THE W.B. NATIONAL UNIVERSITY
OF JURIDICIAL SCIENCES, KOLKATA

Tenth Durga Das Basu Memorial Lecture

Saturday, the 11th February 2017

Uniform Law regulating the Constitution and Organization

Of High Courts Necessary

By

JUSTICE DR. M. RAMA JOIS
Former Chief Justice of Punjab and Haryana High Court
Former Governor of Jharkhand and Bihar
Former Member of Parliament, Rajya Sabha
I feel greatly honoured by the invitation extended to me by the W.B. National University of Juridical Sciences to deliver the 10th Durga Das Basu Memorial Lecture. The earlier lectures delivered by eminent jurists such as Fali S. Nariman, K.K. Venugopal, Padma Vibhushan Justice M.N. Venkatachalaiah, former Chief Justice of India, with whom I had the opportunity of sitting in the Division Bench in the High Court of Karnataka for over two years on the most important topics of Constitution and Constitutionalism have been furnished to me. By a reading of these lectures, I have been greatly benefitted. I was given the choice to select any subject for the 10th Durga Das Basu Memorial Lecture. Having regard to the fact that though the Constitution of Bharat which is the longest and well drafted Constitution in the World vide at Entry 78 of the Union List in the 7th Schedule to the Constitution, specified the subject **Constitution and Organization of the High Courts** on which the Parliament alone is competent to enact a law but no such law so far has been enacted and as a result, there have been divergent practices and procedures in different High Courts, I considered it appropriate and necessary to deliver the 10th Durga Das Basu Memorial Lecture on the topic of **Uniform Law regulating the Constitution and Organization of High Courts necessary.**

Mahabharata the ancient and exhaustive epic of Bharat has the following Samskrit Sloka:

```
क्रेश्च पुरुषyo जायते मानव मृत्युः।
पितृदेववर्मनसेवसे मेघाश्च श्रमित।
यज्ञस्य देवान्त प्रीणाति स्वायत्तस्य लक्ष्मी।
पुल: श्राहँस्य: पितृविभाष्य आनुसारश्चेत्तमानवम्।
```

Every individual should discharge four pious obligations. They are Devaruna (towards God), Pitruruna (towards parents), Rishiruna (towards teachers) and Manavaruna (towards humanity).

A man should discharge Pitruruna by maintaining continuity of the family, Devaruna by worship of God, **Rishiruna by the acquisition and dissemination of knowledge, and Manavaruna by rendering every type of social service.** [Mahabharata 120-17-20] [Courts of India, p28]

Durga Das Basu a great constitutional lawyer and also has been an eminent judge of the High Court and an unparalalled scholar in jurisprudence authored several monumental works such as “Introduction to the Constitution of India, Bharat Ka Samvidhan: Ek Parichay” (Hindi), Comparative Constitutional Law, Workbook on
Constitution of India, Introduction to the Constitution of India [Tamil Translation], Introduction to the Constitution of India [Bengali Translation], Introduction to the Constitution of India Paperback edition 2011, Constitutional Law of India 2008, Human Rights in Constitutional Law, Essence of Hinduism, Shorter Constitution of India, Uniform Civil Code which is essential for National unity and integration and who has delivered innumerable lectures on matters of National interest, he has discharged all the four pious obligations in abundant measure. He is a great rishi in the real sense of the word. His contribution is enormous in the field of public law and jurisprudence which is difficult for an ordinary human being to make during his life time. He has become Immortal by his contribution. His son Dr. Sharadendra Babu along with other members of his family has found an endowment in the West Bengal National University of Juridical Sciences. It is under this endowment, the 10th Durga Das Basu Memorial Lecture is being held. I consider myself fortunate for having got the opportunity to offer my obeisance to that great soul at this University by delivering the 10th Durga Das Basu Memorial Lecture. I express my sincere thanks and gratitude to the University and to its Vice Chancellor, Professor Dr. Ishwar Bhat for extending this privilege and golden opportunity to me.

SALIENT ASPECTS OF BHARATIYA LEGAL, JUDICIAL AND CONSTITUTIONAL SYSTEM

Before explaining with reasons for the necessity of a Uniform Law regulating the Constitution and Organization of High Courts, I consider it appropriate to trace the history of our legal, judicial and constitutional system since approximately five thousand years to wit from the time of Mahabharata and refer to the salient and relevant aspects of our ancient system.
Ours is the most ancient Nation, which had evolved and developed the oldest legal, judicial and constitutional system in the World to wit Vyavahara Dharma and Raja Dharma. Fundamental duties of the State [rajya] headed by a King, Raja Dharma which is equal to our present Constitution is very meaningfully incorporated in Atrisamhita-28 thus:-

To punish the wicked, to honour (protect) the good, to enrich the treasury by just methods, to be impartial towards the litigants and to protect the kingdom - these are the five yajnas (selfless duties) to be performed by a king [State].

Administration of State according to law including judicial system [Raja Dharma] was one of the most important and obligatory functions of a King [State]. The ancient text on the topic stressed that the very object with which the institution of ‘Kingship’ was conceived and brought into existence was for the enforcement of Dharma by the use of the might of the King [State] and also to punish individuals for contravention of Dharma and to give protection and relief to those who were subjected to injury and in whose favour Dharma [law] lay. The smritis greatly emphasized that it was the responsibility of the King to protect the people through proper and impartial administration of justice and that alone could bring peace, happiness and prosperity to the King as well to the people. Any indifference towards this important function of the king, the Smritis cautioned, would bring calamity to the State and to the King himself and to the people as well.

Ancient Indian rulers bestowed great attention in evolving a sound administrative system and constitution of legal, judicial and constitutional
system and administration of justice. The provisions made on the topic including institution of kingship, council of ministers, the description of the highest court to be located at the capital city, of lower courts under royal authority, and of people’s courts recognised as having the power to decide cases. The qualifications of as well as quality of judges and other officers of the Court were prescribed. Appointment of experts as assessors to assist the court on technical questions, whenever necessary, was provided for. Law of procedure and of evidence were laid down. A code of conduct for judges and others concerned in the administration of justice and provisions for punishment of officers committing offences in the course of the administration of justice, had also been provided. After making a detailed survey of the Hindu judicial system and the historical evidence available, Sir S. Varadachariar concludes:

“Whenever and wherever and so far as circumstances permitted, attempts were all along being made in Hindu India to administer justice broadly on the lines indicated in the law books”. [Hindu Judicial System – S. Varada Chariar]

The elaborate provisions made on the topic are indicative of a fairly well developed system of administration of justice.

In the meandering course of our long history, running to several centuries, firstly by Hindu kings thereafter by Muslim rulers and thereafter the British rulers had introduced their own administrative System. Particularly, the latter introduced Anglo-Saxon jurisprudence which we had immediately prior to our acquiring independence on 15th August 1947. On becoming a free Nation, it was essential that in all spheres of National activity, we should have restored and incorporated principles and doctrines of eternal value evolved in this Country from ancient times which would have made our Constitutional, Legal and Judicial
System qualitatively distinct and superior. In fact, Mahatma Gandhiji pleaded for Swadeshi concept in that after securing political independence, every sphere of National activity must be swadeshi oriented. In this regard he had said:

“It seems to me that before we can appreciate Swaraj, we should have not only love but passion for Swadeshi, every one of our acts should bear the **Swadeshi stamp**. Swaraj can only be built upon the assumption that the most of what is national is on the whole sound”. [My Picture of Free India]  

But unfortunately, we failed to do so. On the other hand, there has been greater tendency to import more and more western concepts and life style. We have not made necessary changes in judicial, educational and administrative system etc., so as to bring about a qualitative changes in conformity with our requirement. This is the main cause for most of our social and economic and political problems.

The plea that we should incorporate our concepts in the sphere of judicial, constitutional and legal system, does not mean that we should not enrich our knowledge by the legal, judicial and constitutional system of other countries. In fact from ancient times our slogan has been:-

`Aano bhadra krtavo yantu viśvato.`

*Aano bhadra krtavo yantu vishwatoh* (Rg Veda 1.1.89:1)

“Let noble thoughts come to us from every side”. [Rigveda 1-879-i].

Therefore, we always welcomed thoughts and principles which enrich our knowledge and strengthen our social and national life. But at the same time, our legal, judicial and constitutional system must be rooted in the basic concepts evolved in this land from times immemorial.
Justice S.S. Dhavan, a former Judge of Allahabad High Court in his enlightening paper entitled “WHY STUDY INDIAN JURISPRUDENCE AT ALL” [1966] has forcefully brought forth this aspect. I consider it appropriate to quote what he has stated on this aspect. The relevant portion of the article reads:-

I consider that the teaching of Indian jurisprudence in our law faculties is essential for the healthy development of our judicial process ………. Today, a law student in India is virtually ignorant of Indian jurisprudence. He does not know as I did not know – that the Indian Juridical system and the Indian judiciary have the oldest pedigree of any existing judicial system in the World, that the “dharmasthiyam” part of Kautilya's Arthasastra is, in the words of present Chief Justice of India, “one of the earliest secular codes of law in the World”, and the high level at which legal and judicial principles were discussed, the precision with which statements of law are made, and the absolutely secular atmosphere which it breathes throughout, give it a place of pride in the history of legal literature”. [Excerpts from the paper presented by him on “Secularism: its implication for law and life in India at a Symposium organized by the Indian Law Institute, New Delhi in November 1965].

