DOES THE AMENDMENT OF THE CRIMINAL PROCEDURE CODE BY THE ACT 5 OF 2009 LEADS TO ARREST BY CONSENT OR ARREST BY CLASS SELECTION?

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Criminal Justice System sets into motion with the commission of an offence, offences are classified as cognizable and non-cognizable, bailable and non-bailable in the Code of Criminal Procedure, 1973. A police officer may arrest the suspect, offender or an accused when a "cognizable offence" is committed. The statutory definition of a cognizable offence looses its significance and classification of the offences as cognizable and non-cognizable loose their traditional difference with radical changes brought about by the Criminal Law Amendment (Act No.5) Act 2009. Development and progress is the goal for any civilized society. People enjoy their rights well and with confidence when there is order in the society. Criminal justice system is developed over a period of time.

An attempt is made to trace as to how the criminal justice system is developed in India. Power to arrest is guided by the Code of Criminal Procedure. Doctrine of separation of powers and rule of law are the two undefined guiding principles for the three wings of the State in our democratic republic. There are a number of decisions by the Honorable Supreme Court and various High Courts as to how discretionary power has to be exercised by the functionary on whom discretionary power is vested. Constitutional framers have shown the resolve to develop our system and set as first objective for the post independent Indian System is to secure social, economic and political justice. Social justice, economic justice and political justice do not exist in isolation. They are inter dependent and they affect each other. Society is made of its parts. Persons are the parts of the society. Persons influence the society depending on the roles the people play. The parts of the society do not remain static. They always change. Society progresses with change and continuity. We do not continue forever on this planet. We all leave leaving the society as a continuum. The society is for the present and for the future as well. Our society is for all of us and as well as for the posterity. Religion also shapes the society. Sacred texts always guided the social behaviour and the justice system. Justice is given highest place in religious life. The amendments made with regard to power to arrest in the Code of Criminal Procedure are examined here under.

Criminology is the Science that deals with crimes and criminals, where as investigation is an endeavor to discover the truth by the application of that science. Sir *John Salmond* defined law as the body of principles recognized and applied by the State in the Administration of Justice, as the rules recognized and acted on by Courts of Justice. Law consists of rules which are of broad application and non-operational character, but which are at the same time amenable to formulation, legislation and adjudication. Law is considered as an instrument of social change. Theorists as far removed from one another as *Acquinas* and *Solmond* have claimed justice as the goal of law. The purpose of law is achieving justice and ensuring stability and peaceful change for the betterment of the society. Justice consists precisely in not singling persons for special treatment in the absence of significant differences, but in treating the like cases alike and meeting out fair and equal treatment to all. Criminal Justice System is a Justice Delivery System

which provides for a mechanism which serve the need of the society in ensuring that rights of the people are not unjustly infringed or violated and providing for punishment for the breach of criminal laws, when such violation of rights is considered harmful to the society in general, even though the immediate victim of the crime is an individual. A Police Officer or other officers from the executing wing, a Prosecutor, Magistrate or a Sessions Judge deal with bundle of laws while playing a role in criminal justice system. The Indian Penal Code and Criminal Procedure Code have been codified laws, which form part of the Criminal Law. The Indian Penal Code and other enactments dealing with the crimes are part of the substantive law. Criminal Procedure Code provides for the procedure for dealing with the crimes in pre-trial process, trial process and until the culmination of final adjudication by appeal. The Law of Evidence is also the most important branch of adjective law. The object of codification is that on any point specifically dealt with by an Act, the law should be ascertained by interpreting its language, instead of roaming over a vast number of authorities to discover what the law is and extracting it by a critical examination of prior decisions.

The Code of Criminal Procedure, 1973 has replaced the Code of Criminal Procedure, 1898 which itself was amended from time to time including chief amendments made in 1923 and 1955 *etc.* The Code of Criminal Procedure provides the procedure for implementing or enforcing the various subjective laws. The Code of Criminal Procedure, 1973 replaced the Code of Criminal Procedure, 1898 after its implementation for 3 quarters of a century in advancing Criminal Justice System. The present Code was also amended from time to time by Act 56 of 1974, Act 99 of 1976, Act 45 of 1978, Act 63 of 1980, Act 46 of 1983, Act 10 of 1990, Act 42 of 1993, Act 32 of 1998, Act 50 of 2001, Act 25 of 2005, Act 2 of 2006 and Act 5 of 2009. The amendments made by Act 25 of 2005, Act 2 of 2006 and Act 5 of 2009 propelled nationwide debate on these amendments. On 4.2.2001 there was also a nationwide protest by the legal fraternity against the implementation of the changes made by Act 5 of 2009. The day of protest, ironically and not significantly coincided with the world Anti Cancer Day. It has to be seen whether the changes being made by various amending Acts are or in tune with the objective or purpose of the Criminal Justice System and how far they are restructuring or moulding the Criminal Justice Delivery System and impact of all these amendments on the society and protection of the rights of the individual. The realm of the amendment is so manifold and diverse and it is hardly be possible to touch even the fringe of the various problems within the limited scope of single discussion.

The history of Criminal Law in India corresponds with the history of the mankind and development of Criminal Law and is parallel to the advent of the British and changes brought in by the foreign rulers and the freedom movement. There was no Criminal Law in uncivilized society. Everyone was liable to be attacked in his person or in his property at any time by any one. A person attacked either succumbed or overpowered his opponent. 'A tooth for a tooth, an eye for an eye, a life for a life was the forerunner of Criminal Justice. With the discovery of the passage to India by Vasco Da Gama, Portuguese, Dutch and English have come to India. Britishers have come as traders and transformed as Rulers in this land with rich heritage and resources. The Charter of 1968 which established the Court of Judicature in 1672, the establishment of a Mayor and Corporation at Fort St. George, Madras in 1687, the establishment of Mayor's Court in 1726 are the forerunners. *Robert Clive* succeeded in obtaining the grant of Diwani from the Moghul Emperors which enabled the British to hold the Diwani Courts in 1772, *Warren Hasting* took steps for proper administration

of Criminal Justice. A Fouzdari Adalat was established in each district for the trial of criminal offences. The Kazi or Mufti expounded the law to determine how far the criminals were guilty of the offences charged.

