

4. The learned judge has not discussed the various contradictions in the depositions and documents that were highlighted by the advocate in the argument like, xxxx and yyy. It is respectfully submitted that not discussing all the points raised by counsel in the arguments amounts to misconduct as per the decision of the A.P High Court in 2003 (2) ALD 926. Also 2004 (3) ALD 874
5. The learned Judge has invoked his notions of justice equity and good conscience by over looking the law which appears to be very clear on this point.
6. The learned Judge has applied a provision of law though neither party argued about that provision, without *suo moto* re-opening the case and hearing the advocates on that point. This has caused unpleasant surprise to the advocate whose client lost the case.

ADVOCATE

Results of earlier fair comments

This author tried this technique earlier successfully. Though the learned judges were initially surprised at this unconventional method, they appreciated the frank expression of dissent, and even admitted their errors in the judgements

More importantly, there were no negative after-effects of this approach in other cases argued by this author before the same judges. **This only demonstrates that most judges can be corrected without attributing any corrupt motives, and fairly giving vent to the irritation and frustrations of the advocates, in a polite manner, instead of resorting to unfair comments in canteens and lawyers' chambers or sending anonymous petitions against judicial officers, for real or imaginary grievances.**

THE RULE OF LAW AND THE RULE OF "GOOD" LAW

By

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The rule of law, also called supremacy of law, is a general legal maxim according to which decisions should be made by applying known principles of law without the intervention of discretion in their application. The rule of law, *per se* does not say anything about the **justness of the law**. It only deals with the **enforcement** of the law rather than the principles to be observed while **making the law** at the first instance.

During the heydays of socialism, laws were made abolishing privy purses, levying income tax at 97%, nationalising banks and acquiring lands without providing compensation at market rates, prohibiting recovery of private debts, under the garb of rule of law. Whether such laws were just or not is an altogether different question. Though the West Bengal government run by the communist party, acquired lands by paying compensation which

was more than the market value, to encourage industries, to generate employment and thereby serve the public interest, the public found the law to be unjust, ultimately forcing the state government and Tata's NANO Unit to backtrack. However, under the land ceiling laws when land was taken away without paying compensation at market rate, when tenants were declared as owners, without compensating the original owners, there was no such effective protest, only because the landed gentry who were robbed of the land, were numerically few. In this sense, whether a law is just or unjust depends upon popular notions, passions and prejudices of the public rather than any objectively valid considerations.

Mahatma Gandhi was of the opinion that just as there were bad men, there were also bad laws. The individual should have the courage to fight bad laws, he opined. He

also made it clear that though his choice was the non violent way, even violent defiance was better than timid submission. Open defiance, whether violent or non violent, would be successful only if the majority, or the vociferous majority, share the sentiments fuelling defiance. If the need to oppose an unjust law is felt by a minority, they may find moral justification to evade such law, stealthily. Though they face the risk of being discovered, they can legitimately, though not legally, claim a moral correctness in their conduct. Galileo was forced to express repentance for his heliocentric theory, though secretly he justified his stand, which was vindicated, by the Church formally expressing apology in the year 2000 for what it had done to Galileo centuries ago.

It is to be noticed that when a law is not in accordance with popular sentiment, such law is usually not enforced but only cashed in. Some fitness experts tell us that if the heartbeat and respiration of a person could be slowed down, the fitness level of such person increases. Instead of achieving such laudable objects by voluntary effort like yoga and meditation, if a law is made that henceforth no body's heart should beat beyond a certain number of beats per minute and no body's respiratory cycles should exceed a certain number per minute, such law will surely be not enforced and will equally be surely cashed in. The inspector appointed to enforce such a law, the prosecutor appointed to prosecute such offenders and the judge who is called upon to decide such cases also fail to comply with such law. **The result is corruption.** The failure to enforce total Prohibition of alcohol, the failure to enforce the dowry prohibition laws and their eventual misuse and the taxation law which expects the ordinary selfish man to become a semi-saint and surrender substantial portion of his income to the society, provide some instances of the society trying to achieve laudable objects, through legislative coercion instead of through *manipulation, supplemented by* persuasion to make voluntary efforts to abolish such evils.

The violators (or victims?) of such bad or impractical laws develop a guilt complex that

prevents them from exposing the misdeeds of corrupt officials and politicians, for fear of retribution by the latter, who promptly retort, "Are you perfect? Haven't you violated so many laws? First set your house in order before you point your finger at others, or else *we will let loose the law to take its course.*" Perhaps, such impractical laws are enacted to serve as effective tools to the powerful, to ward off any legitimate criticism and exposure of their misdeeds by good people.

