न्यायपुंज
स्मारिका IV
न्यायः मम् धर्मः

SOUVENIR 2019, ADHIVAKTA PARISHAD, BIHAR

Editor
Kaushal Kumar Singh
Advocate

✹

Sub Editor
Lakmesh Marvind
Advocate

Chetan Kumar
Advocate

✹

Editorial Office
Gorakhnath Lane
Boring Road, Patna-800001 (Bihar)
E-mail : adhivaktaparishadbihar@gmail.com
Visit us - http://adhivaktaparishadbihar.com
Phone-0612-2535891

✹

Design & Production
Tarang Press & Publications Pvt. Ltd.
Shivpuri, Patna-23

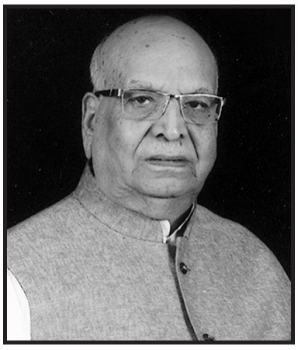
INDEX

लाल जी टंडन
LAL JI TANDON

राज भवन
पटना-800022
RAJ BHAVAN
PATNA-800022

सत्यमेव जयते

राज्यपाल, बिहार
GOVERNOR OF BIHAR



03 मई, 2019

संदेश

यह जानकर हार्दिक प्रसन्नता हुई कि अधिवक्ता परिषद्, पटना, बिहार के तत्वावधान में एक 'स्मारिका' प्रकाशित की जा रही है।

आशा है, प्रकाश्य 'स्मारिका' के केन्द्रीय विषय– 'प्रजातांत्रिक व्यवस्था में संवैधानिक संस्थाओं की भूमिका' – के विभिन्न आयामों पर ऐसे गंभीर आलेख 'स्मारिका' में छपेंगे, जो ज्ञानवर्द्धक और उपयोगी होंगे। देश में प्रजातंत्र के समग्र विकास में संवैधानिक संस्थाओं की अग्रणी भूमिका तो है ही, जन–मानस में स्वस्थ सामाजिक–राजनीतिक चेतना और मानवीय संवेदना का विकास भी लोकतांत्रिक शासन–व्यवस्था के स्वरूप–संवर्द्धन में काफी सहायक और लाभप्रद होता है।

मैं 'स्मारिका' के सफल प्रकाशन के प्रति अपनी शुभकामनाएँ व्यक्त करता हूँ।

लाल जी टंडन

(लाल जी टंडन)

Phone : 0612-2786100-107, Fax : 0612-2786178
e-mail : governorbihar@nic.in

Justice Dinesh Kr. Singh
Judge
Patna High Court.

MESSAGE

ROLE OF CONSTITUTIONAL BODIES IN THE INDIAN DEMOCRATIC SET UP

It gives me immense pleasure to acknowledge the efforts and endeavour made by the Adhivakta Parishad, Bihar in publishing the Annual Souvenir titled as Role of Constitutional Bodies in the Indian Democratic Set Up. No doubt the topic for the Souvenir has assumed great significance in the present times and would be an illustrative work to the great advantage of the society at large in general to the legal fraternity in particular.

Constitutional bodies in India are referable to those institutions which have been mentioned in the Indian Constitution itself and derived its authority directly from it. Any type of change in the mechanism of these bodies needs a Constitutional Amendment. The Constitution of India which as is Commonly referred as Mother and Source of all the legislation is unique in itself in so far as it prescribes the end and sets the goal of Governance and simultaneously provides the means for achieving them. India is a Country governed by a Parliamentary System of Government in which the executive is directly answerable to the Legislature. The goals setforth in the Constitution are achieved through Constitutional bodies like Supreme Court, High Court in the Country, Election Commission of India, CAG, RBI and many others. The bigger question now in the present day is about the Constitutional balance and the conflict of interest between the Constitutional Bodies and the Government in power. The success of Democracy lies in the Independence of Constitutional Bodies.

Thomas Jefferson, the principle author of declaration of Independence (1976) and 3rd president of the United states once wrote " When the people fear the Government there is tyranny and When the Government fears the people there is Liberty ". This is the ideal situation perceived by the Constitution of India and sought to be achieved through the Constitutional bodies. The need of the hour is to repose the confidence in the sanctity of appointments to the Constitutional bodies coupled with the independent exercise of power incumbent of the Constitutional offices.

I wish all the success for the Annual Souvenir and hope that in future also the Adhivakta Parishad would undertake such endeavours for the academic benefit of all.

Dinesh Kumar Singh
Judge
Patna High Court

JUDGE

HIGH COURT, PATNA

सत्यमेव जयते

I am pleased to know that Adhivakta Parishad, Bihar, as usual, is going to publish a savounear "Nayaypunj" on the topic *"Role of Constitutional Institutions under the Constitutional set up"*.

Subject is important and I have no doubt that the articles published in the souvenir will enlighten the society and the legal fraternity at large addressing the burning issues of the society.

I wish every success to the publication of "Nayaypunj".

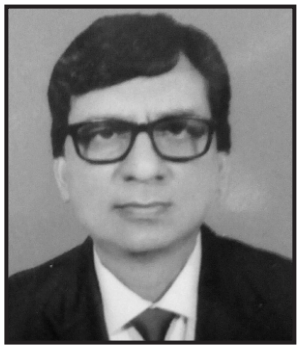
Shivaji Pandey

(Shivaji Pandey, J.)

Sanjay Kumar
Judge
Patna High Court

JUDGE
सत्यमेव जयते
HIGH COURT, PATNA

Balupar Kurji, (Near Sri Chandra Middle School)
Digha, Patna - 800 010
Mob.: 9430001773
9431015018



MESSAGE

It gave me the immense pleasure to know that Adhivakta Parishad, Bihar, a premier organisation of legal fraternity, is to publish its annual 2019 souvenir **'Nyayapunj'**, on the theme topic **'Role of the Constitutinal Institutions in the Democratic setup'**. Topic is not only debatable but important too. Hope, the articles published in the souvenir will enlighten the society and the legal fraternity at large. I wish the success of the souvenir.

Sanjay Kumar

Sanjay Kumar,
Judge,
Patna High Court

अंजनी कुमार शरण
न्यायमूर्त्ति
पटना उच्च न्यायालय, पटना

सतगुरू सदन, रोड
नं0–13–बी, राजेन्द्र नगर,
पटना–800016
मो0 नं0– 9431024040

संदेश

मेरे लिये यह प्रसन्नता की बात है कि अधिवक्ता परिषद, बिहार, पूर्व वर्षों की भांति वर्ष 2019 में भी अपनी वार्षिक स्मारिका "**न्यायपुंज**" का प्रकाशन चिन्तन विषय "**प्रजातांत्रिक व्यवस्था में संवैधानिक संस्थाओं की भूमिका**" पर करने जा रहा है चिन्तन विषय समीचनी एवं सार्थक है। स्मारिका में प्रकाशित लेख समाज में जागृति पैदा करेगा इसमें मुझे कोई संशय नहीं है। मैं स्मारिका के सफल प्रकाशन के लिये संगठन को बधाई देता हूँ।

अंजनी कुमार शरण
20/5/2019.

(अंजनी कुमार शरण)
न्यायमूर्त्ति
पटना उच्च न्यायालय, पटना

सम्पादकीय

ताकि सनद रहे!

कौशल कुमार सिंह
सम्पादक

प्रथमतः तो राज्य कार्यकारिणी की वर्तमान बैठक के विचार मंथन का आधार जानकर आश्चर्य ही हुआ। ये कैसा विषय है कि हम प्रजातांत्रिक व्यवस्था में प्रजातांत्रिक संस्थाओं के महत्व पर चर्चा करें। ये तो स्वाभाविक ही है कि देश की प्रजातांत्रिक व्यवस्था आधारभूत संस्थाओं के बिना चल ही नहीं सकती; तो फिर उसके महत्व की चर्चा क्या करना? वे तो आधार स्तंभ हैं, नींव के पत्थर हैं और उनके बिना प्रजातंत्र की कोई कल्पना ही नहीं की जा सकती अतएव उनका महत्व तो सारवान है बल्कि प्रजातंत्र है ही इसलिए क्योंकि प्रजातांत्रिक संस्थाएँ है, फिर तो उनका महत्व स्वयंसिद्ध है उस पर विचार मंथन क्या?

परंतु गौर से सोचने और समझने पर इस विषय की अहमियत समझ में आती है और ऐसा लगता है कि वर्त्तमान परिप्रेक्ष्य में बहुत सोच समझ कर इस विषय का चयन किया गया है। यह सही है कि प्रजातांत्रिक संस्थाओं पर ही प्रजातंत्र टिका हुआ है परंतु गौर करने वाली बात तो यह है कि इन संस्थाओं की सुदृढ़ता पिछले दशकों में कितनी प्रभावित हुई है। इन संस्थाओं का महत्व कितना कमा या बढ़ा है और प्रजातंत्र की इन पर निर्भरता कितनी घटी या बढ़ी है?हमारा पूरा सिस्टम, हमारी आधारभूत व्यवस्था, कितनी कमजोर या सुदृढ़ हुई है? तो यह विचार मंथन इसी पर आधारित है। प्रजातंत्र है संस्थाएँ है परंतु हम उसे कितना मजबूत या कमजोर कर रहे हैं और फिर अगर इनमें कोई कमजोरी या कमी आई है तो इसका समाधान क्या है?ये विचारण महत्वपूर्ण है।

कुछ उदाहरण हमारे सामने हैं। पिछले दिनों हमारा लोकतंत्र आम चुनाव की परिपक्व प्रक्रिया से गुजरा है। एक लंबा दौर चुनाव का और चुनाव आयोग की भूमिका और परिणाम प्रकाशन, इन सबों को हमने देखा सुना और समझा है। फिर हमारी सर्वोच्च न्यायपालिका की कुछ एक घटनाएँ हुई, कुछ एक निर्णय हुए जो आम जन–मानस में विचार उद्वेलन का वाहक बने। ये दोनों हमारी व्यवस्था का महत्वपूर्ण आधार हैं चुनाव आयोग और सर्वोच्च न्यायपालिका क्या इसमें उनके महत्व को कम करने का प्रयास किया है, अपने मन, क्रम–वचन से क्या चुनाव प्रक्रिया के दौरान और उसके उपरांत परिणाम प्रकाशन तक हमारे कतिपय राजनीतिक दलों ने अपने विभिन्न वक्तव्यों से अपनी अपरिपक्वता का परिचय दिया। अपनी ही संवैधानिक संस्थाओं की कार्यप्रणाली एवं उनके निर्णय पर बिना विचार किए वैचारिक आक्रमण करना इन संस्थाओं को कमजोर करने के समान ही है और इससे हम अपनी ही

प्रजातांत्रिक व्यवस्था एवं जनमानस एवं जनमत की सर्त्तक दृष्टि में स्वयं को ही कमजोर करते हैं, संस्थाएँ प्रभावित होंगी या अप्रभावित रहेंगी यह तो बाद का विषय है। परंतु जनमत यह है कि संस्थाओं का रूतबा कम करने का प्रयास करने वाली प्रत्येक गतिविधि तत्काल प्रभाव से अवरूद्ध की जानी चाहिए। कोई व्यक्ति या व्यक्ति समूह या फिर वर्ग या संस्था इतनी शक्तिवान नहीं हैं कि हमारी प्रजातांत्रिक संस्थाओं पर आक्रमण करने की धृष्टता कर सके या हावी होने का प्रयास कर सके और हमारे परिपक्व लोकतंत्र के जनमत ने इसे सिद्ध कर दिया है।

कुछ ऐसा ही कुचेष्टा हुई हमारी न्यायपालिका को भी प्रभावित करने की, उसे भयाक्रांत करने की, जब सबसे बड़ी अदालत सुप्रीम कोर्ट के माननीय मुख्य न्यायाधीश महोदय पर उनके ही कार्यालय की एक महिला कर्मचारी ने आरोप लगाए। यह न्यायपालिका की छवि खराब करने की साजिश और कुचक्र साबित हुआ। आज देश में ऐसा कुछ चल पड़ा है और ऐसा प्रयास है कि हर संस्था को नीचे लाओ ताकि उस पर बैठने वाला सत्य की राह पर चलने की हिम्मत भी न करे। यह एक खतरनाक आत्मघाती प्रवृति है, क्योंकि संस्थायें भी यदि कुछ व्यक्तियों के कारण यदि संविधान सम्मत कार्य नहीं करती है तो बिना वजह अव्यवस्था ही जन्म लेती है।

