

# Communique

NEWS LETTER FOR PRIVATE CIRCULATION AMONG THE LEGAL FRATERNITY

Volume 7

September 1995

Part 6

## Out of Court Settlement Suggested

Justice A. M. Ahmadi, Chief Justice of India, suggested that international disputes relating to Commerce and Industry requires to be settled out of Court keeping in view the changed economic scenario. Inaugurating the 41st Conference of "The Asian Pacific League For Freedom and Democracy" in Bangalore on 27-8-95 Justice Ahmadi opined that there is need to repeal the Indian Arbitration Act, 1940 to keep pace with the changes in the economy. He said that "the time has come to take a hardlook at the Act and replace it with a comprehensive Legislation" and informed that efforts are already on in this direction and a draft bill is being prepared.

## Dharna Proposed

In a statement president of Tiptur Bar Association Mr. K. S. Sadashivaiah has threatened that members of the local Bar will be constrained to stage a dharna in front of the office of PWD if repair work of the Bar Association is not taken up immediately. According to Mr. Sadashivaiah the three decade old building is in a dilapidated condition and it might collapse any time.

## Campus Watch

United Nations High Commissioner for Refugees, Geneva and Director of NLSIU Dr. N. R. Madhava Menon signed a MOU in Bangalore on 29-7-95 as a consequence of which the National Law School will have a new discipline viz. Refugee Law from this academic year. UNHCR has provided 80,000 Dollars as assistance to the Law School in this regard.

## Jail Term for Top IAS Officer

In a significant Judgment delivered on 24, August 95 a Bench of Supreme Court comprising Justice K. Ramaswamy and Justice B. L. Hansaria awarded sentence of one months simple imprisonment to Mr. J. Vasudevan, Secretary, Housing and Urban Development Department, Government of Karnataka in a Contempt of Court proceeding. The petition was moved by Mr. T. R. Dhananjaya, who had earlier obtained an order from the Supreme Court during July 1993 to the effect that the post of Supernumery Engineer-in-Chief be created in Bangalore City Corporation, he be promoted to that post and all consequential benefits of such promotion be given to him.

The Judges felt that instead of permitting the Bangalore City Corporation to implement its resolution creating a supernumery post and promote Mr. Dhananjaya to the said post with all consequential benefits the Government made a volte face to see that the said resolution based on its order made in July 1993 is not given effect to. The Judges also observed that it was clear that instead of implementing its order an attempt was made by the Government to circumvent the order and deny the benefits to Mr. Dhananjaya.

A Review Petition filed by Mr. J. Vasudevan also came to be dismissed on 8-9-95 as having no merit. The Court felt that no leniency could be shown to the Contemner.

## Around the Courts

□ Indian penal Code, Section 375 and 376-Delay in complaint does not prove it false :

The Supreme Court (Chief Justice A. M. Ahmadi and Justice S. C. Sen) has ruled that delay in lodging complaint in a rape case does not necessarily indicate that a victim's version is false. Dismissing the Appeal of the Accused Karmel Singh against the Judgment of the Madhya Pradesh High Court the Judges said "merely because the complaint was lodged less than promptly does not raise the inference that the complaint was false. The reluctance to go to the police is because of society's attitude towards such woman; it casts doubt and shame upon her rather than comfort and sympathise with her.

Referring to the Appellant's contentions that there was considerable delay and sufficient time for tutoring and therefore the Complainant's evidence could not be believed the Judges said "there is no merit in this contention. The submission overlooks the fact that in India women are slow and hesitant to complain of such assaults." This judgment was delivered during the second week of August 1995.

□ Contempt of Court Act, 1971, Section 12-filing of fabricated documents into Court amounts to contempt of Court :

By its judgment dated 14-11-94 the Supreme Court Bench comprising Justice Kuldeep Singh and Justice B. L. Hansaria, ruled that production of forged and fabricated

documents into Court amounts to contempt of Court and sentenced one Mr. Anil Kumar to two weeks imprisonment for having filed a fabricated document to oppose the prayer of his wife seeking transfer of a matrimonial proceeding from Delhi to Unnao. In a suo motu contempt action the Court held that apparently production of the fabricated document was to deceive the Court and seriously affecting adversary's cause. The Court also held that it would have awarded a longer period of incarceration to Mr. Anil Kumar considering the gravity of contumacious act but for the fact that this was the first time in free India when it sent a person behind bars for such offence.