Law should regulate and not strangle.

The Law as an instrument of social change has its own limitations. Just as the policeman at the traffic signal merely regulates the natural flow of traffic instead of blocking it completely, a law, if it is just, should only regulate **the natural impulses of man such as acquisitiveness, possessiveness, rivalry and love of power.** If laws were made to strangle such powerful impulses, the individual would find **moral justifications** to circumvent such laws either by stealth or through bribery and in extreme cases by open defiance. Communism failed as it hoped to **strangle** and eliminate the first two natural impulses of man namely, **acquisitiveness and possessiveness.** Now even communist China is forced to amend its constitution to recognise the right to property.

John Maynard Keynes who was opposed to the method of robbing Peter to pay Paul to build an egalitarian society, preferred the **manipulative** techniques, such as increasing public spending, if necessary by resorting to deficit finance, (printing money not backed by gold reserve) to achieve **universal though not equal prosperity.** His prescription was to make use of the aforesaid natural impulses of most men (acquisitiveness and possessiveness) to serve as motive force to achieve the desired social objectives, instead of vainly trying to thwart them. To quote Keynes, "For at least another hundred years we should pretend to ourselves and to this world that foul is fair and fair is foul for, foul is useful, fair is not. Avarice, usury and precaution must be our gods a little longer still."

If the average man were to become so self less and evolved that he would identify every body's prosperity with his own, he would cease to be a householder. The laws of economics would become inoperative.

Man conquered nature, not by trying to change the natural laws, but **by correctly understanding them and cleverly manipulating them**, while obeying them. The electric bulb, the air conditioner, the water heater, the motor car (once a wonder called horse less carriage), the aeroplane, the cellular phone, the computer, the television, were made possible by clever manipulation of the natural laws of physics, electricity, thermodynamics, avionics etc. and not by moral preaching or wishful thinking to change the natural laws

Man has a natural impulse to use force but 'good law' only regulates it and confines it to self-defence of person and property. Man has a strong impulse to enjoy sex but the law regulates it by insisting upon free consent of the partner. Man has an impulse to acquire property but the law regulates the method of doing it by limiting it to purchase under a valid contract, gift, inheritance or adverse possession and absolutely prohibits the purchase of public roads, rivers, ancient monuments and the like in public interest. If the law were to completely block these impulses, it would have miserably failed. The experiment with state ownership of means of production, in practice became ownership by politicians and bureaucrats, resulting in misappropriation of the nation's wealth, deprivation of incentive to the individual to perform and ultimately led to the fall of communism. Disinvestment by the State has now become the desirable goal.

If the law prescribes severe penalty like death sentence or jail for minor offences like not wearing a helmet or seatbelt, it encourages corruption. (Mercifully there is no such law at present). The unduly severe punishment makes the offender to feel that he is deprived of a second chance to reform himself and the society is vindictive. Again if the standard of proof required in a criminal case is low

(like accepting the uncorroborated testimony of prosecutrix in a rape case even in the absence of injuries) the scope for either misuse or bribery is greater. When the law prescribes imprisonment and other harsh punishments for acts which do not have *mens rea* (guilty mind) as for instance, under the prevention of food adulteration act, or when an innocent man is convicted and about to be jailed or hanged, he has a moral justification to bribe or escape from the jailor and save his precious life and liberty, though the law does not approve such conduct.

Keeping these broad principles in view let us scan the various laws that have accumulated over a period of time to see whether they should be suitably amended or repealed altogether.

Income Tax Law

Earlier the highest rate of tax in India was ninety seven percent. Clearly, this attempted to **thwart the impulse to possess** what is lawfully earned. The subsequent reduction of the highest incidence of tax to 30 percent to ensure better compliance is an implied admission that the earlier law was bad and impractical. Even the present rate of thirty percent cannot be justified. As Mr. Justice *Markandey Katju* pointed out in a recent article published in the Hindu, a person who earns Rs. Five Lakh per annum and a person who earns a hundred crore per annum, are both forced to pay at the same rate. The moral justifications of individuals to violate this law are many. Though the government requires money to maintain a standing army, the police and the judiciary, the individual feels that every citizen of this country enjoys the benefits while tax is extracted only from a few. The benefits of protection to life and property are also highly uncertain. For instance, when a person is murdered the government will not take the responsibility of maintaining his dependants. When property is destroyed, the government does not restore it to the deprived. Except government servants, no one else is sure of getting the same income till he dies. Film Stars and Sports idols enjoy good income for a short duration. Other professionals and businessmen also work

under constant fear of facing increased competition and a possible fall of income in future. The fear is further increased in a country like India where there is no social security like unemployment allowance. Income spent for such legitimate purposes as for constructing or buying even the first house or for repair and remodeling the existing house is not exempted from tax. Income spent for hostel and mess charges for children is not exempt. So also, income spent on Medicare or litigation. (Only the premium on mediclaim policies is exempt. If additional expenditure is incurred for treatment above the insured level, no exemption is given)