अतः इस कार्यकारिणी की बैठक जो पाटलिपुत्र की एतिहासिक भूमि पर होने जा रही है इन सब ज्वलंत मुद्धों पर विचार करेगी और समस्या की तह तक और समाधान के सतह तक पहुँचेगी ऐसा विश्वास है और स्मारिका के इस अंक में हमने भी विभिन्न लेखों में इन बिन्दुओं को स्पर्श करने का प्रयास किया है और यह आकलन आप सुधी पाठकों पर है कि हम कितना सफल हो पाएँ हैं, परंतु इतिहास साक्षी है कि जब–जब हमारी संवैधानिक और प्रजातांत्रिक संस्थाओं को कमजोर करने की कुचेष्टा हुई है, तब–तब ये संस्थाएँ और मजबूत एवं सुदृढ़ होकर उभरी हैं और हमारा लोकतंत्र और भी निखरा है।

यह कार्यकारिणी की बैठक में सहयोग देने वाली हमारी सभी अनुसांगिक इकाईयों एवं विभिन्न संस्थानों को हम हृदय से धन्यवाद देते हैं क्योंकि उनके सक्रिय सहयोग एवं प्रोत्साहन के बगैर यह संभव नही था।

हमारे संपादकीय सहयोगीगण एवं विद्वतापूर्ण आलेखों को प्रकाशन हेतु देने वाले हमारे विभिन्न सहयोगी एवं अभिभावकगण का हम हृदय से आभार व्यक्त करते हैं और आशा करते हैं कि स्मारिका का यह अंक भी पूर्व की भांति आपके द्वारा सराहा जाएगा। यह स्पष्ट करते हुए कि इस स्मारिका में प्रकाशित लेखों–आलेखों में वर्णित विचार लेखकों के हैं और हम उनसे सहमत ही हों ऐसा नहीं है, परंतु विभिन्न विचारों एवं मतों को स्थान देना हमारी परंपरा रही है, अतएव यह समावेशी अंक आपकी सेवा में समर्पित ।

धन्यवाद।

संवैधानिक दायित्व के प्रति दृढ़ संकल्पित ''परिषद''

महामंत्री प्रतिवेदन

अमोद कुमार सिंह
अधिवक्ता,
प्रदेश महामंत्री
अधिवक्ता परिषद बिहार

भारतीय कानुन पसन्द एवं संवैधानिक दायित्वों के निर्वाहन करने का एक समूह का नाम अधिवक्ता परिषद है। राष्ट्रीय स्तर पर अखिल भारतीय अधिवक्ता परिषद के नाम से जाना जाता है जिसका एक स्वतंत्र संविधान चलने का है वही पुरे भारत में भिन्न–भिन्न नामों से कार्य करते है वही बिहार में ''अधिवक्ता परिषद बिहार'' के नाम से निबंधित है।

भारतीय संस्कृति के आधार पर न्याय निर्णयन की प्रक्रिया पुरानी है तथा ऋगवेद से लेकर भारतीय राजा एवं महाराजा के काल में भी न्याय व्यवस्था भारत में बनी रही तथा मनु स्मृति से न्याय पद्धति की जानकारी भी हम भारतीयों को मिलता है। कालान्तर में मुगलकालीन साम्राज्य के पश्चात ब्रिटिश साम्राज्य के विस्तार होने पर भारतीय संस्कृति के आधार पर नयी व्यवस्था प्रभावित होती रही तथा ब्रिटिश शासक ने पाश्चात्य न्याय व्यवस्था की जो व्यवस्था दी थी उसका अंश आज भी हमारे समाज में समाजिक समरसता एवं संस्कृति के विपरीत असर अंश रूप से प्रभावित करती आ रही है वहीं भारत के स्वतंत्रता के पश्चात भारतीय संविधान 26 नवम्बर 1949 ई० को अध्यक्ष डॉ० राजेन्द्र प्रसाद के हस्ताक्षर से पूर्ण होने पर भारत में 26 जनवरी 1950 ई० को लागु हुआ तथा उक्त संविधान में भी समय–समय पर व्यवस्थापिका के द्वारा सुधार संशोधन किया गया है।

भारतीय संविधान के प्रति दृढ़ प्रतिज्ञ वर्ग आज भी संविधान के प्रति उत्तरदायित्व है परन्तु विद्वानों की विद्वता में आ रही गिरावट के संस्कार के कारण विद्वान भी संविधान जैसे पवित्र ग्रंथ एवं संस्थागत संविधान के विपरीत गलत आचरण करने से भारतीय संस्कृति के रूप में धरोहर संविधान के प्रति अभद्र टिप्पणी भी सुनने को मिलता है वो ऐसे वास्तविक रूप से संस्था एवं भारतीय संस्कृति एवं संविधान के हित में नहीं है तथा सामाजिक समरसता के विपरीत का कृत्य कहा जा सकता है। अखिल भारतीय अधिवक्ता परिषद का मुलतया गठन 07 सितम्बर 1992 ई० में माननीय मार्गदर्शक दंतोपाध्याय देंगड़ी जी के द्वारा की गयी थी तथा वर्ष 2003 ई० में

माननीय देंगड़ी जी का मार्गदर्शन लाभ अखिल भारतीय अधिवक्ता को हुआ था उस समय अखिल भारतीय अधिवक्ता परिषद के राष्ट्रीय अध्यक्ष उत्तम चन्द ईसराणी जी थे तथा भुपेन्द्र जी राष्ट्रीय महामंत्री थे जो वर्तमान में राज्य सांसद है। माननीय अध्यक्ष उत्तम चन्द ईसराणी जी ने स्पष्ट रूप से कहा था कि अधिवक्ता परिषद के माध्यम से हम राष्ट्रीय विचार वाले तथा सेवा भावी अधिवक्ताओं की उन्नति के साथ –साथ न्यायिक प्रणाली व राष्ट्रीय समस्याओं का चिन्तन भी करते है, को संगठित करना चाहते है, ताकि ऐसे अधिवक्ताओं के आधार पर ही भारत दुनियाँ में अग्रणी राष्ट्रों में अपना स्थान प्राप्त कर सके। अधिवक्ता परिषद पुरे भारत में पला–पढ़ा भी तथा अनेकों न्यायिक पदाधिकारी एवं न्यायाधीश भी बने परन्तु वर्त्तमान स्थिति में अखिल भारतीय अधिवक्ता परिषद माननीय उत्तम चन्द ईसराणी जी एवं मानीय देंगड़ी जी के उद्देश्य के विपरीत 15वें राष्ट्रीय अधिवेशन में सेवा भावी की जगह सरकारी वकील बनने एवं राजनीतिज्ञों के साथ बैठकर कार्य करने में अपने को गौरव महसुस करते है जिस वजह से वर्ष 2018 के लखनऊ राष्ट्रीय अधिवेशन में माननीयों के द्वारा संविधान के प्रति कृत संकल्पित व्याख्यान न्याय मुर्त्तियों एवं कानुन मंत्री का प्राप्त हुआ यद्यपि अखिल भारतीय अधिवक्ता परिषद के राष्ट्रीय अध्यक्ष एवं महामंत्री वर्ष 2001 ई० में बने अखिल भारतीय संविधान की भी निर्वाहन करने में असफल दिखलाये पड़े। यहाँ तक कि संविधान पर चर्चा से कतराते दिखें। जबकि माननीय मनमोहन वैद्यजी ने जम्मू में 15 अप्रैल 2015 ई० को अपने समापन भाषण में स्पष्ट रूप से कहा था कि राज्य एवं स्वायत संस्था है जिसका अपना संविधान है परन्तु सम्बद्वता अखिल भारतीय अधिवक्ता परिषद के साथ है एवं कार्य अखिल भारतीय स्वरूप दिखलायी पड़े क्योंकि प्रत्येक प्रांत की अपनी –अपनी अलग–अलग कानुन है तथा राष्ट्रीय कानुन तो एक समान सभी का है। वर्त्तमान स्वरूप में दानी मार्गदर्शक एवं अन्य में भी भिन्नता दिखलायी देने लगा है जहाँ मार्गदर्शक राष्ट्रीय स्वरूप में कार्य करते हुए सांस्कृति धरोहर को आगे बढ़ाने पर निरंतर प्रयत्नशील है वहीं पारिवारिक मार्गदर्शक संवैधानिक दायित्वों के विपरीत एवं दानी मार्गदर्शक के विचार के विपरीत राजनीतिक स्वरूप में कार्य करते देखे जा रहे हैं जो भारतीय संस्कृति के धरोहर के प्रति कृत संकल्पित निरा भाव से कार्य करने वाले समूह को तो ठेंस पहुचाते है हीं साथ ही जिस उद्देश्य से सांस्कृतिक पद्धति के आधार पर पुरे विश्व में निरलोभ रूप से कार्य करने वाले संस्था के हित में भी नहीं है।

अधिवक्ता परिषद बिहार निरंतर अपने संवैधानिक दायित्वों का निर्वाहन करते हुए आगे बढ़ता रहा है। आशा एवं अपेक्षा है कि सांस्कृतिक धरोहर के मार्गदर्शन में अपने संवैधानिक कार्यों के प्रति कृत संकल्पित कार्यकर्त्ता एवं पदाधिकारीगण बिहार में अपना इसे तन्यमेयता से आगे कार्य करते रहेंगे।

Role of Constitutional Institutions in Democratic System

Hon'ble Justice V N Sinha,
Former Judge,
Patna High Court
Presently: Senior Advocate,
Supreme Court of India

India attained freedom and adopted a Democratic Constitution for governing itself. The main features of a democratic Constitution are preamble setting out the aspirations, hope of its people to protect their basic rights assuring dignity of the individual. Part I, II of the Constitution provides for union, states their reorganisation and citizenship. Part III specifies the Basic rights guaranteed by the Constitution to the citizens and others. Part IV of the Constitution, provides for Directive Principles of the State Policy, though not enforceable by the courts, but are nevertheless fundamental in governance of the country. Part V chapter I provides for the union its executive, namely the President, vice president, its Council of ministers, duty of the Prime Minister to furnish information to the President, the Attorney General for India and the manner in which union will conduct its business. Chapter II of part V provides for parliament, its officers, the manner in which it will conduct its business, disqualify the members, their privileges, legislative procedure etc. Chapter IV of part V provides for the Supreme Court of India its Chief Justice, other judges their salary, emoluments, jurisdiction, including the manner of removal. Similarly, Part VI of the Constitution, in chapter II provides for the State(s) its executive, Council of ministers, the Advocate General and the manner in which government business is conducted. Chapter III of part VI provides for the State legislature its officers, conduct of business, disqualification of members, their privileges and legislative procedure. Chapter V, VI of part VI provides for the High Courts and Subordinate Courts in the States, their jurisdiction, including manner of appointment of judges their salaries and other emoluments, conditions of service, etc. Part IX of the Constitution provides for distribution of legislative powers between the Parliament and State legislatures, including concurrent powers of the two legislatures. Part IX, IX-A of the Constitution inserted by Constitution 73, 74 Amendment Act 1992 provides for the Panchayats and the Municipalities with mechanism to function as institution of local self-government, having complete control over subjects, enumerated in eleventh and twelfth schedule of the Constitution to enable the Panchayats and the Municipalities to function as 3rd tier of constitutional government completely independent of the state government in the matters enshrined in the eleventh, twelfth schedule of the Constitution. Notwithstanding the aforesaid constitutional amendments, Panchayats and Municipalities established in the country have not been endowed with powers to enable them to function as institution of self-government with powers to prepare and implement plan for economic development and social justice, including matters enumerated in in eleventh, twelfth schedule of the Constitution.

Framers of the Indian Constitution were cognisant of the importance of free and fair elections to both Parliament and State legislatures, for ensuring the same, entrusted the conduct of elections to both Parliament and the State legislatures to the Election Commission by providing for the same in part XV of the Constitution. Article 324 vested superintendence, conduct of election to both Parliament and State legislature in the Commission. It further authorised the Commission to issue such direction as may be necessary for ensuring free and fair

election to both Parliament and State legislature. The direction issued by the Commission for conducting election could not be assailed, as per article 329, in any court of law, except by filing an election petition challenging the election before the election tribunal.

So far I have outlined the nature of Indian Constitution and the institutions created to sustain and nourish the same. It is well-known that the Constitution and its institutions are an organic whole, which either grow and serve its people well or inflict pain and perish with the times, requiring the people to usher in a revolution and give to themselves yet another Constitution.

In view of the aforesaid premise I may now proceed to examine the status of the different institutions created under the Constitution and analyse the extent to which the Constitutional Institutions have been able to sustain the aims and object of our Constitution enshrined in its preamble, to secure to its citizen Justice in the three dimensions namely social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and opportunity, assuring dignity of the individual so that brotherhood prevails amongst all Indians.

For securing the dignity of the individual Constitution has incorporated fundamental rights and directive principles of state policy in part III, IV of the Constitution respectively. Both the provisions are the two wheels of the same chariot of the State. The two provisions have been incorporated in the Constitution only with a view to secure the aims and object enshrined in the preamble of the Constitution. Provisions of part III are enforceable through superior courts. Directive principles of state policy in part IV are however not enforceable by courts, but the principles incorporated therein are never the less, fundamental in the governance of the country and it shall be the duty of the state to apply those principles in making laws. Once law is enacted, incorporating the principle laid down in the directive principles of state policy, the same is enforceable through law courts.

