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THE HON'BLE MR. B. P. SINHA.

The Hon'ble Mr. B. P. Sinha, Chief Justice of the Supreme Court of India, paid a short visit to South India during December 1960. Members of the legal profession in Madras, Mysore and Kerala were afforded opportunities of meeting the distinguished visitor and hearing his views on matters of interest and importance to the Bench and the Bar in India. It is pleasant to record that his Lordship the Chief Justice holds views, on certain important matters, wholly similiar to those of the legal profession here and gave expression to them in unequivocal terms.

His Lordship's feeling that a high standard of professional ethics should be inculcated in the minds of junior members of the Bar will find ready support in all quarters. The members of the Bar and the litigant public would be particularly pleased at his Lordship's assurance that he was willing to give serious consideration to the proposal that Circuit Benches of the Supreme Court should sit in different centres to enable expeditious and inexpensive disposal of cases.

We shall cherish pleasant memories of his Lordship's visit to Madras and we are confident that his Lordship would equally carry pleasant recollections of his tour in the South.

BOOK REVIEW.

GENTLEMEN OF THE LAW by *Michael Birks*. Published by Stevens & Sons, Ltd., London (Agents in India : N. M. Tripathi (Private) Ltd., Bombay)—Price Rs. 20.

The institution of lawyers, even on present day pattern, is very ancient and England is one of those countries where the institution has flourished in one form or other for over several centuries. But the lawyer has always been the subject of criticism and unfair comment and even literary writers of the past centuries have had their dig at lawyers and law Courts. Lawyers themselves have contributed a great deal in parodying their profession. That the criticisms are unjustified and the picture of the blemishes described by those writers were exaggerated is evident from the fact that the institution has survived these centuries and has attracted the best brains of each age. Most of the leaders in the political field, many eminent parliamentarians and moulders of public opinion in each country have been from among the lawyers of the country. It is fascinating indeed to learn about the historical aspects of this great institution and the ways and practices of those days through which the institution has grown and shaped itself to its present day form. Any one attempting to write on this subject could not help drawing his material from the records of Medieval England.

The author of this interesting work has done a real service in presenting to the public the materials collected from several ancient records regarding the development of the institution of lawyers. The story of the Solicitor from 1200 A.D. to the present day is bound to be of interest and value to one and all. The story is revealed in a simple narrative form which could be followed with interest even by laymen. It is both useful and timely as the profession has come in for a great deal of comment recently.

The book under review is excellently got up with art plates and provides good reading material and could be read with profit and interest by lawyers and laymen alike.

LATE SIR M. VENKATASUBBA RAO

By

V. RADHAKRISHNAYYA.

It is difficult for me to write about the life of Sir M. Venkatasubba Rao without a feeling of deep emotion. We came together in the Madras Christian College in 1895 and our friendship was continuous, close and intimate since then till the Almighty Lord chose to terminate it a few days ago. During this period of sixty years and more I could say with certainty that except when he was employed in the Hyderabad State not a day passed without our meeting and spending a few hours together.

It was barely a few months ago that I was privileged to write a few words about my dear friend in the 'Abhinandan Volume' published to felicitate him on his 83rd birth-day. I had the least idea then that I was to lose him within this short period. This is no occasion to dwell at length on the life history of the departed soul. Great men, known for their learning and judgment, have written about Sir M. Venkatasubba Rao in the Abhinandan Volume. His life as a practising lawyer and as a Judge of the Madras High Court, as a social reformer and a worker, as a philanthropist, entertaining conversationalist and a sociable person, have all been dealt with at length. References have also been made to his great and noble qualities of head and heart by eminent persons in these few days after his death.

The invisible hand of death has separated us and I have to reconcile myself to it. I am grateful to the ever merciful Lord who has given me the privilege of being associated with such an eminent person like Sir M. Venkatasubba Rao. I cannot complain that I have been deprived of a friend prematurely. But still, human as I am, the feeling of sorrow is as intense as the warmth and length of our association during his life.

I would like to quote with approval what is said in the issue of Swarajya of the 7th January, 1961 about the social nature of Sir M. Venkatasubba Rao. Sir M. Venkata Subba Rao had the Frenchman's love of society without his light-hearted gaiety. His house was a salon, where the rich and poor received frequent hospitality and mixed with each other without any sense of difference, whether of status or outlook. What Sir M. Venkatasubba Rao said in his reply to the Farewell Address on his retirement from the Bench years ago reflects his bold and independent outlook as a judge. He said on that occasion "I do admit that justice to be rendered is to be within and not outside the law but much depends on the judge's attitude of mind and the way in which he has developed his judicial conscience. A judge, able and learned and possessing a vision, if intent on advancing justice, is rarely thwarted by the claim of law as opposed to justice on the innumerable controversies which go to make up a case. There are always facts which lend themselves to such treatment as to produce the desired result—without the judge being obliged to wrest or distort the Law—Then again, it is the function of a judge where the law is elastic to adapt it to the growing needs of the community and its constantly shifting life."

The Madras Seva Sadan, known for its excellent work in the cause of the poor and suffering, speaks volumes of the self-less services rendered by Sir M. Venkatasubba Rao and his noble wife who has dedicated her life to the cause of that institution. The great spiritual influence that came over him in the past decade by his devotion to Srimathi Rama Devi is reflected in the Bhajana Hall he has constructed, where devotees congregate in large numbers and derive great spiritual elevation and solace.

A great and good man, who lived a rich, full, and useful life has now left us.

IS THE PRESIDENT OF INDIA A MERE CONSTITUTIONAL HEAD ?

By

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The status of the President of India in the Indian Constitution is an anomalous one, resembling that of the American and Irish Presidents in certain respects, and that of the British Crown in certain other respects, and it cannot be strictly said to belong solely to one of the two forms, Presidential or Monarchical as in England. India is a Republic, and not a Constitutional Monarchy. Powers of the executive are granted by the people and governed and controlled by a written Constitution. (*Duncan* v. *Machall*)[1]. There is no scope for the rule of reign of a hereditary monarch or any privileged class, as the President of India is elected on a broad basis from out of the elected members of both Houses of Parliament and the elected members of the Legislative Assemblies of the States. Under Article 56 of the Indian Constitution, he is removable by impeachment under Article 361, *etc.* So the President has to be responsible to the people. He is above party politics, unlike the Prime Minister of India, who though responsible to Parliament and the people of India, owes his position to the support of the party which has a majority in Parliament. The Prime Minister is not elected by the whole of India in the sense in which the President of India is deemed to be elected, though indirectly.

The President, under Article 60 of the Constitution of India, swears to preserve, protect and defend the Constitution and the Law, whereas Union Ministers swear only to faithful allegiance to the Constitution, and honest and diligent execution of their duties There is no specific provision in the Indian Constitution for impeachment of Ministers as in England. The President appoints the Ministers who hold office at his pleasure, individual ministers have access to the President of India unlike under the English practice, and allocation of portfolios among the Ministers is done by the President in contrast with the English practice, where the Prime Minister alone allocates portfolios. The President of India has a right to see that individual decisions of Ministers are being referred to the Cabinet for joint decisions of policies, as there is collective responsibility under the Indian Constitution, which is generally done only by the Prime Minister in England. The President has rule-making powers and right of information from Ministers, and there is collective responsibility of the Cabinet, and the Ministry will have to resign if there is no majority in Parliament to back them. Individual Ministers may have also to resign if they do not pull on with the rest of the team. Under Article 74 of the Constitution, the Cabinet of Ministers aid and advise the President, and no Court could go into the question whether and what advice was given to him by the Ministry. It is not specifically mentioned that the advice of the Cabinet is binding on the President nor is any reference made in any part of the written Constitution to such convention or usage, or any general indication in the Constitution itself that the construction of the written part is to be made with reference to the debates in the Constituent Assembly.

On the other hand, the words of the Constitution unambiguously exclude any reference to extraneous matters for construing the Constitution. The Preamble, Articles 53, 73, 368, 375 and 393—all refer to "*This Constitution*" which means the written Constitution. There appears to be no ambiguity latent or patent with regard to the grant of power to the Executive and the mode of exercising it. The only place where "custom or convention" is mentioned in the Constitution, is Article 13, where "Law" is said to include custom, and therefore no custom or convention will be valid when pitted against a fundamental right, and hence the President may even be said to be authorised by Article 60 of the Constitution to refuse to follow the advice of the Ministry when the action proposed by the Ministry may lead to a violation of the Fundamental rights and hence of the Constitution also. There is no definition of the word "violation of the Constitution" in any part of the Constitution and hence the term must be widely construed to include

1. 139 U.S. 449.

the violation of Fundamental rights as well as Directive Principles of State Policy. By the appointment of Finance Commission by the President of India, the ambit of the field of ministerial advice is narrowed, as the advice of the Ministry is to be replaced by another Advisory Body.

The Constitution, in unambiguous express words confines the execution of powers to be guided by the written words of the Constitution, and makes no reference, either in the definition, or the explanation chapters or Articles, about the feasibility of resorting to extraneous evidence of intention. Merely because under Article 105 of the Constitution, powers, privileges and immunities of the Houses of Parliament in India are mentioned to be those of the House of Commons in England until legislation is framed in India, it cannot be said that the powers of the Executive in India are those of the Cabinet Ministers in England. In a Republic the Executive derives its authority from specific grant of power alone.

Even though the express words of the Constitution preclude any reference to extraneous evidence of intention, it may be argued that for practical purposes, a reference may be made to extraneous matter, and if on such consideration reference is made to the Constitutent Assembly debates, notwithstanding the prohibition contained also in Article 73, it will be seen that the proposal to provide in the Constitution for an Instrument of Instructions to the President and Governors, making it obligatory for them to follow ministerial advice, was omitted later on by the Constituent Assembly of India. There is something much more than what is spoken in the Constituent Assembly debates, and probably it was thought that, it may not be safe to bind the country for all time by inserting such express provision, as the ministry too may not behave properly always, and there was no express provision in the Constitution for impeaching them, and the President has the onerous duty under the Constitution to preserve, protect and defend the same and the Law. So prudence dictated that conventions may grow either way in future.

The Supreme Courts of America, and India, have maintained that reference to Constituent Assembly Debates is made only for proving the intention when there is latent ambiguity in the words of the Constitution, and that the Constitution, unlike ordinary Statutes should be interpreted liberally, as the Constitution is meant to survive all changes in the conditions of life of the people. It should not be interpreted in such a way as will lead to the presumption that life is static. Constituent Assembly members may not have been *ad idem* on all the points discussed, as nothing could be easily said to be the only view of the entire body. Nor could they have visualised all the changes in the conditions of life and environments of people so as to provide for them. The personalities of individual Presidents or Prime Ministers may have undue weight in coming to decisions on large issues of Administrative policy, ha and sometimes the pendulam may swing in favour of Presidential prerogatives, as in America, if great Presidents like Abraham Lincoln occupy the Presidential Chair in India. Tables may be turned in India also in favour of Presidential powers on future occasions. Hence the Constitution actually made must as far as possible include its application to new conditions also. As for example, the Ministers of India may be away in a foreign country on business, leaving the President in India, and can it be said that in case of a sudden atomic war on India's frontiers by a foreign power, the President of India has no initiative to defend the country, and so must wait till he is advised by the Ministry? Innumerable instances of such type may be visualised under modern conditions when science and technology have advanced so much. Therefore any interpretation of the Constitution must be made to suit modern conditions.

Therefore the theory of the office of the President of India being wholly alike to the British Crown, is neither supported by the words of the Constitution or the general principles of Constitutional interpretation. It must also be said, that unless the President of India is said to have been empowered to exercise his discretion in matters of emergency, the Constitution could not be read as being composed of mutually related and consistent parts. The general rule of

Constitutional interpretation is, that a Constitution should be so read as to make the Constitution "as framed" stand, and none of the provisions stultify against the rest. Following this principle, I have to make the following observations :—

It appears to me, that the words occurring in Article 53 of the Constitution, "in accordance with *this* Constitution", though qualifying the President's executive authority as defined in Article 75, also amplifies his authority to assume discretionary powers in an emergency, in order that he may under Article 60 "preserve, protect, and defend the Constitution and the Law and devote himself to the service and wellbeing of the people of India". Under Article 361, the President is not answerable in any Court for exercising his functions except in an impeachment proceeding under Article 61. But the responsibility lies on the President by virtue of Article 60 to defend and protect the Constitution not only against external enemies, but to save it from his friends too, or members of his own party, who might want to abuse their right of being a majority party in Parliament, and advise him to violate the Constitution.

Since the authority of the Supreme Court of India to go into the question whether there has been a violation of the Constitution, has not been excluded under Article 136, and the other House or authority examining the charge of violation in an impeachment proceeding or any Tribunal being invested by them with such authority, is likely to be construed as a Tribunal or Court for the purpose, violation of the Constitution and the Law will be an objective offence, and not a subjective one, inspite of the support of a 2/3 majority in favour of the impeachment proceedings. In such a case, the defence of the President that he acted on the advice of the Ministry and not on his initiative may be of no avail, as the President is sworn to preserve, protect and defend the Constitution under Article 60, and further under Article 74 (2), no enquiry can be held by any Court in the matter of whether and what advice was tendered by the Ministry to the President. In order that the President of India should be able to defend himself properly in an impeachment proceeding, he should be allowed to let in evidence as to what advice the Ministry gave him, and that he never acted in his discretion, in case the analogy of the Crown being bound by the Cabinet advise in England is to be applied to India. This will be the awkward situation to which the President's position will come to, if his status in the Constitution is wrongly likened to that of the British Crown. It may be difficult for the President in such a contingency where he is precluded from letting in evidence, to escape vicarious liability in an impeachment proceeding. The Union Ministry will escape in such situations as there is no express provision in the Constitution for impeaching them. The President may have to anticipate the gross abuse of power by the Ministry, and dismiss them, but the trouble will not end there, if the dismissed Ministers again have a backing of the people as well as Members of Parliament on a fresh election, and the President may have to face a hostile Parliament. Therefore, construction of the Constitution on the analogy of the English practice may lead to an unresolvable crisis in India.

Therefore, in my opinion, in order that the Constitution as framed, should hold good as one piece of consistent legislation, and in order that a Constitutional crisis of magnitude may also be averted, it is fitting, that the Constitution is read in such a way as to fit in the provisions giving the President rights with those saddling him with responsibilities, that is to say, the Constitution should be so read as to mean that the provision in Article 74 was so worded purposely so as to vest in the President, discretionary power in emergencies, and that nobody could challenge such emergency action by the President on the ground that such action was not in accordance with the Constitution under Article 53, and that is why evidence as to whether, and what advice was tendered by the Ministry to the President, is precluded under that Article. This mode of interpretation would make the President of India more akin to the American President than to the British Crown.

In my opinion the Constitution unambiguously provides that the advice tendered by the Ministry is, as a working rule, to be accepted by the President

in normal cases, but the President has *corrective powers*, as he can override and is bound to override the advice of the Ministry, in matters of emergency, when his duty under Article 60 to preserve, protect and defend the Constitution and the Law arises, out of his duty to work for the service and well-being of the people of India and not of any particular party. The Ministry will have to accept, in such situations, the President's discretion in turn, as they are sworn "to do right to all manner of people in accordance with the Constitution and the Law without fear or favour, affection or ill will".