The Court observed that the stream of administration of justice has to remain unpolluted so that parity of Court's atmosphere may give vitality to all the organs of the State. Polluters of judicial firmament are, therefore, required to be well taken care of to maintain the sublimity of Courts environment; so also to enable it to administer justice and fair play to the satisfaction of all concerned. Any one who takes recourse to fraud, deflects the course of judicial proceeding; or if anything is done with oblique motive the same interferes with the administration of justice. Such persons are required to be properly dealt with, not only to punish them for the wrong done but also to deter others from indulging in similar acts which shake the faith of people in the system of administration of justice.

(continued on page 4)



The law will never make men free; it is men who have got to make the law free.

—Henry David Thoreau

## Act of Limiting Freedom of Speech

While hearing of a contempt petition against Shiv Sena Supremo Bal Thackeray on 7, August 95 a Division Bench of the Supreme Court headed by Justice J. S. Verma indicated that it proposes to lay down permissible limits within which freedom of speech and expression could be exercised by individuals and or organisations. It was pointed out by the Court that while clause 1 of Article 19 made this freedom absolute and unfettered clause 2 detailed reasonable restrictions that could be imposed on the exercise of this Fundamental Right. Further elaborating the matter the Court observed that "the time has come for this Court to lay down some inherent limitation in clause 1 itself so that something obnoxious which is not contemplated under the guaranteed freedom and content of clause 1 itself excludes such situations". Justice Verma also felt that the approach would have to be more Canadian or Australian oriented rather than the law in the United States, which only talks of an absolute right.

Commenting on the freedom of press Justice Verma said "The Court wants to draw a line regarding publication of defamatory statements as the press is only reproducing which someone has said. If the press reproduced an obnoxious statement and then gave its comments on that statement the thrust of such a news story would definitely be different. It would amount to a news report actually condemning someone for his obnoxious statement. The press which serves a larger public purpose has more leeway and the main thrust of such a news

item could change the course of an obnoxious statement."

It is now clear that Apex Court is intending to curtail the Fundamental Right of freedom of speech guaranteed under our Constitution by way of laying down permissible limits or what can be commonly termed as reasonable restrictions. The models of other Constitutions which are sought to be emulated also makes it abundantly clear that the kind of freedom of speech hitherto enjoyed by us may be drastically altered. There may be justifiable causes for such thinking. However, what should not be lost sight of is the fact that good lot of enlightened public debate should precede any such alteration so that all pros and cons of such change could be available to the concerned.

The concept of freedom of speech has no universally accepted definition. Besides it varies from country to country, society to society and situation to situation. Therefore, in the Indian context it is to be adjudged by the enlightened public opinion taking into account historical perspective, debates of Constituent Assembly, inadequacies or shortcomings of the existing Constitutional provisions, changes which have taken place in the Indian Society particularly after attainment of Independence, basic features of the Constitution and the present and future social needs of the Indian Society.

It is in this regard enlightened public opinion will have to be ascertained through free debates and deliberations conducted

(continued on page 4)

## A Constitutional Faux Pas ?

C. B. Srinivasan, Advocate

(continued from last issue)

a sensitive and suspect power to punish is vested in the prosecutor a law which makes it a crime to punish regardless of truth and public good and permits a process of brave man's conviction may unwittingly trench upon civil liberties and so the special jurisdiction and jurisprudence bearing on contempt power must be delineated with deliberation and operated with serious circumspection by the higher judicial echelons."

"In short, the accent is on the functional personality which is pivotal to securing justice to the people."

"We may now sum up, Judges and Courts have diverse duties. But functionally, historically and jurisprudentially, the value which is dear to the community and the function which deserves to be cordoned off from public molestation, is judicial. Vicious criticism of personal administrative act of Judges may indirectly mar their image and weaken the confidence of the public in the judiciary but the countervailing good, not merely of free speech but also of greater faith generated by exposure to the actinic light of bonafide, even if marginally over jealous, criticism cannot be overlooked. Justice is no cloistered virtue."