Parliament and the State legislature are the two institutions entrusted under the Constitution with the authority to legislate as per the legislative scheme enshrined in part XI article 245 of the Constitution and the subject matters enumerated in Union list I, State list II and Concurrent list III of the Seventh Schedule.

Since Independence, over the years, several elections have been held to the house of people/lower house of Parliament and State legislature. Recently, general election to lower house of Parliament was conducted and result declared on 23 May 2019. Soon after declaration of the result, profile of the candidates winning the election, as disclosed by them in the nomination form, was published in the print media and became subject matter of discussion not only in the electronic media but also on other public forum. It appeared from the profile of the candidates becoming victorious that the number of those against whom criminal case/cases are not only pending for investigation, but charge sheet has also been submitted, their number has increased manifold. Researchers pointed out with the help of graphics that the number of candidates winning the election with criminal case(s) pending against them, not only for investigation, but also for trial has all along been steadily growing from nineteen eighty onwards and that the upward trend is presently maintained at a much higher rate. That 28% of the members of the present Parliament (lower house) are such against whom criminal case(s) is either pending for investigation or trial. The number of candidates having assets of crore of rupees and getting elected is on the rise. Those keeping a close watch over the profile of the candidates succeeding in parliamentary elections further pointed out that many parliamentarians who subsequently got convicted asked their better halves or siblings to contest the election in their place and there by represented the constituency from outside Parliament by proxy. Husband representing the wife by proxy is a phenomenon which is more common in elections to Panchayati Raj institutions, where there is reservation in favour of women candidates. Husband, representing the wife, elected as Mukhia or Sarpanch in Gram Panchayat, by proxy, is commonly called MukhiaPati,

SarpanchPati, etc. as it is the husband of the elected lady Mukhia or Sarpanch who inter acts on her behalf with the constituents and others and facilitates the working of the Gram Panchyat.

Researchers also pointed out that information about the profile of victorious candidate and others contesting election to Parliament, State legislature and other local bodies could be ascertained by the elector only after Delhi High Court intervened in the case of Association for Democratic Reforms and held that elector has fundamental right under Article 19 (1) (a) of the Constitution to know about the profile of the victorious and other candidates contesting the election. The aforesaid view of the High Court was upheld by the Supreme Court in the case of union of India versus Association for Democratic reforms A I R 2002 Supreme Court 2112. It was also pointed out by the researchers that following the judicial dictum of the Supreme Court necessary legislative provisions were incorporated in the Representation of People Act 1951, and thereby it became feasible for the elector and others, to ascertain the complete profile of the candidate's contesting the election to Parliament in the year 2019 and discover that 28% amongst the victorious candidates, are such against whom criminal case is either pending for investigation or trial.

Parliamentary election 2019 was notified in April 2019 to be conducted in seven phases. The researchers and others, including the reporters, of the print and electronic media, studied at length the conduct of Election Commission of India in the matters of disposal of petition(s) asserting violation of model code of conduct, which came into operation no sooner the constituency concerned was called upon to elect its representative. From the date of notification calling the constituency in question to elect its representative till the date of poll the model code of conduct remained in operation in the constituency concerned, requiring the candidate contesting the election, including his leaders, to observe the norms, provided for in the model code of conduct, failing which those found violating the norms were liable to be dealt with and restrained from campaigning by the Election Commission of India. The petition asserting violation of model code of conduct filed before the Election Commission of India is required to be considered by the entire Commission (three members). There have been several reports both in the electronic and print media that there has been difference of opinion amongst the members of the Commission about the merit of the allegations levelled in the petition alleging violation of model code of conduct by the senior functionary of the ruling party and the Central Government on the question as to whether model code has been violated and action restraining the senior ruling party/government functionary from campaigning is required to be taken against them, including launching of the prosecution. The petitions alleging such violations against the senior ruling party and central government functionary were considered and disposed of by the Election Commission of India not only belatedly ignoring the public hue and cry which was raised, impugning the independence of the Commission, but on the direction of the apex court to consider and dispose of those petitions, by a majority opinion of two against one withholding the minority view rendered by one of the Election Commissioner.

Belated disposal of the petition, alleging violation of model code of conduct by the senior ruling party and the central government functionary, by the Election Commission of India, at the behest of the apex court, withholding the minority opinion, has raised considerable doubt about the independence of the Election Commission of India.

In this connection I may also refer to article 324 and 329 noted above, included in the Constitution only with a view to maintain the purity and fairness of the election process came under serious criticism placing the utilitarian purpose for which Election Commission of India was created in the Constitution to severe strain. Withholding of the minority opinion, rendered by one of the three Commissioners, while disposing of the petition asserting violation of model code of conduct, cannot be justified

on the ground that the decision of the Commission rendered in that regard is administrative in nature. The minority opinion, rendered by one of the three Commissioners, needs to be made public in view of the right of the elector to know and judge for himself about the merit of both majority and minority opinion rendered by the members of the Commission on the question as to whether senior ruling party and central government functionary has violated the model code of conduct and decided for himself as to who amongst the candidate either belonging to the ruling party or opposition or any other candidate, is required to be voted.

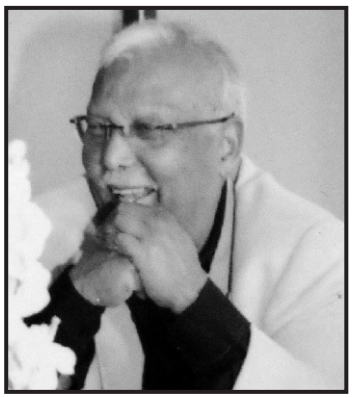
By now, I have briefly outlined the report about the criminal antecedent of the 28% elected members of the lower house of Parliament that criminal case is either pending against them, for investigation or trial. I have also briefly indicated the fact that the husband of the elected women Mukhia/Serpunch not only interact with those who come to interact with the lady Mukhia/Serpunch, but at times also participate for the elected lady in the official meetings and affirm signature, affidavit as and when required on their behalf. Besides, I have also noticed that minority opinion of the member of the Election Commission of India while disposing of petition asserting violation of model code of conduct by the senior leader of the ruling party/ central government is not made known to the elector to enable him to take a view as to which of the two opinions rendered by the majority or minority member of the Commission about the violation of the model code of conduct by the senior functionary of the ruling party/ central government is correct and which of the candidate either of the ruling party or the opposition or any other candidate is to be voted.

Present narration about the role of the constitutional institutions in the country may not be holistic and complete if something is not noticed about the developments taking place in the apex court since January 2018, when four senior judges of the apex court held an unprecedented press conference to accuse the then CJI of assigning sensitive cases to the bench presided by Junior judges of the court. Present CJI was one of the active participants in the press conference. In April 2019, a women group D staff of the apex court alleged sexual harassment against the CJI. The allegations of sexual harassment levelled against the CJI, was enquired into, by setting up an in-house committee. The in-house committee exonerated the CJI of the allegations levelled by the women group D staff of the court. Procedure adopted by the in-house committee of the Supreme Court, in exonerating the CJI, however, has been criticised by the two former judges of the Supreme Court, one of whom led the present CJI in the press conference held in January 2018 and the other followed him in the presser, by writing articles, which is in circulation in the electronic media. The merit or otherwise of the two articles written by the former judges of the apex court is for the members of the legal fraternity to appreciate. Senior legal scribe of the Times of India has analysed both the articles written by the two former judges of the apex court and has published his report/views on the two articles and other developments which took place in the apex court and published the article in the Times of India, Patna edition on 03.06.2019 captioned "Legally Speaking". In the article, the legal scribe has opined that the conduct of the two former judges of the apex court who were critical of the procedure adopted in the in-house committee to clear the CJI of the allegations of sexual harassment is required to be enquired into by forming another in-house committee as was done in the case of another retired judge of the Supreme Court.

I have attempted hereinbefore to explain the prevailing scenario in the four apex institutions of our country, namely lower house of 12 Parliament, Panchayats (third tier of governance), Election Commission of India and the Supreme Court. It is for the readers to appreciate the developments made in the aforesaid four institutions during the passage of more than six decades of the coming into force of the Constitution and take a view about the working of our Constitution and the institutions established thereunder. ◆

Party based Parliamentary form of Government : Its Problems and Solutions

– Speech delivered as chairperson of welcome committee on request of then President, Sri Ram Suresh Rai, Adhivakta Parishad, Bihar, Programme to which then H.E. the Governor of Bihar Late Sundar Singh Bhandari had inaugurated



Vinod K Kantha
Sr. Advocate
Patna High Court

That ours will be a sovereign, socialist and secular democratic republic, says the .constitution.

This the framers of the constitution could decide after deliberating for nearly three years. Their herculean efforts are reflected in the 12 volumes of debates.

Deliberations were to see how and which political system was suited to our land and its people. They could not find anything indigenous, which could inspire them. Possibly we could not have thought of any political system suited to our land and its people, for, we did not want to prove Mr. Macaulay wrong.

More Than 100 years before the independence, Mr. Macaulay, on 7th March, 1835 wrote the horoscope of this nation. He said:

'The destinies of the Indian Empire are covered with the thick darkness. It may be that the public mind of India may expand under our system till it has outgrown that system; that by good governance we may educate our subjects with a capacity for better government; that having become instructed in European knowledge they may, in some future age, demand European institutions. Whether such a day will ever come. I know not..But never will I attempt to avert or retard it. Whenever it comes it will be the proudest day in English history.'

How prophetic he was. We made 26th January, 1950 as the proudest day in English history.

The three years of deliberations were in English, model constitutions or political systems that we debated and discussed were either European or Western. We chose a Westminster model. We even chose to write the constitution also in a language, which we call foreign. i.e., English.

More than three thousand years of political system experienced by the people from Indus valley to Moghuls were either rejected or found not worth consideration probably on the' specious ground that they were either archaic or obsolete. Windows, which were forced open to our west took our intellectuals off their feet within 100 years and we were convinced that road to prosperity is through western philosophy.

Be, that as it may, we decided to have a democratic republic to ensure our people social, economic and political justice, liberty of thought, expression, belief, faith and worship, equality of status and opportunity and to promote fraternity.

This, according to our constitution. could and can be achieved only if we had a Parliamentary form of government. But, our constitution, which is bulkiest in the, world having 444 articles and 12 schedules, never even whispered about the word 'Legislature Party' or 'Political Party' till 1.3.1985, when the 10th schedule was added in our constitution.

How we are going to have a democratic republic is completely wanting in the Constitution. Democratic republic, according to a common man including me, means peoples governance. That means anyone, or a group of people who run the government or who have taken a vow in the name of the constitution to secure its people the high sounding

promises detailed in the Preamble are answerable to them.

But are they? Not at all. At best they can be said to be answerable. to the legislature.. And legislature consists of legislators elected by the people as candidates of political parties.

SO, ,in effect when we speak of a government we understand that it is a government of a particular political party or group of political parties.

Democratic system thus ends with the Party system, Democratic system is. thus, dependent on the political parties.

Now, let us see if our constitution envisages a govt. bereft of political parties. Articles of the constitution per se do not speak of political parties. That the legislators would be seeking the mandate of the people on the basis of manifestoes of the political parties is not to be found any where in the constitution.

Probably the framers of the constitution thought that we the common men, know very well that as in England or in other European countries or Western countries, legislators represent the people on the 'basis of political parties.

What is Party system'?

We have adopted Westminster model i.e. Parliamentary from of govt. of England. So, we will have to understand the system prevalent there.

England has a history of a Parliament right since the days of Tudors. It continued and developed during the Stuarts then Hanovers and the present royalty. People there, have fought for their right and their participation in the governance for about four hundred years now. Peoples cause was taken up by a group of people. These groups of people were at times at variance to achieve the people's cause. England was fortunate to have only two groups of people, which, with the passage of time were known as 'Whigs' and 'Toris'. Whigs, with further passage of time were known as 'Liberals' and 'Toris' as 'Conservatives'. With the growth of Industries, cause of liberals was mainly taken up by a third group of people known as Labour. Slowly Liberals have: become 'Saraswati' river of our country. And people's cause in England is still being looked into by two groups. So, the people have a choice to select between the two and hence the elected one is the real representative of the people.

Similarly we are greatly influenced by the American Constitution also. Right since the date of the constitution in 1789, they have two parties - Democrats and Republicans.

What about India? We have national parties, regional parties, caste parties etc. The framers of the constitution knew that we live in diversities. On most of the occasions local issues are more important than the national issues. Appeal on the basis of caste and sect is much more charming than any issue.

What the framers of the constitution probably thought that as in the pre-independence period Congress represented the ethos of the nation, and it will continue to do so perennially.

Now, when the elections are announced each constituency in this country has about a dozen candidates, seeking the mandate of the electorate either in the name of a national party or a regional party or a caste party or no party. In most of the constituencies the voter is at a loss, who to vote for, because in his estimate all the candidates are self- seekers. They have nothing to offer to the society, or the locality or the state. The voter does not have a choice. If he votes - fine. If he does not, the candidate is not worried.