The Indian Constitution, thereby, provides for protection of the minority parties in Parliament from oppression by the majority party by vesting discretion in the President of India in emergencies, in the same way as the Governor is empowered to have discretion under Article 163, and has to tender advice to the President of India to protect the minority party in State Legislature, from oppression by the majority party, and if necessary to dissolve the Legislature and Cabinet as was done in Kerala recently. Without such power in the President, the Country could not be properly protected and defended in case of external invasion, and there would be no option for the minority party but to resort to civil war in order to overthrow the tyrannical majority party, and that is why, discretion has been vested in the President of India to assert himself in emergencies.*

DEATH PENALTY

By

K. G. Subramanyam, M.A. B.L.

Certain offences such as murder (section 302, Indian Penal Code) are punishable with death or with imprisonment for life. Sub-section (5) of section 367, Criminal Procedure Code, as it was prior to its repeal by Act XXVI of 1955, provided that if the accused is convicted of an offence punishable with Death, and the Court sentences him to any punishment other than Death, it should in its judgment state the reason why the sentences of Death was not passed. Interpreting this sub-section (5) Courts had held uniformly that a sentence of Death was the normal sentence for murder and that whenever a Judge should sentencehe person to the lesser penalty, he had to give adequate reasons therefor—or in otther words, unless he was able to find some mitigating or extenuating circumstances in favour of the accused, he had perforce to sentence him to Death. The statement of the law contained in these decisions were based only upon and could be supported only by the wording of the sub-section (5) as already stated. (See *Ramudu* In re[1], *Boya Burranna* In re.[2]

The sub-section (5) of section 367, Criminal Procedure Code as it stood, has been repealed by Act XXVI of 1955 with effect from 1st January, 1956. The basis for the assumption that Death penalty is the normal penalty for the offence of murder having been removed, the question of proper sentence where a person is convicted of murder is to be decided not at all on any such assumption, but like any other point for determination with the decision thereon and the reasons for such decision as provided by sub-section (1) of section 367, Criminal Procedure Code. This aspect has been judicially noticed in *Satya Vir* v. *State*[3], *Khanzaday Singh* v. *State*[4]. In a very recent case reported in *Ram Singh* v. *State*[5], the Court observed "Courts are now no longer required to elaborate the reasons for not awarding the Death Penalty, but they cannot depart from sound judicial considerations in preferring the lesser punishment." The Court however did not consider that the amendment affected the law regulating punishment under the Code. The sentence of Death passed by the Court in that case might be fully justifiable, as it was a treacherously planned

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* 'Law of Emergency', Madras University Lecture, 1956.

1. (1942) 2 M.L.J. 312 : I.L.R. (1943) Mad. 348.
2. (1955) Andh.W.R. 183.
3. A.I.R. 1958 All. 746.
4. A.I.R. 1960 All. 190.
5. A.I.R. 1960 All. 748.

robbery with murder in coldblood of the master by his servant. The observations of the Judge to the effect that there is no change in the law were unnecessary for the decision and it is submitted that they are not fully justified. The effect of the repeal of sub-section (5) does not appear to have been considered in the other cases reported.

The discretion to award any sentence is now to be exercised without any statutory restrictions but on sound legal principles. In consequence, since no Court is bound to pass the maximum sentence provided for any offence, it becomes, in my view, incumbent on the Court when it takes the extreme step of sentencing the accused to Death, to provide adequate reasons why in the light of the evidence before it, it has to inflict the maximum penalty known to law. Instances of murders connected with robbery, or brutal or coldblooded murders, or motiveless homicidal malignities would fall presumably in this category. All other cases would logically call for lesser punishment as it is no longer necessary to require any extenuating circumstances "in mitigation of the offence" as was the case under old sub-section (5) of section 367. In this view it may be no longer necessary to recommend cases for commutation of Death penalty to Government since Courts are not obliged to pass the Death Penalty, and they have ample discretion—not being bound by any statutory limitations—to award the lesser sentence.

The following observations of Agarwala, J., in *Moolchand* v. *State*[1], are worthy of note:

" Under section 302, Indian Penal Code, a discretion is vested in Courts either to impose a sentence of Death or of transportation for life. Discretion must always be exercised according to principles and not according to the humour of the Judge, arbitrary or fanciful. The principle upon which discretion is to be exercised not being fixed by any statute, may be interpreted progressively in accordance with the spirit of the times, so that real and not technical justice may be secured. To my mind the true principle of exercising the discretion of imposing either the penalty of Death or of transportation for life should be that the sentence of Death is awarded in cases in which the act is very brutal and highly repugnant to morals and the sentence of transportation of life is imposed in all other cases." This view was held to be in conflict with the express provisions of sub-section (5) section 367 as it stood. See *Boya Burranna* In re[2]. Now that the sub-section (5) is repealed, the view of Agarwala, J., so clearly expressed above should represent the correct principle of law.

From reports of some cases appearing in the papers, I have a misgiving that this aspect might not have been duly considered by Courts. I venture therefore to place this aspect for consideration of Courts and those concerned in Criminal trials since I hold the view that the the imposition of the Death penalty on any citizen is a very serious matter.

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1. A.I.R. 1953 All. 220.

2. (1955) Andh.W.R. 183.

LEGALITY OF STAGGERING PENALTIES IMPOSED ON ADJUDICATIONS BY ADMINISTRATIVE AGENCIES EXAMINED

By

K. C. RAJAPPA, *Advocate, Madras.*

Leaving aside for separate treatment the merits and demerits of adjudication proceedings in *Sea Customs cases*—recently extended to Foreign Exchange violations (since they are common to other Administrative Tribunals which have come to stay—indeed on the increase) it is proposed to examine here, the legality of the staggering penalties running into six or seven figures, which the authorities are imposing even after the Constitution with its many valuable safeguards. This question of legality (which alone Courts can examine—not the severity or excessiveness of the penalties) has been the subject of judicial decisions of several High Courts during this decade and latterly of the Supreme Court also and yet, strange as it may seem, uncertainty prevails still on this question and in several States the amazing penalties continue to be imposed just because the respective High Courts of those States did not consider them illegal. This is unfortunate and certainly is avoidable, since the Supreme Court has expressed its views about the illegality in no uncertain terms in three cases, which some High Courts—but not all, have treated as binding decisions. Here is a fine opportunity for the Union Government to intervene and issue Executive instructions that the view of the Supreme Court will be followed by its Administrative Officers in awarding penalties in their Adjudication proceedings even in the States where the High Courts had expressed a contrary view. It is sometimes pointed out—and rightly too, that in many cases the Executive Authorities are in a position to do justice and relieve hardships which Courts may be powerless to do, on account of the inelasticity of Statutes and technicalities and procedure. To cite an example, Judges are required by law to award in murder cases a sentence of death or life imprisonment. Even when they think the lesser punishment is far too severe under the cirumstances of the case they can only move the Government to exercise their powers vested in them and mitigate the hardship. Protagonists of Administrative justice cite this advantage as a point in favour of it.

During all these years the Appeals to another Administrative Authority provided by the Acts have not appreciably served to mitigate the hardship and injustice of these hair-raising penalties. While having an eye on Government revenue they perhaps satisfied their conscience by accepting and following the view that no quarter should be shown to smugglers and no punishment is too severe for them. This is a relic of the days when sheep-stealing was a capital offence. These Departmental Appeals have in practice proved to be inadequate and ineffective and an eminent Chief Justice while over-ruling an objection that the Petitioner did not exhaust the remedy (Appeal) provided by the Sea Customs Act to a higher Departmental authority observed, that these Appeals were from Cæsar to Cæsar.

The gravamen of the objection is often missed ; it is not so much against the excessiveness of the penalties provided in the Act as against the fact that the power of imposing them is vested in the Executive or Administrative Officers of the Government and not in Courts or Judicial Tribunals. It is well known that numerous Statutes in prescribing fines have fixed no limit or maximum, but this circumstance, has not led to the imposition of these staggering penalties. The traditions of Courts, the judicial training of the presiding Officers, no less than the several Appeals and reviews provided in judicial orders, have all contributed to the entire absence of such amazing penalties. Recently, a penalty of fifty-five lakhs was imposed in a certain Adjudication proceedings. Is such a thing conceivable in a Court of Law ?

Before proceeding further it will be better to establish the point mentioned at the outset, that the question of maximum penalty was actually decided by the Supreme Court in *F. N. Roy's case*[1], though a Full Bench of the Madras High Court was under a misconception that this is not a decision but only an observation. The following quotation from the judgment of the Supreme Court is self-explanatory.

"Another similar argument (of Petitioner's Counsel) was that section 167 (8) of the Sea Customs Act itself offended Article 14, in that it left to the uncontrolled discretion of the Customs authorities to decide the amount of punishment to be imposed."

This objection was answered by the Supreme Court in these words :

"The section makes it clear that the maximum penalty that might be imposed under it is Rs. 1000. The discretion that the section gives must be exercised within the limit so fixed. This is not an uncontrolled or unreasonable discretion...."

It is unfortunate that the Full Bench of the Madras High Court in *Sheik Dawood* v. *Collector of Central Excise*[2], missed or overlooked the first of the two passages quoted above and fell into the error of thinking, that the scope of section 167 (8) was not before the Court at all. (*Vide* passage quoted below.)

"From what we have just stated it will become apparent that the only question before the Court was as regards the scope of section 183 and the scope of section 167 (8) was not before the Court at all."

Earlier the following observation occurs :

"It will be noted in that case the amount of penalty imposed was only Rs. 1000 and so the question whether the appropriate Customs Officers could impose a penalty in excess of Rs. 1000 did not arise for consideration."

True, the petitioner did not complain that he was awarded a penalty in excess of the permissible limits but, he went much further and contended, that the entire penalty provision offended Article 14 since it gave uncontrolled discretion to the Customs Authority to impose penalties. Counsel went on the footing that Rs. 1000 mentioned in the clause was not the maximum (because it was not stated or even so indicated.)

The Supreme Court however saved the penalty clause from the attack on its constitutionality by interpreting that Rs. 1000 was the maximum *and so* there was no uncontrolled or unreasonable discretion. But for this interpretation, the entire provision should have been struck down, as offending Article 14. One may respectfully question whether as stated by the Supreme Court, the section makes it clear that Rs. 1000 is the maximum. Far from this being so, several learned Judges *whose attention was not drawn to Article* 14 thought that in the absence of any words like "whichever is less" both alternatives are permissible and legal. Be that as it may, *F. N. Roy's case*[1] is a binding decision on the point that Rs. 1000 is the maximum (legal) penalty leviable under section 167 (8) of the Sea Customs Act and until the Supreme Court sees fit to revise this opinion, it is law of the land. Moreover, having regard to Article 14 which forbids the vesting of unguided, uncanalised, uncontrolled or unreasonable powers in the Executive, a maximum has to be fixed and all that the Supreme Court did was to treat Rs. 1,000 as that maximum and it also happened to be not unreasonable.

How differently this very case of F.N. Roy was viewed by other Judges that is, as a binding decision (not as casual remark or observation) will now be examined. Armed with the decision in *F.N. Roy's case*[1] one Hammid Sultan challenged the penalties imposed on him by the Customs authorities—Rs. 10000, in one and Rs. four lakhs in another case. K. T. Desai, J., of the Bombay High Court in a well-considered judgment observed, relying on the observations in *F. N. Roy's case*[1] :

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1. (1957) S.C.J. 734 : (1957) M.L.J. (Crl.) 684 : A.I.R. 1957 S.C. 648.

2. (1960) 2 M.L.J. 230 : (1960) M.L.J. (Crl.) 626 : I.L.R. (1960) Mad. 961 (F.B.).

It is not possible to consider these observations as mere passing remarks. The observations have been made with a *view to make them the foundation for the decision* that there was uncontrolled or unreasonable discretion vested in the authorities entitled to impose a penalty. In my view, these observations by necessary implication over-rule the view of the Bombay High Court taken in *Mohandas Iswardas* v. *Sathadhan*[1]. The decision of the Supreme Court does not refer to the aforesaid Judgment of this Court and the reasons on which it was based. But that fact cannot affect in any way the *binding character* of the decision of the Supreme Court. Following the decision I hold, the Additional Collector of Customs was not entitled to impose a penalty of Rs. 10,000 as he has done, the maximum limit of this power being the imposition of a penalty of Rs. 1,000."

The Judge had not even a shadow of doubt that *F. N. Roy's case*[2] was a decision, also on the point of the penalty clause in section 167 (8), Sea Customs Act. He therefore treated the Bench decision of the same High Court as impliedly over-ruled by the Supreme Court decision and quashed the penalty which exceeded Rs. 1,000. In Madras, however, Rajagopala Iyengar, J., being of opinion that in view of *F. N. Roy's case*[2] the Bench decisions of the Madras High Court to the contrary call for reconsideration and suggested that a Full Bench should decide this. That is how the matter came up before the Full Bench and ended in the way as already stated.

An appeal was preferred by the Customs authorities and the Bench consisting of Chainani, C.J. and S.T. Desai, J., delivered a judgment on the 30th March, 1959, in Appeal No. 39 of 1958 confirming the judgment of T. Desai, J., in W. Misc. App. No. 377 of 1957. It is a judgment wherein the various arguments raised on behalf of the Government by Sir Nasserwanji, Engineer, have been fully answered, and it will repay perusal. But it does not appear to have been reported. It appears a certified copy of this judgment was filed by the parties before the Full Bench, but there is no reference to this in the Full Bench Judgment. It is noteworthy that the Bench went further than K.T. Desai, J., who treated *F.N. Roy's case*[2] alone as the decision of the Supreme Court. The Bench observed that the Supreme Court having said in *Babulal Amthalal's case*[3], in clear words that it had held in *Maqbool Hussain* v. *State of Bombay*[4], that Rs. 1000 was the maximum permissible penalty, it was not open for them to say that Bhagwati, J.'s observations in the latter case were casual or passing remarks. The passage relied on by the learned Chief Justice of the Bombay High Court is extracted below :

"If section 167, clause (8) lays down in addition to confiscation of the goods, the persons concerned shall be liable to a penalty not exceeding three times the value of the goods or not exceeding one thousand rupees. *This Court has held* that the minimum is the alternative."

The learned Chief Justice went on to observe :

"In this case therefore the Supreme Court has referred to the above observations of Bhagwati, J., in *Maqbool Husain's case*[4] as something which it has held. Consequently, it is no longer open to this Court to say (as Chagla, C.J., had said in an earlier case) that the above observations of Bhagwati, J., is only a casual observation or that it was only an obiter. The Supreme Court having regarded it as a decision that observation is binding upon us. Accordingly, we must hold that the Collector of Customs was not competent to impose a fine exceeding Rs. 1,000."