Similarly, for historical reasons, I like others did not know anything about the existence of an established legal, judicial and constitutional system in Bharat. It is only after I became a Professor in Law at BMS Law College, Bangalure in 1969 at the instance of E.S. Venkataramaiah, who was then the Principal of that Private Law College, who later became a High Court Judge and also the Chief Justice of India, I became aware of the vastness of our ancient legal, judicial and constitutional system. Under the inspiration and guidance of E.S. Venkataramaiah, I authored a book titled “Legal and Constitutional History of India” with the subsidy by National Book Trust. It was published by N.M. Tripathi Pvt. Ltd., Bombay and subsequently by M/s Universal Law Publishing Co. Pvt. Ltd., Delhi. It has undergone as many as seven editions so far. This book incorporated the salient features of our substantive as well as procedural law. Bar
Council of India made it a subject for study in all law colleges in the Country. It gives a detailed account of our substantive as well as procedural law to wit Vyavahara Dharma including Raja Dharma the Constitutional Law of Bharat. Salient aspects of that subject are indicated in this chapter.

**Meaning of Vyavahara:**

Vyavahara means proceedings in a court of law between two parties in which the violation of Dharma is established by effort. From very ancient times the disputes or laws have been arranged under eighteen topics.

1. Runadana - payment of debts
2. Nikshepa - Deposits
3. Aswamy Vikraya - sale without ownership
4. Sambhhyam Samuthana - Joint undertakings [partnership]
5. Dattasyanapakarma - Resumption of gift
6. Vetanadana - payment of wages
7. Samvidvyatikrama - Violation of convention of guilds and corporations
8. Krayavikrayanusaya - sale and purchase
9. Swamipala Vivada - disputes between master and servant
10. Sivavivada - Boundary dispute
11. Vakparushya - Defamation
12. Dandaparushya - Assault

[Manu Smriti VIII-4-7]
13. Steya – Theft
14. Sahasa – Offence by violence
15. Strisangrahana – Adultery
16. Stripumdharma – Duties of husband and wife
17. Vibhaga – Partition
18. Dyutasamahvaya – Betting and gambling

[Legal and Constitutional History of India, page 67] [Courts of India, page 40].

**Origin of Vyavahara:-**

The coming into existence of legal proceeding has been explained here:

“When men conducted themselves entirely according to Dharma and were truthful there was no proceeding at law, no hatred, no jealousy. It is when Dharma declined from among men that a legal proceeding relating to payment of debt and various types of other disputes started and the king has been appointed to decide law suits. Vyavahara Dharma was invented to protect people and to ensure rule of Dharma (law). [Narada Smriti P 5, 1-2, Dharmakosa, pp 3-4]. [Courts of India, p-40]

For purpose of this Lecture, I am confining only to the salient aspects of administration of justice at the highest level.

**Excellent guidance for an ideal judiciary in ancient Bharatiya Legal, Judicial and Constitutional System:-**
**Qualification and appointment of Judges:**

“A person who is (i) well versed in Vyavahara [laws regulating judicial proceedings] and Dharma [law on all topics], (ii) a Bahushruta [profound scholar] (iii) a Pramanajna [well versed in the law of evidence], (iv) Nyayasastravalambinah [law abiding] and (v) has fully studied the vedas and Tarka [logic] should be appointed to carry on the administration of justice. [Mahabharata Shanti Parva 24-18]. [Courts of India, p-40].

This provision in Mahabharata prescribed the qualification as also the qualities of persons to be appointed as judges. The provisions in Narada Smriti and Katyayana Smriti were similar [See Legal and Constitutional History of India]. At present, the qualification/eligibility of person to be appointed as judges are laid down in the Constitution and the law should be adhered to in the light of ancient texts referred to above.

In Rajadharma, the king was advised to appoint suitable persons as judges, indicating therein the qualities and the qualification of a person to be appointed as a judge. They are:

“Let the king appoint, as members of the Court of Justice, honourable men of tried integrity [sabhāyas] who are able to bear the burden of the administration of justice and who are well versed in the sacred laws, rules of prudence, who are noble and impartial
Katyayana Smriti had a few more criteria to indicate the suitability of persons to be appointed as Judges.

(i) For deciding disputes, the King should appoint as a Judge one who is not cruel, who is sweet tempered, kind, clever and energetic but not greedy.
(ii) One who has studied only a single branch of learning would not know how to decide all cases. Therefore, the king should appoint as a judge one who knows many Sastras.

**Sukraniti:**

“Those who are well versed in the arts of polities, have intelligence and are men of good deeds, habits and attributes, who are impartial to friends and foes alike, religious-minded and truthful, who are not slothful, who have conquered the passions of anger, just and cupidity, who are gentle in speech and old in age should be made members of Council irrespective of caste”.

**King to decide cases according to law [dharma sastras] and opinion of judges:**

“The King should try cases with great care, according to law and in due order adhering to the opinion of the Chief Justice.

Unanimous decision by all the judges leaves no room for doubt while a majority decision leaves doubt in the minds of litigants. [Narada Smriti vide Dharmakosha p. 48] [Courts of India p-39]

This is a very salutary provision. It emphasizes the importance and efficacy of unanimous judgment as distinct from decision by majority. It is needless to stress about the desirability of an unanimous judgment. In the present context it applies to High Courts and the Supreme Court, where cases are heard by benches comprising of three or more judges. Therefore, a provision for delivering one unanimous judgment is laudable. However, if it is not possible, in any case, at least one majority judgment should be delivered to avoid confusion as also waste of time in reading several judgments while relying on them before the Courts.

The important guidance here is that when more than three judges hear a case, even if there was no unanimity among them, there should be only one majority judgment and there should be no multiplicity of judgments. This is a very wholesome principle worthy to be followed even at present instead of writing multiplicity of judgments as it has happened in several cases.

Open and fair trial:-
(i) The King should try law suits assisted by the Chief Justice, Amatya, Brahmanas and Purohitas, desisting from greed and anger, and adhering strictly to the Dharmasastras.

(ii) The King should never try cases or hear the parties (when he is) alone

(iii) Neither the King nor the judges should conduct the trial in secret. [Courts of India p-41]

**Judgment should be free from bias:**

There are five causes which give rise to the charge of partiality [against the judge]. They are: [i] Raga [affection in favour of a party] [ii] Lobha [greed], [iii] Bhaya [fear], [iv] Dvesha [ill-will against a party]; and [v] Vadinoscha Rahashrutihi [the judge meeting and hearing a party to a case secretly]. [Sukraniti IV-5-14-15].

The above rules covered all the aspects of a fair trial known to modern jurisprudence. Public and open trial was meant to ensure free and fair trial and to infuse confidence in the people about it. Hearing of both the parties openly and in the presence of each other satisfied the requirement of natural justice, which is a basic ingredient of fairness in procedure. The king was asked to take the assistance of the Chief Justice and other judges. Pitamaha stressed that even if one was well versed in the Dharmasastras, it was not proper for one to try cases single handed. The king and the judges were required to avoid all the five vitiating or doubt creating circumstances set out in the rule, as the existence of
even one of them would create an impression in the minds of litigants and the public that the judgment may not be correct or is not likely to be impartial. The rule impressed that the conduct of a judge must be such as to earn him total confidence of all the right minded persons. It is the same principle as was expressed by Lord Denning, M.R., when he said, “Justice is rooted in confidence; and confidence is destroyed when right minded people go away thinking ‘the judge was biased’. In other words, the rules required that the trial should be conducted in such a manner as to indicate that ‘justice is not only done, but is seemed to have been done’, which is the basis of the modern concept of free and fair trial.

**There should be no delay in examining the witnesses:**

“The king should not delay in hearing cases and examining the witnesses. A serious defect, namely, miscarriage of justice, would result owing to delay in examination of witnesses. [Katyayana-339-340]. [Courts of India, p-40]

**Contents of judgment:**

“A document which incorporates the contents of the plaint, the answer, the gist of the trial, the consideration given to them and the decision thereon, is called Jayapatra. [Narada Smriti-307-19; Dharmakosa-357].
King to impose penalty impartially:

"In criminal cases, the ruler should not leave an offender unpunished, whether the guilty is father, or a teacher, or a friend, or mother, or wife, or a son, or a domestic priest. If the guilty are not punished there will be no rule of law."  [Manu Smriti VIII-335]

Dharmadhikarana (Hall of Justice)

The Court hall was called Dharmadhikarana (Hall of Justice). The Smritis prescribed that a spacious hall in the palace should be reserved for holding the King’s court. Brihaspati p. 279-18 states that the court hall should be on the eastern side of the palace, facing east. Trees should be grown in the premises and water should be made available in the vicinity. It should be equipped with the required number of seats, decorated with flowers and jewels, and pictures and idols of deities should be displayed on the walls.