Suppose that ninety percent of the voters decide not to vote. Only 10% exercise their franchise and the candidate securing the highest number of votes has barely secured 2% of' the total votes. Yet, he will be the representative of the people. Statistics would show that more than ninety per cent of the legislators - whether in Lok Sabha or various legislative Assemblies do not secure more than 15% to 20% of the people's mandate. yet they are our representatives!

Can these legislators be trusted with the governance? Never. Constitution does not speak about their accountability even.

Our constitution, on the American

pattern has envisaged a separation of powers, that means the three wings of the govt. viz. Legislature, Executive & Judiciary are to be separate and independent yet be inter-dependent for proper governance.

Now, when we talk of the bureaucracy, beginning from a humble peon to Cabinet Secretary, working under the executive, for everyone certain educational and other qualifications are needed. An ordinary peon in a Muffasil court to the CJI have to have certain educational and other qualifications. But, the legislators are not expected to have any such qualifications. Those disqualifications enumerated in the constitution are applicable to even a peon. And surprisingly the legislators, bereft of any mandatory educational qualification are the law framers of the land and then the Chief Executives as well.

Probably the only qualification that one needs to be a legislator is to have the proximitly with the leaders of the political parties either through the accident of birth or the cultivated jobbery. Be he an ordinary farmer or a rickshaw-puller or a petty shop-keeper or a babu, teacher or any thing, he has to work to earn his livelihood but what has a leader in making to do? We all know.

So, should we come to the conclusion that Parliamentary from of govt. has failed? Or we need re-writing the constitution? Or adopt a type of governance, which is indigenous? Or adopt something different?

Without going much in debate whether right or wrong, we have travelled quite far. No going back. In the last fifty years two generations have come up. We have got used to the system and know its faults.

Problem is not with the system (albeit being foreign it has its limitations), but the people

Who work for the system.

So, now neither the political animals can be imported lock stock and barrel nor can they be transported out of this country. Certain electoral reforms, few minor amendments in the constitution can probably make things better.

What comes to my mind are :

1. Political parties must find place in the Constitution itself.
2. Only those political parties be allowed to function, which have fixed positive qualifications for the candidates.
3. There should be a parliamentary legislation to govern the functioning of political parties. Their accounts should be properly maintained and annually audited. In the case of the ruling party all auditing by CAG should also be allowed at his own discretion. Suitable penal provisions must find place in the legislation for irregularities relating to collection, accountal and misuse of party funds. It is important to break the nexus between economic crimes and politicians.
4. In the legislation referred to above there should be mandatory provisions to ensure democratic functioning of political parties at every level. Office bearers should be periodically elected on the basis of the constitution of the party which must conform to the norms set out in the legislation. Deviation from democratic norms should entail loss of recognistion of political parties.
5. Recognition of political parties should be accompanied by certain privileges and may be state funding in elections and allotment of time by the media are included in the incentives. Only then deregognition can have an effect on the parties.
6. There should be an independent autonomous body constituted for the purpose of overseeing the functioning of the political parties CEC may be an ex-officio member of this body and at least two more persons should be appointed by the President on the recommendations of a committee consisting of the Vice-President, Chief Justice of Supreme Court and CEC.
7. Only those legislators be allowed to be executive heads, who have basic qualifications to understand the needs of the people, lest the bureaucracy is allowed to thrive under the cloak of ministerial responsibility.

Only those legislators be declared elected, who have secured more

than 50% of votes polled. If need by through the preferential votes.

8. It is understood that given the large illiteracy among the voters and the size of. the constituencies, preferential system of voting may not be workable proposition. There is an alternative framework of electoral system as suggested below. I understand that this will involve comprehensive changes in the present scheme and may not find fovour with the existing political parties. Yet I believe that time has come to think of radical alternatives to correct the present pervasive malaise of the system.

a. The system of direct democracy can be modified and replaced by a system of election of representatives to the state and central legislatures by electors who in turn are directly elected by ordinary voters. If an elector is chosen by 100 persons or may be more, the scale of elections subsequently will also get reduced in the same ratio making elections a far more meaningful exercise. A system of recall can be introduced alongside this change.

b. The elector should be in principle a more or less disinterested but concerned responsible citizen for whom suitable qualifications, including educational, may be prescribed. On the other hand, in elector during the period he/she is entrusted with the crucial responsibility of electing representatives, ought to be debarred from seeking elections himself/herself or holding an office in a political party.

c. An elector should not be allowed to get re-elected except after a break of at least two terms and his period of duty will be two years or may be three, during which an election may/or may not take place. The territorial principle may be applied for the choice of electors with units like villages or wards in the urban areas. Possibly professional groups and other organisations having more than 100 members can be allowed to send their representatives separately provided the voting members opt out of the territorial system of choice of electors. The laws governing this arrangement can grant recognition to different bodies to select their representative electors on their own; otherwise, the election will be the responsibility of the Election Commission. The Election Commission has to be strength-ened for the purpose.

d. There should be a method of staggering for the choice of electors which may be worked out by the Election Commission. It will be a near continuous process and the turn of a constituency should come after a period varying from two to two and half years. Consequently, the term of an elector will be not less than two years and no longer than two and a half.

9. There should be minimum interference of the govt. in the day to day governance. in other words, non governmental participation to be encouraged. Major issues like defense, external affairs, finance, Railways, home be left to the government. Municipalities, village Panchayats be left to the non-governmental organisations.

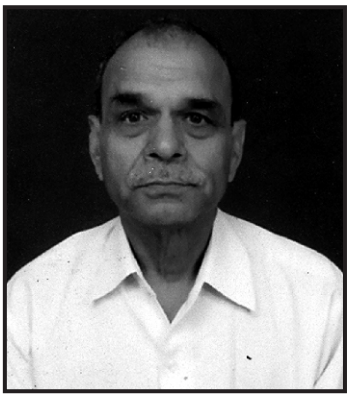
10. Any political party seeking the mandate of the people in the name of the religion or caste or community be banned to participate.

11. Legislators be made accountable to the people, not only during the election but for their everyday conduct.

12. There should be a constitutional bar on the legislators to distribute the largesse, out of people's money without the latter's consent. They should not be allowed to raise their perks as and when they feel like.

13. The bureaucracy, which thrives because of the incompetence of their executive heads (politicians) should not be allowed to keep the hares with them and run with the hounds. They should be made accountable. ◆

Medical Negligence as a Criminal Offence



Rabindra Kumar Sinha
Advocate
President, Adhivakta Parishad, Bihar

Penal liability in criminal cases has been made subject to the classic Latin maxim, act us non face it reum, nisi mens sit rea', which is known in common legal parlance as mens rea, and implies that, no act can by itself make a man guilty unless his intention was so. This basic principle of criminal law was laid down by Lord Keyon Young husband v. Luftung, where it was stated that "the intent and the act must concur to constitute a crime. "The full definition of every crime contains expressly or by implication a proposition as to the state of mind. Therefore if the mental element of any conduct alleged to have been a crime to proven to be absent in any given case, the crime is not committed. This means that no act is criminally actionable if the perpetrator does not have the intention to commit the same. The act of a man as Section 33 of the Indian Penal Code states, would include both commission as well as omission, and essentially requires the presence of the mental element. Negligence is an exception to this rule. Section 304A of the Indian Penal Code lays down the punishment for death caused by rash and negligent act of the offender, which encompasses the cases of death caused by negligent attitude of medicos.

The result of a careless act of the doctor may often be termed as an accident, because the word accident as construed in legal terminology refers to mishap and untoward event no expected or designed but that which is something fortuitous and unexpected. Yet the liability even for a careless act becomes criminal if carelessness is of such a high extent as to border on means rea. ◆

अपने जीवन का एक लक्ष्य निर्धारित करो।
और सभी दूसरे विचार को अपने जीवन से निकाल दो।
यही सफलता की कुंजी है।

—स्वामी विवेकानन्द

सांस्कृतिक आतंकवाद

शिखा सिंह परमार
संयोजिका सुकन्या
अधिवक्ता, पटना उच्च न्यायालय

राष्ट्रीय सोच, सामाजिक उत्तरदायित्व का भाव, शक्ति अपनी बौद्धिक क्षमता का एवं संगठनात्मक कार्य एक Activist का (निदेशन मा॰ दत्तोपंत डेंगरी जी 1992) यदि यही वास्तविक परिचय है सदस्य अधिवक्ता परिषद का? तो लेखिका का इस लेख के माध्यम से चर्चा का विषय बनाने का प्रयास है–

राष्ट्र के ऊपर छाए कई आतंकों में से एक हैं घातक आतंक Cultural Terrorism यानि सांस्कृतिक आतंकवाद।

1990 के दशक में लिए गए कथित राष्ट्र उत्थानी कदम Liberalization of Globalization के Passive Effect के तहत भारतीय समाज को दूरगामी विध्वंशकारी सौगाद मिला सांस्कृतिक आतंकवाद का।

पावन संस्कृति हमारी जो 'वसुधैव कुटुम्बकम' के हितार्थ शांति पाठ 'सहनाभवतु सहनोभुनक्तु' से लेकर शांति मंत्र 'सर्वेभवन्तु सुखिनः' का विचार जन–जन में कराने का श्रोत है। राष्ट्र के नागरिक को 'माँ, मातृभूमि एवं मातृभाषा' को अविकल्पनिय मानने की प्रतिबद्धता की प्रेरणा देता हो। राष्ट्रीयता 'चीर–नवीन' होती है। यह मानक तो विकसित से विकासशील देशों में 'रीढ़ की हड्डी' की तरह वैश्विक स्तर पर प्रमाणित है।

बावजूद इसके हमारा फौलादी भविष्य हमारी नई पीढ़ी अपनी सांस्कृतिक विरासत से, अतुल्य धरोहर से मिले पद चिन्हों से इतना विमुख हैं कि व्यवहारिक भाषा में कहे तो, अंग्रेजी शासन मुक्त भारत के सातवें दशक यानि बुढ़ी होती आजादी में हमें **'माइकेले'** के सपनों की झलक मिलती है। भारतीय समाज का अंग्रेजीकरण शुरू हो गया है। यदि Situation को कम आंककर कहे तो, शहरी सीमा से निकलकर ग्रामीण परिवेश को भी खंघाले तो, इस आतंक का गहरा प्रभाव मिलता है।

अतः चिंतन का विषय है सांस्कृतिक आतंकवाद के गिरफ्त में फँसे अपने वर्तमान पीढ़ी से आगामी पीढ़ी को हमें अपने तर्क पूर्वक प्रमाण के रास्ते संभालने एवं संभलने की 'घुट्टी' पिलाना एवं पिलाते रहने का शतत प्रयास बनाए रखना होगा। स्वदेशी विचार धारा को उनके बीच निरन्तर प्रचारित करना होगा।

कहा गया है– ''वस्तु से महत्वपूर्ण है व्यक्ति, व्यक्ति से महत्वपूर्ण है विषय, विषय से महत्वपूर्ण है विवेक और विवेक से महत्वपूर्ण है 'सत्य'।''

यदि सत्य सामने से खड़ा हो तो आँखें मूँद लेने से अनदेखेपन का बोध लेने के आलस्य को छोड़ हमें सार्थक कदम उठाकर पुरुषार्थ से 'Face Fight and Finish' की Theory पर अमल करनी होगी।

एक अदद ईमानदार कोशिश अन्य आतंकों से लड़ने में मिली सफलता की तरह इस मार्ग में भी सफलता दिलाएगी ही, ऐसा मेरा विश्वास है।

लेख में हम सभी के इर्द–गिर्द पड़े ढेरों, में से किसी भी अप्रिय एवं शर्मशार करने वाली घटना के विवरण (जो बहुत आसान है) की चर्चा से शब्दों को बचाने का प्रयत्न किया गया है। इस लेख के द्वारा–

आवाह्न सिर्फ एक राष्ट्रीय सोच से सामाजिक संरक्षण हेतु एक अथक प्रयत्न का है, जिसका अनुरोध अनवरत 'प्रार्थनीय' रहेगा।

हम सत्र चलाकर G.D. (Group Discussion) की तरह युवक–युवतियों से तर्क पूर्ण वार्ता करें, जीवन के पुस्तकालय से ली गई उदाहरणों से इन्हें परिपक्वता दें। सरल शब्दों में उनके कृत और उपलब्धि का लेखा जोखा समझे, प्राप्ति और प्रसन्नता से संतुष्टि के स्तर पर स्पष्ट कठोर किन्तु अनिवार्य सवाल करें, और उसका निराकरण उन्हें बतायें।

यह **निस्वार्थ कर्म,** अपने आवास निवास के आस–पड़ोस, गाँव–शहर, कार्यस्थल, क्रीड़ा स्थल, school-college से Refreshment Centre तक विशेष कर शादी व्याह आदि समारोह में सम्मिलित हुए युवा समूह के बीच सहजता से की जा सकती है। हाँ, बाध्यता सिर्फ इतनी रखनी होती है कि– 'प्रथम शुरूआत घर से' कहते हैं न, Charity Begain to the Door' दृढ़ता रहनी चाहिए कि प्रतिक्रिया से विचलित न हो।