Then follows a quotation of the relevant passage from *F.N. Roy's case.*[2] It is noteworthy that the same Constitution Bench of five Judges decided both these cases. This is not without some significance. The Full Bench in the Madras case, however did not treat either of these cases as a decision, as the following passage shows :

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1. A.I.R. 1955 Bom. 115.
2. (1957) S.C.J. 734 : (1957) M.L.J. (Crl.) 684 : A.I.R. 1957 S.C. 648
3. 1957 S.C.J. 828 : 1957 M.L.J. (Crl.) 765 : A.I.R. 1957 S.C. 877.
4. (1953) S.C.J. 456 ; (1953) 2 M.L.J. 113 ; A.I.R. 1953 S.C. 325.

"Notwithstanding incidental or parting expressions of opinion that had been made on three earlier occasions the Supreme Court expressly refrained from saying anything in the matter in *Leo Roy's case*[1]....."

This very point of non-mention was the basis of an argument by Sir Nasserwanji Engineer. Chainani, C.J., countered it in this wise :

"It will not be right to draw an inference that the point had not been previously considered or decided by the Supreme Court. The question did not arise in this case and consequently it was observed that it was not necessary to express any opinion on it."

It may be mentioned here, that about a year later that is, on 5th March, 1960, a Division Bench of the Punjab High Court consisting of the Khosla, C.J., and Bedi, J., has also held that a penalty exceeding Rs. 1,000 is illegal under the Sea Customs Act.

It is feared that until the Madras Full Bench judgment is reversed by a fuller Bench or by the Supreme Court in Appeal, the Customs authorities in Madras will continue to impose penalties far in excess of Rs. 1,000 taking shelter under the Full Bench ruling. The Calcutta High Court has also taken the same view as the Madras High Court in *Palriwala Bros. Ltd.* v. *Collector of Customs.*[2] despite what the Supreme Court had stated in the three cases. What is the remedy? If someone moves in the matter—someone with status and stature—it is possible, the Union Government may intervene and issue instructions to the Madras Officials to confine the penalties to the limit of Rs. 1,000 in conformity with the express views of the Supreme Court. Another course is to add an *Explanation* to section 167, clause (8) to make it clear that Rs. 1,000 is the maximum penalty under the clause.

DOUBLE JEOPARDY : While on this topic another hardship which is tantamount to injustice, one frequently finds in Customs cases, is, that in addition to confiscation of goods and imposition of penalty, the offender is in many cases, also prosecuted in Court and receives a sentence of imprisonment or fine or both. The Madras Full Bench case referred to above is a case in point. As the law stands to-day the victim of these successive penal proceedings is unable to invoke Article 20 (2) of the Constitution, known as the rule of "double jeopardy". The Supreme Court decision is clear on this point (vide *Thomas Dena* v. *State of Punjab*[3]. The Supreme Court held that the proceedings before the Sea Customs authorities even though it might result in the confiscation of the goods and increased rates of duty or penalty did not constitute "prosecution" within the meaning of Article 20 (2) of the Constitution. This decision is in line to the earlier decision of the Supreme Court in *Maqbool Hussain's case*[4]. Though Article 20 (2) cannot be invoked, few will dispute that the proceedings clearly amount to a hardhship, if not harassment also.

The principle of double jeopardy underlying the Article does apply to these proceedings and this justice can only be dispensed by the Government issuing Executive instructions that the Customs authorities should make the choice and be satisfied with only one of these remedies. It is not necessary to amend Article 20 (2) though when a general amendment of the Constitution is undertaken the point may be remembered for inclusion in the Article. That the injustice in question is not a fancied one, but really substantial, was recognised by Subba Rao, J., in his dissentient judgment in the very case referred to above.

"I have therefore, no hesitation to hold that the Customs Officers in so far as they are adjudging upon the offences mentioned under section 167 (8) of the Act are functioning as judicial Tribunals. If the other view, *viz.*, that authority is not a judicial Tribunal be accepted, it will lead to an anomalous position which could not have been contemplated by the Legislature. To illustrate, a Customs Collector

1. (1958) M.L.J. (Crl.) 289: (1950) S.C.J. 301.
2. A.I.R. 1958 Cal. 232.
3. (1959) S C.J. 699 : (1959) M.L.J. (Crl.) 474 : A.I.R. 1959 S.C. 375.
4. (1953) S.C.J. 456: (1953) 2 M.L.J. 113 : A.I.R. 1953 S.C. 325.

may impose a penalty of twenty-five lakhs, as in this case on a finding that a person has committed an offence under section 167 (8) of the Act and the accused can be prosecuted again for the same offence again before a Magistrate. On the other hand, if the prosecution is first laid before a Magistrate for an offence under section 167 (8) and he is convicted and sentenced to a fine of few rupees he cannot be prosecuted and punished again before a Magistrate." It is not a rare experience, that dissenting judgments of to-day become the spearheads of progressive and beneficent legislation of the future. Also that they sometimes become the leading judgments a few years later. Nevertheless, it will be too sanguine to hope that in the immediate or near future the judgment of Subba Rao, J., will become a decision of the Supreme Court. Is this not a fit case for the Congres Government which claims to follow the high ideals and standards of justice set up by Mathatma Gandhi to step in and remove the hardship and harassment by its *fiat*? May be, the Law Commission will consider in time the general revision of these Statutes which may have been tolerated in the pre-constitution days, but are inconsistent with the spirit if not the letter of the Constitution. It is not too much to expect the Members of the Bar Associations to take an interest in these matters and bring to the notice of the authorities the remediable hardships, and injustice, which may be removed by Legislative or Executive measures. It is gratifying to note, there is a growing awareness of this responsibility and duty. Before concluding, it is appropriate and even necessary to say a few words about the penalty provision in the Adjudication proceeding introduced three years ago in the Foreign Exchange Regulation Act. It was left to Shri Chintaman Deshmuk, a distinguished former Finance Minister, to raise his voice of protest against this measure. He said in the course of Srinivasa Sastri Memorial Lectures in Madras University in October, 1959 :

" Mr. Srinivasa Sastri held, it was admitted as an universal principle, that where you arm the Executive with arbitrary powers you must be always prepared for its abuse. Had he been alive to-day, I am sure he would have strongly disapproved *as I do*, the transfer of cases of transgression of the Foreign Exchange Regulation Act from the regular Courts to a one-man Administrative Tribunal (Director of Enforcements) not perhaps as holding a threat of injustice to the individual, but as an instance of the tendency, fatal to the working of democracy, to translate quasi-judicial proceedings to the shady penumbra of Administrative-Law, where the absence of the limelight of open public trial could lead to an unduly gentle treatment of influential offenders". (A short comment on the last few words may not be irrelevant. It might lead equally to an unduly harsh treatment of persons who have lost favour or are disliked by the powers that be.)

Here the criticism will be confined to the legality of the penalty clause. Profitting by the discussions in Courts based on the absence of words "whichever is less" or "whichever is more", the penalty clause in section 167, clause (8) of the Sea Customs Act, the draftsman while settling the wording of the penalty clause for the adjudication proceedings, newly introduced in the Foreign Exchange Act, thought it wise to remove all ambiguity by adding the words " whichever is more ". He thus provided for a statutory minimum that should be levied and not a maximum which the law *after the Constitution* requires to provide for making the provision legal and constitutional.

Let us examine now whether the penalty provision as it now stands is legal and constitutional. This point has not so far been the subject of any authoritative decisions of Courts. It is however possible to derive assistance and guidance (in answering this question) from the decided cases under the analogous provision of the Sea Customs Act, some of which have been discussed above. It is enough to start with the case of *F. N. Roy* v. *Collector of Customs*[1], as a sheet-anchor. As already shown above, the constitutionality of the penalty clause was challenged by Counsel on the ground that it gave uncontrolled and unreasonable discretion and power to the Customs

1. (1957) S.C.J. 734 : (1957) M.L.J. (Crl.) 684 : A.I.R. (1957) S.C. 648.

authorities to impose huge penalties—an every day occurrence. For several years, the High Courts had held that both the alternative penalties were permissible and legal and as the words "whichever is less" were not in the provision, Rs. 1,000 was not the maximum penalty leviable. In this form, the question was raised for the first time before the Constitution Bench in *F. N. Roy's case*[1]. Their Lordships of the Supreme Court were left with two alternatives. One, to strike down the penalty clause as violative of Article 14, in that, it prescribed no maximum, and thus gave uncontrolled and unreasonable power and discretion to the Executive authorities to impose penalties. The other alternative was to construe the clause and interpret it, as if, the second alternative *viz.*, Rs. 1,000 was the maximum. In this view the clause would survive the challenge made by counsel under Article 14 on the footing that Rs. 1,000 was not the maximum (as decided by several High Courts previously). Taking guidance from this decision there can be little doubt that the penalty clause relating to the adjudication proceedings in the Foreign Exchange Regulation Act is void and unconstitutional, because of the addition of the words "whichever is more ", after the second alternative Rs. 5,000. These words destroyed all chances of saving the provision and treating it as legal and constitutional by treating Rs. 5,000 as the maximum of the penalty awardable. Being a Foreign Exchange matter Rs. 5,000 in place of Rs. 1,000 found in the Sea Customs Act could not be considered unreasonable. Even a higher limit than Rs. 5,000 may not have drawn the frowns of the Supreme Court. What will not be tolerated, is, penalties like fifty-five lakhs, which was actually imposed in a case, not long ago, which received some publicity. Here again, those in high authority are in a position to see that the Act is worked without undue hardship by issuing Executive instructions to the Director of Enforcements. This is not an abridgement of the rights or privileges of a citizen. On the other hand, it is intended to benefit him and save him from the harassment which the provision as it stands, permits, unless its constitutionality is challenged in a court as was done in *F. N. Roy's aase*[1]. If this benefit is conferred by Executive instructions without forcing the parties to adopt the expensive remedy of testing the validity of the matter in the highest Courts, there will be supporters and advocates of the enlargement of subjects entrusted for decision to Administrative Tribunals.

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1. (1957) S.C.J. 734 : (1957) M.L.J. (Crl.) 684 : A.I.R. (1957) S.C. 648.

THE LAW AS AN INSTRUMENT OF SOCIAL TRANSFORMATION.*

Mr. Vijayaraghavachariar, Mr. Parthasarathy and friends,

I am very happy to be here today. This entire day I have been reviving memories of the two very pleasant years I spent here, and in meeting friends. On this occasion, I would first like to devote a few words to two matters. The first is Mr. Vijayaraghavachariar's eulogy about myself. I am afraid that he has taken the privilege of friendship to paint me in far too glowing colours. I assure you that I am not the formidable person that he has made me out to be. I hope that you will take his references to myself *cum grano solis* that is, with a grain of salt, and not regard me with that awe which a supposed Encyclopaedic knowledge inspires in others.

The other reference that I desire to make is to the revered gentleman in whose memory these lectures are endowed. I knew Mr. Sundaram Chettiar very well. I can even claim that he seemed to have a warm corner in his heart for me. He was not merely a great Judge. He was that rare individual, a man in whom humility overshadowed his considerable intellectual stature. He was also very human; more than one speaker today has referred to his humanity. Above all, he was a profoundly religious person, in the intrinsic sense of that term. I doubt if I could convey to you what exactly Mr. Sundaram Chettiar was, with regard to religious feeling and belief, without taking you far, which I do not propose to do. But I can tell you that he was a man constantly willing to subordinate himself and his claims, to truth. I do not know if a higher tribute than that could be really paid to a person's memory.

My subject this evening is a somewhat difficult one. I have a certain diffidence not from inexperience in speaking to people, but from the possibility of failure of communication at a certain level. So, may I request you to follow me rather closely? I am not presenting rhetorical or emotional appeal, but a certain thesis, which does involve a little philosophical reasoning. Mr. Vijayaraghavachariar has already frightened you about me as a metaphysician. So, I hope you will pardon me, if I try to be slow and clear. All that I can tell you is that if you do follow me, you will see a certain facet of the subject which you perhaps did not think over till now. Not that it is very profound, but that it is not always apparent. A certain problem in a Democracy relates to those who have charge of the destinies of others, *viz.*, politicians. They are the engineers of social change. Change requires thought, and politicians have no time for thought. Philosophers can think; but they are not in charge of affairs. This creates a dilemma, which can only be solved by educating the men concerned, you and me, about the reality behind social change.

My subject is: Law as an Instrument of Social Transformation. I presume that a Social Transformation is essential. I presume that none of us is satisfied with society as it exists. If you are satisfied, you have to walk out of this hall, for there can be no further communication. But if you think with me that society is in a state of degeneration, then the question of a radical, profound change, necessarily arises. Society is in a visibly parlous state. Not merely is cynicism gaining the upper hand, but the evangelism of materiality is rampant. Lip service is being paid to ideals, which are merely convenient forms of distracting attention from one's selfish pursuits. You must excuse me if I sound cynical, not merely realistic—A Judge often sees the worst, but I do not think that I am distorting reality. Well, if that is our society, unless there is a radical transformation, it will not survive. It does not deserve to survive.

How can this transformation be brought about? Is Law the instrument of Social Transformation? Every politician appears to think so, for Law is the power-

* *Diwan Bahadhur Sundaram Chettiar Memorial Lecture*—Address delivered by Sri M. Anantha-narayanan, I C.S., Judge, Madras High Court, at Sri C. Vijayaraghavachariar Memorial Library, Salem, on 10th December, 1960.

house of sanctions. Any other way seems too arduous, individual and difficult, without that intoxication which the use of power brings. So politicians tend to introduce Bills, which, after three stages, become the Law. But when the social consciousness that has to receive the Law is fretful, immature, too deeply self-ingrained to obey it, the sanctions are not enforced. This implies, that you introduce another Bill to enforce the sanctions. So, the vicious circle of the Law goes on. Should we not take time to think out this whole question, make the juristic analysis, even if it is a little abstract? This is my task. I propose to make no reference to any contemporary events, or a contemporary personality.

Clearly, there are two ways of looking at this picture. One is to assume that 'Social Man' is a conditioned product, absolutely conditioned. I might term it the Marxist or Hegelian Dialectic. If you condition society differently, you get a different social man. Since there is no individual who is objectively real beyond the condition, conditioning creates the perfect individual. If you accept this, Law is *par excellence* the instrument of social transformation. For Law, in modern society at any rate, is the state in its functioning; the state as a working force. If the state conditions absolutely, will it get the perfect social man? In Marxist analysis, it will and must. That is why Marx said that when the socialistic ideal is achieved, the state 'will wither away'. Those who, temporarily, feel 'out of joint' with this process of rigid conditioning and resist it, will be 'liquidated' unless they conform. Sinister words like 'elimination' and 'liquidation' are part of the metaphysics of Marxism. Because, if you really believe that there is no individual, as a permanent entity entitled to his fulfilment, then why should you be merciful with intractable forms? Perfect society through law rigidly enforced; that is one extreme of our perspective.