"Even so, if Judges have frailties.....after all they are human..... they need to be corrected by the independent criticism. If the judicature has serious shortcomings which demand systemic correction through socially oriented reform initiated through constructive criticism, the contempt power should not be an interdict. All this far from undermining the confidence of public in courts, enhances it and, in the last analysis, cannot be re-

pressed by indiscriminate resort to contempt power."

"The Court being the guardian of people's rights, it has been held repeatedly that the contempt jurisdiction should be exercised 'with scrupulous care and only when the case is clear and beyond reasonable doubt'."

"If Judges decay the contempt power will not save them and so the other side of the coin is that Judges, like Caesar's wife, must be above suspicion."

With these observations as the leading light, was it necessary at all for the Supreme Court to invoke the power under Art. 142 of the Constitution of India for the suspension of practice is the moot point?

### The Reddendo Singula Singulis :

With the phrases such as, 'in the interest of justice', 'in the interest of public service', 'for doing complete justice in any cause' or 'matter', this maxim has a pertinent observation. It says that where there are general words of description they are to be construed distributively. If the general words apply to something and not to others, the general words are to be applied to those things to which they will, and not to those to which they will not apply. A simple illustration says that when a sentence reads that any one shall draw or load any sword or gun, the word load to the word gun only. This is so because it is impossible to load a sword or draw a gun.

The phrase 'for doing complete justice in any cause or matter' must obviously refer to benevolent effect and not baneful consequences. Law has

(to be continued)



## Judiciary and Speedy Justice

Justice M. F. Saldanha

It is no doubt true the Judges have to interpret the law according to the words used by the legislature. But, as pointed out by Mr. Justice Holmes: "A word is not a crystal, transparent and unchanged. It is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used". It is for the Judge to give meaning to what the legislature has said and it is this process of interpretation which constitutes the most creative and thrilling function of the Judge. Plato posed the problem two thousand years ago. Is it more advantageous to be subject to the best men or the best law? He answered it by saying that laws are by definition general rules and generality falters before the complexities of life. Law's generality and rigidity are at best a makeshift far inferior to the discretion of the philosopher king whose pure wisdom would render real justice by giving each man his due. Aristotle was, however, in favour of the rule of law. He said "he who bids the law bids God and reason rule; but he who bids man rule adds an element of the beast, for desire is a wild beast and passion perverts the minds of rulers even though they be the best of men." The law is "reason unaffected by desire". It is intelligence without passion—the accumulated wisdom of the ages. Yet Aristotle knew with Plato that law cannot anticipate the endless combinations and permutations of circumstance and situation. There is bound to be a gap between the generations of law and the specifics of life. This gap in our system of administration of justice is filled by the Judge and in entrusting this task to the Judge, we have synthesized the wisdom of Plato Aristotle. It

is here that the Judge takes part in the process of law making—what Holmes J. called "interstitial legislation". It will be seen that the scientific and technological revolution, the new philosophy of a Welfare State and the revolution of rising expectations in which millions of human beings are involved and their clamour for a new social order have created an urgent need for fulfilling the task which Alexis de Tocqueville long ago foreseen when he wrote 'To create a more equal allotment of property and of rights throughout the world is the greatest task which confronts those who lead human affairs'. John Stuart Mill had also the vision to foresee the issues confronting our generation when he observed that the basic dilemma of the future would be how to unite the greatest individual liberty of action with common ownership in the raw materials of the globe and equal participation of all in the combined benefits of labour.

I do not agree with the conventional view which has long held the field in England that Judges merely declare the law; they are simply living oracles of law; they no more make or invest new law than Columbus made or invented America. Sir Frederic Pollock was manifestly right when he said that Judges do make or alter the law. Law-making is an inherent and inevitable part of the judicial process. Even where a Judge is concerned with interpretation of a statute, there is ample scope for him to develop and mould the law. It is he who infuses life and blood into the dry skeleton provided by the Legislature and creates a living organism appropriate and adequate to meet the needs of

(to be continued)

## Dissolution Unconstitutional

By a 49 page Judgment the Constitution Bench of the Supreme Court of Nepal [8:3] ruled that the dissolution of the Lower House of parliament of Nepal, the Prathinidhi Sabha, on June 13, 1995 and the proposed General Elections scheduled for November 23, 1995 as unconstitutional. The Apex Court also restored the Prathinidhi Sabha to its original status with a direction to the Speaker and Council of Ministers to convene the special session of the Parliament demanded by 70 members of the House in order to introduce a vote of no confidence against the ruling minority Communist government.

