prevail. [Jaimini XII 2.2].

These are very salutary provisions in our ancient law worthy of following. It is needless to stress about the desirability of unanimous judgment. However, in cases where unanimity is not possible in the High Courts or the Supreme Court, where cases are heard by three or more judges, one majority judgment should be delivered instead of writing several concurring judgments to avoid reading several judgments while relying on them before the Courts.

The present system of appeal from the decision rendered by a single judge of the High Court to two judges of the same High Court existing in some High Courts should be abolished as recommended by Justice Satish Chandra Committee and Justice V.S. Malimath Committee.

For these reasons, I make the following suggestions:-

[1] The Parliament should enact a **Uniform Law regulating the Constitution and Organization of High Courts** under which finality be given to the decisions/orders of the High Court in all ordinary civil and criminal matters subject to the special leave jurisdiction of the Supreme Court

[2] The existing provision in some of the High Courts providing an appeal from the decision of the single Judge of the High Court to two other judges of the High Court shall be abolished.

[3] In every matter decided by the Supreme Court there shall be only one judgment either unanimous or by majority.

[4] A special law Commission comprising of experts both in the present and the past legal and judicial system should be constituted to make a detailed study and to make specific

recommendations to ensure the securing of “**Swadeshi Judicial System**”.

JUSTICE DR. M. RAMA JOIS
FORMER CHIEF JUSTICE OF PUNJAB & HARYANA HIGH COURT
FORMER GOVERNOR OF JHARKHAND AND BIHAR
FORMER MEMBER OF PARLIAMENT [RAJYA SABHA]

**MADHYA PRADESH JUDICIAL ACADEMY
JABALPUR**

**NECESSITY OF EVOLVING A SWADESHI
SYSTEM OF ADMINISTRATION OF JUSTICE**

11th November 2017

LECTURE BY

JUSTICE DR. M. RAMA JOIS
FORMER CHIEF JUSTICE OF PUNJAB AND HARYANA HIGH
COURT
FORMER GOVERNOR OF JHARKHAND AND BIHAR
FORMER MEMBER OF PARLIAMENT [RAJYA SABHA]

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