The other extreme is Democratic thought. This holds that there is such a thing as an indestructable core of individuality. There is a free, unconquerable individual, who is an end in himself. There is something greater than the body, and the conditionings of thought. Society is only a manifestation of individuals. Society exists for the individual. He is not merely a product to be conditioned, to produce a perfect society. The *Illuminate*, Christ, Budha or another, taught that social transformation is possible only in terms of the individual transformation. Any other transformation is superficial, mechanical, liable to fall away. So they taught that when the individual transforms himself, there is peace, there is order, for society is the reflection of his understanding. Purify his understanding, and you have a perfect society. Law is a matter with which the man of illumination is not greatly concerned. Christ said—"I came not to destroy, but to fulfil." Individual transformation is the fulfilment, far greater than the fulfilments of the Law. None of the *Illuminate* has ever been concerned with the Law as an instrument of social transformation. The Prophet has ever believed in the individual as the focus of social transformation, and Law as a pale reflex of that transformation. Such men are spiritual anarchists, in a true, not a derogatory sense. Christ was one, Gandhiji was one. They turned away from the entire structure of positive Law, I mean Law in the Austinian sense, which involves unpleasant consequences for its disobedience.

We have here these two poles, two opposite poles, of a single perspective of our theory of Law. Is the truth at either pole, or somewhere between them? If Law is at least a subsidiary instrument of social transformation, to what extent can we use it, and rely upon it? What are the rules of the best use of this instrument?

One point is clear. Law is powerless to procure for us the things of the deepest concern in our life. Rabindranath Tagore once said, referring to the possibility of a man creating great literature in a language that was not the mother-tongue of a man, that it was like attempting to win the smiles of a wife by a decree for the restitution of conjugal rights. Many of you are lawyers, and know what that means.

You can obtain the decree, enforce it, and get costs, but alas, you cannot get the smile. Because Law ends, where the smile begins. Really, that is so; the smile is something utterly beyond the Law, which, for lack of a better word, we may say is the expression of 'love'. Law cannot, in many ways, touch the deeper springs of life. This has been most beautifully expressed by a modern American poet :—

> "The Law 's our yardstick, and it measures well,
> Or well enough when there are yards to measure.
> Measure a wave with it, measure a fire,
> Cut sorrow up in inches, weigh content."

You cannot measure a wave, because it is moving. Or fire, because it is flaming. The scale of the Law cannot guage sorrow or content, which are immeasurable. Still, we all feel the impact of the Law in our lives. What is its true character?

Here, I would like to tell you something about the theories of Law of two German Philosophers, Stammler and Kelsen. They are often called Neo-Kantian, because the great Kant himself did adumbrate a theory of Law, and both Stammler and Kelson do derive greatly from him. Understanding them, in however brief a measure, will help us to understand the nature of Law as a social force. From there, we can proceed to have a glimpse of those rules of instrumental use, under which the Law functions, or may function, in optimum effect in achieving social change.

What Stammler said was this. Law is not derived from the State, because Law is older than the State. The latter is, in fact, only one type of legal order. Law is a species of binding will. Society may, in fact, be defined as a group of wills which function as ends and means to each other. No juristic claim is valid, save on condition that the person to whom it applies may remain his own neighbour, that is, an end in himself. While being bound, all individuals are still 'ends in themselves.' You see the extraordinary implications of this idea of justice infused into the concept of Law. Law is a congeries of wills ; but the wills are those of individuals who are ends in themselves. Law is valid only when it permits them to be or become this. When Law destroys the individual, it is no longer Law. Surely, a very singificant point, for the ethical factor of a judgment of Law, of a just and unjust Law, has crept in now.

Kelsen made a different contribution, from a scientific standpoint. He said that Positive Law was a normative science, as distinguished from natural science. The relationship of cause and effect in Law is not one of causation, but of attribution. If I put my finger into a flame, a burn injury occurs. But if a man burgles a house, we say that he *shall* be tried for the offence. Hence, that is a tendency resulting from an attribution which is characteristic of the normative order. Actually, the offender may or may not be ultimately punished. But, because of a whole system of attributions, he will tend towards trial and punishment. Two features distinguish Kelsen's thought. Firstly such a system of Norms must necessarily involve some foundation. According to Kelsen, this was the Basic Norm or *Ground-Norm*, that the constitution shall be obeyed. Secondly, this totally excludes the ethical element. There is only the pure science of Law. There is no moral or immoral Law.

But the analysis is unreal, from a Behaviouristic point of view. Actually, men never obey the Law, wholly on account of sanctions. Quite a few men obey the Law from fear. But even they recognise its ethical validity ; a totally unjust Law will be progressively defied and broken. Law is obeyed from a deep sense of its correspondence with the moral values of the concerned society. That is at least as powerful a motivation, as the sanctions behind the Law.

Those of you who are interested in this topic, and wish to go deeper, might perhaps care to read a paper in which I have tried to analyse the implications that I am now referring to, styled "Legal Philosophy and the Problem of obedience", in the First "Year Book of Legal Studies," Madras State. (Published in the Department of Legal Studies, Law College, Madras).

Now we come to the heart of the subject. So long as men obey the Law, partly out of fear and partly from an ethical consciousness, never wholly from fear nor wholly from a deep ethical acceptance, Law will be a legitimate instrument of social transformation. It will not be the primary instrument, the major causation ; but it is there. It is not mere lunacy on the part of politicians to be concerned with the Law, with an available instrument. You cannot tell a politician, "My dear sir, please resign, and please wait. I will go on converting every individual, and bring about an integral change in each man, and thus in society".

I wish to suggest six rules relating to the use of Law as an Instrument of Social Transformation. They are based upon three propositions, or fundamental truths.

The propositions I shall furnish first, for it is from this foundation that a theoretical structure can be validly built. Firstly, legal conformity or obedience is only a partial experience of social organization. The social ethical reality is much greater than legal obedience. Secondly, men, by and large, do obey the Law on the ground of its sanctions. Law is a limited instrument, but an essential instrument of social change. So long as human fallibility and weakness remain, it is a legitimate instrument, within its limits. But beware of the man who desires it as the exclusive weapon, irrespective of the claimate of values ; for he is the destroyer of individuals, who will suffer the fate of all tyrants. Thirdly, Law succeeds where it derives its main strength from ethical consciousness. Law fails when it is exclusively, or almost exclusively sanction-based. Law is the instrument of an energy, it is not the energy itself. Moral energy or *Dharma* is the true source of social change, though Law is one of the instruments.

From these truths, six conditions or rules flow as hereunder :—

Firstly, ethical consciousness or *Dharma* must be vitalised in the new direction. You have to do this before bringing in the instrument of the Law. If you begin with the Law, and the energised values are not there, Law will fail. You will be involved in the vicious circle of creating sanctions to enforce sanctions.

Secondly, qualitative studies of social values are essential. These must *precede* the introduction of the new Law. The agencies for such studies are woefully inadequate in our country.

Thirdly, statistical or quantitative studies (Gallup Polls) with regard to the acceptabilities of the new Law or direction of Law, are equally vital for the success of the instrument.

Fourthly, the Law to be introduced must involve the minimum interference with the existing *corpus* of Law. At the same time, it must be effective, and sanction-based.

Fifthly, the machinery for implementation must be pre-planned, and effective. If the human beings break down, the Law will fail, for the simple reason that Law does not behave like electrical energy or a harnessed river ; it is never automatic in operation.

Finally, the vicious circle must be avoided, by a progressive amelioration of penalties, at the same time increasing moral energy or *Dharma*.

Law is a power-house. The Private Member of the Legislature, as well as the statesman, are both constantly tempted to draw upon this energy, for it gives them a sense of achievement to make Law. But it is a temptation fraught with great harm to society. For each new Law takes away something from the region of individual volition and fulfilment. Because Law limit freedom, this instrumentation must be restricted. He who takes medicine as his food, cannot be healthy.

To act intelligently in this respect requires, not a community of children who try to think, or a community of people who follow some one merely because he is a leader, but a community of responsible and intelligent adults. If I have contributed in the feeblest measure to the creation of such claimate, my journey here would have been more than worth the while. Thank you, gentlemen.

CONFLICT IN PRIVILEGES OF COURTS AND LEGISLATIVE BODIES.

By

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For efficient functioning with dignity, Courts and the Houses of Legislature should possess powers and privileges of their own. Powers and privileges of Courts can be known from decisions and those of the Houses from their Journals. Coke said[1] that the latter are part of the law and custom of Parliament. In England, both are part of the common law[2] and indeed prerogative of the sovereign is part of it. The Houses of Parliament in the United Kingdom have the power to enforce undoubted privileges. But they cannot create a new privilege in the guise of enforcing ancient and undoubted privilege. The Courts on the other hand claimed the right to ascertain the nature and extent of the privilege claimed by the Houses of Parliament, whenever a question in respect of it has arisen, as part of the common law. If it is a privilege determined by them to be undoubted, the Courts would declare the exercise of it as unquestionable. But the Courts never conceded the right of the Houses to determine and enforce their privileges, nor the Houses conceded the power of the Courts to determine what their privileges are. In England, this dualism still continues[3] and it is not easy to conceive of any method by which it may be resolved.

It is clear that the superior Courts should have the power to punish for contempt. The Houses of Legislature bear analogy in this respect to the superior Courts, in punishing a person for contempt. To define what constitutes contempt, neither the Houses nor the Courts would be disposed to do. Perhaps it is undesirable on their part to do it. In this undefined field, several times there were conflicts between the House of Commons and the Courts, and the House of Commons was particularly sensitive because the House of Lords, in the exercise of the Appellate Jurisdiction, would become the arbiter of the privileges of the House of Commons, if the power of the Courts is conceded.

This conflict is not peculiar to the United Kingdom which does not possess a written constitution. In the commonwealth countries and the United States the position is substantially the same. In punishing persons for contempt for breach of the alleged privileges, sometimes the Courts and often the legislative bodies acted with extreme sensitiveness. Legislatures have the power to change the law, to remove Judges if they think it necessary and also in the last resort to amend constitution. There can be no legal limitations in the ultimate stage upon the powers legislatures exercising constitutent functions. When dictatorship can be made legal and it is possible for the country to be turned into an armed camp and tyranny let loose, to suppose that a House of the legislature cannot exercise the power of contempt, assuming it to be perversely, is disturbing to the ideas prevalent. The power of the Courts is to interpret the law and if the history is examined and truth ascertained, also to make the law. Sometimes the Courts have to stand up against legislatures in protection of rights of the people and at some others to arbitrate between Governments and allocate legislative powers particularly in federal constitutions. If the power of the Courts to punish for contempt is subordinated, the persons discharging the duties might not be able to do without fear or favour. The contempt power is not only a protection afforded to the Court or the House, but it is also a protection to the persons discharging the duties. If the powers of the Courts and the Houses come into conflict, self restraint can only be the protection. Arguments, recriminations and appealing to constitutional provisions serve very little useful purpose. They only aggrevate the position. If the Courts begin to say that Legislature or its agents are corrupt and are under undesirable influence, the

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1 Coke's 4th Instituted cited by May in "Parliamentary Practice" p. 60 (16th Edn. (1957).

2. *ibid* p. 47.

3. L.R. 1958 A.C. 331.

legislature can equally say that it is the only business of the Courts to say what the law is. In this conflict, no solution can be found except to counsel moderation to both sides. A page of history, it is said, is better than volumes of logic. If the history has taught us anything, it is that in all serious conflicts either with the executive or the legislature, the judiciary's hand was lower. Only the history proclaimed that the stand taken by the judiciary was correct.

The conflict between the Supreme Court and the Parliament in the Union of South Africa in the recent past established the correctness of the position taken by the Supreme Court[4]. Cool, reasoned and argumentative judgment of the Chief Justice of the Supreme Court was greeted with approbation by the Jurists abroad. The Parliament of the Union attempted by passing the High Court of Parliament Act to deprive the Supreme Court of its finality in judgments on constitutional matters and to assume for itself the powers of the judiciary and the right to set aside the judgments of the Supreme Court. Pursuant to it, the Parliament set aside the decision of the Supreme Court in *Harris* v. *Minister of Interior*[5]. The Supreme Court declared the statute invalid and restored its own decision. It must be said to the credit of the Judges that they did not care to be popular even with the majority of their community.

When the successful plaintiff in *Stockdale* v. *Hansard*[6], applied for execution of the decree given by the Court, the Sergeant-at-arms acting under the authority of the House of Commons had taken the sheriff and the solicitor for plaintiff into custody. The warrant simply contained a statement saying that the persons were guilty of the contempt for breach of privileges of the House. The warrant did not disclose the true state of facts. The position of the Court of Queen's Bench was that it has to determine the validity of detention which resulted in the process of execution of its own decree. Lord Denman, C.J., said[7]:

"On the motions for a *habeas corpus*, there must be an affidavit from the party applying; but the return if it discloses a sufficient answer, puts an end to the case; and I think the production of a good warrant is a sufficient answer. Seeing that, we cannot go in the question of contempt on affidavit, nor discuss the motives which may be alleged. Indeed (as the Courts have said in some of the cases) it would be unseemly to suspect that a body under such sanctions as a House of Parliament, would in making its warrant, suppress facts which, if discussed, might entitle the person committed to his liberty. If they ever did so act, I am persuaded that, on further consideration, they would repudiate such a course of proceeding. What injustice might not have been committed by the ordinary Courts in past times, if such a course had been recognised; as, for instance, if the Recorder of London, in *Bushell's case* (1870) Vaugh. 135 had, in the warrant of commitment, suppressed the fact that the juryman were imprisoned for returning a verdict of acquittal. I am certain that such will never become the practice of any body of men amenable to public opinion."

It can thus be seen that the public opinion is felt to be the ultimate sanction against the excesses done by the Legislature as well as by the judiciary. In this case the House of Commons acted with a strong hand and the Queen's Bench expressed its helplessness.

The executive acted sometimes in disregard of the decision given by Courts. When the Chief Justice of the United States Supreme Court ordered the release of Milligan on a writ of *habeas corpus*, the executive did not give effect to the decision. The Chief Justice was to content himself with a letter addressed to the President reminding him of the oath he had taken to abide by and enforce the constitution.

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4. See "*The Coloured vote case*" *in South Africa by* Dean Griswold, 1951 Har. L.R. 1361. *The Demise of the High Court of Parliament in South Africa by* Dean Griswold,. 1952 Har. L.R. 864.
5. (1952) 2 South Africa L.R. 428.
6. (1839) 9 A & E. 1.
7. *In the case of the Sheriff of Middlesex* (1840) 11 A & E. 273 (292) : 113 E.R. 419 (420).

In spite of the reminder, Milligan was not released for about one and half years. Lincoln's action in this case passed on for patriotism even.

On an application for a writ of *habeas corpus* filed before the Bombay Supreme Court in 1828[8], it issued a rule *nisi* and required a return to be made. The Government of Bombay not only not complied with the direction of the Court but addressed a letter through the Chief Secretary pointing out the undesirability on the part of the Supreme Court to interfere in the delicate matters involved in the case. The Supreme Court thought it necessary to close down the Court and petition to the Privy Council.