Saddar Nizamat Adalats were also established in addition to Fouzdari Adalats. The Regulating Act, 1773, facilitated establishment of Supreme Court of Judicature at Fort Williams, Bengal. The Magistrates, Assistant Magistrates, Deputy Magistrates were entrusted with trial of offences, offences requiring heavier punishment were transferred to the Sessions Judge. Death Sentence and life imprisonment awarded by Sessions Judge were subject to confirmation by the Nizamat Adalat. In Madras by Regulation Act 10 of 1816, Magistrates were empowered to inflict imprisonment for one year. The practice and procedure in Courts in Bengal, Madras and Bombay were prescribed by Regulations which were passed from time to time. In 1833, *Macaulay* moved the House of Commons to codify the whole criminal law in India and bring about the uniformity. A draft code was submitted to the Governor General in Council on 14th October, 1837. It was ultimately passed on 6th October, 1860 after consideration and revision by Judges and Law Advisers and the Law Members of the Governor General's Council Bethune and Peacock. The implementation of Indian Penal Code and entire gamut of minor, special and local criminal laws is possible through the procedure prescribed by the Criminal Procedure Code. Thus the Criminal Procedure Code is key to the success in implementation of the substantive criminal laws. After achieving independence, the people of India have evolved Constitution for themselves. By resolving to constitute India as a Sovereign, Socialist, Secular, Democratic Republic with the objective of securing justice to all its citizens based on the principle of equality and by promoting fraternity by assuring the dignity of the individual and integrity of the nation. Justice intended to be achieved is social justice, economic justice and political justice for the progress and onward march of the democracy.

After liberating ourselves from the Foreign Rulers we have chosen to rule ourselves. Power to rule in a democracy involves 'rule of law'. Rule of law is the Supreme manifestation of human civilization and culture and is a new 'lingua franca' of global moral thought. It is an eternal value of constitutionalism and inherent attribute of democracy and good governance. *Edward Coke* who is said to be the originator of the concept of rule of law said that the King must be under God and. under law and thus vindicated the supremacy of law over the pretensions of the executers. In India rule of law, can be traced to Upanishads. Law is considered as the king of the Kings. It is more powerful and rigid than the Kings. There is nothing higher than law. By its power weak shall prevail over the strong and justice shall triumph. In a democracy the concept has assumed different dimension and means that the holders of public power must be able to justify that the exercise of power is legally valid and socially just. The rule of law is a viable and dynamic concept. The term rule of law like many other concepts, is not capable of any exact definition. The term rule of law is used in true contradistinction to rule of man and rule according to law.

Our State Emblem is adaptation from the Saranath Lion Capital of Asoka. The State Emblem of Four Lions stands above a bell shaped lotus. The wheel appears in relief in the center of the abacus. The capital is crowned by the wheel of the Law (dharmachakra). This dharmachakra also brings majesty to our National Flag. Dharmachakra appears in the center of abacus. The words 'Satyameva Jayate' from Mundaka Upanishad meaning 'Truth alone Triumphs' are inscribed below the abacus in Devanagari script.

In Criminal Procedure, hereinafter referred to as the Code in Chapter 5 with

the caption 'arrest of persons' Section 41 has been drastically amended. Sections 41A, 41B, 41C and 41D have been introduced. 50A, 53A and 54A have been inserted by Act 25 of 2005. An explanation for Sections 53 and 53A was also inserted by the same amendment. Section 54 has been substituted by new Section 54 by Act 5 of 2009.

Prior to the amendment by Act 5 of 2009, any Police Officer may without an order from a Magistrate and without a warrant, arrest any person (a) who has been concerned in any cognizable offence (b) who has in his possession an implement of house breaking (c) a proclaimed offender (d) a person suspected to be possessing stolen property (e) a person who obstructs a Police Officer in the execution of his duty or who has escaped from lawful custody (f) who is suspected to be a deserter from Armed Forces of the union (g) who is considered as an offender of an offence at any place out of India and who is liable to be extradited (h) a released convict who breached rule with regard to his residence or (i) when a requisition from another Police Officer is received for arresting a person with distinct identity and who is liable to be arrested. Sub-section (2) is with regard to arrest of a person concerned in a non-cognizable offence.

Section 41A provides for a notice of appearance before a Police Officer where the arrest of person is not required as per the provisions of sub-section (1) of Section 41. After the substitution of clauses (a) and (b) and insertion of clause (ba), the power of Police Officer to arrest any person stands modified and reads as follows:

41. When Police may arrest without warrant.— (1) Any Police Officer may without an order from a Magistrate and without a warrant, arrest any person.

(a) who commits, in the presence of a police officer, a cognizable offence:

(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:

(i) the police officer has reason to believe on the basis of such complaint, information or suspicion that such person has committed the said offence;

(ii) the police officer is satisfied that such arrest is necessary.

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured; and the police officer shall record while making such arrest, his reasons in writing.

(ba) against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years whether with or without fine or with death sentence and the Police Officer has reason to believe on the basis of that information that such person has committed the said offence.

Article 21 of the Constitution provided for protection of life and personal liberty and mandates that no person shall be deprived of his life or personal liberty except according to procedure established by law. In *A.K. Gopalan v. Union of India*, AIR 1950 SC 27, their Lordships of the Supreme Court gave a restrictive interpretation of the expression personal liberty and held that Articles 19 and 21 deal with different aspects of liberty. Article 21 is guaranteed against deprivation of personal liberty while Article 19 affords protection against unreasonable restrictions (which is only partial control, on the right of movement *etc.*,). Freedoms guaranteed by Article 19 can be enjoyed by a citizen only when he is a freeman and not when his personal liberty is deprived under a valid law.