कठिन कार्य करने को पत्थर तोड़ने की 'संज्ञा' दी जाती है– तो संकल्प शक्ति का ताजा उदाहरण श्री दशरथ मांझी का लें।

लेख के अन्त में लेखिका को उपरोक्त कार्यों का अपने स्तर से किये गए जमीनी प्रयास का सुखद व संतुष्टिजनक अनुभूति साझा करना लाजमी लगा।

प्रयास ही जीवन है।'
जागो! Before It's too late

◆

Fundamental Duties

Anuradha Singh
Advocate
Patna High Court

Fundamental Duties forming Part IV-A of the Constitution of India was introduced by way of Constitution (42 Amendments) Act 1976 w.e.f. 03.01.1977, however the concept of duties in ancient Indian Society is very old. Right from Mahabharat era 'Karm' was the integral part of social system irrespective of the rights of an individual. Lord Krishna while motivating Arjun to perform his duty, has emphasized the value of 'Karm' in following words ;

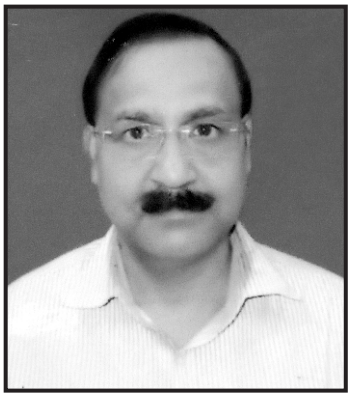
''कर्मण्येवाधिकारस्ते मा फलेषु कदाचन।
मा कर्मफलहेतुर्भूर्मा ते सङ्गोऽस्त्वकर्मणि।।''

Duties have always been an essence of Indian society. The duties towards family, society and state have always been an integral part of human behavior in Indian culture. The concept of duties in ancient Indian society was wider as it cast obligation upon an individual toward his family, society and state. Probably it was the reason for the authors of the constitution for not incorporating the fundamental duties in the draft of constitution. In fact the framers of our constitution have recognized the value of duties in life of an individual and also in discharging their social and national obligations which has always been a part of our social system.

Article 51-A of the Constitution of India was introduced when it was felt that ancient values and traditions which includes the duties towards the society and state in Indian society is degrading and detoriating. By means of the amendment in the Constitution by introducing Article 51-A, the inherent values and traditions in Indian culture were reduced in writing casting duties upon every citizen to pay respect to his country, to protect sovereignty, unity and integrity of India, promote harmony and offers opportunity to become a part of social, economic and political justice which is the main object of the Constitution of India.

Concept of Rights is not different from duties. Rights and duties are the two sides of the same coin and the same cannot be understood with different meanings. Our constitution provides a comprehensive Chapter of fundamental rights of every citizen vis-à-vis a Chapter relating to the fundamental duties. The goal of the constitution in formation of a secular nation by doing social, economic and political justice can only be achieved when every citizen of Indian adopts the duties cast upon him, not as a statutory provision but as an integral part of his life style and behavior. A democratic State can not survive unless the public in general are not willing to take part in active governance and to achieve the goal of the Constitution. The dream of our freedom fighters who sacrificed their lives for the nation will come true only when each and every citizen of India shall take his own responsibility in achieving the goals of Constitution and this can be done only by realizing the fact that fundamental duties as embodied in the Constitution is the integral part of human behavior . The duties towards the society and nation can not be enforced by making enactments or introducing penal provision. It can be done only by making the general public aware of their duties and also by educating them about its importance in building of nation. One must understand that every citizen has his own role to play for betterment of the nation. The Government should also make an endeavor to make proper publication of fundamental duties so that every citizen is made aware of his duties. The Government may also introduce schemes which may be implemented at Village, Block and District level by casting duties upon public representatives to make aware the general public about their fundamental duties. A compulsory chapter relating to fundamental duties be made part of curriculum for school going children at primary and basic education level. ◆

आयकर नहीं उपभोग कर



डॉ० अजीत कुमार पाठक
अधिवक्ता
पटना उच्च न्यायालय एवं कर सलाहकार

भारत की प्रथम स्वतंत्रता संग्राम की लड़ाई 1857 में प्रारंभ हुआ था और इसके पहले तक लोग आयकर (इनकम टैक्स) का नाम तक नहीं जानते थे।

यहाँ आयकर ''प्रथम बार 1860 में सन् 1857 के स्वतंत्रता संग्राम के कारण हुई हानियों की पूर्ति करने के लिए सर जेम्स विल्सन के द्वारा लगाया गया। प्रारंभ में भारतीय लोगों की आय का 97% प्रतिशत टैक्स के रूप में लेने का प्रावधान किया गया था, पर आय का निश्चित परिभाषा न होने के कारण और कई विसंगतियों को ठीक करने के लिए 1863, 1867, 1871, 1878, 1886, 1917, 1918, 1922 में इस अधिनियम में संशोधन किये गये कई संशोधन होने के कारण यह अधिनियम काफी जटिल हो गया था, अन्ततः भारत को स्वतंत्रता मिलने के बाद 1961 में भारतीय संसद ने आयकर अधिनियम 1961 पारित किया। जिसे 1 अप्रील 1962 से संपूर्ण भारत में लागू किया गया।

इस अधिनियम के आधार में पाँच श्रेणियों की आय को आयकर के अन्तर्गत रखा गया (1) वेतन (2) गृह सम्पत्तियों से आय (3) व्यवसाय/कारोबार से आय (4) पूँजीगत आय (5) अन्य श्रोतों से आय, पर आज के युग में दुनियाँ के सभी देश अपने देश के सम्पन्न नागरिकों पर आयकर लगाते हैं। इसके पीछे, शासकों का सोच है कि इससे गरीबों पर आर्थिक भार नहीं पड़ेगा, और आयकर से प्राप्त धन का गरीबों पर खर्च किया जा सकेगा, और अमीर एवं गरीब के बीच की खाई को कम किया जा सकेगा, परन्तु सच क्या है? आयकर लगाने के कारण न गरीब अमीर के बीच की खाई पट रही है और न उन दोनों के बीच असमानता कम हो रही है।

तो जब, कोई काम, अपने उद्देश्य को ही पूरा न करता हो तो, फिर क्यों, न कोई वैकल्पिक उपाय ढूँढ़ा जाये।

हमारे प्राचीन ग्रंथों में कहीं भी आयकर की चर्चा नहीं है। पुराने राजा महाराजे भी जनता से कर तो लेते थे पर आयकर नहीं लेते थे। महान अर्थशास्त्री चाणक्य ने भी अपने अर्थशास्त्र में उपभोग कर की बात की है। यानि खूब कमाओ, कमाये धन से कल कारखाने लगाओ कोई कर नहीं पर अगर सोना खरीदोगे तो सरकार को कर देना पड़ेगा। इसका प्रभाव भी पड़ता था। वे अपनी कमाई का निवेश कल कारखाने को लगाने में करते थे। गरीबों को रोजगार मिलता था लोग खुशहाल रहते थे।

पर आज आयकर अधिनियम की जटिलताओं के कारण देश में एक भय का माहौल है। मानव का स्वभाव है कि वह अपनी कमाई से सरकार को कम से कम कर (टैक्स) देना चाहता है, इसके लिए अपनी वास्तविक आय को छिपाता है और सरकार उसकी छिपाई गई आय को निकालने में अपनी पूरी ताकत लगाती है, और इस प्रक्रिया में सालों साल लग जाता है।

फिर जब आयकर लगाने से देश में भय का माहौल बनता जा रहा है, अमीर और अमीर होता जा रहा है, गरीब और गरीब होता जा रहा है, पूरी सरकार की ताकत करबंचको को पकड़ने में लग रही है, जिससे देश में कई समस्याएँ बढ़ रही है, तो फिर क्यों न हमसब विचार करें कि देश में आयकर (इनकम टैक्स) की जगह उपभोग कर (एक्युपेंडिचर टैक्स) लगाया जाय। पर कैसे?

हमारी पुरातन अर्थव्यवस्था में कभी भी आयकर नहीं लगाया गया था। हमारे पूर्वजों ने गरीब अमीर की असमानता को एक सत्य मानकर स्वीकार किया था। उनकी नजर में गरीब और अमीर समाज में रहेंगे ही, इसलिए उन्होंने कोई ऐसा प्रयास किया ही नहीं जिससे अमीर छोटा हो जाये और गरीब बड़ा।

फिर आखिर गरीब को अमीर

खटकता क्यों है, अमीर व्यक्ति कार में घुमता है, बड़े–बड़े होटलों में खाना खाता है, और गरीब को तो दो जून की रोटी भी नहीं मिलती है। इसका मतलब हुआ, गरीबों को अमीरों की आय से नहीं, बल्कि उसकी उपभोग के कारण आँखों में खटकता है।

अगर उसके उपभोग पर कर लगा दिया जाय तो गरीबों को अमीर नहीं खटकेंगे।

अमीर टैक्स नहीं देना चाहेगा और उपभोग की जगह वह निवेश करेगा। देश में कल–कारखाने लगेंगे, रोजगार बढ़ेगा, गरीबों को पैसे मिलेंगे, और उनकी भी खुशहाली आयेगी।

वास्तव में आयकर लगाने से उपभोग को बढ़ावा मिलता है। अगर किसी व्यापारी को कार खरीदने की जरूरत है तो वह मँहगी कार खरीदेगा। वह सोचता है कि मँहगी कार से उसकी आयकर की देनदारी कम हो जायेगी। उसका काम पाँच लाख की कार से चल सकता था, पर वह सोचता है कि दस लाख की कार क्यों न लें क्योंकि 10 लाख की आय पर से एक लाख से अधिक आयकर के रूप में देना पड़ेगा क्यों न आयकर न देकर मँहगी कार ही लें। अपने घर से तो कम ही रकम देना पड़ेगा। अगर आयकर न देनी होती तो वह पाँच लाख की कार लेता और बचे पैसे को कल कारखाने में लगाता लेकिन टैक्स बचाने के चक्कर में उसने निवेश न करके उस राशि का उपभोग कर लिया।

आयकर देश में एक छद्म अर्थव्यवस्था का निर्माण करती है। व्यापारी आयकर बचाने के लिए दो नंबर का कारोबार करने लगता है। किसी व्यापारी को अपने व्यापार से दस लाख का मुनाफा हो रहा है, तो उसे दस लाख रुपये पर आयकर देना पड़ेगा। फिर वह दो नंबर से कारोबार करके उस दस लाख को पाँच लाख करना चाहेगा, जिससे मिले तो लाभ के रूप में दस लाख, पर टैक्स उसे पाँच लाख पर देना पड़ेगा। वह पाँच लाख ब्लैक मनी के रूप में उसके पास जमा हो गया, जिसे वह कहीं भी जायज जगह पर निवेश नहीं कर पायेगा।

अगर आयकर उसे नहीं देना पड़ता तो, वह अपनी दस लाख की आमदनी को कहीं सही जगह निवेश करता।

लेकिन उपभोग कर कैसे लगे?

पूरा देश डिजिलाइटेशन की तरफ बढ़ रहा है। सरकार प्लास्टिक मुद्रा को चलन में ला रही है, लोगों को सरकार प्रोत्साहित करने के लिए कई योजनाएँ चला रही है। हर गाँव में इन्टरनेट, कम्प्यूटर, मोबाईल जैसी चीजें पहुँच गयी है।

एक अनुमान के अनुसार देश में प्रतिदिन 98,88,674/– लाख करोड़ का बैंकों में लेन देन होता है। लोग उपभोग की वस्तुओं की खरीद दुकानों, मालों से करते हैं। अगर हमलोग पूर्णतः डिजिलाइटेशन लागू कर दें तो बैंको दुकानों या जहाँ कहीं भी मुद्रा का आदान प्रदान होता है, वहीं एक प्रतिशत टैक्स के रूप में काट लिया जाय, तो सरकार को अभी जितना टैक्स, प्रत्यक्ष या अप्रत्यक्ष के रूप में मिलता है, उसे इससे अधिक टैक्स मिलेगा, और इसके संग्रह करने के लिए जितने सरकारी विभाग हैं उसकी भी कोई आवश्यकता नहीं रहेगी। लोग अगर कमाई करेंगे, तो उसका उपभोग भी करेंगे, और उपभोग को वर्गीकृत करके, टैक्स की एक दर तय की जाय। दवाई की खरीद पर कम और कार की खरीद पर अधिक टैक्स लगायी जाय।

अगर हम आय कर की जगह उपभेग कर लगायेंगे तो हमारी मिश्रित अर्थव्यवस्था के लिए अच्छा रहेगा।

अभी सोचने की जरूरत है कि हम वर्त्तमान कर प्रणाली को किस प्रकार बदलें, जिससे देश की जनता विकास में अपनी सही भागीदारी दे सकें।

जब एक बार चाणक्य से किसी ने पूछा कि राजा को अपने राज्य की जनता से किस प्रकार कर लेना चाहिए तो चाणक्य ने फूल पर बैठे भौरों को दिखाकर कहा कि जिस प्रकार फूल पर बैठकर भौरा फूल के रस को ले लेता है और फूल अपना रस खुशी–खुशी उसे दे देता है, उसी प्रकार सरकार को टैक्स लेना चाहिए, यानि कष्टपूर्ण टैक्स की व्यवस्था, लोगों को टैक्स चोरी करने की तरफ प्रेरित करती है।

टैक्स से प्राप्त पैसों का भी अनुत्पादक खर्चों में उपभोग से देश की अर्थव्यवस्था लड़खड़ाती है।

आयकर की विसंगतियों से बचने का एक ही उपाय है आय की जगह उपभोग पर कर लगाओ। ◆

THE DOCTRINE OF LEGITIMATE EXPECTATION AS A GROUND OF JUDICIAL REVIEW IN ADMINISTRATIVE LAW – AN OVERVIEW

Dr. Laxman Singh Rawat
Assistant Professor,
Law College Dehradun

Abstract

The Doctrine of Legitimate Expectation is still at the stage of development, which is becoming a major basis of judicial review of administrative actions. The concept is still at the root of the rule of law, which requires regularity and certainty in the dealing of government with the public. The concept was first developed in the English Law as one of the grounds of judicial review in the administrative law for the protection of both procedural and substantive interest in case when any public authority rescinds from any representation or promise made to any person. The concept incorporates in itself the principle of Natural Justice based on the principle of fairness in order to prevent the authorities from abusing the power conferred on them. Professor Albert Venn Dicey has regarded rule of law to have both procedural as well as substantive effect, and the rule of law implements the minimum standard of fairness. The doctrine of Legitimate Expectation ensures a legal claim in circumstances when any public authority violates any legal expectation of individual.