In the recent times, we are aware of the waves of commotion caused by the decision of the American Supreme Court in *Brown* v. *Board of Education*[9]. It is very doubtful still as to whether the decision is fully complied with. Every attempt is being made by a section of the people, although a negligible minority, not to give effect to the decision to its full extent. When Marshall, C.J., has given the decision in *McCulloch* v. *Maryland*[10], he was threatened to be impeached. The principle contained in the decision is vindicated by the decisions of Courts in other countries nearly a century later.

In inference it may be said that the Judges should render opinions without fear or favour not caring for the public opinion even. If for the time being the legislature or the executive flout their authority, on account of the inherent correctness recognition would be accorded by coolermen in settled times. That is the only reward for unassuming labours of Judges. If Judges attempt to retaliate the executive or legislature by invoking their power to punish for contempt, in the unequal contest they are likely to be exposed to a greater contempt of their authority. They are unequal in the contest because even if they are thoroughly honest and absolutely correct they cannot say anything in their own defence except in an extremely subdued was in a case pending before them. The following passage may be usefully read in this connection.

"While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute. We have ventured on these obvious remarks because it appears to have been suggested in some quarters that the Courts in the new set up are out to seek clashes with the legislatures in the country."[11]

It would have been all the more dignified if the learned Chief Justice did not answer the suggestions made in some quarters. Thoughtless suggestions are being made and will continue to be made. Contemptuous disregard of them is the only answer. Loquacity is not a virtue for a Judge. But it is not so for a legislator or a Minister. Judges are at a disadvantage in a contest on this plane. Legislator is not elected on account of the depth of his learning, but the popularity he possesses made him occupy the position. If he possess other qualification, it is extraordinary. He is essentially a politician. Consistency, adherence to truth, decorous conduct or an unequivocating behaviour are not legally required of him. On the other hand, certainly the judges of the superior Courts should invariably possess at least these qualities if they have to discharge their duties with respect and distinction. The conduct required of a judge can be known from tradition and the Code evolved by unbroken practice. Wisdom and non-partisanship are expected of them. If legislators or executives are corrupt or guilty of nepotism and favourtism, it is excusable. If the judges are intemperate it is reprehensible. In matters of privilege either of their own or of the Houses, the less the sensitiveness the judges show, the greater the admiration they are entitled to command. It cannot be construed as failure to exercise powers vested in them. It is the result of a realisation of stark reality that in a contest between the wise and more numerous, the latter's word is the more vociferous.

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8. *In re* : The Justices of the Supreme Court of Judicature (1829) 1 K. 1.
9. (1954) 347 U.S. 483: 98 L. Ed. 873.
10. (1819) 4 Wheat 316.
11. *State of Madras* v. *V. G. Row*, (1952) S.C.J. 253 : (1952) 2 M.L.J. 135 : A.I.R. 1952 S.C. 196, 199.

It is exactly for this reason, judiciary is said to be the weakest branch of the Government.

Sometimes judiciary has no choice except to support the action of the legislature or of the executive. Putting a seal of approval to the Hindu Woman's Right to Property Act and the Constitution First Amendment Act may be taken as illustrations. When the Governor-General of Pakistan dissolved the Constituent Assembly, the Federal Court of that country had to acquiesce in it. When considered in abstract and taking the Indian analogy, it would be impossible to conceive of the dissolution of that body as legal. President of the United States purporting to act under his military power, caused the removal of American citizens of Japanese origin from the West Coast to the interior and seriously restricted their movements. The Supreme Court of the United States has given its consent to these executive or military acts.

Can it be said that our Constitution has removed the possibility of conflict in the matters of privileges between the Houses and the Courts? Article 121 for instance, places a bar on the power of the Houses of Parliament to discuss. It says,

"No discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in discharge of his duties except upon a motion for presenting an address by the President praying for the removal of the Judge as hereinafter provided."

The prohibition placed on State Legislatures appears to be more decisive. Article 211 says,

"No discussion shall take place in the legislature of a State with respect of the conduct of any Judge of the Supreme Court or of a High Court in the discharge of duties."

No doubt the provisions appear to be widely worded. But the protection they afford appears to be limited. It does not appear that the State of law as laid down by the decision of a High Court or of the Supreme Court cannot be taken note of by the legislatures. Legislatures certainly can take note of the law existing and if necessary may amend the law. If a legislature has no competence to amend, it may suggest amendments. What the provision probably means is that a Judge should not be identified with the Judgment and singled out for discussion. If he is so identified, discussion assumes a personal character and it may very often deter honest men from discharging duties. But if we begin to qualify and interpret the provisions, it is difficult to conceive of methods by which the actual difficulty may be got over.

Apart from the difficulty of laying down as to when the conduct of a Judge is said to be discussed, the question as to when can it be said that it is 'in discharge of his duties' is one of equal difficulty. Should the expression be construed in the same way in which similar expressions under section 197 of the Criminal Procedure Code and section 240 of the Government of India Act, 1935, were construed? If so, as the Judicial Committee pointed out[12], the taking of bribe for instance, as an inducement for judgment delivered cannot be in discharge of duties. In such case discussion on that question may take place. But delivering of a judgment is. If once discussion on judgment is permitted, in a body dividing on party lines, it will soon degenerate into personal attacks in heated times. Suppose a person while remaining as a Judge, discharges the duties of a supplementary character not pertaining to the office of a Judge, it is difficult to conceive the provisions as extending the limits of protection. An attack made against a person in respect of duties of an incidental officer certainly reflect upon the conduct of a Judge. A Judge may become liable to attack for moral delinquencies as well. If one is prepared to go to the extent of saying that every kind of discussion is prohibited, the provision places an absolute bar on State legislatures. Such construction of Article 211 leads to the position that State legislature cannot even put the machinery in motion for the removal of a Judge. If a Bar Association can pass a resolution suggesting the removal of a Judge and an Advocate-

12. *Gill* v. *The King*, L.R. 75 I.A. 41 : (1948) 2 M.L.J. 6 : (1948) F.L.J. 13 : 1948 F.C.R. 19 : A.I.R. 1948 P.C. 128.

General or the Attorney-General can move towards the same end, to say that the Legislature of a State has no power to do it is illogical.

It is the highest interest of Government and legislatures to render voluntary obedience to the decisions of Courts before they require people to abide by the decisions. Supposing that the legislature deliberately in violation of Article 211 indulges in discussion with respect of the conduct of a Judge. No means to compel the legislatures to obey the provision seem to be available. A writ cannot be issued against the legislature. Punishing a Member for what he spoke in the House is equally unthinkable. If it is so attempted, we have to go back to the days when members of the House of Commons were punished for what they expressed in the House[13]. It is against this position, the House of Commons struggled for a long time resulting in passing of the Bill of Rights. It laid down that " the freedom of speech and debates or proceedings in Parliaments ought not to be impeached or questioned in any Court or place out of Parliament." The same position is to be adopted in India in construing Articles 211 and 121 not because the Bill of Rights provided it, but on account of the impossibility to otherwise enforce the provisions. Thus understood the articles contain provisions which are in the nature of self-imposed restrictions. There are several provisions in the Constitution for the violation of which there seem to be no remedy except one of the political nature. For instance, the Constitution says, that the Houses of Parliament should be summoned by the President at least once in six months[14]. If the President fails to do it, no Court can compel him to summon. The remedy is only political. Any other view of the matter would bring the Courts and the legislatures into conflict. No useful purpose can effectively be served. Indeed it is better to recognize the limitations of the Courts than to allow the Courts to declare law which it is not in their power to enforce. Creating a gulf between theory and practice of law is to be avoided in all cases possible. This is the situation if the Courts merely declare law and leave its enforcement to the legislature.

Sometimes it is suggested that the Speaker might draw the attention of the offending member to the provisions of Articles 211 and 121. Even the Speaker might be helpless in times of emotion. In any event he cannot object until the mischief is done. Against a determined effort either to violate the provisions or an attempt to seemingly comply while in effect violating them, there is no remedy. Sooner or later this fact has to be acknowledged. For the holders of the highest offices, their conscience can only be the restraining factor. Legislators and Judges in their respective spheres are the holders of the highest offices.

Sometimes it is argued that Court can issue a writ against the Speaker or presiding member directing him to enforce order in the House pursuant to constitutional provisions. Articles 122 (2) and 212 (2) lay down that an officer or Member of Parliament or legislature of a State "in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the jurisdiction of any Court in respect of the exercise by him of those powers ".

Again the twin questions are :—

(1) What is the meaning of ' in respect of the exercise by him of those powers'?

(2) Who is the final judge, is it the legislature or the Court ?

Prudence and inevitability lead us to accept that the legislature is the final Judge in its matters. This acceptance does not arise out of conviction that the legislatures will always be just. There is no other choice in the matter. If a House of the Legislature acts perversely or illegally as in the case of the Sheriff of Middlesex, there is no remedy. Taking an extreme case into consideration let us suppose that a House of the Legislature directs that a Judge of the High Court should be taken into custody

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13. See the "Account on Freedom of Debates" given by Chafee on the Bill of Rights in Three Human Rights in the Constitution of 1787.

14. *Article* 85.

for an alleged breach of the privilege without giving any further detail. It is difficult to imagine a remedy. A Court is bound to give reasons for its decisions. But a House is not bound. Lord Ellenborough said in *Burdett* v. *Albert*[15] as follows:

"If a commitment appeared to be for a contempt of the House of Commons generally, I would neither in the case of that Court, nor of any other of the superior Courts, inquire further; but if it did not profess to commit for a contempt, but for some matter appearing on the return, which could by no reasonable intendment be considered as a contempt of the Court committing, but a ground of commitment palpably and evidently arbitrary, unjust, and contrary to every principle of positive law, or national (*natural*?) justice; I say, that in the case of such a commitment (if it ever should occur, but which I cannot possibly anticipate as ever likely to occur) we must look at it and act upon it as justice may require from whatever Court it may profess to have proceeded."

A Court of Record may commit a member of a House or a House may commit a Judge for contempt. As suggested by Varadachariar, J., in arguments before the Federal Court in *Gauba* v. *Chief Justice and Judges, Lahore*[16], Federal Court might commit a Judge of a High Court and probably also High Court might commit a Judge of the Federal Court for contempt. There seem to be no legal limitations on these powers. But in the world of reality, self-restraint and public opinion are the operating factors.

There was a tendency to stretch the law of contempt in India. The more reasonable position seems to be not to invoke the law of contempt except for matters of removing obstructions. An institution like Court of Record or Legislature cannot easily be defamed. Persons discharging public duties, should not be hyper-sensitive to the public criticism. The offices they hold involve performance of acts of public nature. Therefore there will be criticism and reaction whenever injustice is felt rightly or otherwise. Criticism opens the valve to give vent to feelings which otherwise become repressed. Repressed feelings are always a source of disorder. In *Bridges* v. *California*,[17] Balck, J., said:

"An enforced silence, however limited, solely in the name of preserving the dignity of the Bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect."

In that case the Supreme Court of the United States declined to enforce the provisions of a California statute enabling punishment to be imposed for expressions amounting to contempt short of 'clear and present danger.'

In *Boucher* v. *King*[18], the Supreme Court of Canada had taken a liberal view of the law of contempt of Court. It said that if the criticism is so repulsive to the public sentiment, prosecution under the law may be initiated.

Our respectful submission is that it is better for the Courts to leave to the Houses to Judge exclusively what transpires within the House. No House should consider this privilege as one to shield an offender. In suitable cases Houses should not hesitate to waive their privilege and allow the offender to be dealt with under law. The Houses should also make it an inflexible principle that they should not cast any reflection either on a Judge or on a Judgment. It is not in their interest to do it. It is more enlightened on the part of the Courts as well as House of legislature not to proceed with cases of contempt except in extreme cases. If necessary prosecution may be directed to be launched under law.

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15. 14 East 1, 150 and 151 : 104 E.R. 558, 559.
16. (1942) 1 M.L.J. 74 : (1941) F.L.J. (F.C.) 33 : (1941) F.C.R. 54 : A.I.R. 1942 F.C. 1.
17. 314 U.S. 252, 271.
18. 1951 S.C.R. 265 (Canada)

CONVENTION AND THE INDIAN CONSTITUTION

By

C. S. SUBRAMANYA AYYAR, *Advocate, Madras.*

The Constitution of the Sovereign Democratic Republic of India is a written Constitution, unlike the British Constitution which is a product of conventions established by centuries of practice between different Heads of the Executive and the Crown, the enacted part of the Constitution in Great Britain being comparatively small. Conventions in Great Britain arose as a result of historical traditions suited to the genius and habits of the people, and were mainly the result of a compromise arrived at between the King and Parliament, after a protracted struggle for power between them. They were adopted by the people of Great Britain, and they modified the enacted parts of the Constitution which are comparatively small.

Here in India, there has been no such struggle between the President and Parliament, and the relations between them are smooth. This cordial relationship between the President and Parliament must have a large bearing on the way that each one behaves towards the other, and the idea of running the Government of India more efficiently is more predominant in their minds than the idea to seize power, or to share it in larger proportion.

Growth of conventions, strictly so called, is the result of historical accident in Great Britain, and its analogy cannot be wholly applied to Indian conditions. Probably it is as a result of this difference in outlook, that the Indian President's Orders or Rules need not be countersigned by a Minister under the Indian Constitution as in England, and the President himself has rule making powers and allocates portfolios of Ministers, which is done only by the Prime Minister in England. There are some more powers of the Prime Minister in England which are exercised by the President under the Indian Constitution.

Before 1947, India was having a Constitution superimposed by the Parliament of Great Britain, and it was only after Indian Independence, that the Constituent Assembly of India resolved to constitute India into a Sovereign Democratic Republic and gave the people of India by its Preamble a Written Constitution which was adopted and enacted by them. Thus in form and substance, there is only one Constitution of India, the Written Constitution. There is no question in India therefore, of having one "Enacted Instrument of Government" and another "Adopted form of Government" as in the Constitutional Monarchy of Great Britain, or in the Constitution of Canada. The Preamble clearly says "Hereby Adopt and Enact *This Constitution*". Under Article 393 of the Indian Constitution, It is *this* Constitution, which may be called "The Constitution of India".

The question of conventions, strictly so called, has therefore been relegated to the background, as the written Constitution is meant to cover the entire field of Constitutional activity, and whatever practice or usage was contemplated for regulating the relations between the several organs of Government, was more in the nature of working rules, rather adopted more for keeping up the efficiency of running a Cabinet system of Government with collective responsibility, than for defining the powers of the respective organs of the Government, and so, such practice or usage has been neither psychologically, nor legally raised to the status of conventions as in Great Britain. While conventions become inflexible rules by long established usage in an unwritten Constitution like that of Great Britain, as a result of compromise arrived at between the King and Parliament, the practices adopted in a written Constitution like India's, where there is no such struggle for power between the President and Parliament, cannot have the effect of abdication of Statutory duties imposed on the Executive of India by a written Constitution, as India is a Republic and not a Constitutional Monarchy, and the Executive derives its authority in a Republic from express grant of power alone.