In *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295, their Lordships of the Supreme Court held that personal liberty was not only limited to bodily restraint or confinement to prisons only but was used as the compendious term including within itself all the varieties of rights which go to make up personal liberty of a man other than those dealt with in Article 19(1).

In *Maneka Gandhi v. Union of India*, AIR 1978 SC 597, their Lordships of the Apex Court have given a widest possible interpretation to the words personal liberty. Thus, Article 21 requires the following conditions to be fulfilled before a person is deprived of his liberty

(i) there must be a valid law

(ii) the law must provide a procedure

(iii) the procedure must be just, fair and reasonable and

(iv) law must satisfy the requirements of Articles 14 and 19 *i.e.*, it must be reasonable.

Article 22 provides those procedural requirements which must be adapted and included in any procedure while depriving a person of his life or person liberty.

Article 22 deals with two separate matters with regard to

(i) persons arrested under ordinary law of crimes.

(ii) persons detained under the law of preventive detention.

Clauses (1) and (2) and Article 22 deal with detention under the ordinary law of crimes and laid down the procedure which has to be followed when a man is arrested. These safeguards while arresting the person under an ordinary laws are

(a) the right to be informed of grounds of arrest as soon as may be

(b) the right to consult and to be defended by a legal practitioner of his choice

(c) the right to be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of Magistrate and

(d) the right not to be detained in custody beyond the said period of 24 hours without an order of a Magistrate:

In *Joginder Kumar v. State of Uttar Pradesh*, (1994) 4 SCC 260, the Supreme Court has laid down guidelines governing the arrest of a person during the investigation. In *D.K. Basu v. State of West Bengal*, AIR 1997 SC 610, the Hon'ble Supreme Court also laid down detailed guidelines to be followed by the Central and State Investigating Agencies and security agencies in all cases of arrest and detention.

It has become the duty of the Police Officer *etc.*, to abide by these guidelines and it has become duty of the Magistrate before whom the arrested person is produced to

consider, whether the Police Officers *etc*., are abiding by these guidelines. These guidelines have been incorporated in the Code as Section 50A by Act 25 of 2005 and Sections 41B, 41C and 41D by Act 5 of 2009.

In *Sunil Batra (1) v. Delhi Administration*, AIR 1978 SC 1675, their Lordships of the Hon'ble Supreme Court held that reasons have to be and read in Section 56 of Prisons Act 1894 and there is an implied duty on the Jail Superintendent to give reasons for putting fetters on a prisoner.

In *Sunil Batra (2) v. Delhi Administration*, AIR 1980 SC 1579, their Lordships of the Supreme Court recognized the right of a prisoner to approach it in regard to the alleged torture to another prisoner and to challenge the lodging of the prisoners in unsatisfactory and inhuman prison conditions.

In early 1979, a lawyer of the Supreme Court filed a writ to secure the release of the victims in various Jails in Bihar. They were decided as a series of cases *Hussainara Khatoon I to VI v. Home Secretary, State of Bengal*, AIR 1979 SC 1360; AIR 1979 SC 1369; AIR 1979 SC 1377, his Lordship Justice *Krishna Ayer* held that 'right to speedy trial' is a fundamental right implicit in the guarantee of life and liberty of prisoner enshrined in Article 21 of the Constitution. Speedy Trial is the essence of criminal justice. No procedure which does not ensure a reasonably quick trial can be regarded as, 'reasonable fair or just'.

In *Veena Sethi v. State of Bihar*, AIR 1983 SC 339, based on report by Free Legal Aid Committee, Hajari Bhagh facilitated the release of illegally detained prisoners who were in detention for almost two or three decades.

In *Sunil Batra (2)'s* case (supra), his Lordship Justice *Krishna Ayer* treated a letter written by a convict *Sunil Batra* on behalf of a fellow prisoner *Prem Chand*, as a writ of *habeas corpus* for the neglect of prison authorities in providing facilities in prison and overlooking conditions like overcrowding, under staffing, in-sanitary facilities, brutality, constant fear of violence, lack of adequate medical facilities, healthy and sanitary conditions, censorship of mails, inhuman isolation, segregation, inadequate or non-existent rehabilitative or educational opportunities.

In *Sheela Barse v. State of Maharashtra*, AIR 1983 SC 378, the Honorable Supreme Court issued detailed directions to the Government for the protection of women in Police lock-up.

All these decisions would go to show that the Honorable Supreme Court is jealous to protect the fundamental rights of the people and to interfere and check the executive excesses. The prisons reforms have been taken up. The prison conditions improved markedly. The Courts are also giving due priority to the cases of Under Trial Prisoners. Prolonged detentions where it is not required in the facts and circumstances of the case are becoming a thing of the past. The Honorable High Courts are also monitoring the status of the Under Trial Prisoners Cases.

In *P.S.R. Sadanandam v. Arunachalam*, (1980) 3 SCC 141, the Honorable Apex Court in the area of criminal law also where it is the duty of the State to prosecute a criminal because a crime is considered to be an offence against the society, the Honorable Apex Court allowed a Private party to initiate and pursue a criminal case in a situation where the State has not prosecuted the offender for reasons which do not bear on public interest but prompted by private influence *mala fides* and other extraneous considerations.

In *Prakash Singh v. Union of India*, (2006) 8 SCC 1, the Honorable Supreme Court gave detailed directions to Central and State Governments to take time bound measures to insulate police machinery from political/ executive interference to make police force more efficient and effective necessary to strengthen and preserve rule of law and to protect the human rights of the people.