Key words : Legitimate Expectation, Natural Justice, Administrative Authorities, Judicial Review.

I. INTRODUCTION

"A man should keep his words. All the more so when a promise is not a bare promise but is made with the intention that the party should act upon it."[1]

– William Blackstone

Ubi Jus Ibi Remedium is one of the most famous legal maxims which means, where there is a right, there must be a remedy. In other words, a right to a useful remedy is the most basic and fundamental right protected by The Constitution of any country.[2] The general rule is that a person is entitled to a remedy only if there is the existence of a right, but the concept of Legitimate Expectation is an exception to this general rule and the abovementioned legal maxim.

Here a person is entitled to a remedy even in absence of existence of any right, but the said right is available only subject to certain conditions. Remedies are said to perform two significant purposes in Law – On one hand, they define an abstract right and enforce otherwise intangible rights, as the rights which stand alone are nothing but simply an expression of social values which are of no value in the eyes of law and it is the remedy on the other hand, which describes the right by making the value true and tangible.[3] Without an adequate remedy, rights are nothing more than an idea or promise that may or may not be fulfilled.

Thus, a remedy is a crucial part of every right which is the ultimate requirement to the effectuation of the rule of law as without the remedy, even the judicial decisions are merely advisory in nature. The concept of Legitimate Expectation is an emerging concept that has been recruited by the judiciary in the long list of grounds of judicial review of administrative actions.

The term "Legitimate Expectation" has till now not been defined by any law, but is believed to mean the compliance with the principle of Natural Justice i.e. fair hearing before

any action is taken by the administrative authority. In other words, a person may have a legitimate expectation of being treated in a particular way by any administrative authority even when he has no legal right to be entitled to such treatment.

II. LEGITIMATE EXPECTATION DEFINED

The Oxford English Dictionary has though not defined the complete term "Legitimate Expectation" but it has defined the term "Legitimate" which means "Conforming to the law or to the rules". Similarly the term "Expectation" has been defined as "A strong belief that something will happen or to be the case".[4]

Judicial Receptions defining Legitimate Expectation

In case of Schmidt v. Secretary of State for Home Affairs[5] (Schmidt Case), "Legitimate Expectation" is meant to be a stage where even if a person has no legally enforceable right or interest, he may yet have some legitimate expectation of something that should happen and it would not be fair it something expected does not happen or if he is deprived of such happening without giving him an opportunity of being heard.

Similarly, in Attorney General of Hong Kong v. Ng Yuen[6], it is defined as "Reasonable Expectation" which would include an expectation to go even beyond the enforceable legal rights subject to it being on some reasonable basis.

In R v. Secretary of State for the Home Department[7], wherein Lord Templeman has said that "Legitimate Expectation is just a expression of the duty to act fairly, but its scope goes beyond the right of being hear.

Thus, Legitimate Expectation that an authority ought not to act in a manner, that it defeats the consequences of expectation, or it may mean that if the authority intends to act contrary to the Legitimate Expectation, it must provide the individual either an opportunity to make representation or must fulfill certain other requirement and procedural fairness.[8]

Thus, it can be analyzed that the doctrine of Legitimate Expectation is a kind of check on the administrative authorities and not a drawback so that the authorities do not use the powers conferred upon them in an arbitrary manner.

III. LEGITIMATE EXPECTATION-ORIGIN AND DEVELOPMENT

The concept of Legitimate Expectation first appeared in the case of Schmidt v. Secretary of State for Home Affairs[9], in which Lord Denning[10] found that the speeches in case of Ridge v. Baldwin[11] depict that the administrative authorities are bound to provide the person who could be affected by their decision, an opportunity so as to enable the person to make his representation. The brief facts of the case were such that a student who being a German National went to England for studies who expected to remain in England till the completion of his course or till he breaks any law while he is in England, but all of a sudden and without even providing him (student) an opportunity of being heard passed an order which required that he has to leave England immediately. Being aggrieved of this arbitrary order passed by the authorities, Schmidt bought the case before Lord Denning. Since then, Legitimate Expectation has played a crucial role in number of decisions delivered by the judiciary in the United Kingdom.

It is pertinent to mention that in the judgment in Schmidt's case, Lord Denning has made no mention of any authority (Judicial or otherwise) upon which the concept of Legitimate Expectation could be founded, certainly he further said that he felt for sure that the concept came out of his own head and not from any provenance. Therefore, it can be said that the concept has originated by Lord Denning in Schmidt's case.

But, it is significant to note that prior to the introduction of the concept of Legitimate Expectation by Lord Denning in England, a similar concept in the Jurisprudence of European Community, which also sought for the protection of confidence of that subject, placed in government, and the concept was named as "The Rule of Protection of Legitimate Confidence."[12]

Though it may be considered that the concept of Legitimate Expectation

was originated by Lord Denning in England, but it is worthy of mentioning that the analysis of European concept might have helped in the development of English Law. In Re Civil Services Salaries E.C. Commission v. E.C. Council[13], a case in European Court, the court has held that the Rule for the protection of the Legitimate Confidence that the citizens may have in relation to the authorities, binds the authorities in its future action. Hence, stress was laid by the Court in this decision, for the protection of Legitimate Confidence that was applicable to administrative law.

In India, the first reference to the doctrine was made in the case of State of Kerala v. Madhavan Pillai,[14] in which sanction was issued by the government to the respondents to open up a new aided school and also to upgrade the existing ones, but after a period of 15 Days, a direction was issued to keep the sanction in abeyance. This direction issued by the government was challenged on the ground of it being violative of the principle of Natural Justice, wherein the Court held that the sanction order had created a Legitimate Expectation in the respondents and that the direction order of the government has violated their expectation as it was done without complying with the Principle of Natural Justice and which was sufficient to vitiate the an administrative order.

The Concept of Legitimate Expectation was for the first time recognized in India in the case of Navjyoti Corporation Group Housing Society v. Union of India,[15] wherein the Court has held that the societies were entitled to "Legitimate Expectation" due to the past consistent practice in relation to allotment would be followed even if there existed no right in the private law for such allotment.

Conditions which Causes Legitimate Expectation to Arise

Following are the conditions which are said to create Legitimate Expectation within the individual:

a) Express Promise or represen-tation by the authority

Where any promise or representation has been held out by any authority for happening of something develops a Legitimate Expectation within the individual where he starts expecting or presuming that something so promised would happen.

b) Past Practice to be followed

The second condition is that the happening of something consistently (practice) for a long time justifies anticipation that the same thing would repeat again

c) Such Promise or Represen-tation is clear and unambiguous

An express promise or representation on part of the authority over happening of something is the third pre-requisite for Legitimate Expectation to arise within any individual.

IV. LEGITIMATE EXPECTATION IN EUROPEAN UNION

The Doctrine of Legitimate Expectation is one of the most general principles of the community law developed by the European Court which 'forms the part of the community legal order'.[16] The doctrine of Legitimate Expectation is pervasive in all the dealings between the individual and the administration also is a guide towards a good administrative conduct. A situation of trust arises when the conduct of administration raises an expectation within the individual, and which gives him (the individual) reasons to believe that administration would act in the expected way towards him.

Till this stage, such expectation is said to be not more than a hope or aspiration. Legitimate Expectation should be distinguished from other certain legal principles and vested rights. Legal certainty demands that there must not remain any doubt in relation to the applicability of law at a particular situation in respect of the lawful/ unlawful nature of certain acts/ conduct.[17] The principle has restrained the penal statutes from having retrospective effect,[18] and also demanded that the non-penal statutes are in general barredfrom taking any effect at a point of time before the publication except for the cases when the purpose of measures otherwise require, and the Legitimate Expectation of those who are

concerned is respected.[19]

Due to the influence and inspiration gained by the European Court from the German Principle (in Schmidt Case),led to the Development of the doctrine of Legitimate Expectation,[20] and finally it found a route to European Courts through Article – 177, references and the opinions of Advocate General.

Though, the doctrine appeared to be the result of the principles of legal certainty and vested rights, but since 1970s, the European Courts has openly referred Legitimate Expectation as a separate and independent law, and the said development was seen in the case of Westzucker GmbH. v. Einturh und Vorratsste fur Zucker,[21] in which the Finance Court of Hesse had sent a reference to European Court inquiring that if a regulation was infringed, then a principle of legal certainty by which the expectation of the concerned individuals was supposed to be protected (Vertrauensschutz),[22] and in the opinion, the Advocate General Roemer was of a view that the issuing of a license would create expectation within the individual and in case if the administration plans to change the situation then the person would suffer loss.

The major reasons as to why the European Courts had to adopt the doctrine of Legitimate Expectation were firstly, the European Courts presumably considered the principle "Progressive",[23] by which it enhanced the legal protection of the individuals against the arbitrary use of administrative power, Secondly, the European Courts considered the adoption of the doctrine of Legitimate Expectation as a step towards community administrative law ensuring protection equivalent to performing national legal order.

V. POSITION IN OTHER COUNTRIES

a) United Kingdom

The first appearance of the doctrine of Legitimate Expectation was seen in UK, England (Schmidt Case),and since last forty years, the doctrine of Legitimate Expectation has become an established principle in the administrative law of United Kingdom. It is feasible to suggest that administrative agencies quite often take account of Legitimate Expectation and consider it to be an integral legal norm of public administration.

b) U.S.A.

The doctrine of Legitimate Expectation has not been adopted in U.S.A. with such a force as it has been adopted in the Indian legal system and in the English Jurisprudence, reason being, the rigidity of the concept of Separation of Power prevalent in the U.S.A. So by this, it can be analyzed that the powers conferred upon the executives there is unfettered and unchecked. It is pertinent to mention that the Fourth Amendment to the U.S. Constitution provides only for Legitimate Expectation of Privacy.

c) India

The doctrine of Legitimate Expectation traces its development in Indian administrative law and is based on the roots of rule of law and mandates regularity, predictability and certainity in the dealings of the government with the public. The Constitution of India is based on the principle of rule of law, and in order to uphold the rule of law, Indian judiciary has been conferred with the power of Judicial review under Article – 13 of The Constitution of India. The Supreme Court of India is the final arbiter of The Constitution and has been vested with such powers that any act of the Parliament which is violative of the provisions of The Constitution of India, can be declared as ultra-vires The Constitution by the Supreme Court of India. Under The Constitution of India, the Supreme Court and the High Courts can exercise the power of Judicial Review under Article 32 and 226 respectively, and can review the legislative, executive and administrative actions.

The doctrine of Legitimate Expectation has been embedded in the Constitution of India under Article – 14 which confirms that anything that is arbitrary, unreasonable and against public interest is violative of Article – 14 of The Constitution.

In India, the importation of the foreign concept of Legitimate Expectation can

be seen done in case of State of Kerala v. K.G. Madhavan Pillai,[24] and the doctrine first found recognition in case of Navjyoti Corporation Group Housing Society v. Union of India,[25] and since then the doctrine has been made applicable to number of cases and is being applied till date.