The Preamble, Articles 53, 73, 368, 375, and 393—all refer to "*This* Constitution", and so the written Constitution alone is the final word, and there is no object served in seeking its interpretation from outside sources unless there is latent ambiguity in the words of the Constitution. The Indian Constitution does not make any reference to the debates in the Constituent Assembly for reference to elucidate the intention, and therefore reference to the Constituent Assembly debates may be made only in circumstances where there is latent ambiguity in the written words in order that they may be cleared. This has been the English practice, and the opinion of the Supreme Court of India also.

The Constituent Assembly of India, though a Sovereign body, was not a body elected or selected on a broad based representation of the people of India or its interests, but was a body composed of those competent to frame a Constitution of India. The validity of the Constitution framed by such a body rests on subsequent acquiescence and ratification by the peope of India, and the statement of any person in the Constituent Assembly cannot be said to be the statement of a person representing the whole of India, and its people at the time it was made, in the strict sense of electoral representation. Therefore it will not also be proper to say that the written part of the Indian Constitution which has been subsequently ratified by the whole of India could be modified by the individual statements of members of the Constituent Assembly. As the entire Constitution of India rests on subsequent acquiescence by the people of India for its validity, it is only the Written Constitution, adopted and enacted by the people of India that would stand the test of acquiescence, and it will not be strictly constitutional to attempt to modify the written word of the Constitution by statements of individual members in the Constituent Assembly. Nor could it be predicated that the entire body of the Constituent Assembly were *concensus ad idem* on all the points discussed, and there was only one view of the Constituent Assembly on the point.

The British Constitution as a result of convention, has made a distinction between the Real Executive and the Nominal Head of the Executive. The King reigns in England but never rules, as the Parliament of Great Britain is Supreme, and the King is bound by the advice of the Cabinet. That has arisen by convention, as the Constitution of Great Britain has adopted a form different from that of pure monarchy. Such a difference between the Nominal and Real Executive, is possible only in an unwritten Constitution governed by conventions, and it is not safe to apply the analogy totally to India, which is a Republic, and has a written Constitution, and is a Federal Union with checks and balances.

In India, the Constitution governed by the Government of India Act of 1935, contained the provision that the Governor-General of India was to be aided and advised by a Cabinet of Ministers, and the Instrument of Instructions to Governor-Generals and Governors contained the provision, that the advice by the Ministry was binding on them. That rule was given up by the Constituent Assembly of India, who merely provided for ministerial advice under Article 74 of the Constitution, without any Instrument of Instructions of a binding nature.

That fully shows, that the relations between the President of India and the Cabinet, as well as the Governors and the Cabinet is left to be governed by rules framed for the sake of efficiently running a Cabinet system of Government with collective responsibility but not of a binding nature as conventions in England, as the idea in India has never been to define or delimit anybody's power. The flexibility imported into the working of the Executive in India, by not inserting a binding provision for ministerial advice in the Constitution itself, is also a result of the necessity to have the Executive Head in India to be above party politics, and not to identify him always with the majority party, as the Federal system in India is composed of checks and balances and the presiding Executive has to keep up the balance evenly between the scales.

While in normal cases, the President of India would respect the advice tendered by the Ministry, such a practice cannot make him abdicate the Statutory powers under the Constitution, but such powers, while being dormant in actual practice, will revive in cases where the President feels, that the working of the Constitution requires a corrective, and an emergency has arisen when, without his interference, the Constitution will stand the risk of violation or jeopardy, as the President is bound under Article 60 of the Constitution to preserve, protect and defend the Constitution and the Law.

The Indian Constitution, therefore, has in a large measure departed from the British North America Act where the Governor-General was bound by the advice of the Ministry, because the Preamble of the Act contained a provision that the Constitution is similar in principle to that of Great Britain. The Preamble of the Indian Constitution does not contain this phrase, but on the other hand, makes it specific that the "Adopted" and the "Enacted" Constitution are one and the same *i.e.*, " *This Constitution* " or the Written Constitution.

The powers of the Executive, therefore, in India are governed by the written word, in strict Constitutional Law, and violation of the Constitution in India is only violation of the written word, as by Article 393 " This Constitution may be called *The Constitution of India* ". There is no mention of the word ' Convention ' in any part of the Constitution, either in the definition or in the explanatory chapters. So the Executive in India are having Cabinet Government by the written words of the Constitution alone. In the result, while in normal cases, the President or Governor has to follow the advice of the Ministry in order that the system of collective responsibility may work efficiently, the discretion of the President in emergency situations has not been taken away.

In fact without such powers in the President, the Country could not be properly defended, and the rights of minorities could not be properly safeguarded.

To sum up: India is a Republic and a Federal Union. It has a written Constitution. It is not Constitutional Monarchy as in England where the entire system of Government is unwritten, and built on conventions. Here in India, the entire Constitution is in written form. The relationship between President and Parliament is wholesome and smooth. We should be on the guard in trying to apply, our notions of the binding nature of conventions gathered from a study of a monarchial form of Government as in England, which depends merely on conventions for becoming responsible Government, *pro tanto* to India, which is a Democratic Republic, and having a written Constitution with a President elected on a broad basis having Statutory obligations, in a Federal Union, with checks and balances. The analogy of British conventions is not fully applicable therefore to India and a *via media* alone can prevail.

BOOK REVIEW.

A COMPARATIVE STUDY OF THE INDIAN CONSTITUTION by Sardar D. K. Sen, M.A., B.C.L. (OXON.), BAR-AT-LAW. Published by Orient Longmans Private Ltd. (1960).

It is over a decade since the Constitution of India has been put on the Statute-book and many of its provisions, notably those relating to the Fundamental Rights, have been put to rigorous test on the touch-stone of the Judiciary. The Supreme Court of India and the several State High Courts have been interpreting its provisions and the powers that be have been facing the inevitable divergence between law and social justice in several spheres. To bring the Constitution in line with their objectives and policy, it has been amended often—too often according to several critics. Be that as it may, there could be no two opinions that the Constitution of India is a unique Charter, blending as it does the finer aspects of the constitutional principles of several countries great or small. The architects of our Constitution and the Constituent Assembly of India drew inspiration from various written Constitutions of the past and the unwritten British Constitution. By and large they have admirably succeeded in weaving the several heterogeneous elements into a homogeneous whole though in the light of its practical working and the experience gained it had to be moulded here and there.

A comparative study of such a Constitution is not only welcome but is a necessity. A handy volume of reference of such comparative study is bound to be of great value to lawyers, judges, students and parliamentarians.

The book under review is the first of a series of three volumes dealing with the provisions of the Constitution of India. It is not a mere commentary or notes on the several articles of the Constitution. It is a critical and liberal study of its provisions, in the back-ground of its history and growth and in the light of the leading decisions of the Supreme Court of India and the several High Courts. Topical headings and rules of interpretation are new features of the work and the appendices and bibliography at the end enchance the utility of the book. The author of this welcome thesis is eminently qualified for the task he has undertaken. With his rich experience in the academic, political and administrative spheres, he has brought to bear great industry and learning in the production of this very useful study and deserves the praise and gratitude of lawyers, students of constitutional law, jurists and politicians.

RETIREMENT OF THE HON'BLE SRI JUSTICE P. RAJAGOPALAN

Most precious to civilisation is justice. The one institution in the country of which, taken as a whole, one feels a sense of pride is its judiciary, particularly at its higher levels. More streams than one supply the Judges of the High Court. The Indian Civil Service has been one such channel and has given to us a number of eminent Judges. In the ranks of the truly great is Justice P. Rajagopalan. Having served as a Judge of the High Court for more than 13 years since April 5, 1948, and having acted as the Chief justice twice during that period, once in 1957 and again recently, he has just retired.

Justice Rajagopalan had a distinguished academic career. He took the B.A. (Honours) Degree from the Presidency College with History, Economics, and Politics as his subjects in 1922, and two years later while in England he took the Tripos in History from the Queen's College, Cambridge. He passed the I.C.S. competitive examination creditably in 1923 and was appointed as a member of that service the next year in the Revenue Department. He served in various districts, and in 1933 became a member of the Judiciary as a District Judge. He served in that capacity for 15 years and was then elevated to the High Court.

His reputation as a Judge was very high indeed even when he came to the High Court. He was held in great esteem for his judicial qualities—efficiency, integrity, courtesy and balanced reasoning. During the years that he has been a Judge of the High Court he has been viewed with mounting appreciation. Patient and receptive to arguments, conscientious and thorough in investigation of both facts and law, sound in regard to his conclusions his work has been hailed with satisfaction. He has dealt with all types of cases, civil, criminal, original and appellate. Whether it was a case of taxation law, or a matter relating to an industrial dispute, or a question of land tenures or of the constitutional validity of a statutory provision, or of procedural law, he has been equally at home. He was fully aware that knowledge should precede understanding and understanding should precede judgment. The atmosphere of his Court was always pleasant and there was the feeling that every case had received a full and fair consideration. His judgments were luminous and his style satisfying.

The pages of the Law Reports afford eloquent testimony to the range and quality of his judgments. He dealt with a number of important mutt cases like those relating to the Shirur Mutt, (1952) 1 M.L.J. 557, the Puthige Mutt, (1956) 1 M.L.J. 532, etc. His Judgment on behalf of the Full Bench in *Ayyan Ammal* v. *Vellayamma,* (1956) 1 M.L.J. 225 holding that section 95 of the Transfer of Property Act as amended in 1929 is not retrospective shows that he is no worshipper of mere logic divorced from other considerations. In *Krishna Iyer* v. *State of Madras,* (1956) 2 M.L.J. 179, he declared that the existence of effective alternative remedies is by itself no bar to the exercise of jurisdiction by the High Court under Article 226. In *Estate of Md. Ooomer Sahib* v. *C. I. T., Madas,* (1957) 2 M.L.J. 320, there is a luminous exposition of the meaning of the term 'association of persons' for

purposes of section 3 of the Income-tax Act. In *Abdul Azeez* v. *C. I. T., Madras,* (1957) 2 M.L.J. 421 he states with force: "It is certainly not the right of any one, fundamental or otherwise, to contend that taxes lawfully due should not be levied and collected. The agent of a non-resident principal accepts that agency with the full knowledge, that if the non-resident principal derives profits, that income would be liable to be assessed under the Income-tax Act". In *Nathella Sampathu Chetty* v. *Collector of Customs,* (1959) 2 M.L.J. 35 there is a brilliant analysis of the implications of section 178-A of the Sea Customs Act and its repugnance to Articles 19 (1) (*f*) and 19 (1) (*g*) of the Constitution.

Justice Rajagopalan has also taken on more than one man's burden in regard to the administrative work of the High Court and other allied matters. He was a member of the Rules Committee of the High Court from 1948 and its President in 1956, and in that capacity he was responsible for the finalising of the Revised Appellate Side Rules. As Judge in charge of the scheme for the separation of the Judiciary from the Executive he achieved the compilation of the Manual of Instruction for the guidance of the Stipendiary Magistrates. He was also responsible for introducing into the areas transferred from the Travancore-Cochin State to the Madras State the pattern of working in the judicial department of the latter State. He also initiated a system of having annual discussions with the District Magistrates in the High Court relating to the administration of justice and its problems.

Justice Rajagopalan has left his mark on whatever task he undertook. In his retirement the High Court loses an able and good Judge. It is to be hoped that his rich and wide experience will be available in the cause of the country for a long time wherever needed. He carries with him the esteem and goodwill of the members of the Bar and the Public.

S. VENKATARAMAN.

THE ADVOCATL-GENERAL'S FAREWELL ADDRESS.

A farewell function was held in the Second Court Hall of the Madras High Court on Friday the 28th April, 1961, on the eve of the retirement of His Lordship Sri Justice *P. Rajagopalan.* The Advocate-General (*Sri V. K. Thiruvenkatachari*) delivered the following Farewell Address to His Lordship.

MY LORD,

We wish to say farewell to you to-day on your retirement after thirteen years as a Judge of this Court.

You had served as a District Judge in many Districts before you became a Judge of this Court in 1948. Your reputation as a Judge was very high indeed even then. Every day of your tenure in this Court you have only enhanced that reputation.

In this Court you have dealt with all branches of work, criminal, original and appellate civil, writs, revenue cases and special Tribunal work. To the adjudication of every type of cases, special contribution has been the impress of an orderly mind. The facts of the case were investigated by you with a thoroughness which was often troublesome to counsel, speaking at least for myself. Equally you were a hard taskmaster in the investigation of the law on every topic. Your passion for arriving at the right judgment was such that quite often you adjourned cases to help Counsel

to study the matter further. In the result there was a confidence that every case received a full and fair consideration and a conclusion into which you as a Judge put in a part of yourself; sparing yourself no pains. Making no comparisons your approach is something which the Bar will remember and hope for.

The atmosphere of your Court has always been pleasant. Indeed your uniform patience and courtesy in all circumstances have left an unforgettable impression on the Bar.

You have shouldered more than one man's share in the administrative work of the High Court. You have taken keen interest in the training and guidance of Munsifs, Magistrates, Assistant Public Prosecutors and other cadres of the service. In this Court itself, the various offices owe a lot to your supervision and advice. In the Rule Committees you have left the impress of your detailed attention. Selfishly, we shall miss you in this Court. We wish you well in your retirement.

Sri Justice Rajagopalan's reply to "The Farewell Address."

MR. ADVOCATE-GENERAL AND GENTLEMEN,

I am very very grateful to you for the exceedingly nice words which you, Mr. Advocate-General, as the spokesman of the Bar have addressed to me on behalf of those assembled here this afternoon to bid me farewell. Mr. Advocate-General, we have known each other for over forty years now, and during the thirteen years I have been on the Bench of this Court and long before that it has been my privilege to be admitted to the intimacy of your friendship. When I heard you this afternoon praising my poor services on the Bench in such generous terms I could not hlep feeling that you remembered our friendship more than your official position as the head of the Bar which should have required you to be dispassionate and critical in your judgment., and let your affection for me overweigh your judgment. It was your heart and not so much your intellect that obviously dictated what you said. I am very grateful to you for all that you said, conscious though I am that I deserve only a small fraction of it.

Allow me to convey to the Bar through you my gratitude for all the unstinted help that I received from the Bar during all these years it has been vouched to me to serve in this exalted position. After I took charge of my office thirteen years ago, on the first occasion I sat alone I appealed to the members of the Bar then present (Mr. Narasaraju) for help and I said that I intended to rely on them for guiding me in the work with which I had been entrusted and in discharging my functions in accordance with the oath of office which I had sworn, and I expressed my hope that that help would be forthcoming. I may acknowledge my deep debt of gratitude for that help which the Bar has readily given to me all through. It is little that a Judge can achieve, whatever his initial equipment might be, without the help of the Bar, and to me who came with very little equipment and with no academic qualification, your guidance was most valuable all through. To adapt the words of Bernard Shaw, the prayer of every Judge could be " If I am on the right path, let the Bar help me to stay in it ; if I swerve, let the Bar lead me back to it." The traditions of the Madras Bar have been such that that duty of the Bar has always been discharged, and I am confident that my colleagues and my

successors will have the same benefit which I have had, and that the noble traditions of this Bar will be kept up.