The place where the truth (in a dispute) is investigated according to the Dharmasastras is called Dharmadhikarana (Hall of Justice).
**Responsibilities of king as the highest court:**

The Smritis emphasized the necessity of the king himself taking the responsibility for the administration of justice. As far as the king’s Court is concerned, any person could approach the king for justice either by way of an original petition or by way of appeal against the decisions given by the lower courts. Except when it was unavoidable, owing to preoccupation with other weighty business of the State or for similar valid reasons, the king himself was required to preside over the highest court at the capital and to dispense justice according to law.

"The King should try cases with great care, according to law and in due order adhering to the opinion of the Chief Justice. [Narada Smriti, page 1-35, 24-74, Smriti Chandrika p 66 and 89]

"As an experienced surgeon extracts a dart from the body of a person by means of surgical instruments, even so the Chief Justice must extract the dart of inequity from a law suit through his sharp intellect and wise discretion.

**Charter of equality in the Vedas:**
Charter of equality [Samanata] is found incorporated in the Rigveda, the most ancient of the Vedas, and also in the Atharvaveda.

No one is superior (ajyestaso) or inferior (akanishtasa). All are brothers (ete bhrataraha). All should strive for the interest of all and should progress collectively. (sowbhagaya sam va vridhuhu). [Rigveda Mandala-5, Sukta-60, Mantra-5].

Article 1 of the Universal Declaration of human rights reads thus:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Let there be oneness in your resolutions, hearts and minds. Let the strength to live with mutual co-operation be firm in you all. [RIGVEDA – MANDALA – 10, SUKTA-191, MANTRA-4].

All have equal rights to articles of food and water. The yoke of the chariot of life is placed equally on the shoulders of all. All should live together in harmony supporting one another like the spokes of a wheel of the chariot connecting its rim and the hub. [ATHARVANAVEDA – SAMJNANA SUKTA] [Courts of India, p-24].

RAJADHARMA THE PARAMOUNT DHARMA
I will now declare Rajadharma, the law to be observed by kings, how kingship was created, how a king should conduct himself and how he can obtain the highest success. [Manu Smriti, VII-1]

Simultaneously with the bringing into existence of Rajya and the institution of kingship its founders felt the necessity to define its structure, the powers and duties of the king and the liability of the people to contribute a part of their income by way of taxes, which should be placed in the hands of the king for purposes of the defence of the realm and to maintain peace, safety and order in society and also to undertake various welfare measures for the benefit of the people. The necessity was met by making provisions for regulating the constitution and organization of the state, specifying the power and duties of the king and all other officers of the State and incidental provisions and treating these provisions also as part of Dharma under the title "Rajadharma" (law governing kings). In the Dharmasastras and Smritis, Rajadharma is dwelt upon as a topic separate and independent from civil, criminal and procedural law. In view of the great importance of the topic of Rajadharma, several eminent writers wrote independent treatises on it under various titles such as Rajanitisara, Dandaniti, Nitisara and it is also dealt with as part of Arthasastra. The monumental work Arthasastra is by Kautilya [300 BC] who was the Prime Minister of Magadha Empire which had its capital at Patalipura (modern Patna, in the State of Bihar). P. V: Kane refers to the other extensive literature available on the subject. The important ones are the Mahabharata - Shanti Parva, Manu Smriti Ch. VII and IX, Kamandaka Nitisara, Manasollasa of Someswsara, Yuktikalpataru of Bhoja, Rajaniti Ratnakara of Chandeswara, Rajaniti Prakasha of Mitramisra and Dandaniti of Keshava Pandita. The system of government envisaged by all the works on Rajadharma was the Rajya (the State) headed by a king. The provisions in the Dharmasastras, Smritis and other works on the topic mentioned above, covered varieties of subjects such as the constitution and organization of the Rajya, Kingship, the manner of assuming office by the king (coronation), the code of conduct for the kings, the succession of
kingship, the education of young princes, the appointment of council of ministers, the chief justice and other judges of the highest court, the administrative divisions, and the powers and duties of the king.

The propounders of Dharmasastra declared that the power of the king (State) was absolutely necessary to maintain the society in a state of Dharma which was essential for the fulfillment of Artha and Kama. Rajadharma which laid down the Dharma of the king, was paramount:

“All Dharmas are merged in Rajadharma, and it is therefore the supreme Dharma”. [Mahabharata Shanti Parva 63, 24-25]

This declaration indicates that Raja Dharma is equal to present day Constitutional Law and supremacy of the Constitution.

“Dharma” whole and soul of our National Life.

From times immemorial, Dharma was accorded the highest position in Bharat in order to ensure and protect right to happiness of all which is a comprehensive basic human right for happy and peaceful living of all human beings. ‘Dharma’ meant righteous code of conduct prescribed for all human beings to be observed in all spheres of human activity without any exception.

Basic aspects of ‘Dharma:-
Truthfulness, to be free from anger, sharing wealth with others, (samvibhaga) forgiveness, procreation of children from one's wife alone [sexual morality], purity, absence of enmity, straightforwardness and maintaining persons dependent on oneself are the nine rules of the Dharma of persons belonging to all the varnas. (M.B. Shantiparva 6-7-8). [Courts of India, p-3]

A reading of each one of the above rules at once makes an individual realize what he should do and what he should not do. The observance of the above rules alone secures real happiness and harmony in life.

Manu Smriti is more concise and brought 'Dharma' under five heads.

Ahimsa (non-violence), Satya (truthfulness), Asteya (not acquiring illegitimate wealth), Shoucham (purity), and Indriyanigraha (control of senses) are, in brief, the common Dharma for all the varnas. [Manu Smriti X-163]. [Courts of India, p-31].

Observance of Dharma was regarded as a must for peaceful co-existence of all. The necessity of scrupulous practice of Dharma is forcefully expressed in Manu Smriti.

Dharma protects those who protect it. Those who destroy Dharma get destroyed. Therefore, Dharma should not be destroyed
so that we may not be destroyed as a consequence thereof. [Manu VIII-15]

The principle laid down in this saying is of the utmost importance and significance. In the above very short saying, the entire concept of Rule of Law is incorporated. The meaning it conveys is that an orderly society would be in existence if everyone acts according to Dharma and thereby protects Dharma, and such an orderly society which would be an incarnation of Dharma, in turn, protects the rights of individuals. Rules of Dharma were meant to regulate the individual conduct, in such a way as to restrict the rights, liberty, interest and desires of an individual as regards all matters to the extent necessary in the interest of other individuals, i.e., the society and at the same time making it obligatory for the society to safeguard and protect an individual in all respects through its social and political institutions. Briefly put, Dharma regulated the mutual obligations of the individual and the society. Therefore, it was stressed that protection of Dharma was in the interest of both the individual and the society. Manu Smriti warns; Do not destroy Dharma, so that you may not be destroyed. A 'State of Dharma' was required to be always maintained for peaceful co-existence, happiness and prosperity of all.

An analysis of all the rules of 'Dharma' would show that, valuable human rights had been identified and recognized in Bharat from times immemorial and duty was cast on the State as also on specified individuals to protect such human rights. It also shows that these values included several human rights now incorporated in the Universal Declaration of Human Rights, and the corresponding Fundamental Rights incorporated in Part-III of the Constitution of India. This aspect is pointed out by the Supreme Court of India in the case of Maneka Gandhi Vs. Union of India [1978 (1) SCC 248] thus:-
"These fundamental rights represent the basic values cherished by the people of this Country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent". [p-277 - Bhagawati. J]

Supremacy of Dharma:

After declaring that Kshatra power [i.e., the king] was created by the creator, Brihadaranyakopanishat proceeds to state, finding that the mere creation of kingship was not enough, the most excellent Dharma [law] a power superior to that of the king, was created to enable the king to protect the people, and gives the definition of law [Dharma] as follows:-

The law (Dharma) is the king of kings No one is superior to the law (Dharma) ; The law (Dharma) aided by the power of the king enables the weak to prevail over the strong. [Brihadaranyakopanishad 1-4-14] [Courts of India, p-27]

Commenting on the above provision. Dr. S. Radhakrishnan observes:

“Even kings are subordinate to Dharma, to the Rule of Law”.
[Prinipal Upanishad P-170]
There is hardly an individual in this world, who on his own, is pure in his conduct.

King’s (sovereign’s) power to punish, keeps the people in righteous path. Fear of punishment (by the king) only yields worldly happiness and enjoyment. [Manu Smriti, VII-22]

The most ancient and perhaps the earliest definition of law given in the Upanishad brings forth the essential aspects of the word ‘law’ as defined in the modern jurisprudence. The law, according to western jurisprudence is an imperative command which is enforced by some superior power or sovereign. The superior power which serves as an instrument of coercion for the enforcement of law is called the ‘sanction’.