Chief Justice Bishwanath Upadhyaya, who is also a party to the majority verdict, said that the Prime Minister's recommendation for dissolving the Lower House of Parliament was faulty in that it sought to deprive the members of the House the exercise of their inalienable Constitutional right to bring forth a vote of no confidence against the government.

The landmark Judgment however absolved King Birendra, who ordered the dissolution saying that he was not responsible for the act since he was a Constitutional Monarch acting on the advice of his Prime Minister. Simultaneously the Court passed severe strictures against Prime Minister Adhikari for having made public privileged communication between the head of the state and the Head of the Government through which he had recommended for dissolution of the Prathinidhi Sabha. The Court noted that having released a copy of the communication to the press on June 9th Mr. Adhikari had denied outright having done so in his deposition to the Court in reply to the petitions challenging the dissolution of the House.

## Point Blank

□ These facts go to show that in a case where there are serious allegations against Advocates, Police officials, Notary public and Stamp Vendors for fabricating the document the matter is looked into in a casual way by the Investigating Officer.

—Addl. CMM, Bangalore while rejecting the 'B' Report submitted by the police in Varadammal's case.

□ Everybody is talking about all kinds of revolutions but nobody is talking about reservation revolution. Only a few hailing from urban areas have enjoyed the reservation benefits. The SC ST people in villages are living in precarious conditions and for them freedom has no meaning. Exclusion of the creamy layer from the pale of reservation would do much harm and injustice to the backward classes which had been subjected to suppression and oppression down the ages.

—Justice N. Y. Hanumanthappa while speaking at a seminar on "Reservation policy of India" organised by Karnataka Joint Committee of Backward Classes, Dalits and Minorities in Bangalore.

□ In some of the High Courts in the country there are still hundreds of cases of Pre-Independence era pending. Then where can you get justice?

—CEC Mr. T. N. Seshan while addressing a gathering at the third anniversary of swadharma, a voluntary social service organisation at Bangalore.

□ An interim application in a disposed off petition by a party which was not a party thereto cannot be entertained.

—A Division Bench of the Supreme Court while directing the CEC to forthwith convene a meeting of the Election Commission on the symbol dispute case between the Kerala Congress (Mani group) and Kerala Congress (Jacob group).

(continued on page 4).



## Act of Limiting Freedom of Speech

(continued from page 2)

in all parts of the country. Lawyers being in an advantageous situation in understanding and appreciating the concept should therefore be in the forefront of all such exercise. Role of Bar Associations and Bar Councils is of immense importance in this regard. All responsible citizens, persons belonging to other interest groups of the Indian society must also take such initiative in creating a positive outlook.

Best intentions, by themselves, cannot be the best guarantee about the Constitutional rights provided by the framers of Indian Constitution. Nobody should have a grouse against the possible changes that may be brought about by the new parameters to the Constitutional right of freedom of speech as and when such changes are brought about. The best way to ensure such safe guard is to forthwith start expressing our views on the concept and articulate a healthy and constructive public opinion. Are we ready to pick up the task?

### Point Blank

(continued from page 3)

□ Foreign Exchange Regulation Act (FERA) has not achieved its purpose but has spawned the biggest 'Hawala market' in the world.

—G. Chandra Mohan, Senior Advocate, while speaking at a recently held work shop organised by FKCCI.

□ Swamy : You are a criminal. Jethmalani : Shut up, you son of a criminal.

Swamy : Why Jayalalitha was colluding with the LTTE that is important.

Jethmalani : You are the LTTE.

—Exchange of recrimination between Dr. Subramaniam Swamy and Mr Jethmalani before Jain Commission of Enquiry.