In *A.D.M. v. Sivakant Shukla*, (1976) 2 SCC 521, popularly known as *habeas corpus* case the contention that there is obligation to act in accordance with rule of law as it is a central feature of our constitutional system and is a basic feature of the Constitution did not succeed on the ground that during the period of emergency certain human rights can be suspended and that the emergency provisions themselves constitute the rule of law. However, their Lordships of the Apex Court in *Kesavananda Bharathi v. State of Kerala*, AIR 1973 SC 1461, held that the rule of law was considered as an aspect of the doctrine of basic structure of the Constitution which even the plenary power of Parliament cannot reach to amend.

The concept of rule of law as developed by the Apex Court not only provides negative constraints on the Government but also impels it to do affirmative duty of fairness by the Government and its agencies. It has been made clear that the power should not be exercised arbitrarily. It means that power should be exercised for the purpose for which it has been conferred. It also means that power should be exercised within the statutory ambit. The *A.V. Dicey's* formulation of the concept of rule of law, which according to him forms the basis of the English Constitutional Law, contains these principles.

(i) Absence of discretionary power in the hands of Government Officials; this Dicey implies that justice must be done through known principles. Discretion implies, absence of Rules, hence in every exercise of discretion there is a room for arbitrariness.

(ii) No person should be made to suffer in body or deprived of his property except for a breach of law established in the ordinary legal manner before the ordinary Courts of the land.

The rights of the people must follow from the customs and traditions of the people recognized by the Courts in the administration of justice.

Another aspect that assumes importance is that the *doctrine of separation of powers*. In India, the doctrine of separation has not been accorded a constitutional status. The Honorable Supreme Court in *Ram Jawaya Kapoor v. State of Punjab*, AIR 1954 SC 156, held that the Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or the branches of the Government have been sufficiently differentiated and consequentially it can very well said that our Constitution does not contemplate assumption by one organ or part of the State of functions that essentially belong to another.

In *Indira Gandhi v. Raj Narayana*, AIR 1975 SC 2299, his Lordship Honorable the Chief Justice *Ray* observed that in the Indian Constitution, there is separation of powers in a broad sense only. The Honorable Justice *Baig* held that separation of powers is a part of the basic structure of Constitution. None of the three organs of the republic can take over the functions assigned to the other. This scheme of the Constitution 'cannot be changed' even by resorting to Article 368 of the Constitution. It is clear from this that the separation of powers is provided structurally but there is a functional overlapping of the powers of the three organs of the State.

The punishments are provided in the Criminal Justice System as provided by various *theories of punishments*. As stated earlier a 'tooth for a tooth' 'an eye for an eye' 'a life for a life' was the forerunner of criminal justice. It was part of retributive theory which is based upon the motive of revenge. The Criminal Justice System might be thought of as an extension of an idea that the society itself is feeling sympathy with the victim and is sharing his desire for vengeance. Akin to the idea of retribution is the concept of expiation. In this view the crime is done

away, with, cancelled blotted out or expiated by the suffering of its appointed penalty. To suffer punishment is to pay the debt due to the law that has been violated. Guilt plus punishment is equal to innocence.

Punishment can be regarded as a method practised in the society for reducing the occurrence of criminal behaviour. Punishment can protect Society by deterring potential offenders by preventing the actual offender from committing further offences and by reforming him as a law abiding citizen. The problem of punishment consists largely of competing claim of these three different approaches. One view that emerges from the analysis of offences is that offences are committed due to conflict between the personal interests of the wrongdoer and those of society at large. Punishment prevents the offenders by destroying this conflict of interest to which they owe their origin. In the words of Locke Punishment becomes an ill-bargain to the offender.

Justice also has got religious basis. In fact, its foundation lies in the religion. The roots of the justice are in religion, but it protects the society by its shelter as a huge banyan tree.

In *Surat (Chapter) 5 Al-Nisaa of the holy Quran in Ayat (Verse) 134,* the importance of justice is emphasized. It is provided that justice is Allah's attribute, and to stand firm from justice is to be a witness to Allah, even if it is detrimental to our own interest (as we conceive them) or detrimental to the interest of all those who are near and dear to us. Islamic Justice is something higher than the formal justice of Roman Law or any other human Law. It is even more penetrative than the subtler justice in the speculations of Greek philosophers. It searches out the innermost motive, because we are to act as in the presence of Allah, to whom all things, acts and motives are known (Notes 644). Some people may be inclined to favour the rich because they expect something from them. Some people may be inclined to favour the poor because they are generally helpless. Partiality in either case is wrong. Be just without fear or favour. Both the rich and poor are under the Allah's protection as far as their legitimate interest are concerned, but they cannot be expected to be favoured at the expenses of others. And he can protect their interest far better than any man. (Notes 645).

In *Surat 5 Al-Maidah in Ayat 8,* it is provided that to do justice and act righteously in a favourable or neutral atmosphere is meritorious enough but the real test comes when you have to do justice to people who hate you or to whom you have an aversion. But no less is required of you but the higher moral law. With regard to punishment, it is provided in Ayat 40 in the same Surat, that punishment really does not belong to mortals, but to Allah alone. Only, in order to keep civil society together and protect innocent people from crime, certain principles are laid down on which people can build up their criminal law. But we must always remember that Allah not only punishes but forgives and forgiveness is the attribute which is more prominently placed before us. It is our wisdom that can really define the bounds of forgiveness or punishment but his Will or Plan which is the true standard of righteousness and justice.

In *holy Bible* in (Amos 5:24) it is stated: let justice run down like water, and righteousness like a mighty stream. With regard to Judges it is recited that you shall appoint Judges and officers in all your gates which the Lord your God gives you according to your tribes and they shall judge the people with just judgment you shall not pervert justice that you shall now show partially, nor take a bribe, for a bribe blinds the eyes of the wise and twists the words of the righteous (Deuteronomy 16: 18 and 19).