According to Austin, the law consists of the general command issued by the State to its subjects and enforced if necessary by the physical power of the State. Therefore, declaration of law by a political superior or sovereign (the King) and the availability of the power of the state machinery for the enforcement of that law are stated to be the essential requisites of an imperative law. The law as defined in the Upanishad also meant that it was enforceable against individuals with the aid of the physical power of the king as is made clear from the statement, ‘The law aided by the power of the king enables the weak to prevail over the strong’. The power of the king constituted the instrument of coercion. This aspect is forcefully put by Manu Smriti VII-22 supra. However, one of the most distinguishing aspects as between the concept of the law as defined in the western jurisprudence and that as defined in Dharmasastras is, whereas the imperative command of the king constituted the law according to the
former, under the concept of Dharma, the law was a command even to the king and was superior to the king. This meaning is brought out by the expression 'the law is the king of kings'. The doctrine 'the king can do no wrong' was never accepted in our ancient constitutional system. Another aspect discernible from the definition of 'law' given in the Brihadarayaka Upanishat and accepted in the Dharmasastras is, that the law and the king derive their strength and vitality from each other. It was impressed that the king remained powerful if he observed the law and the efficacy of the law also depended on the manner in which the king functioned, because it was he who was responsible for its enforcement. There was also a specific provision which made it clear to the king that if he was to be respected by the people, he was bound to act in accordance with the law. Thus the first and foremost duty of the king as laid down under Rajadharma was to rule his kingdom in accordance with the law, so that the law reigned supreme and could control all human actions so as to keep them within the bounds of the law. Though Dharma was made enforceable by the political sovereign -the king, it was considered and recognised as superior to and binding on the sovereign himself. Thus under our ancient constitutional law (Rajadharma) kings were given the position of the penultimate authority functioning within the four corners of Dharma, the ultimate authority. The king was only the Chief Magistrate of the realm but was never considered as the source of law.

Dharma as Secularism par Excellence:

Dharma is many times misinterpreted or misunderstood as Religion. There is a world of difference between Dharma and Religion. Whereas Dharma is a righteous code of conduct to be followed by all individual human beings irrespective of their religion to which they belong to, Religion means mode of
worship of God by believers belonging to various religions who believe in existence of God. The Right to practice one’s religion was recognized in Raja Dharma as is evidenced from the following verse in Narada Smriti. [Dharmokosha P-870]

पाण्डवनैगमक्षेणीपूर्णातगणादिषु।
संक्षेपत्तमयं राजा दुर्गे जनपदे तथा॥

The king should afford protection to compacts of associations of believers of Veda (Naigamas) as also of disbelievers in Veda (Pashandis) and of others. [Courts of India, p-34]

In Bharat where Vedas were held supreme, disbelievers in Vedas were also directed to be protected in the same manner in which the believers in Vedas were being protected, which establishes that under Raja Dharma [ancient Indian constitutional law] “DHARMA HAS BEEN SECULARISM-PAR-EXCELLENCE” and was an element of its basic structure. In other words, just as Rule of Law and arbitrariness are regarded as sworn enemies, in modern law Raja Dharma and theocracy or fundamentalism were sworn enemies. Therefore the expression ‘Dharma Rajya’ in ancient Indian Constitutional vocabulary meant Rule of Law and not Rule of Religion. Just as darkness cannot exist where light exists, fundamentalism cannot exist where DHARMA exists.

It is for this reason that our Constitution confers the Fundamental Right to all to practice any religion of their choice. Article 25 reads:

“Article 25: Freedom of conscience and free profession, practice and propagation of religion:

[1] Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of
conscience and the right freely to profess, practice and propagate religion”.

Thus “Dharma” is the soul of Bharatiya National Life and is secular in that secularism is inherent part of Dharma.

**Right to Happiness**

The natural desire of all human beings is to be happy at every stage of and in every aspect of life. It is a natural human right, for without happiness life becomes meaningless. Therefore, the right of every individual to happiness has been recognized in the Bharatiya culture since ancient times. This being the most important and comprehensive human right, it includes every kind of right, the fulfillment of which leads to happiness. An individual has the capacity to fulfill his desires by his efforts and thereby secure happiness for himself, for members of his family and for fellow human beings.

Our ancient philosophers and thinkers found that man’s desire [kama] is also influenced by other impulses inherent in human nature such as anger [krodha], passion [moha], greed [lobha], infatuation [mada], and enmity [matsarya]. These six natural impulses were considered to be man’s six enemies [arishadvarga], which, if allowed to act uncontrolled, could instigate him to entertain evil thoughts in the mind for fulfilling his own selfish desires and for that purpose cause injury to others. It is a matter of common knowledge and experience that for committing such wrongful acts, the mind acts as the instigator.

**DOCTRINE OF TRIVARGA:**

The Doctrine of Trivarga comprising “Dharma”, “Artha”, and “Kama” was evolved as the sum and substance of Bharatiya philosophy of life. The doctrine was invented to strike a reasonable balance between interests of the individual and the public interest, which means, the interests of all individuals who constitute society or the Nation and even the entire humanity. The object was to
secure and protect the Right to Happiness through the supremacy of Dharma - over Artha [wealth], desires for securing material pleasure and Kama [every type of desire including the desire for securing wealth and every type of pleasure]. It offers an invaluable and everlasting solution for all the problems of human beings for all times to come, irrespective of their belonging or not belonging to any religion, society or Nation and gave the following mandate:

\[ भिन्न जीवनकामोऽधिकारी यो स्यातां धर्मवर्जितो। \]

The desire [kama] and material wealth [artha] must be rejected, if they are contrary to Dharma. [Manu Smriti IV 176] [Courts of India, p-25]

This doctrine means that proper and legitimate means of acquisition of Artha i.e., material wealth and pleasure must regulate the desire [Kama] as well as the means of acquiring material pleasure [Artha]. This fundamental principle manifests itself through various provisions meant to sustain the life of the individual and the Society it is for this reason, that all the works on ‘Dharma’ declare with one voice that ‘Trivarga’ sustains the World. They are:

**In Ramayana**

\[ त्रिवर्गं फलभोक्ता तु। राजा धर्मेण युज्यते।। \]

The essence of Rajadharma is the Ruler must conform to rule of Trivarga( Ramayana 38- 23)

**In Mahabharata:**

\[ धर्मार्थकामः सम्मेव सेवा स उत्तमो योभिष्ठः त्रिवर्गः। \]

“Dharma, Artha and Kama [Trivarga] should be fulfilled together harmoniously. [Shanti Parva 167-40].
**InKAUTILYA Arthasastra**

सामं वा त्रिवर्ग सेवेत।

The Trivarga (Dharma, Artha and Kama) should be obeyed together.

**Barhaspatya Sutra- II-43:**

वीते: फलं धर्मार्थकामावापि: ॥

The goal of polity (Rajaniti) is the fulfillment of Dharma, Artha and Kama.

**In Kamandaka Niti**

गृहीतमेत्रनिर्गुणेऽन्य विन्नणा त्रिवर्गानिष्पतिनिश्चितेति शाश्वतीम्॥

The state administered with the assistance of sagacious ministers secures the three goals (Trivarga) in an enduring manner.

**Somadeva:**

“अथ धर्मार्थकाम फलाय राज्याय नमः”

I salute the State which brings about fulfillment of Dharma, Artha and Kama. [Nitivakyamrita]

Bharat Ratna C. Subramanyam on Trivarga said thus:- “Indian philosophy refers to Dharma, Artha and Kama as TRIVARGA, the inseparable group of three, treats them as the warp and woof of ordered human society.

Justice V.R. Krishna Iyer in his Foreword to my book “Trivarga” has eulogized Trivarga in his inimitable language thus:-

"Reject wealth (artha) and desires (kama) which are contrary to Dharma (righteous code of conduct)" namely “Ahimsa (non-
violence), Satya (truthfulness), Asteya (not acquiring illegitimate wealth), Shaucham (purity) and Indriyanigraha (control of senses) are, in brief, the common dharma for all the varnas.

The trinity of fundamentals – Dharma, Artha, Kama – which constitutes the constellation is collectively expressed as Trivarga.

The glorious epics, the Manusmriti, Kautilya's Artha Shastra and other classics governed the ruler and the ruled. Indeed, the rules of Dharma govern every sphere of activity, every profession, every avocation. **The doctrine of Trivarga is an enduring system of values holding good in the social, political domestic and international planes of human business.**

The scope and meaning as also the role of Dharma in securing and preserving the right to happiness of all has been vividly explained by Justice K. Ramaswamy, speaking for the Supreme Court of India in his judgment in case of A.S. Narayana Dixitulu Vs. State of Andhra Pradesh [1996 (9) SCC 548] has quoted my view with approval.