## Around the Courts

(continued from page 1)

□ Conduct of Judges of the High Court, in-house Procedure is the remedy :

In a Judgment dated 5-9-95 the Supreme Court has given its approval to an "in-house procedure" to be adopted by the Chief Justice of India for initiating action against the Chief Justice or a Judge of the High Court whose conduct falls short of impeachment. In a 48 page Judgment Justice K. Ramaswamy and Justice B. L. Hansaria concerning A.M. Bhattarjee, a former Chief Justice of Bombay High Court observed that the "Yawning gap between proved mis behaviour and bad conduct inconsistent with the high office on the part of a non co-operating Judge or Chief Justice of a High Court could be disciplined by self regulation through in-house procedure. This in-house procedure would fill in the Constitution gap and would yield salutary effect."

### Obituary

□ On 5-9-95 R. Sridhar (37), Advocate S/o K R. Rajagopalan, Advocate, passed away at Bangalore.

□ On 9-9-95 H. Shanmukappa retired District Judge, passed away at Bangalore.

□ On 12-9-95 J. Jeshtmal, (58), Advocate, passed away at Bangalore.

### News Focus

□ On 11-7-95 Justice S. Mohan, Former Supreme Court Judge, addressed the members of AAB, High Court Unit on the topic "Challenges to Legal Profession".

□ On 16-8-95 AAB had organised an open house session on working of Telephones in Bangalore. Mr. J. Ramanujam, General Manager, Bangalore Telecom District, inaugurated the session.

## Seminar on Judicial Reforms

Report : T. S. Mahanthesh

Former Chief Justice of India Mr. M. N. Venkatachalaiah inaugurated the seminar on Judicial Reforms jointly organised by the Karnataka State Bar Council and the National Law School of India at Bangalore on 9-9-95. In his speech Justice Venkatachalaiah advocated for prescription of entrance test to enter the Bar. He strongly recommended the setting up of Criminal Injuries Compensation Board for victims of homicide apart from encouraging out of Court settlement of cases.

Governor Khurshed Alam Khan who presided over the inaugural function opined that procedural delays will have to be reduced to benefit the poor. Justice M. L. Pendse, the Chief Justice of Karnataka, who was the Chief Guest of the function, announced that the State Government has accepted his recommendation to set up a Judicial Academy to train Judicial Officers. Chairman of the State Bar Council Mr. Mohan Shantana Goudar welcomed the participants.

After the inaugural session there were two working sessions to discuss "what the profession can do towards Judicial Reforms?" and "What the business community and the Government can do towards Judicial Reforms?" Former Judges, a sitting Judge, a Judicial Officer, a law student, Managing Director of a Company, Advocate General, a large number of Advocates participated in these sessions.

Justice S. Rajendra Babu delivered the valedictory address. This function was presided over by Sri Nanaiah, Karnataka Law Minister. Sri K. N. Subba Reddy welcomed the gathering. Dr. N. R. Madhav Menon, Director of National Law School of India gave a resume of the deliberations, resolutions adopted and the recommendations made by the seminar.

## ಲಿಟರರಿ ಯೂನಿಯನ್

ಜಿ|| ತಾ|| 17-8-95ರಂದು ಕನ್ನಡ ಮತ್ತು ಸಂಸ್ಕೃತಿ ವಿಭಾಗದ ಮಂತ್ರಿಗಳಾದ ಶ್ರೀಮತಿ ಬಿ. ಟಿ. ಲಲಿತ ನಾಯಕರವರು "ಕರ್ನಾಟಕದಲ್ಲಿ ಕಲೆ ಮತ್ತು ಸಾಹಿತ್ಯ ಬೆಳೆದು ಬಂದ ದಾರಿ ಮತ್ತು ಸರ್ಕಾರದ ಪಾತ್ರ" ಎಂಬ ವಿಷಯದ ಬಗ್ಗೆ ಭಾಷಣ ಮಾಡಿದರು. ಈ ಸಮಾರಂಭದ ಅಧ್ಯಕ್ಷತೆಯನ್ನು ಭಾರತ ಸರ್ಕಾರದ ಹೆಚ್ಚುವರಿ ಸಾಲಿಸಿಟರ್ ಜೆನರಲ್ ಶ್ರೀ ಎ. ಎನ್. ಜಯರಾಮ್‌ರವರು ವಹಿಸಿದ್ದರು.