Utopian dream

Though it may appear to be far fetched, the aim should be to abolish all taxes, except on those types of expenditure, that the society aims to discourage, such as on tobacco, alcohol, *etc.* The central government may get its income through the printing press method, as gold standard was abandoned long ago for good reasons. (Read the articles **The Monetary Policy of the USA by Randall Raus** last edited: Thursday, October 23, 2003, Printing money and its prices by **PETER S. Goodman** Published: December 27, 2008 in the New York Times.) The central government may give grants to the state governments, as they cannot be allowed to print money **Money is at last recognized as only a lubricant to facilitate the movement of goods and services, as an antidote to the friction caused by the possessive clutches of the average man. So long as the lubricant does not drown the rest of the machinery, its supply can be increased without any arbitrary limits like the gold standard.** *It may be relevant to mention here that Amartya Sen, the Nobel laureate, has pointed out that famines have occurred during the last few decades, not due to a lack of food grains, but due to lack of purchasing power (the lubricant) for the hungry.* The fear of inflation needs to be addressed, by studying whether inflation depends more on the quantity of money or the velocity of its circulation. When the government withdraws from its direct role in

economic affairs, its requirement for money also gets drastically reduced. The State should be like an umpire leaving the citizens free to play the game as per the rules. That umpire should be the judiciary and not the executive. The Government should only provide a safety net like subsistence allowance and Medicare and legal aid to everyone whose income is below a certain level. Bertrand Russell had predicted long ago that with modern techniques of mass production, it is possible to provide basic needs to every one freely. If such steps are taken, life ceases to be a struggle for existence, but continues, as it ought to, be a striving for excellence. The government should ensure economic survival through direct income transfer schemes and not through nationalization of business enterprises and bring communism through the backdoor. The State should be a “helping hand” and not a “grabbing hand”.

Labour laws

The Minimum Wages Act is intended to protect the unskilled workers whose bargaining power to secure a just wage is inadequate. This law attempts to strangle the natural impulse of the employer to hire workers at the least possible cost. He will naturally try to circumvent the law by bribing the inspector and managing to get the consent of the worker to falsely state that he received the minimum wage. When the victim, namely, the worker and the aggressor cooperate, the inspector cannot do much except to collect his mamool. The honest employer who pays the minimum wage is pushed into a disadvantageous position as his cost of hiring Labour increases and his cunning competitor steals a march over him in competitiveness.

Instead of such coercive techniques, if **manipulative techniques** like the direct cash transfer scheme by the state to the needy, are implemented, the minimum wages concept will get itself enforced automatically without the need of any inspector and prosecutor. The worker will refuse to work until a decent wage is offered by the employer. The tyranny of the employer becomes a thing of the past. So, Repeal the Minimum Wages Act..

The Factories Act

This Act was rightly enacted to look after the safety of the workers. Some objectionable features are there. For instance, if the employer carries out any construction without prior approval of the authorities, even though the construction is made without violating any safety features, the law contemplates imposition of imprisonment or fine up to Rs1 lakh. Unfettered discretion given to the magistrates results in needless anxiety for the owner of the factory and gives scope for judges, lawyers and busy bodies to extract their pound of flesh to exercise the discretion in favour of the so-called offender.

S.138 of the Negotiable Instruments Act

This provision, which prescribes imprisonment if the amount covered by the cheque is not paid after demand notice following the bouncing of a cheque, virtually converted a mere breach of contract into a criminal offence. This is contrary to even the international covenant on human rights which provides that breach of contract should not be punished. This section should be scrapped. For more detailed treatment of the subject, please see www.LegalArticlesDirectory-businesslaw-dishonourofcheques.

Building Rules and Zoning Regulations

Setback rules, the rules which prescribe a minimum gap between the compound wall and the wall of the building are intended to ensure free flow of light and air. The municipal authorities by themselves and even neighbouring residents can prevent a violation of these rules by timely action by seeking prohibitory injunction in a court of law. If the neighbour keeps quiet and allows the construction to proceed, he cannot later complain as he is guilty of acquiescence. Construction made without prior approval was a minor technical offence for which a small fine was prescribed.