“The concept of ‘dharma’ has been explained by Justice M. Rama Jois in his Legal and Constitution History of India (Vol. I), at pp 1 to 4 quoting the following verse from Mahabharata:-

धारणाद धर्माभ्यासाः धार्मिकता ।
यतः सर्वदा धारणसंयुक्त स धर्मानिनिष्ठ्यः ॥

Dharmasustains the society
Dharma maintains the social order
Dharma ensures well being and progress of Humanity
Dharma is surely that which fulfills these objectives
[KarnaParva Ch. 69, Verse-58]
Dharma embraces every type of righteous conduct covering every aspect of life essential for the sustenance and welfare of the individual and the society. [para 60]

“The word Dharma or Hindu Dharma denotes upholding, supporting, nourishing that which upholds, nourishes or supports the stability of the society, maintaining social order and general well-being and progress of mankind; whatever conduces to the fulfillment of these objects is Dharma; it is Hindu dharma. [para 79]. [Courts of India, p-25].

“Dharma” or rules of righteous conduct was evolved to secure Right to Happiness for all without any exception. The idea, that for the good or happiness of a greater number, unhappiness or misery could be inflicted on a smaller number, was never accepted in Bharatiya culture and civilization. Instead, the “right to happiness” of every human being was laid down as an ideal. The ideal that all should enjoy peace and happiness is implicit in this prayer

Let all be happy, let all be free from diseases, let all see auspicious things and let nobody suffer from grief.

The universal happiness to be the essence of our National life is evidenced by the fact that this Shloka is inscribed in golden letters on the gate of Samsad Bhavan.

Discourse on “Dharma” in Mahabharata indeed discloses that even before the origin of the State, in the hoary past there existed an ideal
Stateless society where the human rights of every individual were protected by others conforming to Dharma as is clear from the following:

There was neither kingdom nor the king, neither punishment nor the guilty to be punished. People were acting according to Dharma and thereby protecting one another. [M.B. Shanti Parva Ch. 59-14]

After the coming into existence of State and Kingship, Kautilya's Arthasastra, which incorporated “Raja Dharma”, the constitutional law of ancient Bharat written around 300 BC, also laid due emphasis on the right to happiness of all individuals and the duty of the King (Ruler) to protect that Right in the following verse:

In the happiness of the subjects lies the king's happiness, in their welfare his welfare; what pleases himself the king shall not consider good but whatever pleases his subjects the king shall consider good.

The king [the State] was required to conform to the above rule of Raja Dharma and act only in the interests of the people and not according to his likes or dislikes or whims and fancies. He was directed not to act capriciously or arbitrarily. His interests and the interests of the citizens were inseparable. What was good for the people was to be regarded good for the Ruler irrespective of any disadvantage or inconvenience caused to him. Every Prince, before assuming office as King, was required to take an oath that he would rule the kingdom
strictly in accordance with Dharma. Thus, Raja Dharma made it the obligatory function of every Ruler [State] to secure Right to Happiness for all the citizens.

The form of oath prescribed in the Schedule-III of the Constitution of Bharat for Ministers and judges of Supreme Court and High Courts is substantially similar. This shloka is also inscribed in golden letters on the dome near lift No. 6.

The spirit of Dharma as man’s abiding nature was being inculcated in the hearts of every individual since inception of this philosophy. It was part of compulsory education prescribed for the Princes who would become Rulers. It was made the ultimate authority. The Rulers were given the position of penultimate authority, functioning within the four corners of “Raja Dharma”, the supreme authority which guided and regulated the exercise of their powers.

The right to happiness is a compendious expression covering all specific human rights intended to secure happiness. That is why the ideal and slogan ‘लोकः समस्ता सुखिनो भवनु’ that is Let all people be happy” became an article of faith in our social and constitutional system, comprising various specific human rights, the protection of which leads to happiness.

This being a comprehensive human right merits to be included in the Universal Declaration of Human Rights made by the United Nations on 10th December 1948.

**DUTY BASED SOCIETY - GUARANTEE FOR HUMAN RIGHTS**
The unique method evolved by the great thinkers who moulded the civilization and culture of this land was to secure the rights to every individuals by creating a corresponding duty in other individuals. This was for the reason that they considered that sense of right always emanates from selfishness whereas the sense of duty always proceeds from selflessness. Therefore, various kinds of rights evolved became values of Bharatiya culture which were based on the duty of every individual towards other individuals. For example, the duty of parents towards their children, and the duty of sons and/or daughters, as the case may be, to maintain their parents in old age, and the duty of teachers towards their students, the duty of students towards their teachers, the duty of every individual in a family towards other individuals in the family and other members of the concerned human society, the duty of the State towards citizens, the duty of the citizens towards the State were all created to protect the basic human rights. The creation of a duty in one individual necessarily resulted in the creation of a right in the other individual and in the protection of such a right.

Therefore, instead of making right as the foundation of social life and establishing a right based society, the ancient philosophers of this land preferred to establish a duty-based society, where the right given to an individual is the right to perform his duty. This fundamental approach to life has been clearly laid down and understood in the entire ancient literature. To illustrate, in Vishnupurana, there is a complete chapter devoted to defining the territorial boundaries as well as the basic philosophy of this Country. The importance given to duty in this land is emphasised in one of the verses therein, which reads:

\[ \text{अत्रापि भारत श्रेष्ठ जन्मृतीपे महामुने ।} \\
\text{यतो हि कर्ममूर्तेः ततोहन्या भोगमूर्त्याः।} \]

Among the various countries, Bharat is regarded as great because this is the land of duty in contradistinction to others which are lands of enjoyment, i.e., based on rights. [Courts of India, p-27].
Mahatma Gandhi eulogized this idealism in the following words:

“India is to me the dearest country in the world, not because it is my country but because I have discovered the greatest goodness in it. Everything in India attracts me. It has everything that human being with the highest possible aspirations can want.

India is essentially Karmabhumi [land of duty] in contradistinction to Bhogabhumi [land of enjoyment].” [My Picture of Free India, P-1].

What is the significance? The answer is extremely important. According to the culture evolved in this land, every one owes a duty towards others and by this method, the right of an individual was made part of the duty of other individuals.

It is significant to note that an eminent Western Jurist Duguit [1859-1928] a Professor of Constitutional Law in the University of Bordeaux too propounded the theory that for peace and happiness of human beings, it is necessary to establish a duty based society, in these words:

"The core of the law lies in duty, which is the means of securing that each one fulfils his part in the furtherance of social solidarity. The only right which any man can possess is the right always to do his duty. What are commonly called rights are only incidental to the relations with other people which arise in the course of performing one's social duty. The reality is thus not the right, but the duty" [Jurisprudence – R.W.M. Dias].

He disagreed with the view which stressed on the rights without reference to the duties. His view is similar to the one which made duty as the basis of the rights in this land. It is this basic value of life, evolved through Vedic and other literature, which is incorporated in the most popular and significant declaration in the Bhagvadgeeta (Ch-II) which reads:
"Your right [Adhikara] is to perform your duty"

The great message of this verse is that every one owes a duty towards others in that he has the right to perform his duty. It is by this process that human rights were sought to be created and protected. To illustrate, the right to education as well as the right to impart education is based on the basic duty or the pious obligation of an individual to discharge "Rishiruna" by the acquisition and dissemination of knowledge. Similarly, the duty to protect the citizens, the duty to treat all equally without discrimination, the duty to afford protection to all religions, the duty to protect women and children who had none to protect, the duty to secure impartial justice were all laid on the State. They were all intended to declare and protect the valuable human rights of every individual.

This basic value, which establishes our national identity and distinction, had been overlooked. As a result, only fundamental rights had been included in Part-III of the Constitution of India. But fundamental duties were not incorporated in the Constitution. This, in fact, has been, over the years, the root cause of our several national problems because it replaced the sense of duty by mere consciousness of the right. Developing the sense of duty in every individual from childhood, through proper education, and by personal example of parents and teachers and social and political leaders is of utmost importance and a greater and better guarantee for the protection of human rights and indeed a panacea for many of our social, political and economic problems by establishing a duty based society on the other to ensure human rights for every individual.
This lapse was realized and the Constitution was amended and article 51-A was inserted into the Constitution by the 42\textsuperscript{nd} Amendment Act with effect from 31-3-1977. It reads:

51A. Fundamental Duties: It shall be the duty of every citizen of India:

(a) to abide by the Constitution and respect its ideals and institutions, the National flag and the National Anthem;
(b) to cherish and follow the noble ideals which inspired our national struggle for freedom;
(c) to uphold and protect the sovereignty, unity and integrity of India;
(d) to defend the Country and render national service when called upon to do so;
(e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;
(f) to value and preserve the rich heritage of our composite culture;
(g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;
(h) to develop the scientific temper, humanism and the spirit of inquiry and reform;
(i) to safeguard public property and to abjure violence;
(j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.
(k) Who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.

The ideals incorporated in the Preamble to the Constitution of Bharat as also in our National anthem are to the same effect.