ಜಿ|| ತಾ|| 28-8-95 ರಂದು ಸರ್ಕಾರಿ ಕಲಾ ವಿದ್ಯಾಲಯದ ಪ್ರಾಧ್ಯಾಪಕರಾದ ಡಾ|| ಸಿ. ಓಂ ಕಾರಪ್ಪರವರು "ಭಗವದ್ಗೀತೆ- ಒಂದು ವಿಶ್ಲೇಷಣೆ" ಎಂಬ ವಿಷಯದ ಬಗ್ಗೆ ಮಾತನಾಡಿದರು. ಶ್ರೀ ಕೆ.ಎನ್. ಮನಮೋಹನ್‌ರವರು ಕಾರ್ಯಕ್ರಮದ ಅಧ್ಯಕ್ಷತೆ ವಹಿಸಿದ್ದರು.

ಜಿ|| ತಾ|| 10-9-95ರಂದು ಲಿಟರರಿ ಯೂನಿಯನ್ ಏರ್ಪಡಿಸಿದ್ದ ಪ್ರವಾಸ ಕಾರ್ಯಕ್ರಮದಲ್ಲಿ 20 ಜನ ಭಾಗವಹಿಸಿದ್ದು ಶಿವನಸಮುದ್ರ, ಸೋಮನಾಥ ಪುರ ಹಾಗೂ ಕೃಷ್ಣರಾಜಸಾಗರಕ್ಕೆ ಭೇಟಿ ಕೊಟ್ಟರು.

## ಗಣೇಶೋತ್ಸವಗಳು

ಜಿ|| ಯುವನಾಮ ಸಂವತ್ಸರದ ಗಣೇಶೋತ್ಸವ ಉಚ್ಛ್ರಾಂತಿಯ ವಿಭಾಗದಲ್ಲಿ ತಾ|| 29-8-95ರಂದು ಆರಂಭವಾಗಿ ತಾ|| 3-9-95ರವರೆಗೂ ವಿಜೃಂಭಣೆಯಿಂದ ನೆರವೇರಿತು. ಎಂದಿನಂತೆ ಅನೂಚಿತವಾಗಿ ನಡೆದು ಬರುತ್ತಿರುವ ಈ ಉತ್ಸವ ವಕೀಲ ಮಿತ್ರರಾದ ಮಹಂತೇಶ್ ಹೊಸಮಠರವರಪರಿಶ್ರಮದ ಫಲವೇ ಆಗಿದೆಯೆಂದು ಪ್ರತ್ಯೇಕವಾಗಿ ಹೇಳುವ ಅವಶ್ಯಕತೆ ಉದ್ಭವಿಸುವುದಿಲ್ಲ.

ಜಿ|| ವಕೀಲರ ಸಂಘದ ನಗರ ಘಟಕದಲ್ಲಿ ಕೂಡ ಈ ವರ್ಷದ ಗಣೇಶೋತ್ಸವವನ್ನು ತಾ|| 30-8-95ರಂದು ಆಚರಿಸಲ್ಪಟ್ಟಿತು.

ಜಿ|| ವಕೀಲರ ಸಂಘದ ಮ್ಯಾಜಿಸ್ಟ್ರೇಟ್ ಕೋರ್ಟ್ ಘಟಕದಲ್ಲೂ ಸಹ ಗಣೇಶೋತ್ಸವ ವಿಜೃಂಭಣೆಯಿಂದ ಆಚರಿಸಲ್ಪಟ್ಟಿತು.

ಜಿ|| ನ್ಯಾಯವಾದಿ ಗುಮಾಸ್ತರುಗಳ ಸಂಘ [ಹೈ ಕೋರ್ಟ್ ಘಟಕ] ಹಾಗೂ [ನಗರ ಘಟಕ] ಗಳ ಆಶ್ರಯದಲ್ಲಿ ಈ ವರ್ಷವೂ ಸಹ ಗಣೇಶೋತ್ಸವ ಉತ್ಸಾಹದಿಂದ ಆಚರಿಸಲ್ಪಟ್ಟಿತು.