The *Upanishads* insist on the importance of ethical life. They repudiate the doctrine of self-sufficiency of ego and emphasize

practice of moral virtues. Man is responsible for his acts. Evil is the free act of the individual who uses his freedom for his own exaltation. It is fundamentally the choice which affirms the finite, independent self, its Lordship and acquisitiveness against universal will. Evil is the result of our alienation from the Real. If we do not break with the evil we cannot attain freedom.

Brihad-aranyaka *Upanishad Chapter 4 and 14 would say*

sa naiva vybhavat Lac chreyo-rupam atyasrjata dharmam: tad etat kshatrasya kshatram yad dharmah, tassmad, dharmad param nasti: atho abaliyan baliyamsam asamsate dharmena, yatha rajna evam. Yo vai sa dharmah satyam vai tat: tasmat satyam vadantam ahuh, dharmam vadatiti, dharmam va vadantam, satyam vadatiti: etad hy evaitad ubhayam bhavati.

Which means yet man did not flourish. He created further an excellent form, justice. This is the power of Kshatriya Class, *viz*., justice. Therefore, there is nothing higher than justice. So weak man hopes to defeat a strong man by means of justice as one does through a King. Verily that which is justice is truth. Therefore, they say of man who speaks the truth, he speaks justice or a man who speaks justice that he speaks the truth-verily, both these are the same.

Even Kings are subordinate to dharma, to the rule of law. Law or justice is not arbitrary. It is embodiment of truth. That which is known and which is practiced is justice. *Jnayamanam anusthiyamanam ca tad dharma eva bhavati.*

From the early times Kings are said to act out truth. *Satyam Krnavanah (Rigveda : 109.6)* King has to take hold of the truth. *Satyam grahnah (Atharva veda 17-10)* Satya and dharma, truth and justice are related organically,

Manusmurthi (8-15) says:

Dharma eava hato hanti dharmo rakshati rakshitaha
tasmat dharmo na hantanyo ma no dharmo hato avadeeth

It means that if we violate dharma, it destruct us. If we abide by dharma, it would protect us. Therefore, let us abide by dharma. Let us not get destructed by destroying dharma. The Manusmrithi further says that the King has to protect dharma and punish the criminals by following justice. The people will follow the righteous path due to fear of punishment or fear of law. In the absence of such fear, man will not be constrained to be truthful and righteous because of the fear of law and punishment the people can enjoy their rights and property.

Sarvo dandajito loko durlabho hi suchimara:
Dandasya hi bhayatsarvam Jagad bhogaya Kalpate (Ch.7:22)

In *Bhagavad Gita* in vibhuti *yoga* while narrating His glories Lord Shri *Krishna* Says:

dando damayata masmi neethi rasmi jigishatam
mounam chaivasmi guhyaanam jnanam jnanvathamaham.

Among the punishers, I am the 'scepter' among those who seek victory I am 'statesmanship' and also among secrets, I am 'silence' and 'I am knowledge' among the knowers. Of the chastisers (law enforcers). I am the scepter.

The ruler and the ruled must prevail in the State, if they desire progressively to push ahead the standard of living in the various communities. The law enforcer must see that he governs by enforcing laws. In the function of the Government, the Governor will, of necessity becomes the punisher of the anti-social members of the community who are tempted, in their selfishness to disobey the existing laws in the community. The ruled, in their loyalty and reverence to the existing laws, generally succumb to the punishments meted out on them by their rulers.

The King wields the scepter (Rajadandam: a staff carried by a monarch on ceremonial occasions). The scepter is the symbol of his

power to punish. Thus the power to punish flows from the God.

Mahatma Gandhi went on to say that truth is God and God is truth. He owed to abide by the truth. Truth is the manifestation of God. Justice is the manifestation of the truth.

India is the seventh largest country in the world as per its area. The India accounts for a meager 32,87,263 square meters which accounts for 2.4% of the world surface area of 135.79 million square meters. India supports 16.7% of the world population. It means more than 1/6th of the world population is in India which is one of the 192 countries on the planet earth. India is also a biggest democracy with a written Constitution. India is a nation with rich heritage.

Investigation is an endeavour to discover the truth by the application of criminology. One of the most important duties of a Police Officer as contemplated in Section 23 of the Police Act 1861 is to bring the offenders to justice. With themselves interlinked the question of detection, investigation and efficient prosecution of cases in Court. The burden of proving an accusation always rests on the party who brings it. Thus, the burden of proving the case beyond the shadow of reasonable doubt rests on the prosecution and this initial burden never changes. The elementary principle of criminal law is that in all criminal cases, the burden of proof lies upon the prosecution to prove the guilt of the accused. It is well settled that suspicion howsoever strong can never take the place of truth. Conjectures can never be accepted as a substitute for proof. Greater degree of evidence is necessary in a criminal case. The benefit of reasonable doubt of prudent man always goes to the accused. The accused is not bound to prove or disprove anything except his special plea such as right of private defence, alibi, *etc.*

Best Evidence Rule is the Golden Rule. Best Evidence means higher kind of evidence that which law regards as affording the greatest certainly of the fact in question.

Section 2(b) of the Code defines investigation by an inclusive definition. It says that investigation includes all the proceedings under this Code for the collection of evidence conducted by a Police Officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf.

This definition of investigation remained the same in the Code of 1898 and in the present Code of 1973.

In a particular case, there may be necessity to hold a Test Identification Parade. The result of the Test Identification Parade conducted at the stage of investigation is not a piece of substantive evidence and cannot be basis of a conviction by itself. The evidence against the accused must be the evidence given by the identifying witness in the witness box. However, it provides a very good piece of corroborative evidences and greatly enhances the credibility of the evidence of identification given in Court. In fact, mere evidence of identification in Court in the absence of a prior identification test is of very little consequence.