With this preface I proceed to expound the subject for today's topic of the Lecture.

\textbf{Enacting a uniform law regulating the Constitution, Organization and}
general Jurisdiction of all the High Courts and Necessity of modifying the jurisdiction of the Supreme Court:-

The founding fathers of the Constitution incorporated Article 32 in the Constitution as part of the fundamental right. This article is declared by Dr. Ambedkar as the most important article of the Constitution. under the said Article, a person can move the highest Court directly without approaching any other Court for enforcement of fundamental rights. This is an extremely good and beneficial provision and the most important aspect of Indian constitution. Having done so, the founding fathers also considered that there should be a provision for appeal to the highest court against the orders of the High Courts on grant of certificate by the High Court.

[1] In respect of matters involving interpretation of provisions of the Constitution vide Article 132

[2] In cases involving questions of law of general importance, which in the opinion of the High Court requires to be decided by the Supreme Court vide Article 133 and

[3] In respect of criminal matters as provided in Article 134.

Apart from the above provisions, founding fathers also incorporated Article 136 to approach the Supreme Court in appeal by seeking its special leave against the orders made by any Court or Tribunal in the territory of India.

But having regard to the vastness of the Country and population, the experience during the last more than five decades regarding the jurisdiction under Article 136 has been that it is highly expensive even at the admission stage and more so thereafter, if notice is ordered and/or leave is granted. As the remedy of filing Special Leave Petition is available, large number of Special Leave
Petitions are being filed by the litigants to take a chance even in respect of ordinary civil and criminal matters. But in practical terms statistics show that only in a few Special Leave Petitions, notices are issued or leave is granted. Large number of Special Leave Petitions, probably 80 to 85 percent are rejected at the admission stage itself. As a result, while it has become a matter of taking chance for the parties at heavy cost as described in a judgment that it has only become lawyers paradise being an inexhaustive source of income to them and also heavy burden for the litigants and heavy work load on the Supreme Court, which is coming in the way of disposal of important matters involving questions of interpretation of the provisions of the Constitution and other matters of great importance, which are pending for five to ten years or even more.

Therefore, it is in National interest, not only to give finality to the decisions/orders of the High Court but also to reduce the work load on the Supreme Court under Article 136 and enable it to devote more time on important matters and giving finality to the decision of the High Courts.

For this reason I as a Member of Parliament [Rajya Sabha] had introduced a Private Member’s Bill for amending Article 136 as follows:-

(1A) Nothing in clause (1) shall apply to any judgment, decree or order of any Court or Tribunal unless the case involves:

(a) a question of law as to the interpretation of the provisions of the Constitution or of the Central Law and/or a question as to the Constitutional validity of State or Central law; or

(b) any question of general importance which in the opinion of the Supreme Court needs to be decided by it.

Explanation:- In this Article the expression ‘Law’ shall mean and include any law made by the Parliament or any State Legislature or any rule or order made thereunder or any order issued by or on behalf of the Central or any State
Governments having the force of law; [pages 222 to 226 of my book Our Parliament]

In the Private Member’s bill I had also proposed for reconstitution of the High Courts after abolishing what are called letters patent appeals which came into existence during the British period which provided for an appeal in ordinary civil and criminal matters from the decision of the single Judge of the High Court to the Division Bench of the same High Court, as a result, there has been differences in original and appellate jurisdiction of the High Courts. They are:-

[1] Some have original, civil jurisdiction, others do not,

[2] There exists letters patent appeals, from the decision of the High Court to the same High Court i.e., from the decision rendered by a single judge of a High Court to two judges of the same Court in some of the High Courts, which are called intra-court appeals.

[3] This is opposed to the very concept of appeal which means approaching a superior Court against the decision of the lower Courts. The Supreme Court in the case of Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatraya Bapat - AIR 1970 SC Page-1 has clearly stated what does an appeal means thus:

“The right of appeal is one of entering a superior court and invoking its aid and interposition to redress the error of the Court below. Two things which are required to constitute appellate jurisdiction are the existence of the relation of superior and inferior Court and the power on the part of the former to review decisions of the latter”.

On this aspect we have the earliest dissenting judgment by Justice Subodhnanjan Das Gupta reported in AIR 1953 Cal. 433, disagreeing with the majority and holding that there can be no appeal against the judgment of a single judge under Article 226 of the Constitution as single judge of High Court is no inferior court.
Similarly, as far as letters patent appeals or appeal from the decision of single judge to two other judges of the same High Court, created by State Legislation as it has happened in Karnataka and Kerala, the very condition precedent namely existence of relationship of superior and inferior courts is absent. Still, it is going on.

[b] Under the scheme of the Constitution, an appeal lies only to the Supreme Court from the decision of the High Court. Division Bench of a High Court is not a Court superior to the High Court just because the power is exercised by a single Judge.

[c] Taking inspiration from the provisions for letters patent appeal, even some State Legislatures have proceeded to provide appeal to two judges from the decision of the single Judge, which is devoid of Legislative competence.

There can be no doubt that provision for filing the Special Leave Petition to the Supreme Court under Article 136 should be continued, but it should be restricted in respect of matters raising questions of constitutional validity of Central or State Laws, interpretation of Constitution and of Central Law and also in respect of matters of National importance, which in the opinion of the Supreme Court requires to be decided by it is necessary. This can be done either by parliamentary legislation or the Supreme Court itself by making such a declaration under Article 141. Such steps on the one hand reduces the heavy burden of innumerable Special Leave Petitions in ordinary civil and criminal matters on the Supreme Court and on the other hand keeps the power and jurisdiction of the Supreme Court very wide enabling it to devote their time and energy which is being spent on hearing innumerable Special Leave Petitions most of which are dismissed at the admission stage or after ordering notice to the respondents or even without notice in cases where there is no substance.

Part-VI of the Constitution provides for formation of States and Chapter-V of
Part-VI provides for establishment of High Courts in the States. Relevant Articles are:

214. **High Courts for States:** There shall be a High Court for each State.

215. **High Courts to be courts of record:** Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.

216. **Constitution of High Courts:** Every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint.

225. **Jurisdiction of existing High Courts:** Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution:

226. **Power of High Courts to issue certain writs:**

(1) Notwithstanding anything in article 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32.
227. **Power of superintendence over all courts by the High Court:** (1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

(2) Without prejudice to the generality of the foregoing provision, the High Court may— (a) call for returns from such courts; (b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and (c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

The aforesaid specific matters relating to the High Courts in the States have been incorporated in the Constitution itself.

Under the scheme of the Constitution, the legislative power on the topic of the constitution and organization of the High Courts is conferred on the Parliament vide entry-78 of the Union List. Article 246 of the Constitution reads:

246. Subject matter of laws made by Parliament and by the Legislatures of States : (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the “Union List“).

In view of clause 1 of Article 246 read with entry 78 of the Union List, a common law ought to have been enacted by the Parliament regulating the Constitution and Organization of all the High Courts. Though 67 years are over since the constitution came into force, no such law has been made. The resultant position is some of the High Courts are still functioning under the letters patents issued more than a century before by the British Government [Emperor] and some new High Courts have inherited the jurisdiction of the erstwhile High Courts given to them under the letters patent issued by British
Crown and the jurisdiction and powers of a few other High Courts is regulated by laws made by the Parliament in exercise of its powers under Articles 3 and 4 of the Constitution relating to reorganization of States and in some cases States Legislatures have proceeded to make laws to regulate the constitution and organization of the High Courts though it is within the legislative power of the Union Legislature.

The position therefore is as follows:-

Chartered High Courts have Original Civil Jurisdiction, others do not have it.

Even regarding exercise of the extraordinary jurisdiction under Article 226 there has been no uniformity, in that:

(a) in some High Courts writ jurisdiction is exercised by Division Bench of two judges.
(b) In some High Courts writ petitions are being entertained by Division Bench and thereafter referred to single Judge.
(c) In some High Courts single Judges entertain writ petition and thereafter refer to Division Bench.
(d) In some High Courts Division Benches entertain appeal against the decision of High Courts rendered by a single Judge following the pattern of Letters Patent Appeals though under the Constitution High Court is one and no appeal is feasible or possible against the High Court itself calling them as “INTRA COURT APPEALS” though as stated by the Supreme Court in AIR 1970 SC page 1, the very concept of appeal means an appeal from a lower court to a higher court and single Judge of a High Court is also High Court and not a court lower to Division Bench. Therefore, the term intra court appeal is a contradiction in terms.
No original jurisdiction except in six High Courts:

Another most important aspect to be taken note of is that out of the 24 High Courts established in different States, only six High Courts have got original civil jurisdiction. They are: High Court of Calcutta, Bombay, Madras, Delhi, Jammu and Kashmir and Himachal Pradesh.