The municipal laws were changed in Andhra Pradesh recently. A construction without mere prior approval also attracts imprisonment. Bureaucratic red tape and

corruption are universal in India. Often such provisions of law are violated on moral justifications like imminent requirement of the building, possibility of steep escalation in the cost making the project unaffordable due to delay *etc.* **A building should be demolished only if it demonstrably violates safety requirements and not otherwise. The judgments of superior courts are also on these lines. The offence of construction in violation of building rules should only be finable and no imprisonment should be prescribed. From this angle the building rules should be reframed.** As far as the zoning regulations are concerned, it is all right to prohibit industries in residential areas as there is a possibility of their contributing to sound and air pollution. However, why shops should not be permitted in residential areas is not clear. Shops and offices do not cause any kind of pollution. Such irrational restrictions lead to injustice and corruption, ridiculing the noble doctrine of rule of law.

Dowry Prohibition Law

This problem of dowry is peculiar to India. It also depends partly on the population ratio. Earlier there was *kanyasulkam* which extracted a price from the groom to secure a bride. Nowadays it is the other way round. The anti-dowry legislation ignores the role played by the giver of dowry. After all, the giver also calculates the benefits his daughter would get by getting married to the most eligible bachelor. No dowry is given by a rich father to a poor and unemployed graduate though he might be of good character. Though the Dowry Prohibition Act formally declares that the giver also should be punished, this has rarely happened as the giver is sympathised with as a victim instead of a participant in the crime.

This law is already being misused. A mere allegation of harassment, allegedly for dowry, invites arrests, protracted trial and possible conviction, giving scope for the police, the prosecutor, the judge and the defence counsel opportunities to make money.

The remedy is to recognise that if dowry is given voluntarily, it would not be an offence, though it should be kept as a deposit for the benefit of the bride, unless she voluntarily consents, in writing, before the registrar of documents, that it may be invested in some business venture of the husband. A contract to pay dowry may be treated as void as being opposed to public policy, though not an offence. A mere verbal demand for dowry may be treated as mental cruelty, entitling the claim of maintenance and even divorce. It is only when physical torture, **resulting in visible injuries**, is alleged and proved, criminal liability must follow. If such changes are made, it becomes more difficult to make false allegations of dowry harassment with ulterior motives, while at the same time the society would enforce its revulsion to this practice. If manipulative techniques like providing subsistence allowance to every one by the state are adopted, the imminent need to get married so as to transfer the burden of maintenance to the husband, will disappear and the evil of forced dowry extraction will vanish.

The Law Pertaining to Prevention of Atrocities on Scheduled Castes and Tribes

The objectionable feature of this law is to treat a mere verbal abuse in the name of caste as an offence, attracting the provisions of immediate arrest and subsequent incarceration after protracted trial. The potential to misuse this law far outweighs the benefits if any. Creditors are misusing this law to realise their debts. Superior officers are afraid of taking action against their inefficient and corrupt subordinates fearing prosecution under this law. The punishment is disproportionate to the notional pain inflicted by the offender on the depressed classes.

The remedy is to provide only for monetary compensation of Rs.1000/- for the first offence, Rs.2000/- for the second and Rs.5000/- for subsequent offences of this nature. The offense should be bailable and compoundable.

Prevention of Corruption Act

The bribe giver should not be punished as he is a victim and not the aggressor. Moreover detection of the crime of corruption becomes very difficult when the bribe giver is also punished. The codified law appears to be vague about the liability of the bribe giver. There were conflicting decisions of various high Courts pertaining to this aspect Under the Indian Penal Code. After the special act namely The Prevention of Corruption Act replaced the earlier law, the bribe taker and the person who helps in taking the bribe, namely, the middleman, come under the purview of the law. Whether the bribe giver can be treated as an accomplice is not authoritatively decided. The bribe taker can compel the giver to offer the bribe while the bribe giver cannot compel the bribe taker to take against his will. At the most, the bribe taker might be tempted by the repeated offers made by the giver. Hence, a rebuttable presumption may be added in the Act, that bribe giver was **compelled to give** the bribe by the taker, unless the contrary is proved.

Law Pertaining to Arrest

The recent amendments to the code of criminal procedure in India have substantially reduced the risk of misuse of the provision pertaining to arrest. Unfortunately, the amendments are not yet enforced. The sooner they are enforced, the better it is.

Conclusion

It should be borne in mind that officials and judges should learn the discipline of enforcing the law as it stands and not as it ought to be. This is required to maintain predictability in the administration and reduce the role of discretion. Otherwise, we will end up with the rule of the bureaucrat and the rule of the judge instead of the rule of law. Care should be taken in making the laws by observing the aforesaid norms.