Section 9 of the Evidence Act provides that facts which establish the identity of any person whose identity is relevant is a relevant fact. It has been held in a number of cases that the value of Test Identification Parade is much less if it is held after considerable period after the arrest of the accused. In *Dane Yadav @ Dahu and others v. State of Bihar*, 2006 (6) SCALE 447, it was explained in what circumstances test identification can be held, value of the Test Identification Parade, use and value of the test identification under various contingencies. In *Vaikuntam Chandrappa and others v. State of A.P.*, AIR 1960 SC 1340, it was held that the substantive evidence of a witness is his statement in Court, but the purpose of test identification is to test that evidence and the safe rule is

that the sworn testimony of witness in Court as to identity of the accused who are strangers to the witness generally speaking requires corroboration which should be in the form of an earlier identification proceedings or any other evidence.

In *Tangellamudi @ Gollamudi Ramesh v. State of A.P.*, 2008 (2) ALT (Crl.) 129, it was held that failure to hold Test Identification Parade, when the witnesses have no prior acquaintance is fatal and conviction basing on the testimony of the witnesses is not safe. In *Ganga Singh v. State of Rajasthan*, 1978 Cri. LJ 269, it has been made clear that the value of identification at a test parade depends to a very large extent on whether the identifying witness had an opportunity between the occurrence and the Test Identification Parade to see the suspect. Test Identification Parade should be arranged early. At any rate, before the accused goes on bail. Similarly, if the accused is released on bail and the Test Identification Parade is held, thereafter, the value of the evidence afforded by the identification parade is greatly diminished.

Cr.P.C. (Amendment) Act 25 of 2005 incorporated Section 54A and provided for identification of person arrested. Having provided a tool for strengthening the investigation where is the necessity to provide fetters in the year 2009 by showing that a Police Officer cannot normally arrest a person who is said to have committed cognizable offence punishable with imprisonment for a term which may extend up to seven years. This is a like putting cart before a horse and tying the horse to the ground. To classify the offences on the basis of quantum of punishment is a pigeon-hole approach. A Police Officer may not comprehend the rationale behind giving a tool and curbing the hands which may result in getting faulted in the course of investigation even when just grounds are there to arrange a test identification, as arresting is stigmatized.

Even otherwise it cannot be said that the police machinery has been insulated from political/executive interference to make Police force more efficient and effective necessary to strengthen and preserve rule of law and to protect the Human Rights of the people. As directed by their Lordships of the Supreme Court in *Prakash Singh v. Union of India* (supra), time-bound measures are necessary to insulate police machinery from political/executive interference for making the Police force more efficient and effective. When the Government assumed that they are only recommendatory, and failed to abide by a time frame, their Lordships developed the concept of continuous *mandamus*. Honourable Apex Court held that the fundamental rights of people are to be not only protected by the State, they should be facilitated by the State.

Maintenance of law and order is the foremost duty of a sovereign Government. It implies that maintaining such order to enable the people to abide by the law and to enjoy the fruits of the law. Where the rights of the people are safeguarded with greater degree or assurance, there will be greater conformation to the law.

The Committee on Government and rule of law of the Free Legal Aid Committee, Hazaribagh, Bihar in *Veena Sethi's* case (supra), which divided itself into certain working groups and which tried to give content to the concept in relation to an individual's area of activity in a society has submitted that Rule of law means not only the adequate safeguards against abuse of power but effective Government capable of maintaining law and order, the Committee on Judicial Process and rule of law has reported that rule of law means

(i) independent Judiciary

(ii) independent legal profession; and

(iii) standard of professional ethics

Can it be said in a vast country like India, where wealth and poverty coexists that a Police Officer everywhere will be just

reasonable and fair and free from political influence and is assertive to overpower the money power and muscle power which is also available in plenty in this country. Can it be said that the Police Organization is an independent organization insulated from the political influence.

The examination of arrested person by Medical Officer, as provided by the newly substituted Section 54 of the Code is another area of concern in this vast country. In India, there are only 6 doctors for every 10,000 people where as the global average is 15 per 10000 people. In Jharkand and Chattisgarh the rate is as low as 2 doctors for one lakh people. Apart from this low ratio of doctors, it is unwillingness of the doctors to work in rural areas that has to be considered.

The Union Government is struggling hard by spending millions of rupees in implementing National Rural Health Mission apart from other health programmes. The State Governments are also using this programme in its modified form by adapting the same. Some Governments have devised their own name for the health programmes. When the common man who produces common salt and can use the same without inhibition, as he toils well under the abundant sunlight available in the country, has to wait for reaping the benefits of Health Programmes due to low ratio of the doctors and non-availability of medical men in the rural areas, where is the necessity to make it mandatory that every arrested person has to be subjected to medical examination by a Medical Officer. We have to visualize the mass agitations where the students, youth, rioters who commit cognizable offences in the presence of Police Officer and who are arrested as per Section 41(1)(a) have to be subjected for medical examinations. Hundreds or thousands of such persons have to be subjected to medial examinations. When such frenzied individuals have to be subjected for medical examination can a poor man who suffers with fits, who cannot stand and who falls to the ground is expected to get medical aid in time.

Mahatma Gandhi always said that whenever one is in doubt one has to recall the meanest and humblest face he has ever seen. Upon recalling such face, one has to consider whether the action he contemplates helps him. Then it clears his dilemma. This talisman clears anyone who has to take a decision while in doubt. We have to think about the wrinkles on the face of a poor old man, we have to recall the loose skin of ill-clad rural or urban people, we have to think about gulf between the rich and the poor in this country which also adapted the mixed economy as a course for the progress and development of the nation.

(i) Can it be said that the crime rate in India has declined?

(ii) We have to admit that the rate of conviction is very low in the country?