Therefore, the question whether the original jurisdiction of the High Courts should be continued or abolished has been the subject matter of consideration by Justice Satish Chandra [Chief Justice of Allahabad High Court] Committee who gave its report in 1986 recommending that ordinary civil jurisdiction of the High Courts should be abolished and that the original civil suits pending before some of the High Courts must be transferred to the City Civil Courts or the District Judge's Court having unlimited pecuniary jurisdiction. Government of India accepted the Justice Satish Chandra Committee report which is extracted in Justice Malimath Committee report, which reads:-

"Government of India, Ministry of Home Affairs (Department of Justice), addressed a communication to the Registrars of High Courts (D.O. No. 35/2/86-Jus(M) dated October 5, 1988) enclosing a summary of recommendations of the Satish Chandra Committee as accepted by the Government of India. Accordingly, the Government of India have accepted the following, amongst others, recommendations of the said Committee.

Ordinary Original Civil Jurisdiction of High Courts:

(i) The Ordinary Original Civil Jurisdiction of the High Court of Delhi, Himachal Pradesh and Jammu & Kashmir be abolished forthwith.
(ii) The City Civil Courts in the three Presidency Towns be vested with unlimited pecuniary jurisdiction for civil work
(iii) All the cases pending in the Ordinary Original Civil Jurisdiction of the High Courts be forthwith transferred to the Courts below".
The same matter was again considered by Justice Malimath [Chief Justice of Karnataka and Kerala High Court] Committee comprising of three senior Chief Justices.

The Committee agreed with the recommendations of the Satish Chandra Committee that original civil jurisdiction of some of the High Courts should be abolished.

In accordance with the above recommendations of Justice Satish Chandra Committee report, by Maharashtra Act 15 of 1987, original civil jurisdiction of the Bombay High Court was abolished. By a separate legislation, unlimited pecuniary civil jurisdiction was vested in the City Civil Courts. The constitutional validity of the said law has been upheld by the Hon'ble Supreme Court by a five judge bench in Jamshed N. Guzdar Vs. State of Maharashtra and Ors. - 2005 (2) SCC 591.

In order to ensure uniformity in all the High Courts, the Justice Malimath Committee recommended that the following enactments should be passed by the Parliament.

(1) Prescribing for the abolition of an Appeal to a Division Bench of the High Court against the decision or order rendered by a Single Judge of the High Court in a proceeding under article 226 or article 227 of the Constitution; and

(2) conferment of power on the High Courts in the matter of deciding which category of cases under article 226 and 227 of the Constitution should be heard by a Single Judge or a Division Bench, as the case may be.”

Another important para in Justice Malimath Committee report regarding the enormous increase in the pendency of the cases which should be taken into account.
“Hasty and imperfect legislation without adequate investigative exercise on the part of the Executive regarding the real need for the enactment or such law or a proper public debate and institutional consultation with expert bodies, professional association etc., results in more institution of cases in the High Courts.”

High courts under the Government of India Act and their continuance under the Constitution:

The High Court established for each State or group of States, in relation to that territory, constitutes the highest court of civil and criminal appeal, reference and revision and is also invested with extraordinary original jurisdiction to issue prerogative writs for enforcement of rights given to individuals under the Constitution and the laws. At the time of commencement of the Constitution, for historical reasons, the States were categorised as part ‘A’, ‘B’ and ‘C’ States. At that time, there were nine part ‘A’ States, eight part ‘B’ States and 10 part ‘C’ States. Clause (1) of Article 214 of the Constitution of India provided for the establishment of a High Court for each State. Clause (2) of the same Article provided that the High Court exercising jurisdiction in relation to any province before the commencement of the Constitution shall be deemed to be the High Court for the corresponding State. By virtue of this clause at the commencement of the Constitution, the following High Courts became the High Courts of the corresponding part-A States under the Constitution.

[2] Patna High Court for the State of Bihar
[3] Orissa High Court for the State of Orissa
[4] Bombay High Court for the State of Bombay
[5] Nagpur High Court for the State of Madhya Pradesh


[7] Punjab High Court for the State of Punjab

[8] Allahabad High Court for the United Province, later called Uttar Pradesh


By virtue of Article 238(12) read with Article 214(2) of the Constitution, the highest court functioning in each of the Part-B States prior to their merger in the Union of India, became the High Court established for the respective part ‘B’ State under the Constitution. Similarly, there were courts of Judicial Commissioners for part ‘C’ States, at Ajmer, Bhopal, Kutch and Vindhya Pradesh. They were all declared to be the High Courts for the purposes of the constitution under Section 305 of the Judicial Commissioner’s Courts (Declaration as High Courts) Act XV 1950. These Courts were abolished under Section 50(1) of the States Reorganization Act, 1956, with the reorganization of States, with effect from 1st November 1956, when New High Courts came to be established for each of the corresponding new State.

Union territory of Delhi which occupies an unique and vital position, being the capital city of India, was earlier placed under the jurisdiction of the Punjab High Courts. Later a separate High Court was established for this union territory. There were also courts of Judicial Commissioners for the Union territories of Himachal Pradesh, Manipur and Tripura. Himachal Pradesh was brought under the jurisdiction of the Delhi High Court, until a separate High Court for Himachal Pradesh was established, Manipur and Tripura were brought under the jurisdiction of the Gauhati High Court.
As a result of the Reorganization of States through various enactments, enacted by the Parliament and regulations made as empowered, by Articles 3 and 4 and other Articles of the Constitution, the latest position regarding the number of High Courts, their territorial jurisdiction and the provision of law under which they came into existence are as mentioned in the table below:

<table>
<thead>
<tr>
<th>Court name</th>
<th>Established</th>
<th>Act established</th>
<th>Jurisdiction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allahabad High Court</td>
<td>11 June 1866</td>
<td>Indian High Courts Act 1861</td>
<td>Uttar Pradesh, Allahabad</td>
</tr>
<tr>
<td>Madras High Court</td>
<td>15 August 1862</td>
<td>Indian High Courts Act 1861</td>
<td>Puducherry, Tamil Nadu, Chennai</td>
</tr>
<tr>
<td>Chhattisgarh High Court</td>
<td>1 November 2000</td>
<td>Madhya Pradesh Reorganisation Act, 2000</td>
<td>Chhattisgarh, Bilaspur</td>
</tr>
<tr>
<td>Delhi High Court</td>
<td>31 October 1966</td>
<td>Delhi High Court Act, 1966</td>
<td>National Capital Territory of Delhi, New Delhi</td>
</tr>
<tr>
<td>Gauhati High Court</td>
<td>1 March 1948</td>
<td>Government of India Act, 1935</td>
<td>Arunachal Pradesh, Assam, Mizoram, Nagaland, Guwahati</td>
</tr>
<tr>
<td>Gujarat High Court</td>
<td>1 May 1960</td>
<td>Bombay Reorganisation Act, 1960</td>
<td>Gujarat, Ahmedabad</td>
</tr>
<tr>
<td>Court name</td>
<td>Established</td>
<td>Act established</td>
<td>Jurisdiction</td>
</tr>
<tr>
<td>----------------------------------</td>
<td>-------------------</td>
<td>------------------------------------------------------</td>
<td>---------------------------------------------------</td>
</tr>
<tr>
<td>High Court of Judicature at Hyderabad</td>
<td>5 July 1954</td>
<td>Andhra State Act, 1953</td>
<td>Andhra Pradesh, Telangana, Hyderabad</td>
</tr>
<tr>
<td>Himachal Pradesh High Court</td>
<td>1971</td>
<td>State of Himachal Pradesh Act, 1970</td>
<td>Himachal Pradesh, Shimla</td>
</tr>
<tr>
<td>Jharkhand High Court</td>
<td>15 November 2000</td>
<td>Bihar Reorganisation Act, 2000</td>
<td>Jharkhand, Ranchi</td>
</tr>
<tr>
<td>Karnataka High Court</td>
<td>1884</td>
<td>Mysore High Court Act, 1884</td>
<td>Karnataka, Bengaluru</td>
</tr>
<tr>
<td>Kerala High Court</td>
<td>1956</td>
<td>States Reorganisation Act, 1956</td>
<td>Kerala, Lakshadweep, Kochi</td>
</tr>
<tr>
<td>Kolkata High Court</td>
<td>2 July 1862</td>
<td>Indian High Courts Act 1861</td>
<td>Andaman and Nicobar Islands, West Bengal, Kolkata</td>
</tr>
<tr>
<td>Madhya Pradesh High Court</td>
<td>2 January 1936</td>
<td>Government of India Act, 1935</td>
<td>Madhya Pradesh, Jabalpur</td>
</tr>
<tr>
<td>Manipur High Court</td>
<td>25 March 2013</td>
<td>North-Eastern Areas (Reorganisation) and Other Related Laws (Amendment) Act, 2012</td>
<td>Manipur, Imphal</td>
</tr>
<tr>
<td>Court name</td>
<td>Established</td>
<td>Act established</td>
<td>Jurisdiction</td>
</tr>
<tr>
<td>----------------------------------</td>
<td>---------------</td>
<td>---------------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Meghalaya High Court</td>
<td>23 March 2013</td>
<td>North-Eastern Areas (Reorganisation) and Other Related Laws (Amendment) Act, 2012</td>
<td>Meghalaya, Shillong</td>
</tr>
<tr>
<td>Mumbai High Court</td>
<td>14 August 1862</td>
<td>Indian High Courts Act 1861</td>
<td>Goa, Dadra and Nagar Haveli, Daman and Diu, Maharashtra, Mumbai</td>
</tr>
<tr>
<td>Odisha High Court</td>
<td>3 April 1948</td>
<td>Orissa High Court Ordinance, 1948</td>
<td>Odisha, Cuttack</td>
</tr>
<tr>
<td>Patna High Court</td>
<td>2 September 1916</td>
<td>Letters Patent issued by the Crown</td>
<td>Bihar, Patna</td>
</tr>
<tr>
<td>Punjab and Haryana High Court</td>
<td>15 August 1947</td>
<td>Punjab High Court Ordinance, 1947</td>
<td>Chandigarh, Haryana, Punjab, Chandigarh</td>
</tr>
<tr>
<td>Rajasthan High Court</td>
<td>21 June 1949</td>
<td>Rajasthan High Court Ordinance, 1949</td>
<td>Rajasthan, Jodhpur</td>
</tr>
<tr>
<td>Sikkim High Court</td>
<td>16 May 1975</td>
<td>The 36th Amendment to the Indian Constitution</td>
<td>Sikkim, Gangtok</td>
</tr>
<tr>
<td>Tripura High Court</td>
<td>26 March 2013</td>
<td>North-Eastern Areas (Reorganisation) and Other Related Laws (Amendment) Act, 2012</td>
<td>Tripura, Agartala</td>
</tr>
</tbody>
</table>
Under the Government of India Act, 1935, the legislative power to enact a law on the subject, **the Constitution and Organization of the High Courts** vested in the provincial legislature. But a change was brought about in the Constitution of India. The subject of Constitution and Organization of the High Courts was specifically included in entry No. 78 of the Union List. **This change was brought about in the Constitution with the object of bringing about uniformity in the Constitution and Organization among all the High Courts in India.** Under the scheme of the Constitution, the High Courts occupy a very important position. The framers of the Constitution felt that the Constitution and Organization of the High Court if left to the provincial legislature, there might be no uniformity in the Constitution, Organization, Jurisdiction and Powers of the High Courts. Hence, not only the legislative subject of Constitution and Organization of the High Court was included in the Union list, the provision for appointment of the Judges of the High Court, their conditions of service were laid down in the Constitution itself. Subject to these provisions Parliament is given the power to make laws on those topics. Under Article 216, central authority, viz., the President of India, is the authority for appointing Chief Justice and Judges of all the High Courts. As regards jurisdiction and powers, certain jurisdiction and powers considered vital for rule of law were conferred on the High Courts by the constitutional provisions. They are, power to punish for contempt of itself (article 215), the writ jurisdiction i.e., power to issue writs or orders for enforcement of fundamental and legal
rights (article 226), supervisory jurisdiction over subordinate courts and tribunals in the concerned State (article 227), power to withdraw cases involving interpretation of Constitution from the subordinate courts (article 228), administrative control over the staff of the High Courts (article 229) and subordinate judiciary (article 233-235). Explaining the object and purpose underlying the aforesaid constitutional scheme, in the course of the debates in the Constituent Assembly, Dr. Ambedkar states as follows:

“We have deliberately brought in the High Courts because we felt that it was necessary to bring in High Courts in view of certain articles we have already passed ....the only matter that is left to the Provincial Legislature is to fix jurisdiction of the High Courts in a pecuniary way or with regard to the subject matter. The rest of the High Court is placed within the jurisdiction of the Centre.”

Shri Alladi Krishnaswamy Iyer said:-

“We have already taken a particular step in regard to the High Court that is appointment of the Judge in the hands of the President. Secondly so far as the organization and jurisdiction is concerned, the idea is that there must be uniformity in the organization of the High Courts in the different parts of India, subject of course to the provisions of the Constitution. Therefore, in so far as the organization is concerned, with a view to emphasize the principle of uniformity and to see that there is uniformity in the different High Courts, this power is transferred to the Central Legislature. It will be realized that we have High Courts and High Courts. There are High Courts which have been functioning for several years for a century. There are High Courts which have come into being recently and it is also proposed to bring in all the High Courts in the State under the jurisdiction of Parliament and see that there is a certain uniformity in the organization and constitution of the different High Courts in India. The only legislature that can function in this regard is the Parliament. That is why that part of the amendment provides for it.”
In view of the change brought about in the constitution and the object with which this change was brought about, it was necessary for the Indian Parliament to have enacted a common law for regulating the Constitution, Organization and general jurisdiction of all the High Courts in India and by that process, achieve uniformity in the matter of Constitution, Organization, Jurisdiction and powers of the various High Courts. No such legislative action has been taken by the Union Parliament so far. In view of inaction in this matter, the position is, that some of the High Courts are still functioning under the letters patent issued more than a century before by the British Government and some new High Courts have inherited the jurisdiction of the erstwhile High Courts given to them under the letters patent and the jurisdiction and powers of a few other High Courts is regulated by laws made by Parliament in exercise of its powers under Articles 3 and 4 of the Constitution relating to organization of States and in some cases States Legislatures have proceeded to make Laws to regulate the constitution and organization of the High Courts. It is high time that the Parliament which alone is given the power to make law regulating constitution, organization, general jurisdiction and powers of the High Court should enact an uniform law on the topic.

Therefore, being fully aware of this lapse on the part of the Parliament, as a Member of Parliament [Rajya Sabha] I drew the attention of the Government of India of this lapse on the part of the Parliament by addressing a letter to the Government of India. I expected that this lacuna would be realized and the Government of India would come forward with a Bill for enacting a Uniform Law regulating the Constitution and Organization of the High Courts. But I was surprised and disappointed to get the following reply from the Government:

“Law for Constitution and Regulation of High Courts:

317: Shri M. Rama Jois
Will the Minister of LAW & JUSTICE be pleased to state:

(a) Whether, even after six decades from the date of commencement of the Constitution, no uniform law regulating the constitution and organization of all the High Courts has been enacted and some of the High Courts are functioning under the charter issued by the British Crown;
(b) If so, whether any action has been initiated in this regard and if so, by when it would be enacted; and
(c) If not, by when the action would be initiated:

Answer:

(a) To (c): A statement is laid on the Table of the House

Statement referred to in reply to Parts (a) to (c) of Rajya Sabha Starred Question No. 317 for 16-08-2010 by Shri. Rama Jois regarding Law for constitution and regulation of High Courts.

(a) To (c): In view of the provisions of Chapter V of Part VI of the Constitution (articles 214-231) relating to the High Courts in the States, no need has arisen to enact a separate uniform law regulating the constitution and organization of High Courts.

A reading of Article 246 read with Entry 78 of Union List, it is crystal clear that only the Parliament has got exclusive power to make a law regulating the Constitution and Organization of the all High Courts in the Country. But no such law has been enacted. Even when this was pointed out to the Government, the Government has given a reply stating that in view of Article 214-231 relating to the High Courts, no need has arisen to enact a separate uniform law regulating the Constitution and Organization of the High Courts.
Alladi Krishnaswamy Iyer in the Constituent Assembly clearly had stated that the power to make a law on the topic of Constitution and Organization of the High Courts which was given to the States in the Government of India Act 1935 was shifted to Union List for the purpose of enabling the Parliament to make a uniform law regulating the Constitution and Organization of the High Courts. Not only this obligation is not discharged but even after it was pointed out, the reply as above was given which tantamount to the shirking of obligations of Parliament to do so.

In the absence of enacting a uniform law regarding Constitution and Organization of all the High Courts, there are number of differences between the rules and regulations made by the different High Courts or by the State Legislatures as pointed out above. It is high time that the Parliament should come forward with a clear and uniform law on this subject.

Instead of the Parliament enacting a law regulating the Constitution and Organization of all the High Courts, allowing them to function under the Charters issued by the British Emperor even after more than 60 years after the commencement of the Constitution and allowing rules made differently by different High Courts or State Legislatures indicates nothing but the failure on the part of the Union Government to discharge its obligation. This is a sad commentary on the functioning of our Constitutional system and there is a famous statement in English that “better late than never”. Therefore, though there has been inordinate delay on the subject of enacting a common law regulating the constitution and organization of all the High Courts, it is the paramount duty of the Parliament to enact such a law without further delay.

For these reasons, I make the following suggestions:-
The Parliament should enact a **Uniform Law regulating the Constitution and Organization of High Courts** under which finality be given to the decisions/orders of the High Court in all ordinary civil and criminal matters which will also serve the object of reducing the enormous burden of Special Leave Petitions on the Supreme Court and enable it to devote more time on all important matters.

**JUSTICE DR. M. RAMA JOIS**