I do not propose to deal at any length on the responsibilities of the Bar to the country under our Constitution in the independent democratic set up of the Parliamentary type we have chosen. The contribution of the Bar and the individual members of the Bar in the struggle for political freedo i was considerable, and in most places the Bar became politically suspect in the eyes of the foreign Government. Even if that is apt to be forgotten now in the changing pattern of politics, the Bar and the lawyers have still a great part to play in maintaining and preserving all that is best of the political and economic freedom guaranteed by our Constitution. The pattern of litigation is also changing, and the Bar with its aptitude has readily adjusted itself to the present needs. Achievement of independence does not eliminate all possibility of conflicts between the State and the citizen. I wish that is realised more readily all around and the Bar is given the place that is due to it in the preservation of the high ideals of democracy. In our Welfare State with its Socialistic ideals, the lawyers' duty is not confined to Courts of law alone, and their help should be sought in every one of the fields in which the citizen feels the impact of the State. The lawyer's right to assist and the citizen's right to avail himself of that assistance should, in my humble opinion, be in no way fettered and shackled. Certainly, there is no basis for any distrust of the lawyer. Whether law is administered by Courts or by Tribunals or by Executive Officers the need for the lawyer and his services and his assistance are the same, and I hope that that will be realised more and more by the other two wings of the State, the Legislature and the Executive. However unsatisfactory the present position might appear to be in some respects, I am quite sure of the future of the Bar ; it will occpuy a much higher position than it had under the British regime.

Permit me to refer to one of the responsibilities of the Bar. It has to contribute its best to fill the judiciary at all levels. The judiciary of the country is what the Bar contributes to its personnel and it makes of them. I do not claim that recruitment to the judiciary at the lower levels has always been designed to attract the best talent available. I commend for your consideration the recommendations of the Law Commission and it is up to you to see that they are implemented. Irrelevant factors should be eliminated and the best available candidates should be selected to man the judicial posts. At the higher level, the claims of the Bar and the claims of the services have to be adjusted, and my humble opinion is that neither should be excluded. One thing I would earnestly entreat you to remember. Except for a few like me—relics of the past regime—members of the subordinate judicial services will be recruited from the Bar, and no one should forfeit his claims for advancement merely because he entered judicial service at a given level. If I am pressing the claims of the services it is certainly not to the detriment of the lawyers or to law. Eminent examples, to name only two of the members of the services that adorned the Bench, are Sir C.V. Kumaraswami Sastriar and Sadasiva Ayyar. I do not think that the fact that they chose to enter the High Court through the services in any way disentitled them to the highest prestige in which they are still held. Let us hope that there will be many more of that kind from the services now and in the near future. Forgive me if I took this occasion when we have met here to review

the past, principally my past, to think aloud, and that thinking was typewritten and on paper. Once again let me thank you for all the help that I have had from you. My work in the Court tended to become specialised of late and if in that special field I was not able to help the junior members of the Bar as much as I would have wished to do, believe me it was lack of opportunities and not lack of will or interest on my part. I trust the juniors will forgive me, and that every one of them will accept my best wishes for his success at the Bar.

Just as I have been lucky in securing the support and esteem of the Bar, and may I add with your permission, your affection, I have been singularly fortunate in the help I have received from my colleagues on the Bench, both on the judicial side and on the administrative side. To my Lord, the Chief Justice, I owe a deep debt of gratitude which I can never hope to repay. It was on his recommendation that I was appointed to the Bench in 1948. Ever since then he has treated me more as a close friend than as a colleague. If I was able to achieve anything at all on the administrative side, all the credit should go to him, for without his unfailing held and advice I could have achieved nothing. Though it might appear invidious to make any distinction between the colleagues with whom I was privileged to sit, I should be failing in my duty if I do not acknowledge the benefit, I hope it was an enduring benefit, that I obtained from my close association with Satyanarayana Rao, J., Rajagopala Ayyangar, J., and Balakrishna Ayyar, J. Satyanarayana Rao, J. and Rajagopala Ayyangar, J. treated me like their younger brother and I always looked to them for guidance and help. I trust that my present colleagues will forgive me if I do not mention any of them by name. To every one of my colleagues during these thirteen years I offer my thanks. I shall be ever grateful to them.

May I on this occasion refer to the valuable services rendered by the subordinate judiciary? It was during my period of office that the scheme for separation of the judiciary from the executive was launched and completed in the course of five years. The magistracy was brought under the control of the High Court. To-day, we can claim that our magistracy is probably the best in India and the standards that now prevail are much higher than those we were able to obtain before the separation. I could claim that because I was on the other side myself. On the civil side also, the high traditions built up in the past have been maintained, though here and there, there might appear to be accumulation of work belying our claim that administration of justice is speedy in this State without detriment to its soundness and completeness. It is really the high sense of duty that prevails among the members of the judiciary that has helped to prefer and sustain the claim that our judiciary is still the best we have in this country, and that it can challenge comparison with any in the countries with similar traditions of the rule of law and administration of justice. I have already referred to the recruitment of the members of the Bar to the subordinate judiciary. Mr. Advocate-General, you pointed out that the interest of the High Court in giving training to those selected, in giving them every possible help to ensure that their service in the judiciary is as it ought to be. I am sure the future of the subordinate judiciary in this State is very bright.

I next offer my thanks and my gratitude to the members of the Madras High Court Service. Theirs is hard work. I am in a better position to say than many of my colleagues, because it was my privilege and duty to study the working of the

High Court, which normally puisne Judges have not. When the High Court staff separated during the separation of the Andhra High Court, and again recently when so many other things had happened, it was given to me to find out how exactly the clerks had to work and how hard their work was. In almost every section they have been overworked. I had to admit to them my failure to relieve them of the burden that still rests on them. The claims for improving the numbers and ensuring better and lighter distribution of work have not yet so far fructified. But I wish to tell them that I hope that my successors will begin where I left and their efforts will be more successful. To every one of them who has done his work I offer my gratitude. Possibly there have been complaints of deterioration in their services judged by the high standards that prevailed even twenty years ago. The nature of litigation has, as I said, changed. You may remember that with Article 226 of the Constitution really in the initial stages, the work became very disorganised, and I know the amount of trouble the Advocate-General had to take in sorting out the papers and in getting the cases disposed of even without papers. But things have come round a bit, and if to-day there are still some defects it is really due to shortage of personnel, and not lack of ability. Though it may appear to be invidious to make a distinction between one section and another, my special praise is due to the shorthand-writers of the High Court. More well equipped than in any other service, more hard worked than even the most hard worked members of the High Court Service, theirs has been a hard lot. Their emoluments have been so low, my wonder was why they stuck to the High Court Service. With their qualification, they would got about four times their pay anywhere else. To some extent they have been able to improve their lot, and the Pay Commission has to some extent increased their salaries. To do full justice to them, they must be paid at least three times of what they are getting. I must once again thank the Registrar, Officers of the Court and other members of the High Court Service for the unstinted help they have extended to me in doing my part of the administrative work. Forgive me for having detained you so long. Once again let me thank all of you. I trust the members of the Bar will forgive my failure to take leave of them individually, and will allow me to say good-bye to them collectively from the slightly advantageous position that I still enjoy. I lay down my office with the pleasant satisfaction that the traditions of the High Court and the Bar are safe in your hands and that the rich heritage will be conserved by you. I offer you my best wishes. May the Bar flourish for ever! And now permit me to say good-bye to one and all of you. Thank you.

RETIREMENT OF CHIEF JUSTICE RAJAMANNAR.

Justice in the abstract is an ideal value of the highest rank. Indeed it is truth in action. Albeit it baffles definition and refuses to be captured by a formula of words. With the voyagers in Browning's Paracelsus, one may legitimately feel that the real heaven is always further beyond. Justice in practice is a matter beset with uncertainty. It fluctuates with the mores of time and country. Yet judicial decision is never at large, and becomes generally a choice between limited alternatives within the framework of traditional approach to legal problems. The impact of independence on the administration of justice has been to produce new perspectives and induce a new outlook. The adoption of the ideals of a welfare State and a socialistic pattern of society has brought in its wake a spate of social legislation giving rise to new types of litigation wherein Courts are called upon to deal increasingly with disputes not so much between private citizens as between the citizens and the State, and in many cases between the States and the Centre, and wherein it is not so much precedents that count as the approach and outlook for finding a just solution to problems. The enlarged scope afforded to writs has served to free imprisoned justice from the trammels of mere technicalities and the cob-webs of law. The post independence period has thus become one of opportunity for the emergence of a new jurisprudence, and for the manifestation of responsibility in the implementation of the new objectives. It was indeed extremely fortunate for the State of Madras to have had at the head of its judiciary during this period a personality like Chief Justice Rajamannar.

A student of philosophy and literature with a brilliant academic background and taste in fine arts like music, dance, drama and painting, imbued with a sense of humour and deep insight into human nature and psychology, endowed with robust commonsense and the temperament of an optimist, trained in the tasks and traditions of the Bar under his distinguished father, and with experience gained through the handling of a variegated volume of work in the Courts, Mr. Rajamannar had all the qualities and equipment needed for making a great and good Judge. He became Advocate-General in 1944, puisne Judge in 1945 and Chief Justice in January, 1948. That he was the first Indian to become the permanent Chief Justice of the Madras High Court gave it an added flavour and was eminently in the fitness of things.

Judged by any test, be it the quality of his judgments or their satisfying character or the nature of the problems tackled or the grasp of facts and principles revealed, Chief Justice Rajamannar is bound to be reckoned as a memorable Judge. He had fully realised the need for progressive interpretation of statutes and particularly of the Constitution in tune with the changing spirit and conditions of the times. It was no accident that in inaugurating the Seminar on Freedom under Law he recalled his own observations made earlier in connection with Article 19: "Even ideas of what is just differs from age to age. What may seem to be just to one man in one age may appear to another in another age as the very quintessence of injustice. In deciding on the reasonableness of the restrictions, it is not possible to think only in the abstract. Several circumstances must be taken into consideration, in particular the purpose of the Act, the condition prevailing in the country at the time, the duration of the restriction, its extent and nature. What may undoubtedly be a reasonable restriction in a state of war or revolution may be utterly unreasonable in normal times. What may be a reasonable restriction if it is for a short duration may be unreasonable for a longer period. The test of reasonableness only makes the task of the Courts in India more onerous". (*Vide*, (1958) 2 M.L.J. (Jour.)

1, 7). This awarness and approach consistently runs through all his judgments, from *Champakam Dorairajan's case,* (1950) 2 M.L.J. 404 onwards.

His judgments outside constitutional matters and statutes are equally luminous. To give a few random instances, in *Prabakara Thampan's case,* (1956) 1 M.L.J. 285, there is a lucid exposition of the nature and incidents of a *stanom* and the status of a *stanee;* in *Thangavelu Asari* v. *Lakshmi Ammal,* (1957) 2 M.L.J. 11, the scope of the forfeiture entailed on remarriage by a widow under section 2 of Act XV of 1856 is vividly explained; and in *Vasanta Pai,* In re, (1960) 1 M.L.J. 21, the rights of an advocate in the discharge of his duties are pointedly brought out.

Another great contribution made by the Chief Justice was the maintenance of a pleasant atmosphere in his Court inviting and encouraging enlightened and luminous discussions and chasing away acrimonious arguments perpetuating mere differences. There was fair deal for all. The Chief Justice's masterly dealing with the facts combined with his mental alertness and erudition led to satisfying solutions.

Literature and fine arts have always engaged the attention of the Chief Justice even among his other duties He has contributed a number of articles and written a number of plays in Telugu. The conferment of a Doctorate in Letters by the Andhra University was a fitting tribute to his versatile talents. His tastes have transcended territory. He is the Chairman of the Sangeet Natak Academy. He also acted as Governor of Madras from October, 1957, for about four months.

Though officially sixty years of age, Mr. Rajamannar is full of energy, and youthful in spirit. Though there is no likelihood of his suffering from *ennui* at any time because of his hobbies and interests outside law, his life has been so rich and his experience so varied that it will be a pity if his services are not availed of by Government in the cause of the country whether in legal and allied fields or in other fields. A truly cultured person and fine gentleman, it may be confidently said of him that no other Chief Justice has on his retirement from service carried with him such a volume of good will and respect as he has done.

FAREWELL FUNCTION AT THE HIGH COURT.

The Fourth Court-Hall and the adjoining corridors of the Madras High Court were filled to capacity by members of the Bar, both of Madras and Andhra Pradesh, Law Officers, and past Judges of the High Court when the Advocate-General, Sri V. K. Thiruvenkatachari, Sri T. M. Krishnaswami Iyer, President of the Madras Advocates Association and Sri S. Chellaswamy, President of the Bar Association, Madras, bade farewell to the retiring Chief Justice on behalf of the Bar. The occasion was unique and the function was impressive with all the Judges of the High Court sitting with the retiring Chief Justice at the function. It was a rare and moving sight to see the Hon'ble Mr. Venkataramana Rao, retired Judge of the Madras High Court and later Chief Justice of the Mysore High Court sitting on the dais listening to the tributes paid to his son who in turn openly acknowledged with reverence his deep debt of gratitute to his parents who moulded his life and career.

THE ADVOCATE-GENERAL'S ADDRESS.

MY LORD CHIEF JUSTICE:

We are met here to-day to say farewell to your Lordship at the end of nearly sixteen years as a Judge, and more than thirteen years as Chief Justice of this Court.

On previous occasions, tributes have been paid to your academic attainments and your career at the Bar, during the last year of which you were the Advocate-General. Your appointment as Chief Justice was welcomed by the Bar and in the Legal Journals. It would be more appropriate for me on this occasion to speak of you as Chief Justice.

In their replies to Farewell Addresses, two predecessors of yours expressed their views about Courts and Justice in Madras. Sir Lionel Leach referred to the changed order and expressed hopes for our future; under your regime these hopes have been fulfilled. Sir William Gentle said it would be a solatium to him if it was felt that he had made a positive contribution to the administration of Justice,—a thought that you will appreciate. But, more to my purpose he referred to the universal approval of your appointment and expressed his sincere wishes for a long, happy and successful tenure for you. This was a felicitous choice of three words.

As to length, time is relentless, but we can assure you that your tenure has not appeared at all long to us. Happy it has been to the Bar, as much as it was to you.

You brought to your work a deep knowledge of law which you wore lightly. Yourself a writer in more than one language, a student of philosophy and the Fine Arts, your approach to any problem or any question was on a broader canvass and with a deeper perception. The advent of the Constitution changed the attitude of law to many aspects of the life of citizens and the controversies in the Courts have raised new vistas. Questions have arisen of reconciling the rights and duties of the State *vis-a-vis* the citizens and the rights of the citizens in the conflict of interests. The period was one of opportunity as well as responsibility. In this context you have given us of your best. In my opinion, your special contribution was what I may call the climate of your Courts. The most controversial or complicated cases were discussed in a pleasant atmosphere. If counsel were unable to put an argument across, you would supply the apt phrase. Arguments took the form of enlightened discussion rather than perpetuation of disagreement. One minor disadvantage for counsel was that he could not get away with a harangue without coming to the point. By a rare combination of gifts, you imbued the halls of solemnity with the unbought grace of life. The reports contain judgments of yours on the most varied topics, bearing witness to your masterly dealing with facts and erudition in law, and more than these, your way of throwing new light on problems bordering on intuition. You could not cease to be an artist in your judgments.