It has been said that rules of evidence are fetters of justice. We are successfully using the Evidence Act which provides fetters. The Evidence Act aims at successfully discovering truth. Act 2 of 2006 inserted a new Chapter XXIA which provides for plea bargaining. Those who are involved in the Criminal Justice System are failing to make use of the benefits of plea bargaining. It is not being implemented successfully. One reason for plea bargaining becoming unattractive is misconception that it provides for compulsory sentencing to imprisonment, in view of phraseology of Section 265-E, without resorting to Probation System. But when the overall spirit and object of the plea bargaining system is considered it is clear that judicial discretion to invoke Probation System is not taken away. The manner of disposing of the case provided under clauses (a) to (d) of Section 265-E are alternatives subject to certain riders. In certain cases where the parties intend to settle the cases through plea bargaining, but are

apprehensive that the accused may be compulsorily sentenced to imprisonment, despite mutually satifactory disposition or agreement, the witnesses are turning hostile instead of invoking plea bargaining. This is promoting untruth on Oath. Application of plea bargaining is likely to reduce hostility in criminal trials. Hostility is becoming the order of the day. Can it be said that as the cases are ending in acquittals because of the hostility of the witnesses, there is a low crime rate in India. Some of the cases are getting compounded in Lok Adalats. In some cases, instead of sentencing, the convicts are being released on probation. Multitude of individuals can get benefits if a plea bargaining is also imaginatively implemented. Low rate of conviction is not an indicator or parameter to say that the crime rate is on the decline. New facets of crimes are on the ascendance.

It has to be squarely admitted that it is within the legislative competence to make the amendments made to Section 41 and Section 54 of the Code.

Section 41A of the Code says that it shall be the duty of that person to abide with the terms of notice issued by a Police Officer. Where such person complies and continues to comply with the terms he shall not be arrested. This section is silent as to 'terms' which a Police Officer may devise. He may devise his own terms. How long a person has to comply with the terms.

When a cognizable offence punishable with imprisonment of less than seven years is alleged to have been committed, Section 41(1)(ii) says, that the police officer is satisfied that such arrest is necessary—

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or

(e) unless such person is arrested, his presence in the Court whenever required cannot be ensured; and such police officer shall record while making such arrest, his reasons in writing.

Recording about the presence of one or more of the grounds mentioned in sub-clauses (a), (b), (c), (d) and or (e) is not difficult and can also be mechanical. Five grounds mentioned cannot be seen tangibly. But it cannot be considered that the satisfaction contemplated is subjective satisfaction. It is objective satisfaction as he has to record reasons for the same. Reasons cannot be tested at that stage. It is not possible to categorise or to state in what situations these threats or possibilities or apprehensions will be there and who are likely to violate conditions in (c) and (d). It is a moot question whether these are or not the factors to be considered by a Court while granting or refusing to grant bail. If it is so, it falls with in the discretionary domain of a Court. If it is a discretion which has to be exercised by a Court, it has to be considered whether it does or does not amount to vesting the judicial discretion with the executive and functional overlapping of separation of powers in a field where there shall not be overlapping.

Our police stations have no such ambience where one can find friendliness and where one can find compassion. A man who can lay his hand on his mustache, may find it that it is a place of friendship. A man who does not carry any cash and can roam around the world with a card may find that it is a place of friendship. For an ordinary man, for an average man, for a common man it is a curse to visit police

station and that he has to wait there in an inhospitable place. Chills and shivers ascend over his spine. That scenario is gradually changing with the change in the outlook and internal sensitization programmes.

Can it be said that moral values are raising in the nation? Can it be said that crime rate is declining? In the wake of liberalism and globalism it cannot be said that State can adopt a liberal approach with regard to the public order and maintenance of law and order and while dealing with the crimes.

Looking from another angle, it has to be seen what arrest means. An arrest involves detention of anyone by lawful authority, especially when he is suspected of having committed a crime. A private person may also make an arrest if crime has actually been committed and he has reasonable ground for believing that the person arrested has committed it. The amendment is also contrary to such scheme of the Code. Arrest is not a measurer of punishment. Arrest does not *per se* prove that a person is guilty of an offence. Even when a person commits a cognizable offence in the presence of a Police Officer or in a public place, it has to be proved in a Court of law, that the person has committed the offence. Only when perjury is committed in the presence of a Judge, a person can be summarily proceeded with. That too as per the Code. Even such instances are exceptionally rare as the hostility has become the order of the day. A person arrested is presumed to be innocent until his guilt is proved in accordance with law.

There shall not be an outsourced criminal justice system approach on the Indian soil while dealing with the crimes and while liberalizing or fettering the rules with regard to arrest. The criminal justice system shall be made 'just' but not liberal. The working of the Criminal Procedure Code has to be considered in the peculiar circumstances in the country. The same varies from State to state and place to place. Amendments in quick succession also may not be desirable.

It is the common practice in the Courts that the police are giving leverage to the accused who are arrested in bailable cases to enable them to secure sureties to be ready with the sureties when they are produced before Magistrate in criminal case. It can be perceived as a hidden practice. Some times accused themselves facilitate the police to arrest them. This is also happening. In the aftermath of the amendment brought in by Act 5 of 2009, if such things happen in communally sensitive areas or faction ridden areas it would amount to arrest by consent. Arrest itself at times acts as a deterrence for normal individuals who constitute the bulk of this nation to conform to the law. Arrest does not mean *dandana.* Arrest only amounts to *'niyantrana'. 'Niyantrana'* is for the sake of 'sodhana'. The sodhana may promote 'satyasodhana'. 'Satyasodhana' is likely to lead to darma raskshana. It is likely to promote justice. This is because crimes are multiplying in an extraordinary degree in the modern society. With the advancement of science and technology. Science and technology is also leading to increase in the crime rate. Even insult of the modesty of a woman by words or gestures may also has to be dealt with appropriately at times. Ragging also has to be checked by taking appropriate measures. There can also be annoyance through cell phones, e-mails. Such offences cannot be ignored. They cannot be stuffed into the pigeon-holes basing on the quantum of punishments.