Throwing light upon the present position of the doctrine of Legitimane Expectation in India, two Judges Bench of the Supreme Court in its recent judgment in case of State of Bihar &Anr. v. Dr. Sachindra Narayan & Ors.have confirmed that Legitimate Expectation is one of the ground of Judicial Review, but until and unless there exists a legal obligation, there is no Legitimate Expectation. Court was further, of the opinion that Legitimate Expectation was neither a desire nor a hope and not even any wish, thus it cannot be demanded as of right.[26]

VI. CONCLUSION OBSERVATION

It can be concluded that the foreing doctrine has gained significance in Indian legal system as well by providing locus standi even to such person who may not have a direct legal right. The doctrine of Legitimate Expectation straight away ensures a procedural right i.e. it being a ground for judicial review. However, it is pertinent to mention that the substantive aspect of the doctrine is stil at the stage of development. Instead of strengthening the scope of the doctrine, the Courts have set arbitrariness as a threshold in order to check whether the denial of Legitimate Expectation was justified or not, which thereby makes the doctrine irrelevant in India as any act in violation of The Constitution is void. ◆

Assisted by
– Irum Zeba
Student, LL.M. (Final Sem.)
Law College Dehradun, U
ttaranchal University –
Dehradun (Uttarakhand)– India.

1Lord Denning, "Recent Development in the Doctrine of Consideration", Modern Law Review Vol. 15,1956.

2Commentaries on The Laws of England 23 (1768).

3Thomas R. Phillips, Speech, The Constitutional Right to a Remedy, 78 N.Y.U.L. Rev. 1309 (2003).

4Available at https://en.oxforddictionaries.com/definition/legitimate visited on March 21, 2019.

5(1969) 1 ALL E.R. 904.

6(1983) 2 ALL E.R. 346 at 350.

7(1987) 2 ALL E.R. 518.

8Halsbury's Law of England, Vol. 1. 1907.

9Supra Note - 4.

10Lord Alfred Thompson Denning (1899 – 1999) was an English Lawyer and Judge of United Kingdom, popularly called as "The People's Judge" as he was considered to be a fighter for the underdog and the protector of the little man's rights against the big businesses.

11(1963) 2 ALL E.R. 66.

12Forsyth, C.F. The Provenance and Protection of Legitimate Expectation, Cambridge Law Journal, 47 (2) 1988 at 240.

13(1973) E.C.R. 575.

14AIR 1989 SC 49.

15AIR 1993 SC 155.

16Case 112/77 August Topfer & Co. GmbH v. Commission (1978) E.C.R. 1019, Para 19.

17Case C-331/88 R v. Minister for Agriculture, Fisheries and Food ex parte Fedesa (1990), E.C.R. 1-4023, Para-8 of the opinion of Advocate General Mischo.

18Case 63/83 R v. Kent Kirk (1984) E.C.R. 2689.

19Case 98/78 Firma A. Racke v. Hauptzollamt Bad Reichenhall (1989) E.C.R. 2415, Para 28 of the opinion of the Advocate General Darmon.

20See Case 169/73 Compagnie Continentale France v. Council (1975) E.C.R. 117, 140, Vol. 1, of the opinion of Advocate General Trabucchi.

21Case 1/73 (1973) E.C.R. 723.

22Supra Note – 18.

23Case 14/61 Koninklijke Nederlandsche Hoogovens en Staalfabrieken N.V. v. High Authority of the European Coal and Street Community (1962) E.C.R. 253, 283 – 4 of the opinion of the Advocate General Lagrange.

24Supra Note – 14.

25Supra Note – 15.

26Available at https://www.vakilno1.com/legal-news/legitimate-expectation-can-be-inferred-from-sanction-of-law-or-custom-supreme-court.html Visited on March 25, 2019.

ADVANTAGE OF GST & NEED TO IMPROVEMENT

Mahesh Prasad Sinha
Advocate
Divisional Convenor Gaya Division
Adhivakta Parishad, Bihar

I thinks that goods & service tax act is measure movements in financial sector. GST has brought together a number of indirect taxes under one umbrella, simplifying taxation for service & commodity business.

(1) Business man with a turnover of 1.50 crore can opt the composition scheme and liability of paying taxes @ 1 % of gross turnover. Under composition scheme liability of return filing on quarterly basis. This will help them the small business man avoid lengthy taxation procedures.

(2) Trader is exempted till turnover lower than 40 lacks and service provider is exempted lower than 20 lacks of turnover in maximum states. Thus small business man and service provider has not need of registration under the Goods and service tax act.

(3) GST is aimed at reducing corruption and sales without receipt

(4) GST reduce the need of companies comply with excise, service and vat

(5) GST brings accountability and regulation to unorganized sector such as textiles industries

(6) GST brings uniformity in the taxation process and allowed centralized registration. This gives a chance to small businessman to file their tax return via an easy online mechanism.

(7) GST reduce logistic cost by eliminating boarder taxes and resolving check-post discrepancies. About 20% prices drop in logistic cost for non bulk goods is clearly an expected outcome.

(8) GST points towards a positive impact on India's GDP. It is expected to increase GDP of INDIA

(9) Possibility of tax evasion and financial corruption by government official is minimized.

I think that it is some measure defect in GST. Businessman is very puzzled in reverse charge on some expenses so, reverse charge should be deleted.

In composition scheme rate of GST for dealer should be decrease by ½ % because it is higher than general scheme as per calculation

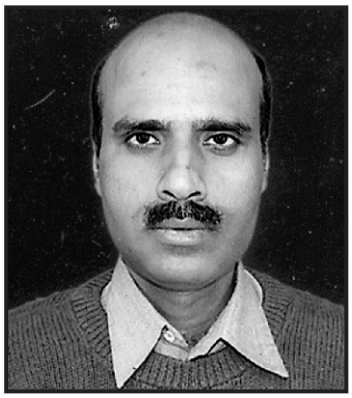
Return process is not satisfactory because 3B & R1 should be merged in one return for simplification, I want to suggest the government to option of revised return should be enable because it is not possible to file accurate return on monthly basis due to none availability of parties ledger & bank statement in short period. So some mistake may be arising due to slip of pen and the result it attract penal provisions. It is demand of maximum businessman and professional for option of revise return should be enabling under GST act.

Again I want to say that rate of 28% of GST is not justified on cement because house for people is under necessary want and house cannot be built without cement. GST on cement should be minimized & loss should be recovered from luxurious goods. ◆

The object of constitution is to render consultation meaningful to serve the intended purpose. It requires meeting of mind between parties involved in it means party must disclose all facts to other party for due deliberation. The consultee must express his opinion after full consideration of matter upon relevant facts and Quintessence (Para-28).

State of Gujrat v/s Gujrat R.T. Bar Association
AIR 2013 SC 107

Jammu & Kashmir



Lakmesh Marvind
Advocate
Patna High Court, Patna

Article 35A was incorporated into the Constitution of India in 1954 (much before the Constitution of J&K came into existence in 1957) by an executive order of the President of India on the advice of the Nehru cabinet. This executive order was treated as an amendment in Art 35. This amendment in Art 35 was introduced by the President exercising the powers conferred by clause (1) of the Constitution of India. The parliamentary route of law making was bypassed when the President incorporated Art 35A into the constitution. Art 368(1) of the Constitution which empowers only the Parliament to amend the constitution was superseded. The Nehru government never placed the said executive orders before the Parliament for the discussions and voting.

Art 35A is about saving of laws with respect to permanent residents and their rights. It stipulates, Not-withstanding anything contained in this constitution no existing law in force in the State of J&K, and law hereinafter enacted by the Legislature of the State–

(a) Defining the classes of person who are or shall be permanent residents of the State of J&K; or

(b) Conferring on such permanent residents any special rights and privileges, or imposing upon other persons any restrictions, as respects–

  (i) employment under the State Government,

  (ii) acquisition of immovable property in the State,

  (iii) Settlement in the State, or

  (iv) right of scholarships and such other forms of aid as the State Government may provide shall be void on the ground that it is inconsistent with or takes away or abridges any rights conferred ont he other citizens of India by any provision of this part.

The constitution of J&K came into existence on 26.1.1957. Several provisions of this constitution were completely inconsistent with the fundamental rights granted under the Constitution of India. And this was the reason Nehru did not dare to introduce the Constitution of J&K into the parliament or before the President for its ratification. Therefore the constitution of J&K was never ratified by the President nor by the Parliament.

Jammu & Kashmor constitution defines a permanent resident (PR) of the State as a person who was a State subject on May 14, 1954 or who has been a resident of the state for 10 years and has lawfully acquired immovable property in the state. Also Art 35A empowers J&K state legislature to alter the definitionof PR through a law passed by two third majority.

This Art 35A has prevented the economic growth of the J&K. The government of India has not been

successful in economically integrating this state from the rest of India due to bottleneck of this Article.

The J&K economy depended merely on farming, animal husbandry, handicrafts, textiles, and tourism. The Kashmir valley was known for its sericulture and cold water fisheries. The agriculture and horticulture products were earlier exported from J&K. These products included apples, barley, cherries, corn, millet, orange, rice, peaches, pears, saffron, sorghum, vegetables and wheat. It also exported manufactured goods like handicrafts, rugs and shawls. But the isolation of this state with the rest of India has prevented the agriculture, horticulture, food processing and manufacturing sectors to grow to its full potential. The tourism industry which was flourishing in the region due to its lakes, handicrafts, and textiles. The tourism industry also collapsed due to the insurgency intensified in 1989 in the valley. Planning at the district and lower levels which was integrated with the programme of the region and the state as a hole and the steps taken to remove the regional imbalances wherever it existed has failed to give result due to terrorism and insurgency in the state.

The engineering, medical and dental colleges opened by the State of J&K is also worst hit due to Art 35A. In this colleges vacancies for teachers on its sanctioned posts existed in large numbers but no qualified teachers from outside the State took appointment there. The reason is that they cannot purchase property for their economic stability. Their children be neither get admission in these professional institutions nor get employment in the State Government services. Non-Residents are not allowed these facilities. Hence, no quality education is being departed by these professional colleges and as a consequence the students of the State are not in a position to participate in the economic development of the State.

The non-resident industrialists have also not invested in the State since they cannot purchase the land and also they cannot bring the professionals to the state from outside for running the industries. Hence the private sectors which are engine of growth in a state has not taken part in the state development on account of restrictive legislations.

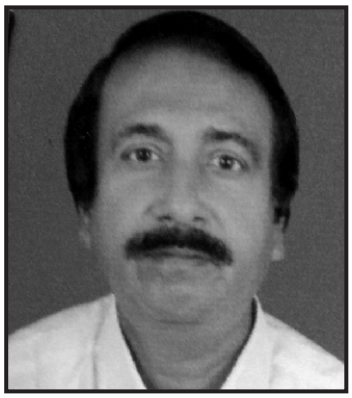
Dr. C. Rangarajan committee report for economic development of the State of J&K has not been implemented yet and after going through the report it becomes clear that the suggested measures can also not yield result unless at least Art. 35A is abrogated or repealed. ◆

''मनुष्य कितना भी गोरा क्यों न हो परंतु उसकी परछाई सदैव काली होती है।''

मैं श्रेष्ठ हूँ यह आत्मविश्वास है!
लेकिन 'सिर्फ मैं ही श्रेष्ठ हूँ' यह अहंकार है।

—भगवान् गौतम बुद्ध

TDS At a Glance



A. K. Pandey
Advocate
President, Bihar Commercial Taxes Bar Association

TDS or Tax Deducted at Source is income tax reduced from the money paid at the time of making specified payments such as rent, commission, professional fees, salary, interest etc. by the persons making such payments.

Usually, the person receiving income is liable to pay income tax. But the government with the help of Tax Deducted at Source provisions makes sure that income tax is deducted in advance from the payments being made by you.

For instance :

ABC PVT Ltd make a payment for office rent of Rs 80,000 per month to the owner of the property.

TDS is required to be deducted at 10%. ABC PVT Ltd must deduct TDS of Rs 8000 and pay balance Rs 72,000 to the owner of the property.

Thus the recipient of income i.e. the owner of the property in the above case receives the net amount of Rs 72,000 after deduction of tax at source. He will add gross amount i.e. Rs 80,000 to his income and can take credit of the amount already deducted i.e. Rs 8,000 by ABC PVT Ltd against his final tax liability.

2. When should TDS be deducted and by whom?

Any person making specified payments mentioned under the Income Tax Act are required to deduct TDS at the time of making such specified payment. But no TDS has to be deducted if the person making the payment is an individual or HUF whose books are not required to be audited.

However, in case of rent payments made by individuals and HUF exceeding Rs 50,000 per month, are required to deduct TDS @ 5% even if the individual or HUF is not liable for a tax audit. Also, such Individuals and HUF liable to deduct TDS @ 5% need not apply for TAN.

3. What is the due date for depositing the TDS to the government?

The Tax Deducted at Source must be deposited to the government by 7th of the subsequent month.

For Instance:

TDS deducted in the month of June must be paid to the government by 7th July. However, the TDS deducted in the month of March can be deposited till 30th April.

For TDS deducted on rent and purchase of property, the due date is 30 days from the end of the month in which TDS is deducted.

4. How to deposit TDS?

Tax Deducted at Source has to be deposited using Challan ITNS-281 on the government portal.