As an administrator, the problems you have had to deal with have been many indeed. I would mention only your untiring efforts to keep the Courts abreast of their work in the course of which you have persistently overworked yourself.

And so, in laying down this office, you may feel gratified that your tenure has been successful. We could say much more but the sum of all that one can say is only to reassure you of what we have always given proof of, and you know only too well, that is the warmth of the regard of the Bar and the depth of our

respect for you. The Bar will always remember your tenure as Chief Justice with pleasant recollections and respectful appreciation. Saying good-bye to you, we offer you our best wishes.

MR. T. M. KRISHNASWAMI AYYAR'S ADDRESS.

Mr. T. M. Krishnaswami Ayyar, President of the Advocates' Association, referred to Mr. Rajamannar's distinguished academic career and said that legal learning, firm grip of first principles, great erudition and untiring habits of critical study and industry brought him an early and easy recognition of both the Bar and the Bench. He had always considered the Bar to be a living institution for study and distinction and had also encouraged the qualities of forthright service and respectful independence of all members of the Bar. It was a great advantage to him that he had his father (Mr. Venkataramana Rao Naidu) with him as an exemplar of professional uprightness and right conduct. He hoped that he would continue to inspire the future members of the Bar to the ways of professional rectitude so that it might ever keep its high reputation. "Your capacity as a Judge of the first rank, your patient hearing of the cases and your unfailing courtesy and kindliness, your uncanny instinct to sense the truth and declare the justice in the cases before you, have become proverbial. May your great example be a guidance and inspiration for all future here and all over the Union," he said.

Offering his good wishes, he said, the work of the retiring Chief Justice would easily rank as the brightest jewel in the reputed diadem of the Madras High Court.

MR. S. CHELLASWAMI'S ADDRESS.

Mr. S. Chellaswamy, President of the Madras Bar Association, said that Mr. Rajamannar, as the first Indian Chief Justice, had a unique role to play after Independence in that he was entrusted with the supreme task of maintaining the high tradition set up by his illustrious predecessors. It must be said to his credit that during his tenure of office the stature and importance of the Madras High Court had been raised in a manner which brought admiration from all parts of the country. Referring to the various qualities of Mr. Rajamannar he described him as an "illustrious Chief Justice."

THE CHIEF JUSTICE'S REPLY.

MY DEAR FRIENDS,

This day and this occasion I will never forget in my life. In spite of the fact that partly by nature and partly by cultivation I generally maintain an attitude of non-attachment I must confess I have been deeply moved and overwhelmed by the unparalleled manifestation of affection and regard on the part of the several members of the Bar. You gentlemen have known me for over 35 years and you Mr. T. M. Krishnaswami Ayyar stand as *loco parentis* to me. You were a contemporary of my father. May I remind you that you were enrolled in the same week as my father. Now I do not know whether I can treat all that you have said as arguments submitted for my approval or disapproval. I am afraid that I do not have that judicial authority to say "The Advocate-General, Mr. T. M. Krishnaswami Ayyar and Mr. Chellaswami argued with great ability. But I am afraid I cannot accept their contentions." I wish to thank you from the bottom of my heart for all the good words you have spoken of me. It is difficult for me to say how far I deserve them. On an occasion like this I am sure you will forgive me if I at the outset express the great debt which I owe and which I hope never to repay to my parents for moulding

my life and career. Mr. T. M. Krishnaswami Aiyar has referred to this aspect. I have tried to imbibe from my father a high sense of duty, thoroughness in work, whether judicial or otherwise, and an intellectual thirst; and from my mother charity, compassion and a deep sense of humour.

My appointment to this exalted office of Chief Justice was both sudden and unexpected. It was sudden because my predecessor, Sir Frederick Gentle, had still several years of service. I was unable to persuade him to change his mind when he was constantly discussing with me his proposed retirement. It was unexpected because I was in point of seniority the sixth among the Puisne Judges at the time. Horwill, Happell, Bell, Kunhi Raman and Clerk, JJ. were all senior to me, and though Kunhiraman, J., had only a few months more to retire, the others had longer service. It was most gracious on the part of the learned Judges who were senior to me to have accepted the choice. I must particularly mention Horwill, J., who continued till the last day of his tenure and who kept up most cordial relations with me and even now regularly corresponds with me and my father. Believe me when I say it was a great ordeal for me. I happened to be the first permanent Indian Chief Justice in a free India I was fortunate to occupy a place which far more eminent Judges like Kumaraswami Sastriar, Ramesam and Venkatasubba Rao were denied. I was young and had been a Puisne Judge for less than three years. If I was able to discharge my duties, and for an exceptionally long period, it was due entirely to the unstinting help and guidance which I received from colleagues, most of whom were senior to me in age and experience. It has also been my privilege during this long period to administer the oath of the high office of a Judge of this Court to over thirty Judges, members of the Bar and members of the Judicial Service. It is a matter for pride that four of such learned Judges have been appointed Judges of the Supreme Court, and two of them are still on that Court.

In recent years there has been constant comment on the deterioration in standards both among lawyers and among Judges. I would like on this occasion to lodge my protest against such aspersion. It is true that there is not a Bashyam Ayyangar or Subramania Ayyar among Judges to-day. But may I ask how many Bashyam Ayyangars and Subramania Ivers adorned the Bench of the Madras High Court, even in the good old days? I have been at the Bar and on the Bench for nearly four decades. Even in the so-called good old days there were brilliant Judges and also mediocre Judges. Irrelevant considerations were responsible for appointment of Judges of very average calibre even in those old days. Some of you must have heard of one of the learned Judges of this High Court asking a leader of our Bar what share did a son-in-law get, and the classical answer was "A son-in-law gets whatever he can lay his hands upon." Since the establishment of the Supreme Court in 1950—hardly a decade—seven members of the Madras Bar including the four whom I have mentioned were appointed Judges of that Court and one of them filled the highest in the judicial hierarchy, that is, the office of the Chief Justice of India. I realise that many of the giants like Srinivasa Ayyangar, Alladi Krishnaswami Ayyar and Venkatarama Sastri have passed away and that there has been a sudden gap in the Bar. But there are still happily with us leaders like Sri T. M. Krishnaswami Ayyar, R. Gopalaswami Ayyangar, Rajah Ayyar, Gopalaratnam, V. Thiagarajan and others. But there is a hiatus between leaders of that age group and promising young lawyers in their thirties. The reason is not far to seek. I have mentioned that about 30 new Judges were appointed during the thirteen years of my tenure as Chief Justice. I venture to submit that almost every leading member of the Bar at the time has found a place on the Bench. Your learned Advocate-General like the Ceaser many times refused my offer of the judicial crown, and probably rightly according to his inclina-

tions. But there are several others among the younger lawyers who have earned a name both here and in the Supreme Court. I shall not mention names. I have the highest opinion of the talents of the Madras Bar which I now proclaim.

I want to concede one thing, namely, that the depth of legal learning to day among the younger lawyers is far less than it was in the previous generations. How many young lawyers are there to-day with the legal learning of young Alladi. Here again the fault is not entirely that of the members of the Bar. The old topics of litigation which demanded such learning are fast disappearing. With new legislation almost daily, many of the acute problems, for instance of Hindu Law, have become historical. The widow has ceased to be the treasure chest of the lawyers. No alienation of hers can be challenged; no adoption by her. Then again, there is the constantly increasing volume of case-law. Every other day, the Supreme Court of India renders a decision which according to the Constitution lays down the law of the land. It will be idle on the part of a young lawyer to spend his time with historical development of a principle when it is found enunciated authoritatively in one of the latest decisions of the Supreme Court. Which learned Judge would listen patiently to an argument from a junior advocate on a question covered by a recent decision of the Supreme Court if he were to begin from Justinian and Coke and the reports of the Sardar Divani Adalat? Then there is the body of special laws in the application of which precedent does not materially help.

This leads me on to the task which lies before Judge and Advocate to-day, a task whiich will increase in its importance in the coming years. Having regard to the socialistic pattern of society which has been adopted by the leaders of our country and new legislation consequent on the implementation of that ideal, Courts will be dealing more and more with disputes not so much between private parties as between the citizens and the State and in some cases, between the States and the Union. To decide a dispute between private parties is comparatively easier than to decide a dispute between a citizen and the State.

Here I shall very briefly refer to an aspect of judicial approach to which reference was made last night by Mr. Mohan Kumaramangalam at a Dinner in my honour, and that is what I may describe as "the principle of progressive interpretation of statutes" and particularly the Constitution. I would go so far as to say that the Constitution itself demands such progressive interpretation from the Court, an interpretation which would accord with the changing spirit and prevailing conditions of the time. Clause after clause of Article 19 contains the expressions "reasonable restrictions" and "in the interests of the public". Now it is obvious that what was reasonable fifty years ago may not only be not reasonable to-day, but it may be grossly unreasonable. Likewise conceptions as to public interest may undergo radical changes. In the *Minakshi Mills Case*[1] I said:

> "The doctrine of *laissez faire* which held sway in the world since the time of Adam Smith has practically given place to a doctrine which emphasises the duty of the State to interfere in the affairs of individuals in the interests of the social well-being of the entire community."

I cited the following passage from Julian Huxley's Essay on "The Economic Man and the Social Man":

> "Many of our old ideas must be retranslated, so to speak, into a new language. Democratic idea of freedom, for instance, must lose its 19th century meaning of individual liberty in the economic sphere, and become adjusted to new conceptions of social duties and responsibilities."

1. (1951) 2 M.L.J. 332, (389).

It may interest you to learn that this passage was specially noticed in a learned article by a Professor of Law in one of the leading Journals in America with appreciation and expressing a doubt whether the American Judges will have the boldness to quote this passage of Julian Huxley in their judgments.

Though I ceased to be a practising lawyer, from July, 1945, I never forgot I was a member of the Bar and I believe I have treated the advocates who happened to appear before me, whether they be senior or junior, as fellow-members of the Bar and friends. I do not think that I was ever deliberately rude or discourteous to any of them. But I cannot say that I have the gift of patience in such an abundant measure as my brother Rajagopalan had evidencly as I gather from the speeches felicitating him. The reason for my occasional impatience was two-fold. One was the spirit of the advocate in me which would not be eradicated. Once an advocate, always an advocate If a counsel was advancing a view which was opposed to my view, I momentarily would forget that I was a Judge and begin to argue sometimes rather forcibly with counsel as if I was the opposing counsel. The second reason for my impatience was the disappointment in finding an argument being advanced which I thought should not have been advanced. If I have unwittingly offended any member of the Bar, senior or junior, I crave forgiveness.

One of the recurring topics for legislators and members of the public is the arrears in Courts. The impression one gathers is that there were never arrears in the old days in this country and arrears never exist in other countries in the world. Arrears like vice and poverty have always existed in this country and will exist in larger or smaller measure. "Laws Delays" is not an expression coined for India. It goes back to Shakespeare. At the same time I accept the necessity of every effort being made both by the Bench and the Bar to keep down the arrears. When I assumed charge as Chief Justice I was faced with an appalling state of arrears. With the magnificent help and co-operation which I obtained from my learned colleagues and learned members of the Bar to-day the Madras High Court stands practically first among the High Courts in pendency. Except in first appeals and tax cases we have practically finished cases of other description like O. S. Appeals, L. P. Appeals, Writ Appeals, Second Appeals and Civil Revision Petitions of the years before 1959. Of course there are no arrears worth speaking on the criminal side.

My learned brother Rajagopalan, J., only the other day paid a tribute to the efficiency and integrity of the subordinate judiciary. I entirely agree with all that fell from him. I have in other places expressed my gratitude to him for giving me all assistance in the toning up of the subordinate judiciary and in all matters of administration.

Now I shall proceed to thanksgiving. First I thank the God who brought me to the exalted office and in whose name I took the oath. Then I offer my sincere thanks to all the learned Judges of this Court who have worked with me during my long period as Chief Justice and before, but for whose willing help I could not have accomplished what I believe I have accomplished in the disposal of cases and in the administrative matters and in general, in keeping up the prestige of this Court. I am happy in the thought that to-day when I am laying down my office the level of the Bench of this Court is as high as that of any other Court in India. I am also happy that Ramachandra Iyer, J., will be succeeding me in this highest office. I am sure his appointment has been received with universal approbation. There are several experienced Judges who will ably assist him.

I must next offer my thanks to all the members of the High Court, gazetted officers as well as the innumerable employees in different departments, Managers,

Superintendents and clerks. The arduous labours of the members of the staff are not generally widely known to the public, why, not even to all the Judges. I often used to marvel at the thoroughness and accuracy of the notes prepared by them. I could easily imagine how many hours should have been taken in the preparation of each note. Every clerk and every superior officer is being overworked and it is a great pity that though the Pay Commission has to some extent increased their salaries, full justice has not been done to them. I pay my tribute to all the large body of clerks and other employees who are a part of the Madras High Court Service. The Bench Clerks and the Shorthand-writers whose efficiency is probably the highest in the land are always with us Judges. I offer my most sincere thanks to all Bench Clerks and Shorthand-writers, not only those who happened to be associated with me in my work, but also to the others who have equally helped the work of other Courts. In this connection I cannot refrain from mentioning that I was fortunate in having a succession of very able and conscientious Registrars, Mr. Raman Nair, who is now a Judge of the Kerala High Court, Mr. Ganpati, Mr. Srinivasa Ayyar, Mr. Jayarama Ayyar and Mr. Gajendram who still continues to be the Registrar.

Members of the Bar, I wish every one of you all the best in the world in such measure as it pleased God to give you. I shall now conclude. If in your opinion I have to the best of my capacity succeeded in maintaining the high traditions of this Court, if I have fulfilled the solemn oath of office which I subscribed that I will perform the duties of my office without fear or favour, affection or ill will, if I have gained the affection and esteem of you, the Members of the Bar, then verily I have not lived in vain. May God be with you.

MR. JUSTICE RAMACHANDRA IYER SWORN IN AS ACTING CHIEF JUSTICE.

The Hon'ble Mr. Justice Ramachandra Iyer, the Senior Puisne Judge of the Madras High Court was sworn in by the Retiring Chief Justice as the Acting Chief Justice of the Madras High Court in pursuance of the warrant of appointment by the President. The Hon. Mr. Justice Ramachandra Iyer, is not new to Madras and is known as an able senior practitioner on the Appellate Side before his appointment as a Judge of the High Court about four years ago. He represents the elder counsel of the older generation and has had a training in legal learning that was at once deep and exacting. It is to be hoped that he will be made the permanent Chief Justice in due course. We are sure under his stewardship the Madras High Court will maintain its glorious traditions and reputation for its efficiency in the administrative and judicial spheres.