Measures have to be taken for prevention, early detection and treatment of Cancer. Crime is also like a Cancer. If it is not checked and prevented and dealt with and curbed appropriately as per law it is likely to spread like a Cancer to the Society affecting social fabric of the society and knocking the individual very hard.

After bringing reforms in the Prison Justice System, after making the prisons

habitable with the recreation facilities and after improving health, sanitary conditions in the prisons and while keeping a thorough check on the cases of the Under Trial Prisoners, to bring such radical changes in the law with regard to the arrest is like making the prisons clean, tidy, habitable and environment-friendly and to maintain that cleanliness by making the admissions only as exceptional necessity. One can only solve a problem by facing and analyzing a problem and solving it. A problem will not get solved by not tackling it, and by glassing over or shelving it. It is like sweeping the dust to a place under the carpet.

If there is decline in the crime rate, the changes brought by the amendment with regard to the arrest may continue. If the moral standards are ascending, the changes may continue. If the nation is becoming corruption free, the changes may continue. If the corruption is being tackled the changes may continue. If the policeman is free from political nexus the changes may continue. If the public order and maintenance of law and order is not a priority of the Government the changes may continue. If the crime can be contained by adapting liberal approach the changes may continue.

If the answers for the above questions is 'nay' the Criminal Justice System is likely to crash, crumble and collapse. The victims would be the vast majority of have-nots. There cannot be a Black Box for detecting cause of the crash.

To sum up it has to be stated that the Criminal Justice System has been radically altered with regard to arrest of the persons who are considered to have committed cognizable cases punishable up to seven years. Rule of law is implicit in Indian Democratic Republic. Their Lordships of the Supreme Court and the Honorable High Courts have from time to time have checked the executive excesses and enforced fundamental rights. Rule of law implies that an administrative action has to be just, reasonable and fair. Though there is structural separation of powers in the doctrine of separation of powers, functional overlapping is always there. The doctrine of separation of powers, has given decision making power with regard to resolution of disputes and trial of cases to the Courts. Police Stations cannot be considered as hospitable places. The distinction between an Officer and a Gentleman always remains. It cannot be expected that common man will not suffer because of the arbitrary exercises of power. Arrest cannot be considered as a measure of punishment. However, it acts as a deterrence. Though arrested persons have to be considered as innocents, arriving at truth shall be the objective for Justice System. It is a duty of the King to safeguard the rights of the people and ensure public order and to maintain law and order. That duty has a religious basis. A system cannot come into existence out of vacuum. Criminal Justice System has got religious basis. The Criminal Justice System which has its objective as quest for truth and necessity to quell disorderly conduct is common to any political, social or religious system. A Criminal Justice System which has the moral strength and strength of law can be considered as an effective Criminal Justice System. If the Criminal Justice System collapses it not only affects individual family or society. It also affects future generations. India is a great nation where the democracy marches with pride. World Nations are looking towards India and the action of the Indian leaders. Indian people have to contribute not only intellectually but also spiritually in making political system and its competence worth its name. The law can be firm, yet it can show compassion. It has to be conceded that the amendments brought by the Act 5 of 2009 are within the legislative competence. We have to wait to see whether they infringe the rule of law and do not violate the doctrine of separation of powers. We have to wait and see whether they safeguard the

human rights of the people. We have to see if they safeguard, or protect the human rights uniformly or favour the haves and have-nots differently. We have to wait and see whether the changes brought about by Act 5 of 2009 to Sections 41 and 41A leads to arrest by consent or lead to arrest by class selection. The authors approach may not be correct. It is a view point or the perspective for discussion of the esteemed readers. There cannot be any difference of opinion that when untruth reigns the truth cannot triumph.

MINORITIES UNDER INDIAN CONSTITUTIONAL LAW

By
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The expression "minority" has been derived from the Latin word "minor" and suffix "ity" which means "small in numbers". In common parlance, the expression "minority" means a group comprising less than half of the population and differing from others, especially the predominant section, in race, religion, traditions and culture, language, *etc.*

According to *Encyclopaedia Britannica* minorities means *"group held together by ties of common decent, language or religious faith and feeling different in these respects from the inhabitant of a given political entity."*

The *Oxford Dictionary* defines 'Minority' a*s a smaller number or part; a number or part representing less than half of the whole; a relatively small group of people, differing from others in race, religion, language or political persuasion".*

The Constitution does not define the terms 'minority', nor does it lay down sufficient indicia to the test for determination of a group as minority.

The framers of the Indian Constitution made no efforts to bring it within the confines of a formulation. Even in the face of doubts being expressed over the advisability of leaving vague justiciable rights to undefined minorities, the members of the Constituent Assembly made no attempt to define the term while Article 23 of the Draft Constitution, corresponding to present Articles 29 and 30, was being debated, and, presumably left it to the wisdom of the Courts to supply the omission.

In *Re Kerala Education Bill* where the Supreme Court, through *S.R. Das*, CJ, suggesting the techniques of arithmetic tabulation held that *"minority means a "community" which numerically less than 50 present of total population"*

In *A.M. Patroni v. Kesavan*, a Division Bench of the Kerala High Court held that the word "Minority" is not defined in the Constitution, and in the absence of special definition, any community religious or linguistic – which is numerically less than 50 percent of the population of the State concerned, is entitled to fundamental right guaranteed by Article 30 of the Constitution.

In *D.A.V. College, Bhutinda v. State of Punjab and others*, the Supreme Court held that *"what constitute a linguistic or religious minority must be judge in relation to the State inasmuch as the impugned Act was a State Act and not in relation to whole of India".*

The *U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities* has defined minority as under:

① The term 'minority' includes only those non-documents group of the population