5. How and When to file TDS returns?

Filing Tax Deducted at Source returns is mandatory for all the persons who have deducted TDS. TDS return is to be submitted quarterly and various details need to be furnished like TAN, amount of TDS deducted, type of payment, PAN of deductee, etc. Also, different forms are prescribed for filing returns depending upon the purpose of the deduction of TDS. Various types of return forms and Rate of TDS are as follows :

Form No	Transactions reported in the return
Form 24Q	TDS on Salary
Form 26Q	TDS on all payments except salaries
Form 26QB	TDS on sale of property
Form 26QC	TDS on rent

Sec.	Particulars	Rs.	TDS Rate (%)	
192	Salaries (Annexure-I)	-	Basis on Slab	-
192A	Premature withdrawal from EPF	50,000	10	-
193	Interest on Securities/ Debentures	10,000	10	10
194A	Interest (Banks, co-operative society and post office)/ For Senior Citizen Rs. 50000	40,000/ 50000	10	10
	Interest (Others)	5,000	10	10
194C	Contractor - Single Transaction	30,000	1	2
	Contractor - During the F.Y.	1,00,000	1	2
	Transporter (44AE) declaration with PAN	-	-	-
194H	Commission / Brokerage	15,000	5	5
194I	Rent of Land and Building - F&F	2,40,000	10	10
	Rent of Plant / Machinery / Equipment	2,40,000	2	2
194IB	Rent by Individual / HUF (wef 01.06.2017)	50000/PM	5	-
194IA	Transfer of certain immovable property other than agriculture land	50,00,000	1	1
	Professional Fees / Technical Fees / Director fees/ royalty	30,000	10	10
194J	**Payment to Call Centre Operator (w.e.f. 01.06.2017)**	30,000	2	2

6. What is a TDS certificate?

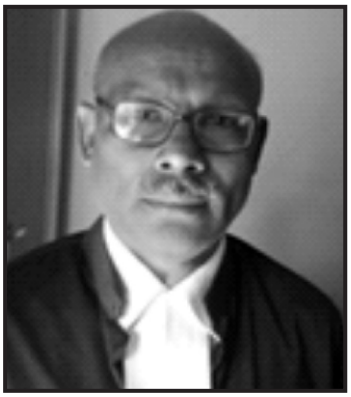
Form 16, Form 16A, Form 16 B and Form 16 C are all TDS certificates. TDS certificates have to be issued by a person deducting TDS to the assessee from whose income TDS was deducted while making payment.

For instance, banks issue Form 16A to the depositor when TDS is deducted on interest from fixed deposits. Form 16 is issued by the employer to the employee. ◆

Two things are easiest to do. One, to carry water in a sieve.
Two, to still the mind. Freeze water. Breathe calm.
Only two secrets to learn.

– Swami Veda Bharati

वर्तमान समय में भारतीय परिवार व्यवस्था की प्रासंगिकता



राकेश चन्द्र वर्मा
अधिवक्ता, मुंगेर
मंत्री, अधिवक्ता परिषद्, बिहार

मनुष्य एक जीवंत सत्ता है। वह शरीर, मन, बुद्धि और आत्मा का एक जीवंत समुच्चय है। वह सामाजिक प्राणी है और परिवार जो समाज की प्रारंभिक इकाई है उसमें उसका आविर्भाव होता है। उसमें ही उसे संस्कारित किया जाता है।

मनुष्य के सभी क्रियाओं का एक ही उद्देश्य है – आनंद या शाश्वत सुख जो सृष्टि के मूल में है। अनुकूल वेदना ही सुख है। इन्द्रियजन्य सुख मनुष्य तथा अन्य प्राणियों में समान होता है। आहार, निद्रा, भय एवं मैथुन से जो अनुकूल वेदना होती है उसे मनुष्य और पशु में समान सुख कहा गया है। अंतर केवल यही है कि मनुष्य का कुछ जीवन लक्ष्य होता है। लक्ष्य ही मनुष्यों में मनुष्यत्व समझा जाता है। वह विशेष लक्ष्य है धर्म (शाश्वत नैतिक नियम)।

इसलिए शारीरिक सुख, मानसिक सुख, बौद्धिक सुख एवं आत्मिक सुख प्राप्त करने के लिए मनुष्य अकेला सक्षम नहीं है। परिवार के रूप में उसमें हम की भावना जागती है वही बढ़कर लोकाः समस्ता सुखिनों की भावना में परिणत हो जाता है।

हिमालय से कन्याकुमारी तक का भू–भाग को भारत कहा जाता है तथा उसमें रहने वाला समाज जो इससे माता–पुत्र की भावना से जुदा एक जन है उसी जीवंत राष्ट्र की इकाई भारतीय परिवार है जिसकी विशेषता है परस्परानुकूलता। संघर्ष नहीं, सहयोग ही प्रगति का लक्षण है। सनातन लक्ष्य परमानन्द की प्राप्ति सहयोग पर टिका है। यह सहयोगिता प्राकृतिक नियम है। प्रकृति में हर पदार्थ सहयोग पर निर्भर है।

अतः भारतीय परिवार में बच्चे को माता–पिता के सहयोग की आवश्यकता होती है। व्यष्टि, समष्टि, सृष्टि, परमेष्टि ये चार तत्त्व हमारे सामने उपस्थित होते हैं जो परस्पर सहकारी से सुखदायी होते हैं। व्यक्ति समाज समाज पर अवलंबित है, समाज सृष्टि पर निर्भर है और सृष्टि का संचालन परमेष्टि द्वारा हो रहा है। भागवत गीता में कहा गया है कि प्राणी अन्न से, अन्न पर्जन्न से, पर्जन्न यज्ञ से और यज्ञ ब्रह्मा (सृष्टिकर्ता) से निर्माण हुए हैं। इस तरह यह चक्र पूर्ण होता है। यह अखंड सुख ही सब सुखों की धारणा करता है। इसे ही हमने "धर्म" के नाम से जाना है अर्थात परस्पर कर्तव्य करने से धारणा रूप जो धर्म प्रकट होता है वही सुख है।

व्यक्ति जीवन में इस सुख की प्राप्ति के लिए चार बातों की आवश्यकता है, यथा–शिक्षा, स्वतंत्रता, शांति और पौरुष। धर्मानुकूल आचरण (अभ्युदय और निःश्रेयस्य की प्राप्ति) के लिए व्यवस्था एवं निष्ठा के साथ संचालित करने के लिए शिक्षा की जरुरत है। मानसिक और राजनैतिक स्वतंत्रता की आवश्यकता है। समाज में शांति और परम लक्ष्य की प्राप्ति के लिए पौरुष की आवश्यकता है। ये सब चिति से ही साध्य होते हैं। इसलिए राष्ट्र को चैतन्य प्रदान करना ही सब कार्यों की मूल प्रेरणा है।

प्रारंभिक शिक्षा भारतीय परिवार व्यवस्था में दिखाई पड़ती है। सुख–प्राप्ति के लिए जिन साधनों का अभ्यास करना चाहिए उन्हें हमारे यहाँ पुरुषार्थ कहा गया है। ये चारों पुरुषार्थ एक दुसरे के पूरक होते हैं। अर्थ (धन) पुरुषार्थ शरीर के लिए, धर्म (नैतिक आचरण) पुरुषार्थ समाज के लिए, काम पुरुषार्थ कामना के लिए और मोक्ष पुरुषार्थ आत्मा के लिए अर्थात चारों पुरुषार्थों के समावेश से ही मनुष्य उन्नति कर सकता है। प्राकृतिक नियमों की भांति ही हमारी एक जीवन पद्धति है। उसके शाश्वत नियम हैं। उसका ज्ञान परिवार में होता है जिससे उन नियमों की धारणा होती है। हमारे जीवन को चार अवस्थाओं (आश्रमों) में बांटा गया है– ब्रह्मचर्य, गृहस्थ, वानप्रस्थ एवं संन्यास। सभी आश्रमों के कर्त्तव्य निर्धारित किए गए हैं। उसी तरह स्वभाव और प्रकृति के अनुसार मनुष्यों की चार श्रेणियाँ बनायी गई है जिससे योग्यतानुसार उनका जीवन व्यवसाय निर्धारित किया जाए। इसे चातुरवर्ण व्यवस्था कहा गया है। सात्विक, राजसिक, राजसी तामसिक, तामसी राजसिक (ब्राह्मण, क्षत्रिय, वैश्य और शुद्र)। हम सब भारत माँ के संतान हैं लेकिन गुण और योग्यतानुसार हमारे कार्य का विभाजन किया गया है।

इस तरह हम देखते हैं कि भारतीय परिवार व्यवस्था आज भी प्रासंगिक है और वर्तमान में जातिवाद, संकीर्णता आदि का समाधान भारतीय जीवन पद्धति को अपनाने से होगा। ◆

INCOME TAX TAXATION OF INDIVIDUAL

Shree Anand
Advocate
Munger

An income tax is a tax imposed by government on income earned by you. Income tax is a key source of funds that the government uses to fund its activities and serve the public. A person by whom any tax or any other sum of money is payable under the income tax Act is called "ASSESSEE". The Income Tax Act, 1961 has classified Assessee in different categories, such as : Individual, Partnership Firm, A Hindu Undivided Family, Company, An AOP (Association Of Persons) or BOI (Body Of Individuals), A Local Authority, Artificial Juridical Persons. The word Income has a very broad and inclusive meaning which is defined under section 2(24) of income tax act, without getting too in depth we can understand it broadly.

- In case of a salaried person, whatever amount received from an employer, either
- in cash or kind or as a facility is considered as income.
- For a businessman, his profits and gains will constitute income
- For professionals, freelancers etc. there earnings from various sources like professional fees, other incomes etc. are considered as Income.
- You might receive Rental income from house owned.
- Or capital gains from sale of shares, buying or selling of property etc.
- Income may also flow from investments in the form of Interest, Dividend, and Commission etc.
- Income Tax Department has classified income in 5 broad categories. Those are :

Income from Salary : The amount received by you from your employer every month comes under the head income from salary. As per law, employer-employee relationship is must to consider the amount as income from salary else it will be considered under other head and therefore exemptions, allowances available to a salaried individuals will not be available. The amount of your Salary includes basic pay, dearness allowance, medical, transport, annuity, gratuity, advance of salary, allowances, commission, perquisites in lieu of salary and retirement benefits etc.; The aggregate of the above incomes, after the exemptions but before the deductions, is known as Gross Salary and this is charged under the head income from salary.

Income from House property : Any Rental Income from residential or commercial property that you own will be taxed. If you have home loan then interest part of it would also be considered as negative income from House property.

Income from Business or Profession : Income earned through business or profession is taxable under the head 'profits and gains of business or profession. The income on which tax is levied shall be net of expenses.

Income from capital gains : Any profit or gain arising from transfer of capital asset held as investments (such as house, Jewellery are chargeable to tax under the head capital gains. The gain can be on account of short-term and long-term gains.

Income from other sources : Any income that does not come under the above four heads of income is taxed under the head income from other sources. For eg. savings bank interest, lottery etc..

Under the Income Tax act, all individuals below the age of 60 years are liable to pay tax and required to file income tax return if total income exceeds Rs. 2.5 Lakhs in Assessment

year 2019-20 (FY – 2018-19). For the age group 60-80years it's limit is Rs. 3Lakhs and for the individuals above 80 years , it's limit is Rs. 5 Lakhs.

Income Tax Rate AY 2019-20 | FY 2018-19

Taxable income (Below 60years individuals)	**Tax Rate**
Up to Rs. 2,50,000	*Nil*
Rs. 2,50,000 to Rs. 5,00,000	5 %
Rs. 5,00,000 to Rs.	
10,00,000	20%
Above Rs. 10,00,000	30%

Taxable income (60 – 80 years individuals)	**Tax Rate**
Up to Rs. 3,00,000	*Nil*
Rs. 3,00,000 to Rs. 5,00,000	5 %
Rs. 5,00,000 to Rs. 10,00,000	20%
Above Rs. 10,00,000	30%

Taxable income (Individuals above 80 Years)	**Tax Rate**
Up to Rs. 5,00,000	*Nil*
Rs. 5,00,000 – Rs. 10,00,000	20%
Above Rs. 10,00,000	30%

In addition to the Income tax amount calculated, based on the above-mentioned tax slab, individuals are required to pay Surcharge and Cess.

Tax planning :

Tax planning is the activity undertaken by the taxpayer to reduce the total tax liability by optimally utilizing all the allowances, deductions, rebates, concessions and exclusions available well within the legal framework. Efficient tax planning can help you achieve your financial goal if you explore all the possible tax saving options available to you and make the most of it. These are some effective ways to save tax.

- Save tax under section 80C, 80CCC, 80CCD- Limit Rs. 1,50,000.
- Save tax under section 80D, 80DD, 80DDB
- Tax planning through Home loan
- Save tax through Education loan under section 80E
- Tax planning under section 80CCG : RGESS
- Tax planning of long term capital gains arising on sale of property
- Income tax deduction for donation under section 80G. ◆